

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)

Respondent,)

v.)

DUANE ALLEN MOORE
(your name))

Appellant.)

No. 44221-3-II

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

BY
[Signature]
DEPT

STATE OF WASHINGTON
2013 MAY -6 AM 9:40

FILED
COURT OF APPEALS
DIVISION II

I, DUANE ALLEN MOORE, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

BAILIFF MIS CONDUCT

SEE ATTACHMENTS

Additional Ground 2

JUDICIAL MIS CONDUCT AND PREJUDICE

SEE ATTACHMENTS

ADDITIONAL GROUND #3

EX PARTE COMMUNICATION SEE ATTACHMENTS

If there are additional grounds, a brief summary is attached to this statement.

Date: 5/1/13

Signature: Duane Moore

CERTIFICATE OF SERVICE
I certify that I mailed
copies of SAG
to B. Brubaker
& R. Sullivan
5/9/13 [Signature]
Date Signed

No. 44221-3-II

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

STATE OF WASHINGTON,
RESPONDENT,

V

DUANE ALLEN MOORE
APPELLANT.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KITSAP COUNTY

THE HONORABLE SALLY F. OLSEN, JUDGE

STATEMENT OF ADDITIONAL GROUNDS

DUANE A. MOORE
APPELLANT

DUANE A. MOORE #932369
COYOTE RIDGE CORRECTIONS CENTER
1301 N. EPHRAIM AVENUE
CONNELL, WA. 99362

STATEMENT OF ADDITIONAL GROUNDS

I, DUANE MOORE NOW COME BEFORE THE WASHINGTON STATE COURT OF APPEALS (DIVISION II) WITH A STATEMENT OF ADDITIONAL GROUNDS IN ACCORDANCE OF (RAP 10.10) FOR REVIEW.

THE STATEMENT THAT I AM ABOUT TO GIVE IS ACCURATE AND TRUE, AND IN ACCORDANCE TO THE RECORD IN THE STATE OF WASHINGTON V. DUANE ALLEN MOORE (APPELLANT). CASE # 44221-3-11 IN THE WASHINGTON STATE APPEALS COURT, OUT OF KITSAP COUNTY (CASE # 12-1-00848-3 SUPERIOR COURT.

THESE ADDITIONAL GROUNDS ARE AS FOLLOWS:

① BAILIFF MISCONDUCT ② JUDICIAL MISCONDUCT AND PREJUDICE.

③ EX-PARTE COMMUNICATION

ADDITIONAL GROUNDS ISSUE #1

BAILIFF MIS CONDUCT

REFLECTING TO THE RECORD ON 10/24/12 (RP) 5-6 THE COURT ASKS HEAD BAILIFF MEREDITH KINCL TO INTRODUCE OUR NEW PERSON HERE? MEREDITH STATES "THIS IS JENNIFER TORRES, SHE'S TRAINING. THIS BAILIFF IS THE ONE HERE IN QUESTION. THE COURT WENT ON STATING THAT "THE BAILIFFS ARE IN CHARGE OF TAKING CARE OF YOU, TAKING YOU TO AND FROM THE JURY ROOM, TO AND FROM BREAKS, HELPING YOU WITH NONLEGAL MATTERS, AND THEY'RE THE PEOPLE THAT YOU SHOULD GO TO FIRST IF YOU HAVE QUESTIONS OR CONCERNS ABOUT PROCEDURE, TIMING, AND THOSE TYPES OF ISSUES." JENNIFER TORRES IS ESTABLISHED AS A PARTICIPANT IN THIS TRIAL, SERVING AS BAILIFF.

FURTHER ON THE RECORD 10/24/12 (RP) 8 THE COURT CONTINUES TO INSTRUCT THE JURY AND ALL PARTICIPATING PARTIES STATING "ALSO DO NOT ALLOW ANYONE TO DISCUSS THE CASE WITH YOU OR IN YOUR PRESENCE. A VIOLATION OF THE ORDER IS SERIOUS. IT COULD RESULT IN A PERSONAL PENALTY TO YOU AND RESULT IN GREAT HARM OR INJURY TO THE PARTIES IN THIS (3)

CASE. "ALSO THROUGHOUT THE TRIAL AND JURY SELECTION PROCESS, YOU MUST COME AND GO DIRECTLY FROM THE JURY ROOM AS THE BAILIFF DIRECTS. PLEASE DO NOT REMAIN IN THE HALLS AND COURTROOMS, AS WITNESSES AND PARTIES MAY NOT RECOGNIZE YOU'RE JURORS, AND YOU MAY ACCIDENTLY HEAR SOME DISCUSSION ABOUT THIS CASE." "I'VE ALSO INSTRUCTED THE ATTORNEY'S, PARTIES AND WITNESSES NOT TO TALK TO YOU, EVEN ^{TO} GREET YOU DURING THIS TRIAL. IN THIS WAY I HOPE TO AVOID ANY INADVERTENT CONTACT BETWEEN YOU AND JURORS AND ANYONE ELSE ASSOCIATED IN THIS CASE. PLEASE DO NOT THINK WE'RE BEING RUDE, BUT THEY'RE UNDER MY INSTRUCTIONS NOT TO GREET YOU IN ANY WAY. ON THE MORNING OF 10/25/12 THE COURT ACCOMMODATED THE VICTIM (SABRINA MOORE) WITH A COMFORT DOG AND BROUGHT HER BEFORE THE JURY TO TESTIFY (RP) 164. AFTER SABRINA MOORE'S TESTIMONY AND THE PROSECUTIONS NEXT WITNESS ^{PREPARED TO TESTIFY} THE COURT STATED THAT "WE HAVE TO PUT SOMETHING ON THE RECORD." (RP) 184 THE COURT WENT ON TO SAY THAT "JENNIFER (BAILIFF). SHE FOUND OUT, (H)

OUT. IN THE HALLWAY BEFORE ANY JURORS OR ANYBODY ELSE WAS OUT, THAT SHE RECOGNIZES AND KNOWS THE VICTIM." THIS CLEARLY IS NOT JENNIFER TORRES'S ACCOUNT OF WHAT HAPPENED AS THE RECORD WILL CLEARLY REFLECT. JENNIFER JUST DIDN'T RECOGNIZE THE VICTIM (SABRINA MOORE) THEY GREETED EACH OTHER AND HAD A CONVERSATION WITH EACH OTHER AS THE RECORD WILL REFLECT ITSELF. WHETHER IT WAS BRIEF OR FOR A SHORT MOMENT, THE RECORDS DO REFLECT THAT THEY SPOKE WITH ONE-ANOTHER. THE COURT WENT ON TO SAY, "WE WANTED TO PUT THAT ON THE RECORD, BUT SHE INDICATED THERE WERE NO JURORS AND THE DEFENDANT WASN'T AROUND. ACCORDING TO MS. KINCH (HEAD BAILIFF) NO ONE SAW THIS. SHE WAS NOT AWARE THAT SHE WOULD KNOW THE VICTIM UNTIL SHE SAW HER. THE PROSECUTOR RESPONDED TO THE COURT STATING, "WHEN YOU'RE TALKING--WHEN YOU SAY, "NO ONE SAW THIS," WOULD IT BE THE BAILIFF ACKNOWLEDGING THAT SHE KNOWS THE VICTIM, YOUR HONOR JUST FOR THE RECORD, IS THAT WHAT MS. KINCH SAYS NO ONE SAW? THE COURT THEN RESPONDS BY STATING "MS. KINCH, DO

YOU MIND TELLING THE COURT WHAT YOU TOLD ME IN CHAMBERS THIS MORNING. (BAILIFF) KINCL STATES, "MS. MOORE WAS COMING DOWN THE HALL ABOUT EIGHT O'CLOCK, A LITTLE BIT AFTER, AND SHE AND JENNIFER TOMES SAW EACH OTHER, THEY GREETED EACH OTHER AND THAT WAS IT. IT WASN'T UNTIL MS. MOORE WALKED INTO THE COURTROOM THAT MS. TOMES REALIZED WHO SHE WAS. THEY KNEW EACH OTHER BRIEFLY OVER FOUR YEARS AGO. THE COURT ASKS COUNSEL, "ANY FURTHER INQUIRY PUT ON THE RECORD?" THE STATE STATES "NOTHING." JACOB MURPHY STATES, (RP) 185 "I THINK AT THIS POINT I REQUEST SHE NOT PARTICIPATE IN THIS TRIAL ANY LONGER, SO WE CAN MAKE SURE THERE BE NO POSSIBILITY OF ANY INFERENCE OR TAMPERING OF THE JURY." THE COURT QUESTIONS MR MURPHY TWICE WHILE HE'S PETITIONING TO HAVE THIS BAILIFF REMOVED FROM THE TRIAL. THE COURT STATES "COULD YOU CLARIFY WHAT YOU MEAN?" AND THE COURT STATES "SEEING HOW THE VICTIM IS GONE, CAN YOU ELABORATE HOW YOU THINK THAT COULD BE A PROBLEM?" BY THE TRIAL COURT JUDGE STATING "RP 184 DO YOU MIND TELLING THE COURT WHAT YOU TOLD ME IN CHAMBERS THIS MORNING?"

Clearly shows that the Court had prior knowledge of the Bailiff Misconduct before she allowed the trial to continue that morning. Having the knowledge before hand of this misconduct between the (Witness) Sabrina Moore and the (Bailiff) Jennifer Torres, is clearly prejudicial to Mr (Duane Moore - Defendant) because the Court should have addressed the issue of misconduct that was brought to the Judge's chamber RP 184 before the Court proceeded with any testimony. This is manifest injustice - an error in the trial court that is direct, obvious and observable. The trial court is in error and blatantly prejudicial because after getting the information from (Bailiff) Ms. Kinch, about (Bailiff) Jennifer Torres speaking/greeting with and having contact with the (Victim) Sabrina Moore, in the trial Judge's chambers, the morning before the court proceedings began, ^(RP 184) the trial court went forward and allowed Sabrina Moore (Victim) to testify without first investigating the Bailiff Misconduct before she testified. The trial court did not address this issue on the record until

AFTER THE TRIAL COURT HAD ALLOWED SABRINA MOORE (THE VICTIM) TO TESTIFY BEFORE THE EMPANELLED JURY WHICH CLEARLY PREJUDICES AND VIOLATES THE DEFENDANTS RIGHT TO A FAIR TRIAL AND DUE PROCESS. UNITED STATES CONSTITUTIONAL AMENDMENTS 6, 14 AND THE WASHINGTON STATE CONSTITUTION ARTICLE 1 SECTION 3 AND 22.

THE TRIAL COURT FAILED AND WAS IN ERROR BECAUSE IT SHOULD HAVE HAD A HEARING TO ASSESS THE BAILIFF MISCONDUCT AND INTERVIEW JENNIFER TOMES (BAILIFF) TO GIVE HER STATEMENT ON THE RECORD OF THE OCCURRENCE BEFORE ALLOWING THE VICTIM (SABRINA MOORE) TO TESTIFY. THE TRIAL COURT JUDGE HAD CLEAR KNOWLEDGE OF THE BAILIFF MISCONDUCT WITH THE VICTIM (SABRINA MOORE) PRIOR TO ALLOWING THE VICTIM (SABRINA MOORE) TO TESTIFY. THE COURT STILL ALLOWED THE BAILIFF (JENNIFER TOMES) TO REMAIN ON THE CASE AND INTERACT WITH THE JURY HAVING KNOWLEDGE OF THE COMMUNICATION BETWEEN THE VICTIM (SABRINA MOORE) AND THE BAILIFF JENNIFER TOMES.

THIS IS CLEAR AND NEGLIGENT JUDICIAL PREJUDICE TO THE DEFENDANT AND THIS ALSO CLEARLY VIOLATES

THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AND ANYONE ELSE ASSOCIATED IN THIS CASE RP 10/24/12 PAGE 8.

IN STATE VS ROBINSON, 146 W.N. APP 471, 479-483, 191 P.3D 906 (DIV II 2008) THE TRIAL COURT FAILED TO ENGAGE IN A SCRUPULOUS EXERCISE OF JUDICIAL DISCRETION (MELTON, 97 W.N. APP AT 332, 983 P. 2D 699 (QUOTING BROWNING, 38 WASH. APP. AT 775, 689 P. 2D 1108), ON THE CONTRARY THE TRIAL COURT ACTED "PRECIPITATELY BY FAILING TO QUESTION THE BAILIFF AND AFFECTED JURORS IN A FACT FINDING HEARING, INSTEAD, IT ALLOWED LESS THAN NINE MINUTES OF UNPREPARED ORAL ARGUMENTS BY THE PARTIES' ATTORNEYS BEFORE RENDERING ITS DECISION. THE TRIAL COURT ALSO FAILED TO INTERVIEW ANY JURORS WHO MIGHT HAVE ENGAGED IN OR HAVE BEEN AFFECTED BY THE BAILIFF MISCONDUCT. HERE IN THIS MATTER ALTHOUGH THE RECORD STATES THAT THERE WERE NO JURORS AROUND THE RECORD DOES NOT REFLECT THAT JENNIFER TOMES (RP 184) STATED HERSELF THAT THERE WERE NO JURORS AROUND. THE TRIAL COURT DIDN'T ALLOW HER TO ADDRESS THE ISSUE IN HER OWN WORDS ON THE RECORD. STATE VS ROBINSON, 146 W.N. APP. 471, 479-483, 191 P. 3D 906 (DIV II 2008)

REVERSED AND REMANDED. ALTHOUGH THERE WAS ORAL ARGUMENT ALLOWED BY THE COURT, IT DID NOT GIVE DEFENSE COUNSEL TIME TO RESEARCH THE MATTER OR TO PREPARE ARGUMENTS CONCERNING MISCONDUCT. SEE STATE V HOPSON, 113 WN 2d 273, 284 778 P. 2d 1014 (1989) PREJUDICE TO DEFENDANT IS KEY QUESTION IN TRIAL COURT'S DECISION TO GRANT OR DENY A MISTRIAL. STATE VS ROBINSON, 146 WN App. 471, 479-483, 191 P.3d 906 (Div II 2008); THE TRIAL COURT WAS IN A UNIQUE POSITION TO DEVELOP THE RECORD IN ORDER (1) TO DETERMINE WHETHER BAILIFF MISCONDUCT OCCURED AND (2) IF SO TO IMPLEMENT A REMEDY THAT WOULD PRESERVE ROBINSON'S CONSTITUTIONAL RIGHT TO FAIR TRIAL AND HIS VALUED RIGHT TO HAVE HIS TRIAL COMPLETED BY A PARTICULAR TRIBUNAL. BUT THE TRIAL COURT FAILED TO DEVELOP SUCH A RECORD OR TO CONSIDER AN APPROPRIATE REMEDY. NEITHER DID THE TRIAL COURT CONSIDER ROBINSON'S INTEREST AND CONSTITUTIONAL RIGHTS NOR DID THE COURT DISCUSS AND WEIGH WHETHER THE ALLEGED JUROR-BAILIFF ~~COMMUNICATION~~ COMMUNICATION MIGHT PREJUDICE ROBINSON / STATE VS JUNGERS (TRIAL COURTS SHOULD GRANT A MISTRIAL ONLY WHEN THE DEFENDANT HAS BEEN SO PREJUDICED THAT NOTHING SHORT OF A NEW TRIAL CAN ENSURE THAT THE DEFENDANT RECEIVES FAIR TRIAL. (10)

By Knowledge of Misconduct By This Trial Court
RP 184
AND PROCEEDING WITH TESTIMONY BY INDIVIDUALS
INVOLVED WITH^{OUT} ADDRESSING THE COMMUNICATION, CLEARLY
IS A VIOLATION OF MY CONSTITUTION RIGHT TO FAIR TRIAL,
AND DUE PROCESS, AND PREJUDICES DEFENDANT IN A HARMFUL
UNREPAIRABLE MANNER.

Additional Grounds Issue #2 Judicial
Misconduct &
Prejudice

RP 184 10/25/12, THE TRIAL COURT JUDGE CLEARLY
ACKNOWLEDGES THE ISSUE WITH WITNESS AND BAILIFF
BEFORE THE TRIAL PROCEEDED THIS MORNING. INFORMED
BY BAILIFF (MS. KINCL) AND NEGLECTED TO DEAL WITH
THE ISSUE ON RECORD UNTIL AFTER THE DEFENDANT WAS
VICIOUSLY PREJUDICED BY THE TRIAL COURT, WHO HAD
ALLOWED THE VICTIM (SABRINA MOORE) TO TESTIFY AND
THE BAILIFF (JENNIFER TOMES) TO INTERACT WITH JURY
AFTER THE MISCONDUCT, WITHOUT FIRST ADDRESSING AND
DEALING WITH IT. CODE OF JUDICIAL CONDUCT (CJC),
CANON 2, RULE 2.2 - IMPARTIALITY AND FAIRNESS, A JUDGE
SHALL UPHOLD AND APPLY THE LAW AND SHALL PERFORM
ALL DUTIES OF JUDICIAL OFFICE FAIRLY AND IMPARTIALLY.
TO ENSURE IMPARTIALITY AND FAIRNESS TO ALL PARTIES,

A JUDGE MUST BE OBJECTIVE AND OPEN-MINDED.
RESPONSE: HERE THE TRIAL COURT JUDGE LOST SIGHT
OF MY CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

CANON 2, RULE 2.3 - BIAS, PREJUDICE AND HARASSMENT,
A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL
OFFICE, INCLUDING ADMINISTRATIVE DUTIES, WITHOUT BIAS
OR PREJUDICE. (B) A JUDGE SHALL NOT, IN THE PERFORMANCE
OF JUDICIAL DUTIES, BY WORDS OR CONDUCT MANIFEST
BIAS OR PREJUDICE, OR ENGAGE IN HARASSMENT, AND SHALL
NOT PERMIT COURT STAFF, COURT OFFICIALS OR OTHER
SUBJECTS TO THE JUDGE'S DIRECTION AND CONTROL TO DO SO,
A JUDGE WHO MANIFESTS BIAS OR PREJUDICE IN A
PROCEEDING IMPAIRS THE FAIRNESS OF THE PROCEEDING
AND BRINGS THE JUDICIARY INTO DISREPUTE.

RESPONSE: RP 10/24/12 (^{PAGES} 5, 6 & 8) THE TRIAL COURT JUDGE
NEGLECTED HER DUTY IN ASSURING ME THE DEFENDANT
THAT ALL PARTIES INVOLVED FOLLOW HER INSTRUCTIONS. AND
JUDGE FAILED TO ADDRESS AND CORRECT THE ISSUE
BOUGHT TO HER CHAMBER'S WHICH WAS AN IMPORTANT
MATTER TO THE REPORTING BAILIFF (RP 184), THE PROSECUTION
RP 184 LINE 10-14. THE JUDGE'S DELAYED RESPONSE SAYS
IT'S OK TO COMMIT MISCONDUCT IN MY COURT.

CANON 2, RULE 2.7 - RESPONSIBILITY TO DECIDE (A) A JUDGE SHALL HEAR AND DECIDE MATTERS ASSIGNED TO THE JUDGE (B) JUDGES MUST BE AVAILABLE TO DECIDE THE MATTERS THAT COME BEFORE THE COURT. ALTHOUGH THERE ARE TIMES WHEN DISQUALIFICATION IS NECESSARY TO PROTECT THE RIGHTS OF LITIGANTS AND PRESERVE PUBLIC CONFIDENCE IN THE INDEPENDENCE, INTEGRITY AND IMPARTIALITY OF JUDICIARY, JUDGES MUST BE AVAILABLE TO DECIDE MATTERS THAT COME BEFORE THE COURTS. UNWARRANTED DISQUALIFICATIONS MAY BRING PUBLIC DISFAVOR TO THE COURT. THE JUDGE'S RESPECT FOR FULFILLMENT OF JUDICIAL DUTIES AND A PROPER CONCERN FOR THE BURDENS THAT MAY BE IMPOSED UPON THE JUDGE'S COLLEAGUES REQUIRE THAT A JUDGE NOT USE DISQUALIFICATION OR RECUSAL TO AVOID CASES THAT PRESENT DIFFICULT, CONTROVERSIAL OR UNPOPULAR ISSUES.

RESPONSE: HERE THE JUDGES DELAYED OR LACK OF RESPONSE TO A CRITICAL ISSUE CAUSED PREJUDICE TO THE DEFENDANT, THIS DELAY ALSO SENT A TAINTED BAILIFF BACK INTO THE FOLD OF A JURY THAT HAD MY LIFE IN THEIR HANDS. THE SAME JURORS THAT WERE NEVER QUESTIONED ABOUT WHETHER THEY OBSERVED COMMUNICATION BETWEEN WITNESS AND BAILIFF, BECAUSE THE TRIAL JUDGE (13)

DECIDED TO DELAY HER RESPONSE. (ISSUE #3)

CANON 2, RULE 2.9 - EX PARTE COMMUNICATION - A JUDGE SHALL NOT INITIATE, PERMIT OR CONSIDER EX PARTE COMMUNICATIONS, OR CONSIDER OTHER COMMUNICATIONS MADE TO THE JUDGE OUTSIDE THE PRESENCE OF THE PARTIES OR THEIR LAWYERS, CONCERNING A PENDING OR IMPENDING MATTER, BEFORE THAT JUDGE'S COURT EXCEPT AS FOLLOWS (A) THE JUDGE MAKES PROVISION PROMPTLY TO NOTIFY ALL OTHER PARTIES OF THE SUBSTANCE OF THE EX PARTE COMMUNICATION, AND GIVES THE PARTIES AN OPPORTUNITY TO RESPOND (B) IF A JUDGE INADVERTANTLY RECEIVES AN UNAUTHORIZED EX PARTE COMMUNICATION BEARING UPON THE SUBSTANCE OF A MATTER, THE JUDGE SHALL MAKE PROVISION PROMPTLY TO NOTIFY THE PARTIES OF THE SUBSTANCE OF THE COMMUNICATION AND PROVIDE THE PARTIES WITH AN OPPORTUNITY TO RESPOND.

RESPONSE: STATE VS BONE-CLUB, 128 WN. 2d 254, 906

P. 2d 325 (1995) STATE VS SLETT 169 WN App. 766, 282

P. 3d 101 (WN. App. Div 2 2012), EX PARTE-COMMUNICATION

~~VIOLATION~~ VIOLATION, CONVERSATION OUTSIDE OF THE COURTROOM RECORDER OR HEARING. JUDGE IS INSTRUCTED TO PROMPTLY

NOTIFY THE PARTIES OF THE SUBSTANCE OF THE COMMUNICATION IMMEDIATELY, NOT AFTER YOU ALLOW THE PERSON OR (14)

PERSONS TO TESTIFY OR TAINI YOUR JURY WHEN YOU
HAVEN'T INVESTIGATED THE SUBSTANCE OF THE EX PARTE.
THIS IS CLEAR NEGLIGENT MISCONDUCT ON THE TRIAL
JUDGE'S BEHALF AND UNEXPLAINABLE PREJUDICE TOWARDS
THE DEFENDANT SEEKING FAIR RIGHTS AND DUE PROCESS.

CONCLUSION TO RELIEF SOUGHT

THIS IS CLEARLY PREJUDICIAL AND ASSUMEDLY FRUIT
OF A POISONOUS TREE UNDER THE MANIFESTO CLAUSE.
NEGLIGENCE OF THE TRIAL COURT INFLUENCED THE JURY
TO ARRIVE AT A VERDICT WHICH ASSUMEDLY IS
PREJUDICIAL DUE TO THE NEGLIGENCE OF THE TRIAL
COURT AND THE APPOINTED DEFENSE COUNSEL WHO
SHOULD HAVE OBJECTED TO THE TRIAL COURTS
MISCONDUCT, PREJUDICE AND VIOLATION OF MY
RIGHT TO A FAIR TRIAL. I ASK THAT RELIEF
SOUGHT IN THIS MATTER WOULD BE TO REVERSED
AND DISMISS WITH PREJUDICE.

SINCERELY,
Duane Moore

DUANE ALLEN MOORE

5/1/13

(15)

SUPERIOR COURT CRIMINAL RULES
C.R. 7.5 (RULE 7.5 NEW TRIAL)

(A) GROUNDS FOR NEW TRIAL. THE COURT ON MOTION OF DEFENDANT MAY GRANT A NEW TRIAL FOR ANY ONE OF THE FOLLOWING CAUSES WHEN IT AFFIRMATIVELY APPEARS THAT A SUBSTANTIAL RIGHT OF THE DEFENDANT WAS MATERIALLY AFFECTED ① ACCIDENT OR SURPRISE; ② IRREGULARITY IN THE PROCEEDINGS OF THE COURT, JURY OR PROSECUTION OR ANY ORDER OF COURT, OR ABUSE OF DISCRETION, BY WHICH THE DEFENDANT WAS PREVENTED FROM HAVING A FAIR TRIAL;