

NO. 40504-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

11-27-11 11:05 AM  
KIN  
CLERK

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STATE OF WASHINGTON, Respondent

v.

DINO J CONSTANCE, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.07-1-00843-8

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BRIEF OF RESPONDENT

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pm 3-31-11

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I. NATURE OF APPEAL

A jury convicted the defendant of three counts of Solicitation to Commit Murder in the First Degree and one count of Solicitation to Commit Assault in the Second Degree. The defendant appealed these matters and those issues went on to the State Supreme Court where the matter was rejected and the main appeal was affirmed. The basis of the appeal dealt with wire tapping. Certificate of Finality terminating the appeal was entered on March 2, 2011. An order denying a motion for reconsideration was entered in August 2010. That was also denied by the Supreme Court on February 1, 2011. Ultimately, the appellate courts determined that this case was to be mandated back to the Superior Court from which the appeal was taken for further proceedings.

In the Superior Court the defendant had filed a number of motions including a motion under 7.8. It is the State's position that this appeal is in response to that 7.8 petition raised by the defense and therefore is more in line with a Personal Restraint Petition than a main appeal. A copy of the Certificate of Finality and a copy of the Mandate are both attached hereto and by this reference incorporated herein.

## II. STATEMENT OF THE FACTS

While matters were pending in the appellate court the defendant had filed a 7.8 motion in the Superior Court. The trial court determined that a hearing would be appropriate to help determine the sole issue of whether or not the defense attorney provided adequate representation at the time of trial including whether or not he prevented the defendant from testifying. By way of Order of May 20, 2009 the Superior Court entered Findings of Fact, Conclusions of Law, and Order Granting the Hearing concerning this matter. A copy of those findings are attached hereto and by this reference incorporated herein.

The matter ultimately came to hearing on the 7.8 motion between September 11 and September 14, 2009. The court reviewed a number of documents together with taking extensive testimony from a number of witnesses. At the conclusion of that hearing the court entered *Findings of Fact and Conclusions of Law and Order Dismissing Issue and Transferring Motion for Relief from Judgment to Court of Appeals, Division II*. A copy of those Findings of Fact are attached hereto and by this reference incorporated herein.

The Court of Appeals determined that this matter was not properly before it and therefore returned it to the Superior Court. When it was

returned to the Superior Court the court then entered an *Order Amending Findings of Fact and Conclusions of Law, and Order Dismissing Issues, and Denying Defendant's Motion for Relief from Judgment, Pursuant to CrR 7.8(c)(2)*. A copy of that order amending the findings of fact is attached hereto and by this reference incorporated herein.

### III. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised by the defendant is a claim that the defendant was prevented by his attorney from testifying at trial.

It is to be noted that this matter was never raised at the trial court level either before or during the time of trial, nor was it entered by the defendant immediately after the trial. In fact, the defendant had multiple contacts with the trial court (a number of letters written to the Judge) but does not discuss, at all, misrepresentation by his attorney or being prevented from testifying because of some actions of trial counsel.

Most of the correspondence with the court deals with his claim of perjured testimony and collusion by the State, and possibly the court, in denying him his right to fair trial.

For example, in a letter of August 25, 2008, written by the defendant to Judge Lewis he discusses in some detail the claims of perjury committed by some of the parties and deceptive practices used by the

prosecution against the court. At no time in this correspondence does the defendant discuss his attorney preventing him from testifying or raising any grounds of that nature. A copy of the letter of August 25, 2008 is attached hereto and by this reference incorporated herein.

Another example deals with correspondence sent to the Superior Court by the defendant on November 24, 2008. In that letter he is again discussing perjury of some of the witnesses but also be able to fully develop a “compelling” demonstration if he is allowed an evidentiary hearing. Again, in this correspondence there is no mention of problems with his defense attorney at the time of trial. A copy of the letter filed November 24, 2008 is attached hereto and by this reference incorporated herein.

Another example is a typed letter of May 21, 2009 from the defendant to the trial court. In this particular letter he is again making mention of many of the complaints that he has previously had, but he also is discussing representation by Mr. Walker and the fact that Mr. Walker was able to cross-examine some of the witnesses but was prevented from doing so in other situations because of rulings by the trial court. He attacks the Court, not his attorney. He also makes mention of someone having tampered with the court record. Again, at no time does he discuss any difficulties with his attorney, nor that he has been prevented from

testifying. A copy of the letter dated March 25, 2009 and filed in the court on May 21, 2009 is attached hereto and by this reference incorporated herein.

Finally, the defendant also had correspondence sent to the court by his father. By way of letter of March 28, 2008, Dr. Constance wrote to the Judge concerning some of the information that they believe should have been given to the jury and the fact that some of it was prevented by the court and this prevented the defendant from receiving a fair trial. The father comments about the attorney, Brian Walker, and indicates on page 2 of the letter:

Not allowing so many important motions from his attorney, Brian Walker, you left him NO DEFENSE! Brian was unable to bring witnesses to testify that Dino always was complaining about... Again, you disallowed so much of what was pertinent to Dino's case, you basically Brian's ability to defend Dino off at the knees. You left them with NO case!

The attack again is aimed at the court, not his attorney.

It is only some time later after change of attorneys that the questions concerning Mr. Walker's representation are represented to the trial court. Up until that time, as demonstrated by the foregoing documents, this was not an issue that was raised with the court. The

documentation and other correspondence with the court also clearly indicates that the defendant wished to have the 7.8 motion. He and his attorneys pushed for this particular hearing and in fact they received the hearing. After three days of testimony and review of documents, the court entered findings of fact that did not go well for the defendant and thus he now complains that the trial court either misinterpreted what was being discussed, or was just wrong in its decision that the attorney had done nothing inappropriate nor at any time was there any indication that he had coerced or forced the defendant not to take the stand.

There is a strong presumption of effective representation by counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). “Deficient performance is not shown by matters that go to trial strategy or tactics.” State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (*quoting* State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse

sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134[, 102 S. Ct. 1558, 1574-75, 71 L. Ed. 2d 783] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1995).

-(Strickland, 466 U.S. at 689).

But even deficient performance by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. A defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." Strickland, 466 U.S. at 693. "In doing so, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" State v. Crawford, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (*quoting* Strickland, 466 U.S. at 694).

When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court presumes that counsel's performance was reasonable. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989); State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

The State submits that the defendant received his opportunity to discuss this matter with the trial court. He, together with Mr. Walker and other witnesses, testified. The trial court felt after hearing all of the evidence that the information supplied by Mr. Walker was accurate and that the story spun by the defendant was not credible. The State submits that the defendant has demonstrated nothing in this appeal to change those findings. The findings of fact entered by the trial court are detailed and sufficient to support the conclusions of law entered by the court.

The ultimate decision whether or not to testify rests with the defendant and his waiver must be knowing, voluntary, and intelligent,

although the trial court need not obtain such a waiver on the record. State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999) (*citing* Thomas, 128 Wn.2d at 558-59). A defendant's right to testify is violated when an attorney uses threats and coercion against his client, or when the attorney flagrantly disregards the defendant's desire to testify. Robinson, 138 Wn.2d at 763 (*citing* United States v. Robles, 814 F. Supp. 1233, 1242 (E.D. Pa. 1993); United States v. Butts, 630 F. Supp. 1145, 1147 (D. Me. 1986)). This is not to say that defendants who accept tactical advice from their attorneys on the decision to testify can later claim that their right to testify was denied. State v. Hardy, 37 Wn. App. 463, 466-67, 681 P.2d 852 (1984); State v. King, 24 Wn. App. 495, 500, 601 P.2d 982 (1979).

A court must distinguish between cases in which an attorney actually prevents a defendant from taking the stand and cases in which counsel "merely advise[s the] defendant against testifying as a matter of trial tactics." Robinson, 138 Wn.2d at 763 (*quoting* State v. King, 24 Wn. App. 495, 499, 601 P.2d 982 (1979)). Where a defendant asserts facts suggesting that his attorney actually prevented him from testifying, an evidentiary hearing is appropriate. Robinson, 138 Wn.2d at 759. But a defendant who remains silent at trial and later alleges that his attorney actually prevented him from testifying must allege specific, credible facts demonstrating that counsel coerced him to waive his right to testify in

order to successfully raise such a claim on appeal. See Robinson, 138 Wn.2d at 760. And a defendant who relies on tactical advice from his attorney has not been coerced and may not later claim denial of his right to testify.

The Robinson court, at Robinson, 138 Wn.2d at 759- 760 discussed the issue as follows:

The waiver of the right to testify must be made knowingly, voluntarily, and intelligently, but the trial court need not obtain an on the record waiver by the defendant. Id. at 558-59.

Washington case law supports Robinson's assertion that a defendant who remains silent at trial may be entitled to an evidentiary hearing if he alleges that his attorney actually prevented him from testifying. Thomas, 128 Wn.2d 553, 910 P.2d 475; State v. King, 24 Wn. App. 495, 601 P.2d 982 (1979) . This court first recognized this rule in In re Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994 ) . In Lord, the defendant argued that he did not knowingly and voluntarily waive his right to testify. Lord, 123 Wn.2d at 316. He claimed that the only reason that he did not testify at trial was because his attorneys thought that his testifying would be the "wrong thing" to do. Id. at 316. This court held that Lord's mere assertion that his counsel advised him against taking the stand was insufficient to warrant an evidentiary hearing on the issue of whether the waiver was knowing and voluntary. We suggested, however, that Lord would have been entitled to an evidentiary hearing had he alleged that his attorneys "'actually prevented' him from testifying." Id. at 317 (quoting State v. King, 24 Wn. App. at 499). Lord's allegations were plainly insufficient, so there was no need to reexamine his decision not to testify.

Washington is not alone in affording defendants an evidentiary hearing upon a sufficient showing that their attorneys actually prevented them from taking the stand. Several federal jurisdictions provide for evidentiary hearings if a defendant is able to show that his attorney prevented him from testifying. Siciliano v. Vose, 834 F.2d 29 (1st Cir. 1987 ); Underwood v. Clark, 939 F.2d 473 (7th Cir. 1991 ); Passos-Paternina v. United States, 12 F. Supp. 2d 231 (D.P.R. 1998 ) . See also Louis M. Holscher, *The Legacy of Rock v. Arkansas: Protecting Criminal Defendants' Right to Testify in Their Own Behalf*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 223, 264 (1993) (Affording an evidentiary hearing is a "middle course approach.").

The amount of evidence that must actually be produced before a criminal defendant is entitled to such an evidentiary hearing was discussed most recently in the unanimous State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996) decision. . In Thomas, a defendant challenged his conviction in post trial motions, asserting, without any factual support, that his attorney had prevented him from testifying. Id. at 561. We held that no evidentiary hearing was required. "The defendant must . . . produce more than a bare assertion that the right [to testify] was violated; the defendant must present substantial, factual evidence in order to merit an evidentiary hearing or other action." Id. Once a defendant meets this burden, he is entitled to an evidentiary hearing on the issue of whether he voluntarily waived the right to testify. Id. at 557.

Mere allegations by a defendant that his attorney prevented him from testifying are insufficient to justify reconsideration of the defendant's waiver of the right to testify. Defendants must show some "particularity" to give their claims sufficient credibility to warrant further investigation. Underwood, 939 F.2d at 476. The defendant must "allege specific facts" and must be able to "demonstrate, from the record, that those 'specific factual allegations would be credible.'", 12 F. Supp. 2d at 239 (*quoting Siciliano*, 834 F.2d at 31).

The State submits that there is no showing that the defendant was prevented from testifying by the attorney. The claim that the defendant couldn't testify because of lack of preparation is not consistent with findings entered by the trial court.

For example, the court found that prior to trial it was the understanding of Mr. Walker that the defendant was going to testify and as such he prepared his case based on the assumption that the defendant would take the stand. (Findings of Fact No. 4). The court further indicated that during a number of meetings prior to trial that the attorney and defendant discussed areas concerning direct testimony and even areas of possible cross-examination. In other words, the court was finding that the attorney was preparing the defendant for testimony in his case. The court found that the defense attorney was concerned about the way the defendant was answering some of the questions that it may cause some problems between himself and the jury because of his demeanor. The attorney testified that he expressed these concerns to the defendant but did not tell him that he would not allow him to testify. (Findings of Fact No. 5).

The court further found that as the defendant began observing the court proceedings he began expressing reservations to his attorney about possibly testifying or not testifying. The attorney and the defendant discussed tactics and the attorney indicated that during closing argument many of the areas he wished to attack could be presented through cross-examination of the State's witnesses and testimony of the defense witnesses that were called. Again, the defense attorney indicated to the court that he had reservations about the defendant's demeanor. (Findings of Fact No. 6).

The court found that the defense attorney felt that he was able to cross-examine the State's chief witnesses and was able to elicit inconsistent statements from these witnesses and highlight inconsistencies between their respective testimonies. Further, the defense attorney called six witnesses for the defense. He indicated to the court that just before the final defense witness was to testify, the defendant met with his attorney for approximately 20 minutes. During that meeting the defendant advised the attorney that he did not wish to testify. As a result of that conversation the defense attorney rested his case without calling the defendant. (Findings of Fact No. 8). As a result of those findings, the court entered Finding No. 18, which indicated, "The defendant's trial counsel, Brian Walker, did not actually prevent Dino Constance from testifying at trial.

The defendant, after observing the trial and considering his options, chose not to testify. Although Walker had expected that Constance would testify, he accepted this decision and rested his case without calling the defendant.”

Finally, the court discusses the defendant’s testimony at the 7.8 trial in Finding No. 19. In that finding the defendant testified about the areas that he maintained his attorney prevented him from testifying. The trial court did not find that version of events to be credible. (Findings of Fact No. 19).

The State submits that the defendant had not adequately demonstrated grounds for the hearing under 7.8, but nevertheless, the trial court allowed the three-day hearing to take place. At the conclusion of the hearing and based on the findings, the Judge determined that the defense attorney had not prevented the defendant from testifying and that the version of the facts as set forth by the defendant were not credible. These findings of fact ultimately lead to conclusions of law, which the State further submits are adequate under the circumstances.

Attached hereto and by this reference will be found the Transcript of attorney Brian Walker’s 7.8 hearing testimony. (RP 56, L.5 - 69, L.8).

IV. CONCLUSION

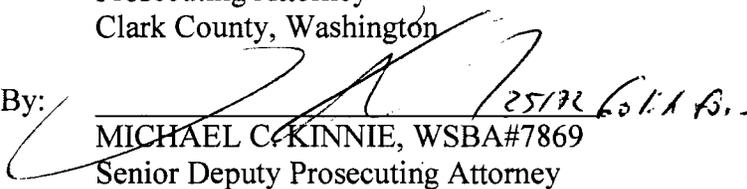
The 7.8 motion raised by the defendant was properly ruled on by the trial court. The State submits that this appeal is more in line with a Personal Restraint Petition than a main appeal. The State submits that this matter should be dismissed and the trial court affirmed in all respects.

DATED this 30 day of March, 2011.

Respectfully submitted:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

By:

  
MICHAEL C. KINNIE, WSBA#7869  
Senior Deputy Prosecuting Attorney

APPENDIX A

Certificate of Finality  
COA# 39878-8-II

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

**FILED**

In re the  
Personal Restraint Petition of:

Dino Constance,  
  
Petitioner.

No. 39878-8-II

JUL 06 2010  
10:00AM  
Sherry W. Parker, Clerk, Clark Co.

CERTIFICATE OF FINALITY

Clark County  
Superior Court No. 07-1-00843-8

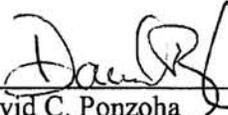
**Court Action Required**

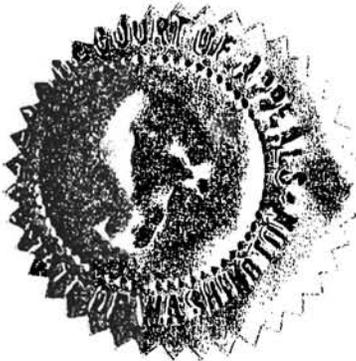
**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington in and  
for Clark County.

This is to certify that the decision of the Court of Appeals of the State of Washington,  
Division II, filed on February 22, 2010, became final on March 25, 2010.

**Court Action Required:** The sentencing court or criminal presiding judge is to place this matter  
on the next available motion calendar for action consistent with the opinion.

**IN TESTIMONY WHEREOF**, I have hereunto set my  
hand and affixed the seal of said Court at Tacoma, this  
26 day of June, 2010.

  
\_\_\_\_\_  
David C. Ponzoha  
Clerk of the Court of Appeals,  
State of Washington, Division II



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APPENDIX B

Mandate  
COA# 63903-0-I

26

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

STATE OF WASHINGTON,  
Respondent,  
v.  
DINO J. CONSTANCE,  
Appellant.

)  
) No. 63903-0-1  
)  
) MANDATE  
)  
) Clark County  
)  
) Superior Court No. 07-1-00843-8  
)  
)

**FILED**  
MAR 08 2011  
10:16  
Scott G. Weber, Clerk, Clark Co.

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington in and for Clark County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on March 8, 2010, became the decision terminating review of this court in the above entitled case on March 2, 2011. An order denying a motion for reconsideration was entered on August 17, 2010. An order denying a petition for review was entered in the Supreme Court on February 1, 2011. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

c: Neil Fox  
Rachael Probstfeld  
Hon. Robert A. Lewis



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 2nd day of March, 2011.

*[Handwritten Signature]*  
**RICHARD D. JOHNSON**  
Court Administrator/Clerk of the Court of Appeals,  
State of Washington, Division I.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	No. 63903-0-1
Respondent,	)	
	)	
v.	)	PUBLISHED OPINION
	)	
DINO J. CONSTANCE,	)	
	)	
Appellant.	)	FILED: <u>March 8, 2010</u>

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SCHINDLER, C.J. — A jury convicted Dino J. Constance of three counts of solicitation to commit murder in the first degree and one count of solicitation to commit assault in the second degree. On appeal, Constance only challenges his conviction on one count of solicitation to commit murder in the first degree, count 3. As to count 3, Constance contends the trial court erred in denying his motion to suppress evidence of the court-authorized recorded telephone conversations with Ricci Castellanos. Constance asserts that because the application for an order to intercept and record the telephone conversations relies on boilerplate justifications, it does not comply with the statutory requirement to set forth particular facts showing that "other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ."<sup>1</sup> Constance also asserts the application does not support the

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<sup>1</sup> RCW 9.73.130(3)(f).

No. 63903-0-1/2

characterization of him as a violent criminal. We hold that because the application to intercept and record the telephone conversations sets forth facts showing that other investigative procedures were tried and appeared unlikely to succeed or too dangerous to employ, and does not only rely on boilerplate justifications, the court did not err in denying the motion to suppress. We affirm the conviction of solicitation of murder as charged in count 3.

### FACTS

Dino J. Constance and Jean Koncos married and had a child together in 2004. Constance worked as a real estate broker and Koncos worked as a massage therapist.

In early 2005, Koncos and Constance separated. The court designated Koncos as the primary residential parent. At the request of both parties, the court entered mutual restraining orders. Constance was arrested on February 9, and again on April 21, for violating the restraining order.

On February 12, 2006, Constance assaulted Koncos while attempting to abduct their two-year old son. According to the police report, Constance grabbed Koncos by the neck constricting her airway, and was "pulling her hair, choking her, and punching at her." One witness said that Constance was "dragging Koncos around by the hair outside of the vehicle and was 'beating her up'" while their son was in the car crying.

In March, Koncos filed for dissolution of the marriage. Constance and Koncos disputed custody of their son, and the dissolution proceedings were contentious.

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In January 2007, Constance started living with Michael Spry and his adult son Jordan Spry. According to Michael and Jordan Spry, Constance was angry and incessantly complained about Koncos and the dissolution proceedings. At first, Michael and Jordan were sympathetic to Constance. But in March, when Constance refused to pay Michael for driving to California to retrieve Constance's belongings from storage, the relationship between Constance and Michael and Jordan deteriorated. In late March, Constance moved out.

On March 27, Koncos called the police to report that Jordan Spry had called to tell her that Constance "wanted to hire somebody to kill" her.

According to the police report:

On 03/27/2007 I was dispatched to call Jean Koncos on the report of threats.

I contacted Jean by telephone since she was out of state at the time. She stated that she received a call earlier in the day from her ex-husband's ex-roommate, Jordan. He told her that Dino, her ex-husband, mentioned that he wanted to hire somebody to kill Jean. Jordan didn't mention to Jean a date, time, or method in which Dino was planning on.

Jean told me that she wasn't sure if Dino would have that done. She said that they have been fighting back and forth for awhile and dealing with a custody issue between their children. She also explained that Dino and Jordan have been fighting and Jordan is aware of the situation between Dino and Jean. She said that Jordan may be telling her Dino wants to kill her in order to help her gain custody instead of Dino.

Koncos asked the officer to contact Constance to make sure he knew that his threat to kill her had been reported to the police.

When the officer spoke to Constance about his alleged threat to kill Koncos, he denied telling Jordan Spry that he wanted to hire someone to kill Koncos. The police report states:

No. 63903-0-1/4

I contacted Dino by telephone. He explained the same situation between he and Jean about the custody issue. I confronted him about the information that I received. He denied making such statements to Jordan. He also told me that he and his roommate were also having issues with each other and that he had just recently moved out.

I informed Dino of the seriousness of the situation and he understood.

On April 5, Koncos filed a motion for an ex parte temporary restraining order against Constance. In support of the restraining order, Koncos submitted declarations from Michael Spry and Jordan Spry about the threats Constance made to kill her. The court issued a temporary restraining order and scheduled a show cause hearing for April 10. Before the hearing, Jordan told Constance that if he paid his father the money he owed, Jordan would not testify at the hearing on April 10.

At the show cause hearing on April 10, Koncos and Constance represented themselves pro se. Michael and Jordan Spry were the only witnesses who testified at the hearing. Michael and Jordan each testified that Constance was angry about the dissolution proceedings and talked about his plans to kill Koncos. Michael and Jordan also testified about Constance's use of alcohol and drugs, and his poor parenting skills.

Michael Spry testified that Constance told him "no matter what the cost, what it takes" he had to get his son away from Koncos. Michael said that Constance was constantly "filing documents for any reason, anywhere[,] at anytime, at any cost. He writes, he writes, he writes. He stays up all day, all night, thinking, working, plotting, planning, writing documents."

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According to Michael, Constance told him that it would be "worth \$5,000 to him to have somebody just make an appointment to get a massage and while they were there to just beat the very livin' s-h-blank out of" Koncos. Michael testified that Constance said "it'd be worth another \$5,000 if they'd just f\_ in kill" Koncos. Michael said that at first, he thought it was all "locker room talk" and idle threats. But when Constance started repeatedly talking about arranging to injure or kill Koncos, whether he had been drinking or was sober and in different settings, Michael believed Constance was serious.

Jordan Spry testified that Constance paid him money to schedule a massage with Koncos in order to gather information to use against her in the dissolution proceedings. Jordan testified that he rescheduled massage appointments several times and did not follow through because of his concerns about Constance.

Jordan testified that he did not believe that the statements Constance repeatedly made that he wanted to find someone to kill Koncos were serious until Constance "came to me with a contract, he offered me \$5,000 in cash to go and brutally harm" Koncos. According to Jordan, Constance also said that if Jordan "would be willing to go a step further and kill you [Koncos], he would give an additional \$5,000. So it was a total of \$10,000 to kill" Koncos. Jordan testified that Constance made the offer to him several times, but the "offer is for anyone." Jordan said he called Koncos to warn her and told her he would testify on her behalf in court.

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Constance cross examined Michael and Jordan Spry about the dispute over the money he owed Michael, and about Jordan's offer to not testify if Constance paid the money.

Constance argued that neither Michael nor Jordan Spry were credible witnesses. Constance asked the court to lift the no contact order as to his son and to not restrict visitation. The court found the testimony of Michael and Jordan Spry credible. Based on the threats to harm Koncos and Constance's excessive use of drugs and alcohol, the court prohibited Constance from having contact with Koncos and ordered supervised visitation with his son.

On April 13, the court found Constance in contempt for failure to pay child support. Constance was incarcerated in the Clark County jail and was housed in a jail cell with Ricci Castellanos.

The next day, Castellanos told jail Classification Officer Barbara Schubach that "Constance wanted to hire him to kill his wife." After Castellanos returned to his jail cell, he wrote out his recollection of the conversation with Constance.

Later that day, Clark County Sheriff Detectives John O'Mara and Eric O'Dell conducted a lengthy taped interview with Castellanos. Castellanos said that Constance told him, "I need somebody to kill — kill my — my ex." Constance told Castellanos that his wife is 5'10", works as a masseuse, advertises on craigslist, and lives in a four-plex apartment off Mill Plain Boulevard. Constance said that he loves his son but was only allowed supervised visitation, and "he will do anything in this world to get that child."

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Castellanos said that he told Constance "[w]ell I could have it done." When Constance asked, "[h]ow much. How much would you charge?" [Castellanos] said, 'around \$15,000.00.'" When Constance said, "[w]ell, that's too much money . . . ." 'I was looking more about three to five thousand,'" Castellanos told Constance that he could probably "get it done for about \$5000," and Constance agreed to pay Castellanos "\$2500 up front."

You know, if there's two ... two of us, I said, 'I'm going to get mine, and these other guys are going to want theirs.' I go, 'You said she's 5'10", right? So, she's got to be a big lady. It's hard for one guy, you know, to do that.' I said, 'I'll—' 'They can have all the money upfront, and then I can take my cut at the end. But you've got to make sure that the money is there. I've got to have the money.' And he said, 'Okay. The money will be there. The money will be there.' When I call you.

...  
He mentioned that he's a mortgage broker, and that he's got ... we've got firms out there, you know, things that he sells. I don't know what mortgage brokers do. You know, I never bought a house or anything else like that, but I'm sure it's into real estate or something like that. But he said he's got . . . he's got ways to get. You know, that \$11,000.00 that he's supposed to get, he thinks that that company is going to lose, but he's got other ways to get it. That's why he said three weeks. You know, 'Give me three weeks. I will have your \$2,500.00.'

...  
It's a \$5,000.00 deal. . . .

...  
\$2,500.00 would be paid upfront. And he would put it in an envelope at a specified location, and he would call me with the code name, you know.

Castellanos told the detectives that Constance then talked to Castellanos about the plan to kill his spouse.

And then he would say that — that's when he was talking about how to kill her. 'How you going to do this, Ric?' 'How you going to—' 'how you going to —' 'What? Is there going to be two of

them? Is there going to be one of them[?]' And I said, 'Well, there was going to be two of them.'

...

And he said, 'Great. This is the best. This is what I want.' And then he proceeded to tell me about how it would be easier, because he owns a boat, that we could just knock her out, put her body on there, you know, he kept saying different ways about ... about knocking her out. You know, clubbing her. Clubbing her. We could hit her head on the wall, because a lot of people drown ... drown in their ... in their bathtubs a lot, you know, by just slipping and falling and drowning in the bathtub. Said we could go blow dry her in the tub. You know, things like that.

...

And I said, '[w]ell, whatever.' I said, 'We've got to do this right, though. If we're going to do it, we've got to do it right.' Then, he mentioned about moving her to – just getting a house, like, for sale. There's a house for sale or something like that. And just make sure, you know, have her come out. She's there, you know, you're going to get a massage and stuff like that, because she's a massage therapist. That make an appointment for her to come to this certain house, and then just have her go in the backyard, you know, club her and stuff like that.

According to Castellanos, he and Constance planned to meet in a couple weeks. Constance insisted they use pay telephones and code names.

Constance planned to use the name "Tim" and Castellanos said he would use the name "DeWayne." Constance gave Castellanos a cell phone number to use to call him.

Castellanos told the detectives that Constance was angry and his demeanor was very aggressive. Castellanos also believed Constance was serious because "he's asked his roommates to go and do this for him . . . [k]ill his wife and stuff like that."

Castellanos agreed to work with the detectives and gave the detectives permission to record the telephone conversations. The plan was to contact

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Constance and attempt to get him to meet with a detective posing as a "hit man." In exchange for his cooperation, Castellanos sought a modification of the terms of his supervision.

On April 20, Detective Bryan Acee submitted an application for an order authorizing the interception and recording of communications to a superior court judge. The sworn twelve-page application sets forth a detailed statement of probable cause alleging that Constance "has committed, and will further commit, the felony crime of Criminal Solicitation to commit Murder in the First Degree." The application describes the testimony of Michael and Jordan Spry at the April 10 court hearing, Officer Schubach's report of the statements Castellanos made to her, the taped interview the detectives had with Castellanos, and the contemporaneous notes Castellanos made of his conversation with Constance while in jail. The application attaches as exhibits a recording of the April 10 hearing, Officer Schubach's report, a ten-page transcript of the detectives' interview of Castellanos, and a number of police reports related to violations of the restraining orders and incidents of domestic violence between Constance and Koncos. The application also sets forth the criminal history of Constance and Castellanos.

The application states that Castellanos used the agreed code name and called Constance on his cell phone on April 18, leaving a message for "Tim" to call "DeWayne." The application says Castellanos returned the call on April 19 and that Constance "yelled at him because Constance expected" Castellanos to

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call him sooner. Constance told Castellanos that he was "bogged down with court" and would call him after a court hearing on April 20.

The application says that the detectives contacted Koncos and verified that the information Constance gave Castellanos was accurate — she is approximately 5'10" tall, works as a massage therapist, advertises on craigslist, and lives in a four-plex off Mill Plain Boulevard. Koncos also told the detectives she "was afraid of Constance and believed him capable of killing her—or having her killed."<sup>2</sup>

The application describes in detail the proposed "Operational Plan" to have Castellanos arrange a meeting with undercover Detective John Hess, posing as a professional "hit-man" who was willing to murder Constance's ex-wife for \$5,000. The application also describes the plan to intercept and record the conversations, the duration of the investigation, and the need to record the conversations. The application explains why normal investigative techniques likely would not succeed because of the nature of the crime, the need for independent verification of statements to prove solicitation to commit murder, and the need to monitor the safety of Detective Hess.<sup>3</sup>

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<sup>2</sup> The Clark County Sheriff's Office made arrangements to relocate Koncos.

<sup>3</sup> "Normal investigative techniques are unlikely to succeed if tried and are too dangerous to try. Castellanos was in contact with Constance as the two shared a jail cell over the weekend. Outside the above described investigative operation, involving the murder of Constance's ex-wife, Constance has not requested to meet Castellanos' 'hit-man'. The idea of arresting Constance in hopes he will admit his intent to hire a hit-man to murder his ex-wife is unlikely. Even if Constance did divulge his desire to have his ex-wife murdered, that alone may not support his prosecution for Solicitation to Commit Murder in the First Degree and Criminal Conspiracy. In the meantime, as Constance has demonstrated, he may be soliciting

The court found probable cause to believe Constance "has committed, and will further commit the felony crime of Criminal Solicitation to Commit Murder in the First Degree" of Koncos and that "[n]ormal investigative techniques reasonably appear to be unlikely to succeed if tried and reasonably appear to be too dangerous to employ." The court entered an "Order Authorizing Interception and Recording of Communications or Conversations Pursuant to RCW 9.73.090" for seven days, or until April 27.

On May 1, Detective John O'Mara submitted a second application for authority to intercept and record communications between Constance and Castellanos and/or Detective Hess for an additional seven days. The

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other individuals to murder his ex-wife. I believe time is of the essence, as Constance is out of jail and may be soliciting another person or persons, to murder his wife. The statements made by Castellanos and the sworn testimony made under oath by Jordan and Michael Spry support my belief. Additionally, Constance has demonstrated a propensity toward violence, as detailed in the many police reports attached herein (Exhibit No. 5).

An additional, but significant problem occurs with Castellanos' testimony. His felony criminal history is of a nature that they will be disclosed to a jury during any trial. Although his information corresponds with the statements of Jordan and Michael Spry, who testified in court that Constance tried to hire them to kill Koncus [sic], any solicitation of Castellanos is a separate crime. Because of the nature of Castellanos' criminal background, independent verification of his statements is necessary to help prove he was solicited. A recording of statements between Castellanos and Constance will be the best way to verify Castellanos' statements.

Further, because of the nature of the crime, a recording of all of the conversations is appropriate and helpful to prove that the scheme originates in the mind of Constance and that he is not entrapped into committing the crime. Given Castellanos' background and potential issues with his criminal history being placed in front of a jury, a recording will be the best way to ensure that he has not overstepped his role and entrapped Constance."

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application incorporates by reference the information previously provided in the first application.<sup>4</sup>

In the application, Detective O'Mara states that during a telephone conversation between Constance and Castellanos on April 20, Constance said that because of the family court proceedings, "things are 'too hot now.'" Constance told Castellanos to "call him back in about one and one half weeks to set up the meeting in order to 'get this done.'" The court entered an order authorizing the police to intercept and record communications or conversations between Constance and/or Castellanos and Hess for an additional seven days.

The police intercepted and recorded telephone calls between Castellanos and Constance on May 1 and May 7. In the first May 1 call, Constance identifies himself as "Tim," and after verifying that "DeWayne" is calling him from a pay phone, Constance tells Castellanos he wants to talk to him later that day. In the second call on May 1, Castellanos tells Constance that a friend of his is interested. In response, Constance says he needs to wait at least a week.

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<sup>4</sup> RCW 9.73.130 provides in pertinent part:

(4) Where the application is for the renewal or extension of an authorization, a particular statement of facts showing the results thus far obtained from the recording, or a reasonable explanation of the failure to obtain such results;

(5) A complete statement of the facts concerning all previous applications, known to the individual authorizing and to the individual making the application, made to any court for authorization to record a wire or oral communication involving any of the same facilities or places specified in the application or involving any person whose communication is to be intercepted, and the action taken by the court on each application; and

(6) Such additional testimony or documentary evidence in support of the application as the judge may require.

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In the telephone call on May 7, Constance gives Castellanos Koncos's telephone number and instructs Castellanos about how to go about scheduling a massage appointment with her. Constance tells Castellanos to call Koncos using a pay phone, but to make sure to use "67" so Koncos would not know he is using a pay phone. Constance instructs Castellanos to get a haircut and grow a beard. Constance also tells Castellanos what he should say to avoid suspicion, emphasizing that "this has to be done right or you're gonna get busted." When Castellanos asks Constance "[w]e still want her dead, right?" Constance responds, "[w]e don't want to talk about things like that on the telephone." Constance then tells Castellanos how to avoid leaving fingerprints and "how to get away with this." Constance says he will leave Castellanos the money and when he is scheduled to be out of town "we will get this done." After listening to the conversation on May 7, the police arrested Constance.

After his arrest, the police learned that in March 2007, Constance solicited former cellmate Zachary Brown to assault Koncos. Brown testified that Constance asked him to do a "one-time job" for \$1000. Brown said Constance deposited money in Brown's jail commissary account to show that he was serious. According to Brown, Constance wanted him to beat up Koncos. Consistent with the instructions that Constance later gave Castellanos, Constance told Brown to grow a beard and how to schedule an appointment with Koncos.

Q: All right. And what was the job?

A: He wanted me to schedule an appointment with his wife, fiancée, baby's mom, I don't know what she was to him. Obviously the baby, the – the baby's mother.

Q: Okay.

A: He wanted me to schedule an appointment with her on Craig's List. He told me that she was a massage therapist on Craig's List.

He wanted me to schedule an appointment, go in, grow my facial and the hair on my head out to where it couldn't be recognized, so a disguise.

He wanted me to go in, beat her up, rob her, bust her teeth out, make her bleed, and then leave.

And upon the completion of the job, give him a call and he'd give me the remainder of the money.

Q: Okay. Did he say how he wanted you to initiate contact with him?

A: Yes. He said only calling from a pay phone, no land lines, he just didn't want any land lines, he said just a pay phone.

The State charged Constance with three counts of solicitation to commit murder of Koncos in the first degree, count 1 as to Michael Spry, count 2 as to Jordan Spry, and count 3 as to Castellanos. The State charged Constance in count 4 with solicitation of Brown to commit assault in the second degree of Koncos.

Constance filed a motion to suppress the recorded telephone conversations. Constance argued that the application to intercept and record the conversations did not comply with the statutory requirement to set forth the particular facts to explain why other investigative techniques were not considered or used. The court rejected Constance's argument and denied the motion to suppress.

The information indicates that Mr. Constance was alleged to have contacted some individuals to solicit a serious violent crime and that when confronted about that that he indicated that not only denied that that had occurred but also denied that or indicated that the

people who were accusing him had problems, that they had motive, reasons to be lying about him.

Then another person comes in and says, he solicited me on a separate occasion, and the person that's making this report is someone[]s whose veracity could also be challenged.

And so the police considered whether it would be a good idea to just simply go with a he-said, he-said sort of a thing or whether there should be some way to try to independently verify whether any of the three people accusing Mr. Constance were, in fact, telling the truth, and they perceived that the best way to do that or one way to do that would be to conduct an investigation where they didn't have to rely on the word of any of the accusers, that one of the accusers could make a contact with Mr. Constance and Mr. Constance would either make additional incriminating statements that could be verified by third parties or would not make such statements, which perhaps would indicate that the three people were, including Mr. Castellanos, were not telling the truth.

That's a perfectly acceptable way to proceed.

And that there was certainly danger involved other than the danger that's inherent in all undercover investigations. This is not a situation where the police said, Well, every time there's an undercover investigation we should be allowed to record or transmit. They indicated because Mr. Constance's past allegations of violent behavior and the fact that they were investigating a crime which indicated he was trying to solicit other people to commit violent acts, that there was more than the normal danger involved.

A number of witnesses testified at trial on behalf of the State, including Detective O'Mara, Detective Hess, Officer Schubach, Michael Spry, Jordan Spry, Koncos, Castellanos and Brown. The recorded telephone conversations between Constance and Castellanos were admitted into evidence and played for the jury.

The defense argued that Michael Spry, Jordan Spry, Castellanos, and Brown were not credible. The defense also claimed that when Constance is

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mad, he is prone to say things that he does not mean. Constance's sister testified that Constance has a tendency to exaggerate. Constance did not testify.

The jury convicted Constance as charged of three counts of solicitation to commit murder in the first degree and one count of solicitation to commit assault in the second degree. Constance only appeals the conviction of solicitation of Castellanos to commit murder in the first degree, count 3.

#### ANALYSIS

Constance contends the court erred in denying his motion to suppress the recorded telephone conversations with Castellanos. Constance asserts that because the application to intercept and record the conversations contains "boilerplate" justifications, the application does not comply with the mandatory requirement under RCW 9.73.130(3)(f) to set forth particular facts showing that other normal investigative procedures were tried, appear unlikely to succeed, or were too dangerous to employ.

Washington's privacy act, chapter 9.73 RCW, prohibits the interception and recording of private communications and conversations without the consent of all parties. RCW 9.73.030(1)(a) provides in pertinent part:

Except as otherwise provided in this chapter, it shall be unlawful ... to intercept or record ... [p]rivate communication transmitted by telephone ... between two or more individuals ... without first obtaining the consent of all the participants in the communication.

Information obtained in violation of RCW 9.73.030 is inadmissible. Under RCW 9.73.050,

[a]ny information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state. . . .

RCW 9.73.090 sets forth a number of exceptions to the prohibition against the interception and recording and the admission of communications. RCW 9.73.090(2) allows the police to intercept and record communications if one party consents, there is probable cause that the nonconsenting party "has committed, is engaged in, or is about to commit a felony," and a judge authorizes interception and recording. RCW 9.73.090 provides in pertinent part:

The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police, fire, emergency medical service, emergency communication center, and poison center personnel in the following instances:

...

(2) It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent to the interception, recording, or disclosure: PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony . . . .

(3) Communications or conversations authorized to be intercepted, recorded, or disclosed by this section shall not be inadmissible under RCW 9.73.050.

The application for court approval to intercept and record communications under RCW 9.73.090(2) must meet the requirements of RCW 9.73.130. Under RCW 9.73.130, the application must contain a "particular

statement of the facts" justifying interception and recording, including a statement of probable cause, detailed information concerning the offense, the necessity to intercept and record, and facts showing that other investigative procedures have been tried, are unlikely to succeed, or are too dangerous to employ. RCW 9.73.130 provides in pertinent part:

**Recording private communications—Authorization—Application for, contents.**

Each application for an authorization to record communications or conversations pursuant to RCW 9.73.090 as now or hereafter amended shall be made in writing upon oath or affirmation and shall state:

- (1) The authority of the applicant to make such application;
- (2) The identity and qualifications of the Investigative or law enforcement officers or agency for whom the authority to record a communication or conversation is sought and the identity of whoever authorized the application;
- (3) A particular statement of the facts relied upon by the applicant to justify his belief that an authorization should be issued, including:
  - (a) The identity of the particular person, if known, committing the offense and whose communications or conversations are to be recorded;
  - (b) The details as to the particular offense that has been, is being, or is about to be committed;
  - (c) The particular type of communication or conversation to be recorded and a showing that there is probable cause to believe such communication will be communicated on the wire communication facility involved or at the particular place where the oral communication is to be recorded;
  - (d) The character and location of the particular wire communication facilities involved or the particular place where the oral communication is to be recorded;
  - (e) A statement of the period of time for which the recording is required to be maintained, if the character of the investigation is such that the authorization for recording should not automatically terminate when the described type of communication or conversation has been first obtained, a particular statement of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;
  - (f) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried

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and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ.

Relying on State v. Manning, 81 Wn. App. 714, 718, 915 P.2d 1162 (1996), Constance argues that because the application uses boilerplate justifications, it violates the requirement of RCW 9.73.130(3)(f) to provide a particular statement of facts showing that other normal investigative procedures were tried or appear reasonably unlikely to succeed.

We review the court's decision authorizing the interception and recording of communications to determine whether the facts set forth in the application "are minimally adequate" to support the court order. State v. Johnson, 125 Wn. App. 443, 455, 105 P.3d 85 (2005). RCW 9.73.130(3)(f) requires "something less than a showing of absolute necessity to record to acquire or preserve evidence." State v. Platz, 33 Wn. App. 345, 349, 655 P.2d 710 (1982). In determining whether to authorize the interception and recording of communications, the judge "has considerable discretion to determine whether the statutory safeguards have been satisfied." Johnson, 125 Wn. App. at 455.

Manning does not support the premise of Constance's argument that if an application contains boilerplate justifications, the decision to authorize interception and recording of communications under RCW 9.73.090, violates the requirements of RCW 9.73.130(3)(f).

In Manning, the court authorized the police to intercept and record conversations between a confidential informant and a suspected drug dealer.

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Manning, 81 Wn. App. at 717. The application to intercept and record relied on a number of justifications including:

The anticipated conversations were of primary importance to the investigation. Interception and recording would avoid a 'one-on-one swearing contest as to who said what, provide uncontroverted evidence of Manning's criminal intent, minimize factual confusion, and rebut anticipated allegations of entrapment. The application stated, '[n]o more reliable evidence of the communications or conversations is available than a recording, or recordings, of the actual conversations. The spoken words are themselves the best evidence of criminal intent. No other investigative method is capable of capturing these words in such clear and admissible evidentiary form.' In further justification, the application averred it was necessary 'to intercept and record conversations at the earliest stage of case development to maintain the integrity and proper direction of the investigator.'

Manning, 81 Wn. App. at 720.

We decided that the justifications in Manning were contrary to the statutory mandate to provide a particular statement of facts, and "appear to have become boilerplate in applications under the Privacy Act," contrary to the requirement under RCW 9.73.130(f). Manning, 81 Wn. App. at 720. We held that an application to intercept and record communications cannot rely on boilerplate justifications alone, and emphasized that the critical inquiry is to determine whether the application shows that the police gave "serious consideration to other methods" and explain why those methods are inadequate. Manning, 81 Wn. App. at 720.

Boilerplate is antithetical to the statute's particularity requirement set forth in RCW 9.73.130(3)(f). The requirement for a 'particular statement of facts' reflects the Legislature's desire to allow electronic surveillance under certain circumstances but not to endorse it as routine procedure. Before resorting to an application under RCW 9.73.130, the police must either try, or give serious

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consideration to, other methods and explain to the issuing judge why those other methods are inadequate in the particular case. [Footnote omitted] This is the critical inquiry to which the issuing judge and the trial judge must give their attention when reviewing an application.

Manning, 81 Wn. App. at 720. Consequently, an application that contains “nothing more than general boilerplate” undermines and violates the intent and the language of RCW 9.73.130(3)(f) to set forth particular facts showing normal investigative methods were tried or appear unlikely to succeed. Manning, 81 Wn. App. at 721.

Nonetheless, we concluded that the application in Manning was “minimally adequate” because it contained more than general boilerplate justifications. The application stated that the defendant was the target of a previous inconclusive investigation, was known to be armed and dangerous, and that using an undercover officer without the protection of a transmitter would be unlikely to succeed because of the risk to the officer. Manning, 81 Wn. App. at 721-22.

Here, Constance argues that the application violates RCW 9.73.130(3)(f) because it only relies on boilerplate justifications and does not set forth particular facts showing that other investigative procedures were tried or appear “unlikely to succeed if tried or to be too dangerous to employ.” In support of his argument, Constance points to statements in the application that are similar to the boilerplate justifications criticized in Manning — that a recording was the best way to verify the conversation, that recorded conversations were critical to later evaluation of the witnesses, that a recording would avoid “a one-on-one

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swearing contest" and would rebut an entrapment defense, along with the stated need to monitor the safety of the undercover officer.

Contrary to Constance's argument, the decision in Manning does not prohibit the use of boilerplate language altogether. Here, as in Manning, the application does not rely only on general boilerplate justifications to show that the police gave serious consideration to other normal investigative techniques. The application explains why normal investigative methods were inadequate and unlikely to succeed or too dangerous to employ. The application states in pertinent part:

Normal investigative techniques are unlikely to succeed if tried and are too dangerous to try. Castellanos was in contact with Constance as the two shared a jail cell over the weekend. Outside the above described investigative operation, involving the murder of Constance's ex-wife, Constance has not requested to meet Castellanos' 'hit man.' The idea of arresting Constance in hopes he will admit his intent to hire a hit-man to murder his ex-wife is unlikely. Even if Constance did divulge his desire to have his ex-wife murdered, that alone may not support his prosecution for Solicitation to Commit Murder in the First Degree and Criminal Conspiracy. In the meantime, as Constance has demonstrated, he may be soliciting other individuals to murder his ex-wife. I believe time is of the essence, as Constance is out of jail and may be soliciting another person, or persons, to murder his wife. The statements made by Castellanos and the sworn testimony made under oath by Jordan and Michael Spry support my belief.

The application also describes the unsuccessful previous attempt to question Constance about the threat to kill Koncos that he made to Jordan Spry. When the police asked Constance about the reported threat to kill Koncos, he flatly denied making any such threat.

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Moreover, in deciding whether to authorize interception and recording, the court must take into account the nature of the crime and the inherent difficulties in proving the crime. State v. Kichinko, 26 Wn. App. 304, 311, 613 P.2d 792 (1980); State v. Lopez, 70 Wn. App. 259, 267, 856 P.2d 390 (1993). Interception and recording is appropriate if proof of knowledge is an element of the crime. State v. Porter, 98 Wn. App. 631, 636, 990 P.2d 460 (1999).

Here, as the application correctly states, the crime of solicitation to commit murder in the first degree requires proof of intent.

[I]ndependent verification of his statements is necessary to help prove he was solicited. A recording of statements between Castellanos and Constance will be the best way to verify Castellanos[] statements.

Further, because of the nature of the crime, a recording of all of the conversations is appropriate and helpful to prove that the scheme originates in the mind of Constance and that he is not entrapped into committing the crime.

Solicitation to commit murder is an anticipatory offense that requires proof of a person's "intent to promote or facilitate" a crime. State v. Varnell, 162 Wn.2d 165, 169, 170 P.2d 24 (2007); RCW 9A.28.030(1). A person is guilty of the offense without regard to whether the criminal act is completed. Varnell, 162 Wn.2d at 169. RCW 9A.28.030(1) requires only that the solicitation occurs—that a person offers money or something of value to another person to commit a crime. Varnell, 162 Wn.2d at 169.

The application also explains the need to monitor the undercover officer for safety reasons. "It would be unsafe for Detective Hess to meet with Constance without audio and video capability so that other investigators can

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monitor the meetings and ensure the ability to respond quickly if anything goes wrong." The application states that because the undercover officer would not always be in close proximity to the police protection teams, "[t]he only way to monitor the safety of the officer is through the use of transmitted conversation."

We conclude the application sets forth facts that are more than adequate to meet the statutory requirements and support the court's determination that "normal investigative procedures with respect to the offense have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ." RCW 9.73.130(3)(f).

Constance also argues that the police reports submitted with the application do not support the characterization of him as a violent criminal. The application states:

[T]he investigative plan described above, if successful, is anticipated to result in the arrest and prosecution of a habitual domestic violence offender and violent ex-con . . . .

Constance's interactions with his ex-wife and his criminal history show him to be an active and elusive criminal who has been engaged in criminal activity for quite some time. He is therefore not likely to speak about his criminal activity or to participate in the planned murder of his ex-wife if he thinks non-participant witnesses are in a position to overhear his conversations.

The police reports indicate that Constance was a suspect in a number of domestic violence assaults and violated the protection order against Koncos eleven times over the previous three years. While Constance contends that many of these incidents were minor or were instigated by Koncos, he ignores

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the most recent police reports describing the failed attempt to abduct his son and the violent assault of Koncos, and the threat to kill her.

Because the application to intercept and record the communications between Constance and Castellanos meets the requirements of RCW 9.73.130, the court did not err in denying the motion to suppress. We affirm the conviction of solicitation to commit murder in the first degree as charged in count 3.<sup>5</sup>

*Schneider, C*

WE CONCUR:

*Leach, J.*

*Eberington, J.*

---

<sup>5</sup> We deny Constance's request to consider the information he submitted in support of his CrR 7.8 motion for relief from judgment without prejudice to his right to pursue post conviction relief. State v. McFarland, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995). We also conclude that the other arguments raised in his statement of additional grounds are without merit.

APPENDIX C

Findings of Fact and Conclusions of Law and Order Granting  
Evidentiary Hearing on Limited Issues  
Clark County No. 07-1-00843-8



- 4) Affidavit in Support of Motion for Relief from Judgment (Dino Constance), received April 7, 2009;
- 5) Affidavit in Support of Motion for Relief from Judgment (Alexa Constance-Saxon), received April 7, 2009;
- 6) Correspondence from the defendant to the court dated March 25, 2009, and April 2, 2009, and received April 7, 2009;
- 7) Letter from the defendant to the court stating corrections to brief, dated April 12, 2009, and received April 14, 2009;
- 8) Letter from the defendant to the court requesting evidentiary hearing, dated April 13, 2009, and received April 15, 2009;
- 9) Letter from the defendant to the court stating corrections to brief, dated April 19, 2009, and received April 22, 2009;
- 10) Response to 7.8 Motion, filed April 20, 2009;
- 11) Defendant's Reply to State's Response to 7.8 Motion, dated April 22, 2009, and received April 30, 2009; and
- 12) Letter from the defendant to the court requesting status, dated May 13, 2009, and received May 18, 2009.

These materials have been filed with the court. The court also reviewed the records and files herein. Based upon this review, the court makes the following:

#### FINDINGS OF FACT

1. The defendant, Dino Constance, was charged with three counts of Solicitation to Commit Murder in the First Degree, and one count of Solicitation to Commit Assault in the Second Degree. Constance was represented by attorney Brian

Walker from September 17, 2007, through March 28, 2008. Following Walker's appointment, Constance's trial was continued to allow an evaluation of the defendant's competence, to consider pretrial suppression motions, and to allow counsel additional time to prepare.

2. Prior to trial, the defendant moved to sever the trial of Counts I and II from the trial of Counts III and IV. The defendant also moved to suppress recorded conversations between Constance and Ricci Castellanos, related to the solicitation of Castellanos to murder Jean Koncos. The motion was based upon alleged violations of CrR 3.6 and RCW 9.73. These motions were heard and denied on February 13, 2008. The court also dealt with other pretrial motions and discovery issues at this hearing.

3. The case was tried to a jury between February 25-28, 2008. The defendant did not seek a continuance of the trial date. Prior to trial, the court heard and decided a number of motions in limine filed by defendant's counsel. The court granted most of these motions, including motions to exclude reference to other prior wrongs or acts alleged to have been committed by the defendant.

4. Constance moved to present habit evidence through the testimony of Alexa Saxon and Michael Phillips. The defendant asserted that both would testify "as to Constance's routine, reflexive reaction to anger, frustration and stress by describing in great and lengthy detail how he intends to get revenge." The defense ultimately did not call Phillips as a witness. The court heard an offer of proof regarding Saxon's testimony, and ruled that the proffered evidence was not admissible as proof of habit.

5. The defendant's counsel cross-examined the State's chief witnesses, including Koncos, Jordan Spry and Michael Spry. Counsel elicited prior inconsistent

statements by the witnesses, and highlighted factual inconsistencies between their respective testimonies. Walker also called six witnesses during the defendant's case. The defendant did not testify.

6. On February 28, 2008, the jury found Constance guilty of three counts of Solicitation to Commit Murder in the First Degree and one count of Solicitation to Commit Assault in the Second Degree as charged. On March 19, 2008, the defendant filed a motion for arrest of judgment, which noted inconsistencies between Koncos and Jordan and Michael Spry concerning when the Sprys had first warned Koncos that Constance wanted to have her harmed or killed. Constance submitted a revised declaration in support of the motion, asserting that this inconsistent testimony proved that these witnesses had perjured themselves, and had conspired together concerning these false statements. The defendant argued that there was insufficient credible evidence to convict him of the crimes charged in Counts I or II. The court heard and denied the motion on March 28, 2008.

7. The court entered judgment and sentence, based on the jury's verdicts, on March 28, 2008. The defendant was sentenced within the applicable standard range for each offense. On April 3, 2008, Constance filed a notice of appeal. That appeal is currently pending before the Court of Appeals, Division II, under Docket No. 37576-1-II.

8. On April 7, 2009, the court received the defendant's motion for relief from judgment (CrR 7.8), and accompanying materials. The asserted grounds for the motion are (a) irregularity in obtaining the judgment, based upon the use of the perjured testimony of Jean Koncos, Jordan Spry and Michael Spry; (b) ineffective assistance of trial counsel, based upon Walker's trial tactics, failure to adequately prepare for trial,

failure to call witnesses and his refusal to allow the defendant to testify on his own behalf; and (c) the discovery of an affidavit filed on Constance's behalf by James Castner in a Clark County domestic relations file, and the potential use of this affidavit, or the testimony of Castner, as evidence for the defendant in this case.

9. The documents attached to the defendant's motion in support of asserted ground (a), and the records and files herein, do not support his assertion that relief should be granted. Inconsistent statements by a witness, and inconsistencies between witnesses, are not uncommon at trial, and do not prove either perjury or conspiracy. The jury was presented with evidence of inconsistency, and other asserted bases for disbelieving the State's witnesses. The jury is the sole judge of witness credibility.

10. Resolution of asserted ground (a) of the defendant's motion does not require a factual hearing. The information concerning the inconsistent testimony of the witnesses was presented at trial, and was also argued as the basis for the defendant's motion for arrest of judgment. This information is contained in the record of proceedings before the trial court.

11. The documents attached to the defendant's motion in support of asserted ground (b), and the records and files herein, do not support his assertion that relief should be granted. Most of the defendant's complaints against his trial attorney are either disagreements with tactical decisions, or disagreements with the court's rulings on motions. Neither are appropriate grounds for relief on the basis of ineffective assistance of counsel. However, as to two issues discussed below, the court cannot determine whether the defendant has stated adequate grounds for relief from judgment.

12. Resolution of asserted ground (b) of the defendant's motion requires a factual hearing on two issues. First, the defendant has asserted that defense counsel neglected to call certain available witnesses who could have provided favorable testimony on the defendant's behalf. Second, the defendant contends that defense counsel actively prevented him from exercising his right to testify on his own behalf. Neither of these issues can be decided by reference to the record, and an evidentiary hearing on these two assertions is necessary. The remaining allegations of ineffective assistance of counsel contained in asserted ground (b) can be resolved by reference to the record, and do not require a factual hearing.

13. The documents attached to the defendant's motion in support of asserted ground (c), and the records and files herein, do not support his assertion that relief should be granted. Prior to trial, Constance knew of Castner's affidavit, and the availability of Castner to testify as a witness for the defense. This evidence is not "newly discovered," and does not justify reversal of the defendant's convictions.

14. Resolution of asserted ground (c) of the defendant's motion does not require a factual hearing. Constance has not presented any basis for a finding that Castner's testimony was unknown, or unavailable to him, prior to trial.

Based upon the foregoing Findings of Fact, the court enters the following  
Conclusions of Law:

#### CONCLUSIONS OF LAW

1. This defendant's motion for relief from the judgment and sentence is made pursuant to CrR 7.8.

2. The motion is not time barred by RCW 10.73.090, and is timely pursuant to the requirements of CrR 7.8 (b).

3. The defendant has not made a substantial showing that he is entitled to relief.

4. Resolution of two issues concerning asserted ground (b) of the defendant's motion will require a factual hearing. Resolution of all other grounds asserted in the defendant's motion will not require a factual hearing.

Based on the foregoing Findings of Fact and Conclusions of Law, and the court being fully advised, now, therefore, it is hereby ORDERED, ADJUDGED and DECREED as follows:

#### ORDER

1. The defendant's request for an evidentiary hearing on asserted ground (b) of his motion for relief from judgment is granted, limited to the following issues: (A) whether defendant's trial counsel actively prevented the defendant from exercising his right to testify on his own behalf at trial; and (B) whether the defendant received ineffective assistance of counsel, based upon trial counsel's failure to call available witnesses favorable to the defendant, under circumstances which warrant a new trial. The defendant's motion for an evidentiary hearing on all other grounds asserted in the motion for relief from judgment is denied.

2. This matter is scheduled for review on **Tuesday, June 23, 2009, at 9:00 am, on the court's arraignment docket.** The State shall arrange for the transport of the defendant to Clark County for this review. At the review, the court will appoint counsel to represent the defendant concerning the issues before the court. The court will also

enter an order fixing a date and time for the evidentiary hearing and directing the State to show cause why the relief requested, with regard to the evidentiary issues described above, should not be granted, as required by CrR 7.8 (c)(3).

3. All other grounds asserted in the motion for relief from judgment are reserved, pending further order of the court. If the court determines, following the evidentiary hearing, that relief should be granted, the parties will comply with the requirements of RAP 7.2 (e). If the court denies relief following the evidentiary hearing, the remainder of the defendant's motion for relief from judgment will be transferred to the Court of Appeals, Division II, for consideration as a personal restraint petition, pursuant to CrR 7.8 (c) (2).

4. The Clerk of the Court shall mail a copy of this order to the defendant and to the assigned deputy prosecuting attorney, as notice of the hearing date and time.

Dated this 20<sup>th</sup> day of May, 2009.

  
\_\_\_\_\_  
Judge Robert A. Lewis

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent a copy of this **Findings of Fact and Conclusions of Law and Order Granting Evidentiary hearing on Limited Issues** to the parties addressed below, by regular mail:

Dino Constance  
DOC 317289 HOUSING B-10  
CLALLAM BAY CORRECNTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 98326-9723

Tony Golik  
Deputy Prosecuting Attorney  
PO BOX 5000  
Vancouver, WA 98666-5000

Dated: 5/20/09

Signed: Jennifer Dahn  
Judicial Assistant, Superior Court #9

APPENDIX D

Findings of Fact and Conclusions of Law and Order Dismissing  
Issues and Transferring Motion for Relief from Judgment to Court  
of Appeals, Division II  
Clark County No. 07-1-00843-8

FILED

2009 SEP 14 PM 5:03

Sherry W. Parker, Clerk  
Clark County

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	
	)	NO. 07-1-00843-8
Plaintiff,	)	
	)	
vs.	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW,
DINO J. CONSTANCE.,	)	AND ORDER DISMISSING
	)	ISSUES AND
Defendant.	)	TRANSFERRING MOTION
	)	FOR RELIEF FROM
	)	JUDGMENT TO COURT
	)	OF APPEALS, DIVISION II
	)	
	)	[CLERK'S ACTION REQUIRED]

This matter came on regularly for a factual hearing before the undersigned judge of the above-entitled court on September 11 and 14, 2009, on the motion of the defendant, Dino Constance, for relief from judgment pursuant to CrR 7.8 (b). The defendant was present, and represented by and through his attorney, Edward Dunkerly. The State of Washington was represented by and through deputy prosecuting attorney Anthony Golik.

The court has reviewed the following materials with respect to the motion:

Page 1 of 11 – Findings of Fact, Conclusions of Law, and  
Order Dismissing Issues and Transferring Motion  
For Relief from Judgment to Court Of Appeals

- 1) Defendant's motion and brief in support of motion for relief from judgment (CrR 7.8), received by the assigned judge April 7, 2009;
- 2) "Recorded Proceedings," received April 7, 2009;
- 3) "Summary of Exhibits," with Affidavit of Authenticity and 39 attached exhibits, received April 7, 2009;
- 4) Affidavit in Support of Motion for Relief from Judgment (Dino Constance), received April 7, 2009;
- 5) Affidavit in Support of Motion for Relief from Judgment (Alexa Constance-Saxon), received April 7, 2009;
- 6) Correspondence from the defendant to the court dated March 25, 2009, and April 2, 2009, and received April 7, 2009;
- 7) Letter from the defendant to the court stating corrections to brief, dated April 12, 2009, and received April 14, 2009;
- 8) Letter from the defendant to the court requesting evidentiary hearing, dated April 13, 2009, and received April 15, 2009;
- 9) Letter from the defendant to the court stating corrections to brief, dated April 19, 2009, and received April 22, 2009;
- 10) Response to 7.8 Motion, filed April 20, 2009;
- 11) Defendant's Reply to State's Response to 7.8 Motion, dated April 22, 2009, and received April 30, 2009;
- 12) Letter from the defendant to the court requesting status, dated May 13, 2009, and received May 18, 2009;
- 13) Motion for *Franks* hearing, filed May 21, 2009;

- 14) Affidavit in support of motion for *Franks* hearing, filed June 2, 2009;
- 15) Motion for Modification of Findings of Fact and limits on Evidentiary Hearing, filed June 8, 2009;
- 16) Addendum to Motion for Relief from Judgment, filed June 9, 2009; and
- 17) Exhibit 25 of Constance's Exhibits to Motion for Relief from Judgment, filed August 13, 2009.

These materials have been filed with the court.

On May 21, 2009, the court ordered a factual hearing in this matter, limited to two specific issues raised in the defendant's Motion for Relief from Judgment. Although the court entered findings of fact and conclusions of law with regard to the remaining issues raised in the motion, the court reserved action on these issues, pending the outcome of the evidentiary hearing. The defendant was ordered returned to Clark County, Washington, for purposes of the hearing. On May 21, 2009, the court denied the defendant's motion for a *Franks* hearing, and the defendant's motion for bail pending appeal.

On September 11, 2009, the defendant and his counsel asserted on the record that the defendant wished to withdraw all issues raised in the motion for relief from judgment from the court's consideration, except for the issue of whether the defendant's trial counsel actively prevented the defendant from exercising his right to testify on his own behalf at trial. The court granted the defendant's request to withdraw these issues. On the remaining issue, the court heard the testimony of Spiro Constance, Ruth Constance, Dino Constance and Brian Walker. The court also reviewed the records and files herein, and considered the arguments of counsel.

Based upon this review, and this court's assessment of the credibility of the testimony and evidence presented, the court makes the following:

#### FINDINGS OF FACT

1. The defendant, Dino Constance, was charged with three counts of Solicitation to Commit Murder in the First Degree, and one count of Solicitation to Commit Assault in the Second Degree. Constance was represented by his second appointed attorney, Brian Walker, from September 17, 2007, through March 28, 2008. Following Walker's appointment, Constance's trial was continued to allow an evaluation of the defendant's competence, to consider pretrial suppression motions, and to allow counsel additional time to prepare.

2. Prior to trial, the defendant moved to sever the trial of Counts I and II from the trial of Counts III and IV. The defendant also moved to suppress recorded conversations between Constance and Ricci Castellanos, related to the solicitation of Castellanos to murder Jean Koncos. The motion was based upon alleged violations of CrR 3.6 and RCW 9.73. These motions were heard and denied on February 13, 2008. The court also dealt with other pretrial motions and discovery issues at this hearing.

3. The case was tried to a jury from February 25-28, 2008. The defendant did not seek a continuance of the trial date. Prior to trial, the court heard and decided a number of motions in limine filed by defendant's counsel. The court granted most of these motions, including motions to exclude reference to other prior wrongs or acts alleged to have been committed by the defendant.

4. Before trial commenced, Constance planned to testify as a witness for the defense. The defendant wanted to explain the meaning of his conversations with

Castellanos, and to assert that his alleged solicitations of others to harm or kill Koncos did not occur. Walker also believed that Constance would testify at trial, and prepared his case based on the assumption that the defendant would take the stand.

5. During a number of meetings prior to trial, Walker and Constance discussed areas to be covered in his direct testimony, and possible areas of concern regarding his cross-examination. For example, Walker was concerned that Constance would try to always have the “perfect answer”, and that the jury would not like the defendant because of his demeanor. Walker expressed these concerns to Constance, but did not tell him that he would not allow him to testify.

6. As Constance observed the court proceedings during trial, he began to express reservations about testifying to Walker. The defendant and his counsel agreed that most of the information Walker planned to use during his closing arguments could be presented through the cross-examination of State witnesses, or the testimony of other defense witnesses. Constance was also concerned about the areas of inquiry which would be raised during his cross-examination. Because Walker had reservations about the defendant’s demeanor while testifying, he did not urge or encourage Constance to testify.

7. Constance moved to present habit evidence through the testimony of Alexa Saxon and Michael Phillips. The defendant asserted that both would testify “as to Constance’s routine, reflexive reaction to anger, frustration and stress by describing in great and lengthy detail how he intends to get revenge.” The defense ultimately did not call Phillips as a witness. The court heard an offer of proof regarding Saxon’s testimony, and ruled that the proffered evidence was not admissible as proof of habit.

8. The defendant's counsel cross-examined the State's chief witnesses, including Koncos, Jordan Spry and Michael Spry. He elicited prior inconsistent statements by these witnesses, and highlighted factual inconsistencies between their respective testimonies. Walker also called six witnesses during the defendant's case. Just before the final defense witness testified, Walker and Constance met alone for approximately 20 minutes during a court recess. During this meeting, the defendant advised Walker that he did not wish to testify. Walker rested his case without calling the defendant. Counsel did not have Constance affirmatively state on the record that he had chosen not to testify.

9. On February 28, 2008, the jury found Constance guilty of three counts of Solicitation to Commit Murder in the First Degree and one count of Solicitation to Commit Assault in the Second Degree as charged. On March 19, 2008, the defendant filed a motion for arrest of judgment, which noted inconsistencies between Koncos and Jordan and Michael Spry concerning when the Sprys had first warned Koncos that Constance wanted to have her harmed or killed. Constance submitted a revised declaration in support of the motion, asserting that this inconsistent testimony proved that these witnesses had perjured themselves, and had conspired together concerning these false statements. The defendant also argued that there was insufficient credible evidence to convict him of the crimes charged in Counts I and II. The defendant did not assert in this motion that he had been denied his right to testify at trial. The court heard and denied the motion on March 28, 2008.

10. The court entered judgment and sentence, based on the jury's verdicts, on March 28, 2008. The defendant was sentenced within the applicable standard range for

each offense. On April 3, 2008, Constance filed a notice of appeal. That appeal is currently pending before the Court of Appeals, Division I, under Docket No. 37576-1-II.

11. On April 7, 2009, the court received the defendant's motion for relief from judgment (CrR 7.8), and accompanying materials. The asserted grounds for the motion were (a) irregularity in obtaining the judgment, based upon the State's knowing use of the perjured testimony of Jean Koncos, Jordan Spry and Michael Spry; (b) ineffective assistance of trial counsel, based upon Walker's trial tactics, failure to adequately prepare for trial, failure to call witnesses and his refusal to allow the defendant to testify on his own behalf; and (c) the discovery of an affidavit filed on Constance's behalf by James Castner in a Clark County domestic relations file, and the potential use of this affidavit, or the testimony of Castner, as evidence for the defendant in this case.

12. The documents attached to the defendant's motion in support of asserted ground (a), and the records and files herein, do not support his assertion that relief should be granted. Inconsistent statements by a witness, and inconsistencies between witnesses, are not uncommon at trial, and do not prove either perjury or conspiracy. The jury was presented with evidence of inconsistency, and other asserted bases for disbelieving the State's witnesses. The jury is the sole judge of witness credibility.

13. Resolution of asserted ground (a) of the defendant's motion does not require a factual hearing. The information concerning the inconsistent testimony of the witnesses was presented at trial, and was also argued as the basis for the defendant's motion for arrest of judgment. This information is contained in the record of proceedings before the trial court.

14. At the time of the evidentiary hearing on September 11, 2009, Constance affirmatively withdrew asserted ground (a) as part of his motion for relief from judgment. This portion of the motion will not be transferred to the Court of Appeals. This portion of the motion should be dismissed.

15. The documents attached to the defendant's motion in support of asserted ground (b), and the records and files herein, do not support his assertion that relief should be granted. Most of the defendant's complaints against his trial attorney are either disagreements with tactical decisions, or disagreements with the court's rulings on motions. Neither are appropriate grounds for relief on the basis of ineffective assistance of counsel. The record does not support the defendant's contention that his counsel was not willing to call available witnesses to support his defense.

16. Except for the factual issue of whether the defendant's trial counsel actually prevented him from testifying, resolution of the allegations of ineffective assistance of counsel contained in asserted ground (b) can be resolved by reference to the record, and do not require a factual hearing. The issue of whether the defendant received ineffective assistance of counsel, based upon trial counsel's failure to call available witnesses favorable to the defense, would need to be resolved following a factual hearing. That hearing was not conducted, because Constance affirmatively withdrew this asserted ground for relief prior to the scheduled hearing.

17. At the time of the evidentiary hearing on September 11, 2009, Constance affirmatively withdrew asserted ground (b) as part of his motion for relief from judgment, except for the issue of whether the defendant's trial counsel actually prevented him from

testifying at trial. The remaining portions of the motion will not be transferred to the Court of Appeals. These portions of the motion should be dismissed.

18. The defendant's trial counsel, Brian Walker, did not actually prevent Dino Constance from testifying at trial. The defendant, after observing the trial and considering his options, chose not to testify. Although Walker had expected that Constance would testify, he accepted this decision, and rested his case without calling the defendant.

19. At the factual hearing, Constance testified that he had advised Walker for months that he insisted on testifying, and had urged Walker to prepare him for cross-examination. The defendant testified that counsel refused to call him as a witness, told Constance that he planned to put on a case without his testimony, and advised the defendant that he would be going to "Walla Walla" if he took the stand. Constance asserted that he finally gave up on the idea of testifying, because Walker refused to prepare him to take the stand. After listening to all of the testimony, and considering both the defendant's demeanor, and his history of advising the court when he was dissatisfied with court proceedings, or the quality of his counsel's representation, the court does not find this version of events to be credible.

20. The documents attached to the defendant's motion in support of asserted ground (c), and the records and files herein, do not support his assertion that relief should be granted. Prior to trial, Constance knew of the Castner affidavit, and the availability of Castner to testify as a witness for the defense. This evidence is not "newly discovered," and does not justify reversal of the defendant's convictions.

21. Resolution of asserted ground (c) of the defendant's motion does not require a factual hearing. Constance has not presented any basis for a finding that Castner's testimony was unknown, or unavailable to him, prior to trial.

22. At the time of the evidentiary hearing on September 11, 2009, Constance affirmatively withdrew asserted ground (c) as part of his motion for relief from judgment. This portion of the motion will not be transferred to the Court of Appeals. This portion of the motion should be dismissed.

Based upon the foregoing Findings of Fact, the court enters the following Conclusions of Law:

#### CONCLUSIONS OF LAW

1. The defendant's motion for relief from the judgment and sentence is made pursuant to CrR 7.8.

2. The motion is not time barred by RCW 10.73.090, and is timely pursuant to the requirements of CrR 7.8 (b).

3. With one exception, all of the grounds asserted for relief from the judgment and sentence have been affirmatively withdrawn by the defendant from court consideration and should be dismissed.

4. The defendant has not established by a preponderance of the evidence that his trial counsel actually prevented him from testifying. The credible evidence presented at the factual hearing established that Dino Constance made a voluntary decision to exercise his right to remain silent, and that he chose not to testify after consulting with defense counsel.

5. The defendant has not made a substantial showing that he is entitled to relief from the judgment and sentence entered on March 28, 2008.

6. No other grounds for relief have been asserted in the defendant's motion, and a further factual hearing concerning this motion is not required.

Based on the foregoing Findings of Fact and Conclusions of Law, and the court being fully advised, now, therefore, it is hereby ORDERED, ADJUDGED and DECREED as follows:

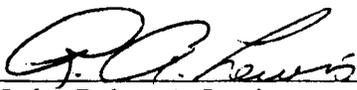
ORDER

1. The defendant's motion for relief from judgment, filed April 7, 2009, on the asserted ground that defendant's trial counsel actively prevented the defendant from exercising his right to testify on his own behalf at trial, under circumstances which warrant a new trial, is transferred to the Court of Appeals, Division II, for consideration as a personal restraint petition.

2. The defendant's motion for relief from judgment, filed April 7, 2009, on all other grounds asserted in the motion, is dismissed.

3. The Clerk of the Court shall mail a copy of this order to the defendant, Dino Constance, to the defendant's appointed counsel, Edward Dunkerly, and to the deputy prosecuting attorney, Anthony Golik.

Dated this 14<sup>th</sup> day of September, 2009.

  
\_\_\_\_\_  
Judge Robert A. Lewis

APPENDIX E

Order Amending Findings of Fact and Conclusions of Law, and  
Order Dismissing Issues, and Denying Defendant's Motion for  
Relief from Judgment, Pursuant to CrR 7.8(c)(2)  
Clark County No. 07-1-00843-8

3

**FILED**  
2010 MAR -3 PM 12:39  
Sherry W. Parker, Clerk  
Clark County

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CLARK COUNTY

STATE OF WASHINGTON,	)	
	)	NO. 07-1-00843-8
Plaintiff,	)	
vs.	)	ORDER AMENDING FINDINGS
	)	OF FACT AND CONCLUSIONS
DINO J. CONSTANCE,	)	OF LAW, AND ORDER
	)	DISMISSING ISSUES, AND
Defendant.	)	DENYING DEFENDANT'S
	)	MOTION FOR RELIEF FROM
	)	JUDGMENT, PURSUANT TO
	)	CrR 7.8(c)(2)

**[Clerk's Action Required]**

This matter came on regularly before the undersigned judge of the above-entitled court, on the order of the Court of Appeals, Division II, rejecting CrR 7.8(c)(2) transfer. The trial court has reviewed the order, and the records and files herein, and is fully advised.

On September 14, 2009, the court issued its Findings of Fact and Conclusions of Law, and Order Dismissing Issues and Transferring Motion for Relief from Judgment to Court of Appeals, Division II. The trial court determined that all of the grounds asserted by the defendant in his Motion for Relief from Judgment, filed April 7, 2009, except for

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the asserted ground that defendant's trial counsel actively prevented the defendant from exercising his right to testify in his own behalf at trial, under circumstances which warranted a new trial, should be dismissed. The basis for the dismissal was the affirmative request of the defendant, and his counsel, that the matters be withdrawn from the trial court's consideration.

With regard to the remaining asserted ground for relief, the trial court conducted an evidentiary hearing on September 10 and 14, 2009. The trial court entered Findings of Fact and Conclusions of Law, expressing the opinion that the motion was not well taken, and that the defendant had not made a substantial showing that he was entitled to relief from the judgment entered on March 28, 2008. The trial court did not, however, deny the defendant's motion for relief from judgment. The trial judge concluded that he did not have the authority to deny the motion for relief from judgment based upon the language of CrR 7.8(c). Instead, the trial court believed that his sole authority was to enter findings and conclusions with regard to the motion, and to transfer the case to the Court of Appeals for decision as a personal restraint petition. The order entered on September 14, 2009, reflects that belief.

By order dated February 22, 2010, the Court of Appeals, Division II, rejected the CrR 7.8(c)(2) transfer. This order indicates that the trial court does have the authority to deny the motion for relief from judgment, when an evidentiary hearing on the motion has been conducted. Further, the Court of Appeals concluded that the trial court's action was an effective denial of the motion. The trial court's order should be corrected, to reflect the Court of Appeals' conclusion.

Based on the foregoing, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Paragraph 1 of the "Order" section of the Findings of Fact, Conclusions of Law, and Order Dismissing Issues and Transferring Motion for Relief from Judgment to Court of Appeals, Division II, entered by the court on September 14, 2009, shall be amended to read as follows:

"1. The defendant's motion for relief from judgment, filed April 7, 2009, on the asserted ground that defendant's trial counsel actively prevented the defendant from exercising his right to testify on his own behalf at trial, under circumstances which warrant a new trial, is denied."

2. The title of the Findings of Fact, Conclusions of Law, and Order Dismissing Issues and Transferring Motion for Relief from Judgment to Court of Appeals, Division II, filed September 14, 2009, is amended to read as follows:

"Findings of Fact and Conclusions of Law, and Order Dismissing Issues and Denying Motion for Relief from Judgment [Clerk's Action Required]."

3. Except as expressly amended above, the court's previous Findings, Conclusion and Order, entered on September 14, 2009, is affirmed, and shall be and remain in full force and effect.

4. The Clerk of the Court shall mail a copy of this order to the defendant, Dino Constance, to the defendant's appointed counsel, Edward Dunkerly, to the defendant's counsel on appeal, Neil Fox, to the deputy prosecuting attorney, Anthony Golik, and to the appellate deputy prosecuting attorney, Michael Kinnie.

Dated this 1<sup>st</sup> day of March, 2010.

  
Judge Robert A. Lewis

APPENDIX F

Letter from Defendant to Judge, received August 25, 2008



Dear Judge Lewis,

I have done extensive research on my case and convictions because I know I was falsely convicted. Among other things, I have discovered evidence that my jury never heard, indicating that Michael and Jordan Spivey committed widespread perjury at my trial, and that this perjury was initially conspired with Jean Kacor. You will recall that the Spiveys testified that they began to warn Mrs. Kacor of supposed warnings of my solicitations to harm her "early on" and "almost immediately" upon my January 15, 2007 move in. You will also please recall that Jean Kacor, quite implicitly, testified that she heard no such warnings from the Spiveys until 3/27/07, the date of my huge fight with the Spiveys and the beginning of the time period when they blackmailed me.

I can now positively prove that 1) Jean Kacor, initially and in the family court, first swore that she had received advanced warnings from the Spiveys, 2) was caught attempting to perpetuate this ruse on the attorney in my case, and 3) then changed her story and testimony so as to not be caught committing perjury at my

trial. I can clearly show that she was planning on testifying similarly to the Spys, but having been caught lying, changed her story.

Since a reasonable person would no doubt find such severe allegations, proved only after a severe disagreement, police intervention, and blackmail, to be not credible, and also given that the alleged victim was initially involved in the perpetration of this Spys credibility - lachtering deception, I need to augment the trial record with this information and related testimony.

I wish to obtain an evidentiary hearing by invoking RAP 7.2. However, my court appointed appellate attorney informs me that this is beyond the scope of their retention. As such, I request the appointment of counsel for this purpose in the interests of justice.

Moreover, the acquisition of additional related evidence which would make it possible to "overkill" the validity of my assertion and the Konec-Spys conspiracy, to defraud the courts, would be easy if I were appeal bonded. However, as you set my bail at one million dollars, this would be impossible without a very substantial bond amount reduction,

Appropriate to only a single count of solicitation to murder (which is not fraudulent). If you would be willing to hear my oral argument regarding the unheard evidence and the Korean-Spy conspiracy, to defend your court, I request transport back to Clark County and that a hearing be set.

Once again, in any case, as I have discovered previously unheard proof of perjury by Michael and Jordan Spay, and the explanation of mutually exclusive testimony between them and Mr. Korea, indicating a pre-existing conspiracy, I request appointment of counsel able to pursue the RAD 72 post-conviction motion.

Thank you,

Pat

*Shirley J. Constance - 307209  
D104  
Washington Correction Center  
PO Box 402  
Shelton, WA 98584*

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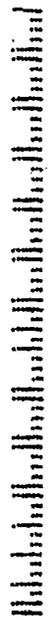
*Superior Court Judge Ferrin  
PO Box 5070  
Vancouver, WA 98666*

**RECEIVED**

**AUG 25 2008**

Sherry Parker, Clerk, Clark Co.

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APPENDIX G

Letter from Defendant to Judge, received November 24, 2008

FILED

NOV 24 2008

Sherry W. Parker, Clerk, Clark Co.

11/16/08

07-1-00843-8

3  
Dear Judge Harris,

appellate  
In my last letter, I informed you that court appointed  
counsel Eric Nielson, and privately retained counsel for a CrR 7.2  
motion, Charles Fove, both disagreed with your decision  
to not hear my CrR 7.2 motion on the grounds that  
the Superior Court no longer had jurisdiction, since I had  
filed a Notice of Appeal. Counsel and I would argue  
that because the law requires a Notice of Appeal to be  
filed within 30 days, and also prescribes a 1 year time  
limit for a CrR 7.2 motion, 11 months of overlapping  
jurisdiction must occur. Further, because the ~~state~~  
nature of my basis for the CrR 7.2 motion involves a  
conspiracy to defraud the court by alleged "victim"  
Jean Kowec, and state witnesses Michael and Jordan  
Spuy, this is not a matter eligible for review under  
direct appeal. Obviously, the legislature did not  
intend for a defendant to become vulnerable to the  
effects of venereal dishonesty, in order to receive the  
benefit of appellate review. Further, because the only  
way to concretely prove the fraud is by way of the  
victim's part in the conspiracy, and because the trial  
~~and~~ court would presumably not allow the alleged  
"victim" to be impeached in a manner necessary to  
prove the fraud and perjury ~~and~~ false accusations  
against me, the only way to broach the  
subject of the false accusations, perjury, fraud, and  
resulting wrongful convictions they precipitated, is  
via CrR 7.2.

I can assure you that the evidence, only recently  
discovered and fully developed by me is compelling. An  
evidentiary hearing into this matter will expose a



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11/14/88

Dear Judge Harris,

After conferring with attorney ~~at~~ Charles Jane, who first conferred with Eric Nielsen, I am told that the consensus of opinion is that you may have been in error with regards to the jurisdictional issue of CrR 7.8. These attorneys ~~at~~ are of the opinion that there is overlapping jurisdiction within 12 months of sentencing. As such, I request that you consider the subject, and if you still believe the Superior Court has no jurisdiction to hear a CrR 7.8 motion at this time, that you please confer with Mr. Nielsen on the subject.

My motion proves fraud on the court by way of my alleged "witness" and conspiring witnesses.

At this time, we are considering the optimum legal basis for the motion to be heard, as several may apply under CrR 7.8.

As communication between my attorney is limited and hampered, I request that you forward a copy of your reconsidered opinion and all correspondence with my attorneys to me directly.

Thank You,  
Paw J. Contines

Duo Container 317289

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Chubbam Bay, WA 98326

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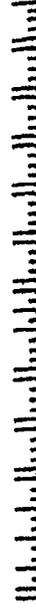
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NOV 17 2008

Frederick George Heenan

PO Box 5000

Vancouver WA, 98666

98666\$5000 8900



APPENDIX H

Letters to Judge, filed March 28, 2008

4  
**FILED**

**MAR 28 2008**

Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND  
FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

vs.

*Dino Constance*

Defendant.

No. *07-1-00843-8*

*Letters to the court*

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Judge Lewis,

07-1-00843-8

I feel compelled to write this letter to you and employ you to read it as it is pertinent to my son's case, namely the "Extenuating Circumstances" you did not hear at my son's trial that caused him to say things resulting in such horrific charges and to his remaining in "the hole" for 10 months.

I will try to explain why he said the things he said and the reasons for such behavior so that you can understand and perhaps feel you can give him a lesser sentence. I hope you will read my letter and give some thought to these extenuation circumstance. I feel that if you had allowed more of the motions and testimony that his attorney tried to get admitted his trial would have been more equitable and probably would have lasted three weeks rather than three days. In California, extenuating circumstances would have effected his trial in a positive way for Dino which would also lessen his sentence.

From the beginning we all realized his wife, Jean Koncos, saw a good thing, financially, in hooking up with our son. The fact that she deliberately got pregnant, without my son's knowledge, is one of many deceptive things she did. Dino did too much bragging about his income and about our comfortable lifestyle.

Dino believed she truly loved him and wanted to be a part of our family. So much so that he rented a house in WA big enough for he and Jean and her 2 other children....They both signed the lease but when she first took off he got stuck with all the rent. He spent all of his savings to pay for litigation she was going through to try to get custody of her 2 other children. When the relationship went bad between the two of them, she took off to another state so that she could have their baby and sign something saying she did not know who the father was. This was the first terror she imposed on our son. We paid for detectives to find her before giving birth. She returned had the baby and then took off for her adoptive parents when the baby was one week old. Her parents would not let her stay beyond two weeks.

She returned again, they fought, and child protective services placed our grandson into foster care for 4 months until they both decided to try and mend their relationship and they married to get the baby out of foster care. Not much later they broke up again and she had a restraining order placed on Dino.....he broke the order by phoning her trying to makeup so that they could give their son stability and family. She had him arrested but the message he had left on her cell phone pleading with her to work at the marriage and not lose the baby again was listened to by the judge presiding over their first divorce hearing and he did not go any farther with the violation of a no contact order.

The custody battle began and there are 9 volumes on this fight. He was so worried about losing the baby that he was unable to work very much. Jean moved in with her old boy friend, a nigerian, who she had filed a complaint on previously and had a restraining order on him and had him legally removed for being bad to her and a bad influence on her other children. Of course, all the bills incurred while Dino and she were together, she stuck Dino with. She knew the code to Dino's bank account so she took it all without his consent.

She lied to the court about an incident that occurred early on in their relationship where when they had gone boating on Dino's boat with her other children she said Dino had pushed her son into the water when he wouldn't mind his mother about something. Another time she reported Dino had spanked her daughter for leaving the gate open so that his beloved dog could have gotten out and been run over. That she cried for 6 hours....later on she laughed and admitted to Dino and an attorney friend of Dino's that she had lied about the incident. She told her ex about this, even though it was a lie, so he blamed Dino and used it to get custody of his and Jean's children. Jean was constantly ranting about her husband's wife, Athena Paradise, whom she had had a sexual affair with and brought home to her marriage bed, how she was the reason for the whole custody battle...after listening about her over and over again for approximately 1 1/2 years, he started saying that he wanted to kill her so that she couldn't cause anymore problems for them.

Some time passed and later on they tried to reunite once again and decided it would be better for the child and for Dino's business if they moved to California. She was in full agreement and even signed a notarized contract stating that Dino should be the primary parent of Nicko if she decided not to stay, that she was under NO duress and had made this decision to move with Dino and Nicko as a family. This way Nicko would be close to his paternal grandparents, aunts and cousins in Ca. They also saw an attorney to make it legal for \$5,000 that we paid for.

They rented a little home, once again, Jean co-signed the lease and agreed she would start working as a massage therapist so that with their combined income they could afford this house. Dino found her a massage job which she lasted at only one day. Jean and Dino hosted a Christmas Eve dinner for the whole family....they were getting along very well and seemed quite happy. Christmas day was celebrated at our daughter and son-in-laws home by us all. That day Jean had told both our daughters that "Dino was the best father she had ever seen" and that she loved him.( It was during this period of time that Dino saw Jean putting her finger down Nicko's throat to make him gage because he had bitten the new sofa, we bought for them, as punishment ) He was teething at the time.(She also doesn't believe in innoculations for childhood diseases.) Two days later when she asked Dino if she could have her other 2 children flown down to Ca. for the remainder of the Christmas holidays Dino told her they simply could not afford airfare for the two of them but that as soon as they could they would. Disregarding

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her signed, notarized agreement, she took off with the boy in the middle of the night. Terrorized once again Dino pleaded with us to pay for detectives to find them and we did. She took a route through AZ to throw us off before returning to WA which is where the detectives finally found them after 6 terrifying weeks. Dino was so scared of what she might do that he was, again unable to work. He flew immediately to WA to try to get back his son and when he found them he saw Nicko, now 2 years old, walking in the middle of the street while Jean was reading a book. His reflex was to grab the boy before he could be run over and an altercation ensued. He was unaware the previous restraining order was still in affect at the time so he landed in jail. We hired an attorney, Jon McMullen, it cost us another \$10,000.

Dino returned to Ca. with 2 1/2 days a week visitation rights....costing him \$1600 to each time for flights to and from. He could not afford this amount every week so he returned to WA. He rented a room with the Sprys and agreed to pay them \$500 to retrieve his second car from Ca. which was left with our daughter. Mr. Spry did pick the car up and spoke with our daughter telling her that everything was fine with Dino and Nicko. When he returned with the car, he demanded an additional \$500 for gas.. An argument ensued, police were called. This is when the Sprys decided to call Jean to tell her that Dino tried to hire them to kill her. Seems a bit obvious to me that they were mad and wanted to get back at Dino for not paying them the extra \$500. If they had heard him say he wanted her killed before this argument why didn't they go to the authorities then? or contact Jean then? But, No, this was a perfect way to get back at Dino. Jean testified that she had never heard from the Sprys until this disagreement happened. The Sprys did this when Dino was in jail for 2 days because he was late with his child support. He had just begun to make good money and had a check for all the back child support in the mail but Jean, in order to help destroy Dino, called his boss pretending to be from the licensing office of mortgage brokering and told his boss that he was not licensed.

His boss stopped payment on the check so when she went to deposit it it bounced. This was a deliberate action by Jean to keep Dino incarcerated and in trouble. She knew Dino was in the process of getting licensed in Oregon..

This was no surprise to us that she did this as she has a deceptive background. For example, she had told Dino early on that she wasn't sure her daughter was her husbands.

that she had had an affair while married to him. She also had, at her promoting, a threesome affair with she, her female Chiropractor employer (Athena Paradise) and Jean's husband. Dino learned of this later on in their relationship.

Jean is just as smart as Dino but more conneaving. Dino gets so frustrated with all of these lies and manipulations that he vents.

Judge Lewis, It appears to me that you have put my son in prison potentially for the rest of his life without full knowledge of this relationship for the past 3 years. This has everything to do with what he was charged and convicted of. I know he is NOT a murderer but I also know he has a very BIG mouth and always has had. I have many attorneys and several judges as patients who I have explained these charges to and they all felt that most courts would consider these circumstances and that his sentence would be greatly reduced because of them. The Sprys are liars and Jean Koncos is a liar.

Not allowing so many important motions from his attorney, Brian Walker, you left him with NO DEFENSE! Brian was unable to bring witnesses to testify that Dino always was complaining about Jean as a mother and how the child would scream and hang on to his dad when his mother came to pick him up. How the child would wake up screaming "Don't hit me, don't hit me" The terrified look on his face when his mother would show up for him. How Dino said repeatedly to his friends and us how he wanted her dead for treating his little boy so badly. Again, you disallowed so much of what was pertinent to Dino's case, you basically cut Brian's ability to defend Dino off at the knees. You left them with NO case! I think if you had read the volumes on this whole contentious custody battle you would have seen what lead to the total frustration and anger on Dino's part. He talked a lot, venting, I've heard and seen this many times and it is ALL TALK!

I ended up putting approximately \$140,000 into this situation. I have no regrets because I knew my son was going crazy with all that this woman did to him and his only child. But I do regret the fact that Dino has been branded a murderer! How many times can a person be put in jail, usually unjustly, before the frustration explodes into wild talk? Testimony not heard from his sisters and friends to the fact that they heard him talk of killing her for the past 1 1/2 years.

If this Castellanos person had not been given the chance to get out sooner by calling Dino with a, police-provided, recorder for the conversation and kept calling him, at work, to egg him on, and inflaming his anger (if this is not entrapment, I don't know what is!)

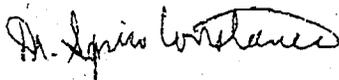
Dino would never have contacted him or anyone else to do such a horrible thing. Dino was out of jail thrilled to be working again in anticipation of making a lot of money. I can assure you this would have never gone any farther. Dino was, at that time, ready to move forward with his life. Frankly Judge Lewis, Dino is much too smart, if he had really wanted to kill her, he wouldn't have gotten involved with someone like Castellanos to do it!

The way you ran your courtroom there was no reason for a defense attorney. All of your decisions, on every point, was in the prosecutors favor. You disallowed everything that would have helped Dino's attorney to defend him. You allowed an habitual heroine addict, a career criminal, for a few less days spent in jail, entrap and destroy the

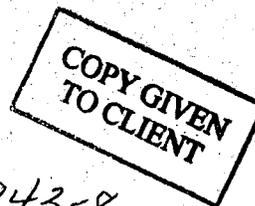
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rest of my son's life.

Dr. Spiro Constance



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March 3, 2008

Judge Lewis,

07-1-00843-8

We are writing this letter on behalf of our son Dino Constance. We respectfully ask you to consider his positive qualities before sentencing him.

Dino was our first child of three. Almost from the very beginning it was obvious he was of a very high intelligence, energy and imagination. Always very dramatic using his hands and facial expressions when he talked, even as a toddler. As early as kindergarten he showed extreme intelligence particularly in mathematics and was advanced to a higher grade at 6 years old. He began to display intense loyalty to his friends and if they were wronged in any manner, from the other students, he would come to their defense. We recall one such incident in junior high where a boy with severe cerebral palsy was being ridiculed for the way he walked and talked due to his affliction. The other boys were relentless in this mean conduct until Dino physically fought with them and ended the situation. He remains completely loyal to his friends and family, always ready to help when needed.

As a child he had difficulty sitting still and staying focused in school but always received good grades without much studying. We, as his parents, believe he was probably afflicted with Attention Deficit Disorder but such a diagnosis and treatment was not available at the time it was not even a known condition.

After two years of pre-med at USC followed by four years in business school at Cal State Northridge, he worked in the electronics field, did well, until the entire industry collapsed. Next he went to work for Berdel Optical Co. and in one year he was number one in sales in the company, in the nation. He decided to become a mortgage broker as he enjoyed working with numbers. His first job in this field was with Principle Financial and after a few months he was ranked fifth in the nation and was the only employee honored in New York.

About ten years ago Dino's fiancée was killed by a hit and run driver following her being raped by an acquaintance. The driver was never found. At the time Dino said things like "I will find the bastard who raped her" We are sure you can understand he was devastated! He showed great strength in coping with this loss but it certainly affected his ability to work for a couple of years. Several years later he met Jean Koncos. After a few weeks they moved in together and began discussing marriage and their son was conceived. Soon followed by her custody battle with her first husband costing Dino all of his savings he had put together for a family of his own. She lost custody of her two older children which caused them to break-up for a time. Back together by the time their baby was born, which didn't last long. It soon became apparent they had an on-again off-again toxic relationship. When the baby was born they married in the hopes of giving their son the stability of a family and extended family. Dino began working 16 hour days to rebuild his savings. We are telling you these things so that you can understand that Dino tried very hard to make everything right for his son.

Their union became impossible and a contentious custody battle began.

For the past three years Dino has endured many, many false statements, allegations, and charges by Jean. This custody battle over this little boy has been the source for Dino's severe anxiety, extreme frustration and fear for his child as he has been the recipient of violence by Jean on several occasions and is convinced that she is physically abusing his son, now 31/2 years old.

His complete devotion to his only child he waited to have until he reached his mid-forties and thought he had found the right woman to have him with, is obvious to all who know Dino.

This severely stressful, frustrating and fearful situation has driven Dino to behave in a way that is unlike him.

Thank you for your thoughtful consideration of these writings regarding Dino's sentence.

Respectfully Yours,  
Dr. and Mrs Spiro Constance

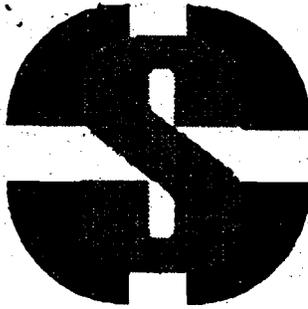
*Dr. Spiro Constance*  
*Mrs Spiro Constance*

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MAR 10 2008

BY: *Ag*



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NOTE: If you did not receive all of the pages or if you have a question, please call the verifying number (below).			
TO: <u>Brian Walkee</u>		FROM: <u>Marlene Constance</u>	
CO. NAME <u>Walker, Fong-Urabe Law Firm</u>	NAME <u>#</u>		
ADDRESS <u>100 E. 13<sup>th</sup> St - Vancouver WA.</u>	SUBJECT <u>letters To Judge Lewis</u>		
ATTENTION <u>IRENE</u>	FAX NO.		
FAX NO. <u>360-695-1926</u>	VERIFYING NO.		

# **FAX Transmission**

REMARKS:

APPENDIX I

Transcript of Brian Walker's Testimony at 7.8 Hearing  
RP 56, L5 – 69, L8

1 (WITNESS TAKES THE STAND, 3:01)

2 THE COURT: Now that you're seated, please state  
3 your name in full, then spell your last name for the  
4 court's record.

5 MR. WALKER: Brian A. Walker, W-A-L-K-E-R.

6 THE COURT: All right. Counsel?

7 DIRECT EXAMINATION

8 BY MR. GOLIK:

9 Q Good afternoon. Mr. Walker, you were Mr. Constance's  
10 trial counsel in this matter?

11 A The second appointed counsel; correct.

12 Q Okay. And at trial you represented the Defendant?

13 A I did.

14 Q Okay. I just want to ask -- first I want to ask you a  
15 few background questions. How long have you been an  
16 attorney?

17 A Twelve years.

18 Q Okay. As a criminal practitioner the whole time?

19 A I've done criminal defense ever since I started  
20 practicing, yes.

21 Q Okay.

22 THE COURT: Do you need some water?

23 MR. WALKER: I don't, Judge, I'm fine, thanks.

24 Q All right. So you've done criminal defense -- or at the  
25 time of this trial, you'd done criminal defense for 12

1 years?

2 A Not at the time of this trial, but at the time of us  
3 speaking today.

4 Q Okay.

5 A So, knock off a year and a half, I guess.

6 Q Okay. All right. Did you have discussions with the  
7 Defendant in trial preparation about the Defendant  
8 testifying in this matter?

9 A Yes.

10 Q Okay. When did those discussions start roughly within  
11 your time that you were with the Defendant?

12 A I couldn't say exactly what date, but they occurred off  
13 and on throughout the representation, probably pretty  
14 much from the very beginning.

15 Q Okay. So basically from the beginning of the time that  
16 you represented the Defendant, you had discussions with  
17 him about his desire to testify?

18 A Yes.

19 Q Okay. And did you have an opinion about whether the  
20 Defendant would be testifying in this case?

21 A I assumed that he would.

22 Q Okay. Was that kind of right from the beginning?

23 A Yes.

24 Q And did that presumption continue all the way through  
25 trial?

1 A It -- well, I wouldn't say completely through trial, but  
2 it seemed to wane toward the end of trial. But I  
3 assumed that he was going to testify at least halfway  
4 through trial.

5 Q Okay. So, during the whole time you were preparing for  
6 trial, it was with the assumption that the Defendant  
7 would testify?

8 A Yes.

9 Q Okay. Had he expressed to you his desire to testify?

10 A He did.

11 Q Okay. And did you, during trial -- excuse me, during  
12 trial preparation, did you tell him that you didn't plan  
13 to call him or anything like that?

14 A No.

15 Q Okay. So you planned to call him?

16 A Yes.

17 Q Okay. All right. Did you engage in preparation with  
18 the Defendant for his eventual testimony?

19 A Yes.

20 Q How did you do that generally?

21 A Well, as a general matter and -- I don't like to divulge  
22 my preparation techniques -- but with Dino, it was a  
23 little different than with most clients. We would --  
24 when we'd get to a certain area, certain discussion  
25 covering certain parts of the police reports, we would

1 be talking about testimony of things he could offer  
2 during that time. And so we would -- I don't know that  
3 we devoted any particular single time to testimony  
4 preparation, but we did it all throughout the  
5 preparation from time to time.

6 Q Okay. Did you spend -- in preparation for trial in this  
7 matter, did you spend the same amount of time roughly  
8 that you spend with other clients in preparation, or  
9 more time?

10 A Do you mean -- do you mean time with the client?

11 Q Right.

12 A More than most.

13 Q Okay. Significantly more?

14 A Yes.

15 Q Is it fair to say that you think you spent more time  
16 with the Defendant in preparation for trial in this  
17 matter than with perhaps any other clients that you've  
18 had in your career?

19 A I wouldn't say any other, but probably with one other --  
20 with the exception of one other person, yes.

21 Q Okay. That being perhaps the Gall case?

22 A Yes.

23 Q Okay. That was a Murder I case?

24 A Correct.

25 Q Okay. So only one other case in your career as a

1 criminal defense attorney where you may have spent more  
2 time with the client preparing for trial than in this  
3 case; is that fair?

4 A Yeah. I don't know about more, but about the same  
5 probably -- a lot.

6 Q Okay. All right. Okay. Now, you said that there  
7 wasn't, you know, one specific day where you just  
8 devoted, okay, this day is going to be trial -- or  
9 excuse me, testimony preparation and nothing else. You  
10 didn't have a day that was fully devoted to that; is  
11 that right?

12 A Well, I think there were a couple of visits where that  
13 was the intent, but it never ended up that way.

14 Q Why not?

15 A Well, Mr. Constance had a real definite way he wanted to  
16 do things --

17 (ATTORNEY/CLIENT DISCUSSION OFF THE RECORD)

18 A -- questions he wanted to be asked, and it would usually  
19 devolve into a situation where we wouldn't get much  
20 done.

21 Q Okay. But did you, over all of the time that you spent  
22 with the Defendant, talk about preparation for testimony  
23 in most of the meetings?

24 A I don't know that I would say most, but in a lot of  
25 them, I'd say over half of them.

1 Q Can you estimate how many times roughly you met with  
2 him?

3 A I don't know, the trial had kind of a short time span,  
4 as far as I'm concerned, it was about five and a half  
5 months. I couldn't say -- I mean, I'm not prepared to  
6 answer that.

7 Q Okay. Let me ask you this. Did you feel like you had  
8 had enough preparation time with the Defendant for the  
9 Defendant to take the stand and testify?

10 A I don't feel that we had enough time to try the case --  
11 to prepare for trial, period. But in relation to  
12 preparing him for testimony, yes.

13 Q Okay.

14 A On a proportional basis, if you understand my answer.

15 Q All right. And why was it, you think, you didn't have  
16 enough time to prepare for trial, period?

17 A Because it was a complicated case with a lot of  
18 witnesses that required more than five and a half months  
19 preparation, and we were not able to get the amount of  
20 time that we needed.

21 Q Was that the Defendant's decision?

22 A It was.

23 Q Okay. He just didn't want to waive speedy trial and  
24 give you more time?

25 A He did once for me over -- he didn't want to, but did.

1 The second time he would not.

2 Q And did you counsel him on that --

3 A Yes.

4 Q -- that more time would be better?

5 A Yes.

6 Q But he made that decision knowingly?

7 A Yes.

8 Q Okay. So with the amount of time that he gave you, you  
9 didn't feel like you were as prepared as you could have  
10 been. Is it fair to say, though, that you did have  
11 enough time to talk to him about preparation for his  
12 testimony?

13 A I think for the trial that we had, we could have put him  
14 on the stand easily to testify.

15 Q Okay. And that was your plan?

16 A Yes.

17 Q Okay. All right. So going up to, say, the day before  
18 trial. We're the day before trial now. It was your  
19 plan to call the Defendant as a witness?

20 A I can't say for sure that I firmly believed he was going  
21 to testify the day before the end of the trial. Is that  
22 what you're -- the day before trial or the day before  
23 the --

24 Q Day before trial began?

25 A No, at that point I think the plan was still that he

1 would testify.

2 Q Okay. So the day before the trial began, the day before  
3 the first day of trial --

4 A Right.

5 Q -- your plan was to call the Defendant as a witness?

6 A Yes.

7 Q Okay. And you felt the Defendant --

8 MR. DUNKERLY: Sorry, Your Honor. I had called the  
9 investigator about the interviews and forgot to turn my  
10 phone off.

11 Q And you felt the Defendant was adequately prepared to  
12 testify in his defense?

13 A I felt that I had put in enough time and effort to  
14 prepare him. I can't say that he was prepared to  
15 testify.

16 Q Okay. Did you feel like you had done everything that  
17 you could to prepare him to testify?

18 A Not given the time constraints, but under the  
19 circumstances, yes.

20 Q Okay. And the time constraints were the Defendant's  
21 choice?

22 A Yes.

23 Q Okay.

24 A And I -- well, I should clarify that. I'm not positive  
25 that's it because I don't know what the Court would have

1           said if we'd have asked him for more time, so.

2           Q     Okay. But you're saying that if the Defendant would  
3           have executed his speedy trial waiver, you would have  
4           made a motion for another continuance, but --

5           A     Yes.

6           Q     -- the Defendant didn't want to waive?

7           A     Correct.

8           Q     Okay. All right. During trial you indicated that the  
9           Defendant's desire to testify declined; is that fair to  
10          say?

11          A     Yes.

12          Q     Okay. Can you explain how that happened?

13          A     Well, he seemed to be -- seemed to be kind of, maybe a  
14          bit fearful as trial went on and when it came down to  
15          it, he was asking questions like, do you think I  
16          should -- do you think I should testify? And I'd begun  
17          to sense that he wasn't as sure as he had been before  
18          that he would testify.

19          Q     Okay. Whose choice was it for the Defendant to not  
20          testify?

21          A     Mr. Constance.

22          Q     Okay. Did you at any time tell him he could not  
23          testify?

24          A     No.

25          Q     Did you do anything to bar him from testifying?

1 A No.

2 Q Okay.

3 A Well, I don't know what he believes subjectively, but I  
4 did not do anything that I deemed an effort to prevent  
5 him from testifying.

6 Q Okay. Did you ever tell him that you thought he -- did  
7 you ever tell him specifically that you thought he  
8 should not testify?

9 A No.

10 Q Okay. Were you surprised when the Defendant decided not  
11 to testify?

12 A Yes.

13 Q Okay. Did you counsel the Defendant at any time  
14 specifically that he shouldn't testify?

15 A No.

16 Q You indicated that when you got to the -- closer to the  
17 point where the Defendant would testify, he started to  
18 ask you questions about whether or not he should  
19 testify?

20 A Correct.

21 Q Did you give him any advice with respect to issues that  
22 he might have with testimony?

23 A You mean, any drawbacks?

24 Q Drawbacks.

25 A To him testifying?

1 Q Right.

2 A Yeah, I -- in his case the discussions that we had was  
3 whether or not we needed his testimony. And when he  
4 says that I said we didn't need his testimony to make  
5 the argument, he's correct, I did say that. I did tell  
6 him I was concerned that he would not be able to resist  
7 the temptation to have a perfect answer for everything,  
8 and I was afraid the jury might not like him because he  
9 tends to come off as somewhat arrogant, I did tell him  
10 that.

11 Q Okay. So you counseled him with respect to that?

12 A Yes.

13 Q Okay. All right. When was it specifically during the  
14 trial that the Defendant decided not to testify, when  
15 did that actually happen?

16 A At the -- this would have been the last day of trial.  
17 Trying to remember if you had rebuttal or not. This  
18 was -- he was my last witness if we were going to have  
19 him, and the Judge gave us a break and I don't recall  
20 how long the break was. Seems like it was 20 minutes or  
21 45 minutes or something like that to have a final  
22 discussion.

23 Q Okay. Up until that final discussion, you were still  
24 planning to call him?

25 A I wasn't sure we would be, but I was prepared to call

1 him.

2 Q Okay. And it was during that final discussion the  
3 Defendant indicated he decided he didn't want to  
4 testify?

5 A Yes.

6 Q Okay. Did you prepare the Defendant in this matter for  
7 testimony generally in the same way that you prepare all  
8 defendants in criminal cases for testimony?

9 A I tried to, yes. I can't say it went exactly the same  
10 with Mr. Constance as it did with anybody else, but I  
11 used my general approach, yes.

12 Q Okay. So, in preparation for trial in this matter, you  
13 were using the same general approach you do with all  
14 defendants when you plan to potentially put them on the  
15 stand -- you were using the same techniques with this  
16 Defendant?

17 A For the most part, yes.

18 Q Okay. Because you planned to call him?

19 A Right.

20 Q Okay. Did you have any significant concerns about the  
21 Defendant's prior criminal history, anything like that  
22 coming out at trial if he testified?

23 A Not -- not really. We had that heard in limine and  
24 there was an order entered that it wouldn't be coming  
25 out. There was always the possibility of opening the

1 door, but it seemed unlikely in this case.

2 Q So that wasn't a significant concern?

3 A Not for me.

4 Q All right. Did you have a conversation with the  
5 Defendant before he decided not to testify where you  
6 discussed whether you'd be able to make the arguments  
7 that you and the Defendant thought you should make  
8 without the Defendant testifying?

9 A Yes.

10 Q How did that go?

11 A Well, that's -- I thought I had mentioned this, but the  
12 discussion we had as trial went on was, I could make  
13 just about every argument we had talked about without  
14 him testifying. Is that what you're asking?

15 Q Yes.

16 A Yeah.

17 Q Okay. And did the Defendant agree that you could make  
18 those arguments without him testifying?

19 A I don't know that he said, I agree, or yes, yes, you're  
20 right, but it appeared that we were in agreement.

21 Q Okay. All right. Did the Defendant at any time express  
22 to you any frustration about the fact that he did not  
23 testify in this matter?

24 A You mean, after trial?

25 Q Yeah, was there -- any time, after trial or -- it would

1 have been after he didn't testify, but was there a point  
2 where he --

3 A I can't point to anything he said, but I -- I mean, if  
4 he says that he told me later he wished he had  
5 testified, I don't doubt him, but I can't recall  
6 anything.

7 Q All right.

8 MR. GOLIK: No further questions. Thank you.

9 THE COURT: Cross-examination?

10 MR. DUNKERLY: All right.

11 CROSS-EXAMINATION

12 BY MR. DUNKERLY:

13 Q Did you -- did you find it necessary at times to take an  
14 investigator with you to visit Mr. Constance?

15 A A few times, yes.

16 Q And on those occasions, was part of that -- your reason  
17 for taking him sort of to protect yourself later against  
18 possible claims by Mr. Constance?

19 A I wouldn't say I took investigators with me for that  
20 purpose, no.

21 Q Okay. Okay. So you didn't ever take somebody up there  
22 to talk to Mr. Constance so that you would have a  
23 witness as to what he may have agreed to or not agreed  
24 to?

25 A Not solely for that purpose, no.

