

NO. 35492-6-II  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

JASON Z. BALASKI,

Appellant.

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CLERK OF COURT  
STATE OF WASHINGTON  
BY: [Signature]

ON APPEAL FROM THE  
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable Robert Lewis, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying Appellant Jason Balaski's initial motion and renewed motions for severance of his case from Michael O'Dell and Dan Johnson based on his Sixth Amendment right and Criminal Rule 4.4(c).

2. The trial court improperly relied upon Findings of Fact 2, 3, 4, and 5 in support of its ruling denying the initial motion for severance. The Findings are found at Appendix A.

3. The trial court erred in entering Conclusions of Law 6, 7, 8, 9, and 10, denying the initial motion for severance. The Conclusions are found at Appendix A.

4. The trial court erred in admitting evidence obtained as result of an illegal police detention of Balaski, where the detention was unsupported by reasonable, articulable suspicion to believe Balaski was involved in a shooting that occurred approximately an hour before the *Terry* stop.

5. The trial court erred in making "Undisputed Findings of Fact" 7, 8, 9, 12, and 13, in support of its ruling denying the motions to suppress evidence under *Terry*. The Findings are found at Appendix B.

6. The trial court erred in entering Conclusions of Law 5, 6, and 7, denying the motions to suppress evidence under *Terry*. The Conclusions are found at Appendix B.

7. Baaski's right to a fair trial was violated by the presence of juror Romano on the jury.

8. The trial court abused its discretion in denying co-defendant O'Dell's and Johnson's motion for new trial as it pertained to alleged juror misconduct due to a juror's prior contact with Jerry Newman, a victim in the case.

9. The trial court erred in failing to conduct a fact-finding hearing on O'Dell's and Johnson's motion for new trial based upon alleged juror misconduct based on a juror's acknowledgment that he had had prior contact with Jerry Newman and had been in Newman's house.

10. Defense counsel was ineffective when he failed to ask juror Romano about any fiduciary relationship with Newman that he may have had and when he failed to ask the court to remove the juror for cause.

11. The trial court improperly admitted Balaski's statements, which were obtained through custodial interrogation by a law enforcement officer on August 7, 2005 following the *Terry* stop.

12. The trial court erred by entering Conclusions of Law 4, and 7a, pertaining to a CrR 3.5 hearing. The Conclusions are found at Appendix C.

13. There was insufficient evidence of specific intent and insufficient evidence of a reasonable fear of apprehension, required for first degree assault against Laura Harrington, as alleged in count 3.

14. The cumulative error of the acts of law enforcement, errors committed by the trial court, and errors committed by counsel prejudiced the Appellant and materially affected the outcome at the trial.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Appellants Balaski, Johnson and O'Dell were tried jointly on charges of first degree felony murder. Co-defendant Johnson admitted his involvement in the burglary and an assault against Jerry Newman and testified that Balaski and an alleged co-conspirator Adrian Rekdahl were involved and went into Newman's house with him on August 6, 2005. Johnson testified that O'Dell had driven them there to the house and was aware of a plan to enter the house by force in order to take money. O'Dell said Johnson, Balaski and Rekdahl made a plan to burglarize the house and that he drove them there, but that he had no knowledge of what they planned to do. Did the presentation of mutually antagonistic defenses cause specific prejudice that denied Balaski a fair trial? Assignments of Error No. 1, 2, and 3.

2. Whether the trial court erred in ruling that there was a reasonable suspicion to detain Balaski where his appearance did not meet the vague descriptions of the suspects in the shooting, where one witness

to the shooting described the suspects as being three black males, where the officer testified that he saw four white males leaving the vehicle after it stopped? Assignments of Error No. 4, 5, 6, 11, and 12.

3. During voir dire, juror Romano disclosed that he had had contact with Jerry Newman, a victim in the case. Did the trial court err in denying Balaski's co-defendant's motions for new trial based on alleged juror misconduct due to Romano's prior contact with Newman? Assignments of Error No. 7 and 8.

4. Whether the trial court erred in denying Balaski's co-defendant's motions for new trial based on alleged juror misconduct when it failed to conduct a fact-finding hearing giving both sides the opportunity to conduct an investigation and present evidence regarding the alleged misconduct? Assignment of Error No. 9.

5. Defense counsel did not pursue questions regarding any fiduciary relationship between Newman and Romano, did not inquire as to the effect of seeing Newman shortly after having experienced a traumatic home invasion, and did not request that the juror be removed for cause. Was defense counsel ineffective? Assignment of Error No. 10.

6. Whether the statements Balaski made to law enforcement following his arrest on August 7, 2005 are admissible where the initial detention was unlawful? Assignments of Error No. 4, 5, 6, 11, and 12.

7. Whether there was insufficient evidence of specific intent

as to the first degree assault conviction in count 3, where Laura Harrington was not shot and there was no indication that the assailant or an accomplice created fear of imminent harm? Assignment of Error No. 13.

8. Did the cumulative errors deny the Appellant a fair trial? Assignment of Error No. 14.

**C. STATEMENT OF THE CASE<sup>1</sup>**

**1. Procedural history:**

A jury convicted Jason Balaski of felony first degree murder while armed with a firearm, as charged in a second amended information filed by the State in Clark County Superior Court on November 14, 2005, contrary to RCW 9A.08.020(3). CP at 19-22, 201. The jury also convicted Balaski of two counts of first degree assault, contrary to RCW 9A.36.011(1)(a), and one count of first degree burglary, contrary to RCW 9A.08.02. CP at 203, 205, 207. Report of Proceedings [RP] at 2911.

Trial court Judge Robert Lewis imposed a standard range sentence of 608 months for Count I, including a 60 month firearm enhancement. CP at 385. The court also sentenced Balaski to 183 months for Counts 2 and 3, and 176 months for Count 4, each including a firearm enhancement. The court ordered that counts 1, 2, and 3 be served consecutively, for a total sentence of 1034 months (86.1 years). CP at 385. Timely notice of

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<sup>1</sup>This Statement of the Case addresses the facts related to the issues presented in accord with RAP 10.3(a)(4).

this appeal followed. CP at 397.

**2. Substantive facts:**

**a. Shooting at Newman's house.**

After midnight on August 6, 2005, three men wearing masks came through the front door of a house owned by Jerry Newman. RP at 801. Newman's house is located at 15708 SE Evergreen Highway in Vancouver, Washington. RP at 793. Newman was shot in the leg and was beaten. RP at 801, 857-59. Friends of Newman's—Laura and Robert Harrington—were visiting Newman at the time. RP at 707-709. They arrived at his house at approximately 9:30 p.m. RP at 709. Between 11:00 and 11:30 p.m. everyone had left except Newman and the Harringtons. RP at 709. They were both sitting in the kitchen when Laura Harrington heard the front double doors to the house “burst open” and saw three men with “camouflage clothing and masks and automatic weapons.” RP at 713. Robert Harrington made his wife get up and they ran outside onto the back deck. RP at 715. Newman went toward the men with his arms outstretched and Laura Harrington heard a gunshot. RP at 715, 716. The Harringtons ran down several stairs off the deck and Laura Harrington fell on her side. RP at 716. As she got up, she saw a man standing on the deck “with the gun pointed at us.” RP at 717. The gun had a laser light scope on it. RP at 717. Robert Harrington got his wife

off the ground and they ran across the yard. RP at 717. About halfway across the yard, she heard gunshot and heard her husband say “God, oh my God.” RP at 717. Laura Harrington continued running and heard five more shots. RP at 717. She crawled across the street to a flowerbed and laid down. RP at 718, 743. She heard someone “in the shrubbery like he was looking for me.” RP at 718. She heard someone say “come on man, we gotta get the fuck outta here” and then heard “a car take off.” RP at 718, 746.

Robert Harrington had been killed. He was shot six times with a .223 caliber rifle. RP at 1549-62, 1570.

After the men entered the house, Newman went across his living room toward them and was shot in the hip. RP at 801. After that he was beaten. RP at 801. The men were wearing ski masks and he did not recognize any of them. RP at 802. When police arrived, Newman said that he thought the assailants were black. RP at 805. Newman told them that there had been three men and they were wearing masks and carrying guns. RP at 1963.

Newman was in the hospital for three to four weeks following the incident. RP at 807.

Of the seven cartridge casings recovered from the scene, four were “very close to one another” in appearance, two were very close to the other

four. RP at 1661. One casing was fired from another gun. RP at 1661. All were fired from a .223 caliber weapon. RP at 1669.

Newman had been convicted of conspiracy to distribute cocaine in 1989 and sentenced to federal prison for five years. RP at 778, 798. Newman acknowledged that he had used marijuana and cocaine on August 6, 2005. RP at 801.

A private security guard driving from one job to the next drove by Newman's house a little after 11:30 p.m. on August 6, 2005 and heard five to seven gunshots. RP at 986. Approximately two blocks later he saw a white Chevrolet Tahoe parked on the shoulder of the road. RP at 987. The guard notified his dispatcher and asked them to contact the Vancouver Police Department. RP at 989. He parked at an intersection and "no more than two minutes later" a white Tahoe passed him. RP at 989. He followed the vehicle and was able to see the license plate, which he reported to his dispatch. RP at 992. He stopped following the vehicle after he obtained the license plate number. RP at 993.

**b. Arrest of Balaski.**

Clark County Deputy Sheriff Todd Young heard a report on the Vancouver city police radio frequency while he was working a shift at the Clark County Fairgrounds late on August 6, 2005. His shift ended and he left the fairgrounds and started to drive home. RP at 1040. While driving

he saw a white Tahoe with Oregon license plate number 097 BLX, which was the number he had been advised to look for. RP at 1042. He followed the Tahoe until it parked. RP at 1043. He testified that he saw four doors open and four people get out of the vehicle, at which point he drew his gun, activated his lights and spotlight and told them to get on the ground. RP at 1044. Three complied, but the person exiting from the right front passenger side ran. RP at 1044. Deputy Young testified that he did not see anyone come out of a house located at 8708 NE 161<sup>st</sup> Avenue, which is near where the Tahoe was parked. RP at 1046. Police later learned that Jason Balaski lives at 8708 NE 161<sup>st</sup> Avenue. RP at 2016, 2185. Deputy Young alleged that Balaski was in the Tahoe at the time it stopped and that he got out of the vehicle with the other men. RP at 1046. Police alleged that the man who ran was Adrian Rekdahl.<sup>2</sup> RP at 2183.

Balaski, O'Dell and Johnson were taken into custody. RP at 1968. Johnson was wearing camouflage pants and boots. O'Dell was wearing cargo shorts, a shirt and tennis shoes. Balaski was shirtless and was wearing camouflage pants and boots. RP at 1999.

Balaski's left hand tested positive for gunshot residue. RP at 1708. O'Dell did not have blood on his clothing and did not have gunshot residue on his hands. RP at 1707. Johnson had Newman's blood on his

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<sup>2</sup> Rekdahl was later located and arrested in Oregon. RP at 2194.

clothes and had gunshot residue on his left hand. RP at 1709, 1797.

Three handheld Motorola radios were found by police in the Tahoe. RP at 1374. Balaski had a fourth Motorola radio attached to his pants at his hip when he was arrested. RP at 1800, 1969.

**3. Balaski's statements to law enforcement:**

After his arrest, Balaski was tested for gunshot residue. RP at 2066. Jon Thompson of the Vancouver Police Department administered the test. He asked Balaski if he had recently handled a firearm or had recently fired a weapon. RP at 2066. Thompson testified that Balaski told him "If I was to tell you something, it would be very incriminating." RP at 2066. Balaski also told police that he had been at an establishment called the Dancin' Bare earlier on August 6, but that he had run out of money and had driven his Honda Civic home by himself. RP at 2067, 2167, 2337.

Balaski also owned a Blazer, which was located by police at 8115 N. Albina, which is owned by O'Dell. RP at 1183, 2020. Balaski's Honda Civic was located at his house on 161<sup>st</sup> Avenue. RP at 2025. The Tahoe belonged to O'Dell's mother in law. RP at 2248.

**4. The divergent defenses:**

**a. Balaski's defense.**

The State offered testimony that Balaski said that he was at the

Dancin' Bare earlier on August 6 with O'Dell, Rekdahl, and Johnson. RP at 2067. During closing argument, Balaski's counsel argued that Balaski had been with them at the Dancin' Bare the evening of August 6, but after drinking he ran out of money and drove home in his Honda. RP at 2828, 2852, 2853. He argued that Balaski had been given one of the Motorola radios so that he could tell the others how to get to his house and to let him know when they were so there so that he could go out with them again. RP at 2837. His counsel argued that he gave them directions to his house on the radio, but at some point they stop following the directions to Balaski's house and went instead to Newman's house. RP at 2836-37. His counsel argued that Balaski did not go to Newman's house, that he was not in the Tahoe when it was pulled over, and that he did not take part in the crimes. RP at 2837. He argued that Balaski came out of his house when the Tahoe arrived, and he was arrested with the others at that point. RP at 2844. His brother Ricky Balaski testified that in August, 2005 he lived with Balaski in Vancouver. RP at 900.

Counsel argued that Rekdahl had Balaski's Blazer, and that is how it ended up at O'Dell's building. RP at 2818. Counsel noted that Balaski did not have blood on his clothing. RP at 1843, 1917-18.

**b. O'Dell's defense.**

The State offered testimony that O'Dell acknowledged that he was

the driver of the Tahoe on August 6, and that he had been at the Dancin' Bare earlier that night. During closing, O'Dell's counsel argued that O'Dell had driven the Tahoe, taking Balaski, Johnson, and Rekdahl from the Dancin' Bare, where they had been drinking, to Balaski's house. RP at 2867. He argued that when they were on a dark portion of Old Evergreen Highway, they told him to pull over and park the Tahoe. RP at 2867. They told him to stay in the vehicle, and then they got out and walked to Newman's house. RP at 2868. O'Dell's counsel argued that O'Dell did not know that they intended to commit a burglary. RP at 2868.

**c. Johnson's testimony.**

Johnson testified that he, Rekdahl, Balaski, and O'Dell took part in a home invasion of Newman's house on August 6, 2005. RP at 2593. He stated that they initially discussed that there was a large amount of money at a particular house and that were going to get it. RP at 2584. This discussion occurred while they were at a cabin near Morton, Washington, co-owned by Rekdahl. RP at 2585. He stated that on August 6, 2005 got a telephone call from Rekdahl telling him to meet him at the Dancin' Bare that night. RP at 2585. When he got to the Dancin' Bare, O'Dell, Balaski and Rekdahl were already there. RP at 2586. They left the Dancin' Bare in two separate vehicles and drove to Odell's shop on Albina. RP at 2587. They decided to buy radios, and he dropped Rekdahl at O'Dell's shop and

he proceeded to to Fred Meyers and bought two packs of two way Motorola radios. RP at 2588. After he returned to the shop, he changed into camouflage pants and boots. RP at 2589. He brought a Glock 9 mm pistol with him. RP at 2589. Johnson stated that O'Dell called his wife and asked her to bring the Tahoe to the shop. RP at 2590. The rifles were in a duffle bag until they got out of the Tahoe. RP at 2605. He stated that O'Dell drove them to Newman's house and Johnson, Rekdahl and Balaski got out of the vehicle and approached the house from the back. RP at 2593. He testified that they went past a hot tub in the back yard, went around the house, and Rekdahl opened the front door. RP at 2593. He said that they went into the house and a man came running toward them and Rekdahl shot him in the leg. RP at 2593. He stated that he was not told the homeowner's name, but was told that he was believed to have 1.2 million dollars at the house. Johnson said Rekdahl went into the house first, Johnson was second, and Balaski third. RP at 2593. Johnson said that he pistol whipped the man with the 9 mm handgun in order to "subdue him." RP at 2593-94.

As he assaulted the man, he said Balaski and Rekdahl ran towards the kitchen and then he heard gunshots. RP at 2594. He said Rekdahl ran back into the room and "he proceeds to jam a rifle in the man's head." RP at 2594. He hit Rekdahl and said that was enough. RP at 2595.

He said Balaski had left the house through the back and then went back into the house the same way. RP at 2596, 2635. Johnson stated that he never went further into the house than the foyer. RP at 2594. O'Dell was in the Tahoe when they came out. They got into the vehicle and drove away. RP at 2597. He said that O'Dell asked "did you kill the motherfucker?" and Balaski said "he's dead." RP at 2598. Johnson said that O'Dell was excited and pumped his fist. RP at 2599. Johnson said they hid the weapons two miles from Balaski's house. RP at 2603.

Johnson said that he and Rekdahl had taken part in home invasions previously. RP at 2623.

**5. Motions to sever:**

Counsel for Balaski, O'Dell, and Johnson repeatedly moved to sever their trials from one another. Counsel for Balaski moved for severance pursuant to CrR 4.4(c) in a motion filed May 1, 2006. CP at 42.

At the hearing at the initial motion to sever, counsel noted that the State was not going to introduce an alleged statement of O'Dell's to the effect that Balaski was giving directions to O'Dell regarding how to get to Balaski's house and that the basis regarding severance pursuant to *Bruton*<sup>3</sup> was "basically gone" by the State's concession. RP at 401. The court denied the motions of all three defendants to sever. RP at 414-15. The

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<sup>3</sup> *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

court found that there was no basis to sever on *Bruton* grounds. RP at 415. The court also found that regarding antagonistic defenses, “it appears to me that almost everything that is admissible against Mr. Johnson is admissible against Mr. Balaski and is admissible against Mr. O’Dell . . . .” The court also stated “I don’t hear that they have antagonistic defenses other than that they’re all asserting basic variations on the same theme.” RP at 416.

The court entered the following Findings of Fact and Conclusions of Law on August 22, 2006:

#### **UNDISPUTED FINDINGS OF FACT**

1. There are no disputed facts.
2. On 8-11-05, Defendants Balaski, Johnson, O’Dell and Rekdahl were all joined and charged in this case in one information listing all four defendants.
3. All charges arise from one burglary/shooting incident that occurred at 11:40pm on 8-6-05 where it is alleged all four defendants were involved in a planned home invasion burglary where one defendant drove and the other three defendants entered the home with radios, masks, guns and wearing camouflage clothing.
4. Defendants Balaski, Johnson and O’Dell are currently joined for trial to commence 8-14-06.
5. Defendant Rekdahl is not joined with the other three Defendants due to him not being back in the jurisdiction of this Court and by election of the State.

#### **CONCLUSIONS OF LAW**

1. Defendant Balaski withdraws his motion to sever based upon the condition that the State does not introduce a statement of Defendant O’Dell that

Defendant Balaski was in the Tahoe giving directions to him (O'Dell) while he (O'Dell) drove, naming Defendant Balaski as a participant. The State has agreed to no introduce such statement.

2. Under CrR 4.3(a) and (b) both multiple offenses and multiple defendants were joined in a single charging document in this case.
3. Under CrR 4.3.1(a) offenses or defendants (in this case both) properly joined under rule 4.3 shall be consolidated for trial unless the court orders severance pursuant to rule 4.4.
4. There has been no order of severance in this case under CrR 4.4
5. The State is not seeking to introduce any statements of any Defendant in violation of the defendants confrontation clause rights under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).
6. Judicial economy supports a joint trial in this case based upon the facts of the three Defendants being charged under an accomplice theory of a single burglary incident involving all Defendants.
7. The vast majority of the evidence as against all Defendants would be admissible in both joint and separate trials. No Defendant will be subjected to any identifiable evidence in a joint trial that they would not be subjected to in a separate trial.
8. ~~There are no [A]ntagonistic defenses that would do not warrant separate trials[, in these cases].~~
9. No Defendant has supported their burden that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy.
10. Defendant Balaski's, Johnson's and O'Dell's motions to sever are hereby denied.

CP at 152-154. Appendix A-1 through A-3.

As the trial progressed, Balaski's counsel either moved for severance or joined in motions by counsel for O'Dell and Johnson for

severance, based on the argument that each defendant had antagonistic defenses. RP at 767, 880, 2532, 2533, 2577, 3007.

**6. CrR 3.6 suppression hearing:**

Counsel for Balaski<sup>4</sup> moved to suppress evidence obtained from the initial arrest of Balaski and any evidence obtained as the fruit of that arrest. CP at 27, 29. The motions were heard by Judge Lewis on June 7, 2006.

Michael Koenekamp, employed in the private security industry, was driving on the street that goes past Newman's house at 11:30 p.m. on August 6, 2005 when he heard approximately six to seven gunshots. RP at 206, 208. He stated that the gunshots sounded "pretty close to the roadway on the north side of the roadway." RP at 208. A block later he saw a white Tahoe parked on the shoulder of the road. RP at 208. The Tahoe had Oregon plates and he saw a driver in the vehicle. RP at 208-09. Koenekamp notified his dispatcher of the shots and asked that the dispatcher call 911. RP at 209. He was told to wait for police at an intersection, which he did. RP at 210. Approximately one minute later a white Tahoe went past him. RP at 210. He was "confident" that it was the same vehicle he had seen parked on the shoulder. RP at 210. He followed the vehicle and was able to obtain the license plate number, which he

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<sup>4</sup> Counsel for O'Dell and Johnson filed similar suppression motions.

reported to his dispatcher. RP at 211, 212. He eventually stopped following the vehicle. RP at 213.

Sgt. Joseph Graaf responded to the report of a shooting at a house on SE Evergreen. RP at 234. At the house, he interviewed a man who had been shot. RP at 236. The injured man gave him “a description of three black males wearing ski masks and camouflage clothing.” RP at 238, 244.

Sgt. Graaf gave the description of the assailants to dispatch and asked them to link that information with the information about the white Tahoe. RP at 238.

Clark County Deputy Sheriff Todd Young learned about a shooting in Vancouver on August 6 at approximately 11:45 p.m. as he was finishing a shift at the Clark County Fair. RP at 280. He learned about the shooting when he tuned his radio to the city frequency. He tuned to that frequency because it was “an interesting call, and I wanted to listen and see what was goin’ on.” RP at 280. He finished his shift at midnight and learned that the city “had put out an attempt to locate or a BOLO” to be on the lookout for a white Chevrolet Tahoe with Oregon plates 097 BLX. RP at 281. He testified that he heard from reports that there were “multiple suspects, possibly four, wearing masks and camos and armed with assault rifles.” RP at 281. The suspects were described as being black. RP at

303. As he was returning from the fair in his patrol car, he saw a white Tahoe with Oregon plates 097 BLX at approximately 12:35 a.m. RP at 285, 286. Deputy Young contacted his dispatcher and followed the Tahoe until it came to a stop in the 880 block of 161<sup>st</sup> Avenue in Vancouver. RP at 287. He stopped four to five car lengths behind the vehicle. RP at 305. He testified that four doors on the vehicle opened and four white males got out. He stated that he saw "some camouflage." RP at 288. At that point Deputy Young activated his overhead lights and conducted what he called "a high-risk stop." RP at 289. Deputy Young pointed his firearm in the direction of the Tahoe and told the men to get on the ground with hands at their sides. RP at 289, 301. Three of them complied with Deputy Young's orders, but the fourth man ran. RP at 301. Several other patrol cars arrived at that time. RP at 302.

After hearing argument of counsel, the court denied the motion to suppress. RP at 380. The following Findings of Fact and Conclusions of Law were entered on August 22, 2006.

#### **UNDISPUTED FINDINGS OF FACT**

1. There are no disputed facts.
2. On 8-6-05 at approximately 11:40pm, three calls were made to 911 dispatchers reporting certain observations regarding shots fired at a location near 115708 SE Evergreen Highway in Vancouver, WA.
3. Information from the calls was dispatched via oral radio traffic and via CAD (computer aided dispatch)

- computer text to law enforcement.
4. One call came from Metrowatch worker, Michael Koenekamp, who testified consistent with the information contained in the dispatched information.
  5. Koenekamp is not a law enforcement officer.
  6. Koenekamp testified that he witnessed within 100 yards, or fairly close of where shots were heard and ultimately found to have been fired, he observed a White Chevy Tahoe bearing an Oregon license plate number parked on the nearby roadway, in an area where vehicles are usually not parked, with its lights off.
  7. Koenekamp further testified that within less than two minutes of the shots being fired, a vehicles that he was reasonably certain was the same vehicle he saw parked by where the shots were fired, was seen driving by Koenekamp North towards 164<sup>th</sup>. Koenekamp either chased or followed the Tahoe and obtained an exact license plate of the vehicle of Oregon license plate #097-BLX. He reported this information to his dispatch, who reported the information to 911 dispatch, who in turn reported it via radio traffic and CAD to law enforcement.
  8. Minutes later, dispatch also received a call from another person in the same area testifying that he saw a White Tahoe shortly after the shorts were fired, speeding in area and heading in same direction as Koenekamp reported.
  9. Minutes later a third person, one of the persons allegedly attacked in the incident, called from another residence and gave additional information to dispatch.
  10. Both alleged victims were interviewed and both reported that they were attacked at gunpoint by three males wearing camouflaged clothing. One thought they were black and the other said that their identity was obscured with masks and the camouflage clothing. One said that they were armed with possibly pistols and one said that they were armed with possibly long rifles.

11. Law enforcement arrived on scene and observed one deceased individual, an apparent gunshot victim, and another significantly injured person.
12. Within an hour of this time, Deputy Todd Young saw vehicle matching the exact same license plate. Deputy Young followed the vehicle until it parked on its own and stopped and four doors open and the occupants began getting out of the vehicle.
13. Deputy Young conducted, at this point, a high risk detention of the individuals, later identified as the Defendants, by illuminating his police patrol car lights and by ordering them verbally to get on the ground at gun point.

### **CONCLUSIONS OF LAW**

1. Under the 4<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Article 1, Section 7 of the Washington State Constitution, Deputy Young's detention of Defendants Balaski, Johnson and O'Dell was a warrantless detention and is per se unreasonable unless an exception applies.
2. One exception to the rule against warrantless detentions is that outlined under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), which allows a police officer to conduct an investigative stop, or *Terry* stop, based upon less than probable cause to arrest.
3. The initial "stop" or "detention" of the Defendants at issue occurred at the moment the Tahoe stopped, the four doors opened, the Defendants exited the vehicle and Deputy Young illuminated the scene with his lights, pointed his weapon and conducted a high risk detention of the Defendants.
4. This moment in time is the point at which the Court must determine whether or not the police had a well founded suspicion, pointing to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.
5. In this case, a vehicle speeding away within two

minutes from the area of where shots were fired, and the vehicle having been identified by an exact license plate state and number, and that vehicle being found within an hour of the shots fired, and when that vehicle stops, four doors open, dictating that there were several people within that vehicle, represents a reasonable suspicion to detain the individuals and investigate further, which is the very purpose of a *Terry* stop.

6. Based upon the information known to the police about the nature of the weapons involved and the weapons used, the detention was further justified as a high risk stop as done by Deputy Young.
7. Defendant Balaski, John and O'Dell's motion to suppress evidence regarding Deputy Young's *Terry* detention is hereby denied.

CP at 140-143. Appendix B-1 through B-4.

7. **CrR 3.5 suppression hearing re: statement:**

Balaski moved for suppression of statements police alleged that he made following his arrest on August 7, 2005. CP at 25. Vancouver Police Officer Darren McShea stated that Balaski was brought to the Vancouver Police Department's East Precinct early on the morning of August 7. RP at 317. He stated that he read Balaski his *Miranda*<sup>5</sup> warnings at approximately 2:40 a.m. RP at 318, 325. Balaski told McShea that he had been at a bar drinking all night. Vancouver Police Officer Jon Thompson administered a gunshot residue test on Balaski at approximately 4:15 a.m. on August 7. RP at 337. At the time of the test, he gave Balaski his

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<sup>5</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

constitutional rights, reading from a card issued by the department, as McShea had done. RP at 338-39. He stated that he also read Balaski a waiver, asking if he understood his rights, and having those rights in mind, did he want to talk to police. RP at 340. Thompson stated that Balaski said that he understood his rights and that he was willing to waive them. RP at 340. During the gunshot residue test, Thompson asked if Balaski had handled or fired firearms recently. RP at 343. He alleged that Balaski told him “[i]f I was to tell you something, it would be very incriminating.” RP at 338.

The State requested the admission of the post-*Miranda* statements. The defense moved to suppress his statements pursuant to Criminal Rule 3.5. The motion was heard by Judge Lewis on June 7, 2006. Defense counsel argued that the warnings administered were not complete and that the statements were not knowingly, intelligently and voluntarily made. After hearing argument the court found that Balaski was adequately advised of his *Miranda* warnings and denied the motion to suppress. RP at 397. The following Findings of Fact and Conclusions of Law were entered August 22, 2006:

#### **UNDISPUTED FINDINGS OF FACT**

1. There are no disputed facts.
2. On 8-6-05 at approximately 11:40 pm, police responded to a report of a shooting at 15708 SE

Evergreen Highway in Vancouver, Washington. It was alleged that three males wearing masks, camouflage clothing and armed with firearms had entered the alleged victims' home and shot and wounded the homeowner and shot and killed a guest.

3. A vehicle was seen (and identified by full license [p]late number) leaving the immediate area of 15708 SE Evergreen Highway.
4. Approximately 50 minutes later Clark County Sheriff's Officer[s] Deputy Todd Young detained Defendant Balaski and Defendant O'Dell during the course of further investigation.
5. At least as of 2:40am, on 8-7-05, both Defendant's Balaski and O'Dell were in the custody of the police and not free to leave.
6. At approximately 2:45am on 8-7-05, before any questioning by police, or statements made by Defendant Balaski, Detective McShea advised Defendant Balaski of his *Miranda* warnings.
7. At approximately 3:00am on 8-7-05, before any questioning by police, or statements made by Defendant O'Dell, Detective McShea advised Defendant O'Dell of his *Miranda* warnings.
8. Detective McShea accurately and adequately recited the *Miranda* warnings to both defendants.
9. After Defendant Balaski was advised of his *Miranda* warnings by Detective Darren McShea, Defendant Balaski was turned over to Detective Thompson for questioning.
10. Detective Thompson also fully and accurately advised. Defendant Balaski of his *Miranda* warnings, going further to seek a verbal express waiver of Defendant Balaski's rights to remain silent.
11. After being advised of his *Miranda* warnings for the second time, Defendant Balaski indicated expressly and orally to Detective Thompson that he understood his rights and was willing to speak with the Detective.
12. After being advised of his *Miranda* warnings twice,

Defendant Balaski made statements to Detective Thompson.

13. After being advised of his *Miranda* warnings, Defendant O'Dell was put into contact with Detective O'Dell for questioning.
14. Before speaking with Defendant O'Dell, Detective O'Dell confirmed with Defendant O'Dell that he had been advised of his *Miranda* warnings.
15. Defendant O'Dell then made statements to Detective Eric O'Dell.
16. Defendant Balaski appeared to understand Detective Thompson's questions and was able to communicate with him without misunderstanding.
17. Defendant O'Dell appeared to understand Detective Eric O'Dell's questions and was able to communicate with him without misunderstanding.
18. There was no trickery or coercion on the part of the police during their contact with Defendants O'Dell and Balaski, to get the Defendants to make statements.

### **CONCLUSIONS OF LAW**

1. Defendant's Balaski and O'Dell were both in custody and were not free to leave, at the time they made statements to police.
2. Defendant Balaski made a voluntary, knowing and intelligent decision to make statements to Detective Thompson, after which time that he had been adequately and accurately advised of his *Miranda* warnings twice.
3. Defendant O'Dell made a voluntary, knowing and intelligent decision to make statements to Detective O'Dell, after which time that he had been adequately and accurately advised of his *Miranda* warnings.
4. Defendant Balaski's statements to Detective Thompson are admissible at trial.
5. Defendant O'Dell's statements to Detective O'Dell are admissible at trial.
6. The statements made by both Defendant Balaski

and Defendant O'Dell ultimately invoking or asserting their rights to any attorney or to remain silent, are inadmissible.

7. Subject to further orders of the Court, the State has agreed to limit admission to the following statements by Defendant Balaski:
  - a. A statement to Detective Thompson that (1) he was earlier at the Dancin' Bare Club; and (2) a statement to Detective Thompson when asked if he had handled or fired a firearm recently, he responded "if I was to tell you something, it would be very incriminating."
8. Subject to further orders of the Court, the State has agreed to limit admission to the following statements by Defendant O'Dell:
  - a. A statement of Defendant O'Dell that: (1) he was driving the White Chevy Tahoe when contacted by police initially; and (2) he was earlier at the Dancin' Bare club.

CP at 148-151. Appendix C-1 through C-4.

**8. CrR 3.6 Suppression hearing re: DNA evidence.**

Balaski moved to suppress DNA evidence obtained from a swab by after obtaining a search warrant. The court found that any error was harmless and denied the motion. RP at 393. The court entered the following findings and conclusions on August 22, 2006:

**UNDISPUTED FINDINGS OF FACT**

1. There are no disputed facts.
2. On 8-6-05 at approximately 11:40pm, Robert Harrington was shot and killed, Gerald Newman was shot and injured[,] and ~~Laura Harrington was shot at and not injured.~~ This incident involved an unlawful entry of three armed men wearing camouflage and masks into Newman's home.

3. A White Chevy Tahoe, with a full Oregon license plate of 097-BLX, was seen near the incident leaving the scene shortly after shots were fired.
4. Within an hour of the attack, in the early morning hours of 8-7-05, Deputy Todd Young saw the Tahoe matching the exact same license plate. Deputy Young followed the vehicle until it parked on its own in front of Defendant Balaski's residence, four doors opened and Defendant Balaski emerged, was taken into custody and arrested in connection with the attack.
5. The Vancouver Police Department developed probable cause for the arrest and detention of Defendant Balaski on 8-7-05.
6. Defendant Balaski first appeared before Judge Robert L. Harris on 8-8-05.
7. Judge Harris appointed an attorney for Defendant Balaski on 8-9-05.
8. Charges were filed against Defendant Balaski on 8-11-05.
9. Also on 8-11-05, Vancouver Police Detective Stuart Hemstock used the probable cause factual basis developed up to that point, and in furtherance of the investigation, obtained a signed and valid search warrant for a buccal (oral) swab of Defendant Balaski's DNA.
10. Judge Vernon L. Schreiber signed the warrant at 10:55am on 8-11-05.
11. Detective Hemstock attempted to serve the warrant to obtain the swab from Defendant Balaski on 8-11-05. Defendant Balaski refused without his attorney present, and Detective Hemstock did not force the issue.
12. Detective Hemstock and other members of the Vancouver Police Department then made communications to Defendant Balaski's attorneys' office and returned the next day, 8-12-05.
13. Defendant Balaski consented to giving the swab on 8-12-05.
14. Defendant Balaski contends that under 6<sup>th</sup> Amendment to the United States and Washington

State Constitution and CrR 3.1, he had a legal right to have his counsel present during the taking of the DNA buccal swab.

### **CONCLUSIONS OF LAW**

1. At the time of the taking of the DNA swab, there existed probable cause for the detention of Defendant Balaski and for the legal taking of the DNA buccal swab.
2. No right to an attorney attaches under either the Federal or State Constitution's for the taking of a physical specimen such as a DNA buccal swab.
3. The taking of a DNA buccal swab is not testimonial, thus does not trigger a right to have counsel present.
4. The 6<sup>th</sup> Amendment does not trump a validly issued warrant, requiring execution with counsel present.
5. The taking of a DNA buccal swab as in a case such as this, is a minimal intrusion (as it merely involves the swiping of a Q-Tip in the inner cheek of the Defendant).
6. In this case, the police possibly violated CrR 4.7.
7. Any error or violation of CrR 4.7 is harmless and moot.
8. If counsel would have been notified of the Judge's warrant, counsel could not have done anything but standby and watch as the DNA buccal swab was taken.
9. If the State had brought this request to the trial court via CrR 4.7, the Court would have granted the State's motion and allowed for the taking of the DNA buccal swab.
10. There exists no misconduct under CrR 8.3 on the part of the police or the State in the taking of this DNA buccal swab, as this search was merely the continuation of the police investigation, shortly after arrest and charges.
11. No statements of Defendant Balaski, if any were made, admissible during the police contact with Defendant Balaski during the taking of the DNA

buccal swab on 8-11-05 or 8-12-05.

12. Defendant Balaski's motion to suppress DNA evidence seized from his person by Detective Hemstock on is hereby denied.

CP at 144-147.

9. **Juror Romano's prior contact with Newman and knowledge of the interior of Newman's house:**

During *voir dire*, juror Romano was questioned about his previous contact with Jerry Newman. He stated that he met Newman while photographing his home in preparation for selling the house. He described his work by stating "we go over to the client's house, who does a for sale by owner, and we photo shoot the home." RP (*Voir Dire*) at 4. Romano stated that when doing the photo shoot he noted that Newman's leg was in a cast and that "he had been shot in the leg." RP (*Voir Dire*) at 4. He was curious "and so we asked and he didn't want to discuss it, so left that alone." RP (*Voir Dire*) at 4. Romano stated that "[o]ne of the guys that I had photo shot with, he had mentioned that there had been a murder in that same area or there had been something that had happened in that same area two weeks or three—maybe a month after we shot—we'd photo shot over there." RP (*Voir Dire*) at 5. The photo shoot took place in November, 2005. RP (*Voir Dire*) at 5. During the photo shoot he looked the entire interior of the house, noting that carpet was torn up in the master

bedroom. He stated that he “remember[ed] stains on the ground” when he was asked about bloodstains. RP (*Voir Dire*) at 6.

When asked if that fact that he had been in the house would affect his view of the case, Romano stated that it would not. RP (*Voir dire*) at 8. The State challenged Romano for cause. RP (*Voir Dire*) at 15. Balaski’s attorney opposed the State’s motion, joining with counsel for O’Dell in his opposition. RP (*Voir Dire*) at 16. The court denied the motion to remove Romano for cause. RP (*Voir Dire*) at 16-17.

**10. Jury Instructions:**

Counsel for Balaski did not note exceptions to instructions not given or object to instructions given. RP at 2675.

**11. Verdict:**

On August 29, 2006 the jury found Balaski guilty of first degree murder, two counts of first degree assault, and first degree burglary as charged. CP at 201, 203, 205, and 207. By special verdict, the jury found that all four counts were committed while he was armed with a firearm. CP at 202, 204, 206, and 208.

**12. Sentencing:**

The matter came on for sentencing on October 20, 2006. Counsel for Johnson and O’Dell moved for arrest of judgment and new trial, arguing *inter alia* that the court erred by not severing the trials and that the

court should not have permitted juror Romano to be seated on the jury. RP at 2925-31. The court denied the motions. RP at 2933.

The State calculated Balaski's offender score as 10. Balaski asked that the counts merge with burglary and argued that several Oregon offenses were incorrectly classified and should wash out. RP at 2936-38. The court accepted the State's calculation of Balaski's offender score and standard ranges. RP at 2939.

The court sentenced Balaski to 608 months for count 1, 183 months for count 2, 183 months for count 3, and 176 months for Count 4, with Counts 1, 2, 3 to be served consecutively to each other, including a 60 month firearm enhancement for each count, for a total of 1034 months. RP at 2967. CP at 385.

#### D. ARGUMENT

1. BALASKI'S DEFENSE WAS IRRECONCILABLE WITH O'DELL'S DEFENSE, AND PARTICULARLY JOHNSON'S 'DEFENSE.' THE TRIAL COURT'S REFUSAL TO GRANT A SEVERANCE VIOLATED CrR 4.4, DENIED BALASKI HIS CONSTITUTIONAL RIGHT TO DUE PROCESS, AND INFRINGED HIS CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION. BALASKI'S MOTIONS FOR SEVERANCE SHOULD HAVE BEEN GRANTED.

Criminal Rule 4.4(c)(2) provides that severance of defendants

should be granted before trial whenever “it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant...” Severance should be granted during trial if “it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.” CrR 4.4(c)(2). In addition, a joint trial violates due process if it results in substantial prejudice to the defendant. *Johnson v. Bett*, 349 F.3d 1030 at 1037 (7<sup>th</sup> Cir., 2003), *citing United States v. Lane*, 474 U.S. 438, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986).

Weighed against the right to a fair trial is the government’s interest in judicial economy. A defendant seeking severance must demonstrate that a joint trial will result in specific unfair prejudice that outweighs the gain achieved in judicial economy. *State v. Israel*, 113 Wn. App. 243 at 290-91, 54 P.3d 1218 (2002). Specific prejudice may be demonstrated by showing antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive. *State v. Medina*, 112 Wn. App. 40 at 52-53, 48 P.3d 1005 (2002).

Criminal Rule 4.4(c) directs the trial court to sever defendants for trial if there is a danger that the defendants will be prejudiced by the joinder:

- (2) The court, on application of the prosecuting attorney, or on application of the defendant other than under

subsection (i), should grant a severance of defendants whenever

- (i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or
- (ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

Reversal is required when the court abuses its discretion in denying a motion to sever. *State v. Jones*, 93 Wn. App. 166, 171, 968 P.2d 888 (1998), *review denied* 138 Wn.2d 1003 (1999). To support a finding that the trial court abused its discretion, a defendant must point to specific prejudice that outweighs concerns for judicial economy. *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 557 (1991). Reversible prejudice can result when defendants joined for trial present antagonistic defenses. *Hoffman*, 116 Wn.2d at 76. While defenses that are merely inconsistent generally do not produce the kind of prejudice that warrants reversal, mutually exclusive defenses may prevent joined defendants from receiving a fair trial. Where the defenses presented are irreconcilable, the jury may find that the simplest way to resolve the conflict is to convict both defendants. *State v. Grisby*, 97 Wn.2d 493, 508, 647 P.2d 6 (1982), *cert. denied sub. Nom. Frazier v. Washington*, 459 U.S. 1211 (1983); *United States v. Tootick*, 952 F.2d 1078, 1082 (9<sup>th</sup> Cir. 1991).

In *Grisby*, co-defendants sought severance, claiming their defenses were mutually antagonistic. In addressing this issue, the Supreme Court noted that both defendants admitted going to a drug dealer's apartment to settle a dispute. They were armed, and following an argument several people were shot. The only disagreement between the defendants was who shot which victim. Thus, while the defenses conflicted, they were not inherently antagonistic. 97 Wn.2d at 495, 508.

The facts presented in this case go far beyond mere antagonistic defenses. Johnson's testimony not only directly contradicted Balaski (and O'Dell), but by admitting his culpability and placing himself, Balaski, and O'Dell at the scene of the crime, Johnson played the role of a second prosecutor, requiring the jury to convict Balaski by making it virtually impossible to acquit him. The jury could not accept Balaski's defense unless it disbelieved Johnson's testimony. Nor could the jury acquit Johnson unless it disbelieved Balaski. Acceptance of Johnson's testimony necessarily meant rejecting Balaski's defense—and Johnson's testimony could *not* be rejected because he essentially told the jury: "convict me."

Where the jury must disbelieve one defense in order to believe the other, the defenses are mutually antagonistic. *State v. Lane*, 56 Wn. App. 286, 298-99, 786 P.2d 277 (1989); *see also United States v. Hanley*, 190 F.3d 1017 (9<sup>th</sup> Cir. 1999) (defenses are mutually exclusive where

acceptance of one defendant's theory precludes acquittal of other defendant).

As noted *supra*, the existence of mutually antagonistic defenses does not automatically require severance. *Grisby*, 97 Wn.2d at 507. But when the defendant demonstrates specific prejudice as a result of the court's failure to sever, reversal is required. *Jones*, 93 Wn. App. at 171; *State v. McKinzy*, 72 Wn. App. 85, 89, 863 P.2d 594 (1993).

Johnson's "defense," which amounted to an in-court confession implicating Balaski, caused specific and reversible prejudice to Balaski's case. Balaski was forced to face not only the State's evidence but also the overwhelmingly negative effects of Johnson's testimony. Johnson in effect served as a second prosecutor. *See Tootick*, 952 F.2d 1082-83 (mutually antagonistic defenses resulted in specific prejudice).

Johnson's confession, if made to law enforcement, could not have been admitted in evidence against Balaski under *Bruton* if the trials were severed. And the State could not have called Johnson as a witness against Balaski, since he too was charged with the offense. *See State v. McDonald*, 138 Wn.2d, 680, 693, 981 P.2d 443 (1999) (defendant in separate processing is unavailable as witness).

The reviewing court must consider the effect joinder has on the jury's ability to assess independently the case against each defendant. The

ultimate question is whether, under the circumstances, the jury is able to follow the court's instructions to consider the cases separately. *Grisby*, 97 Wn.2d at 509; *Tootick*, 952 F.2d at 1082.

Although the jury was instructed to consider the case of each defendant separately, Johnson's case necessarily impacted the jury's decision as to Balaski. If the jury believed Johnson's testimony—and again, it is unreasonable to expect a jury would reject the testimony of a defendant who confessed in court---it would be impossible to ignore that evidence in deciding Balsaki's case. Regardless of the general instruction given by the court, there was no way for the jury to keep the cases separate.

That the defenses were mutually antagonistic was clear even prior to trial, and counsel for all three defendants repeatedly moved to sever their respective cases throughout the duration of the trial. RP at 575, 672, 2533, 2553, 2559, 2568, 3006. The need for severance went from a whisper to a scream by the time Johnson testified, however. Following Johnson's testimony, the trial court appeared to recognize the severity of the schism between the defenses. Responding to a motion for severance by counsel for O'Dell, the judge stated:

That has been something I've tried to study thoroughly to make sure I'm making the correct decision, and while it is a close—, certainly to have defenses that are

antagonistic, in balance it does not appear to me it outweighs the reasons for joinder in this case.

RP at 2577.

In October, 2005, when addressing the joint motion for arrest of judgment, the court noted that “the severance issue was close” but that “overall I believe that the defendants received a fair trial, albeit not the trial that they wished for, that is, separate trials.” RP at 2932.

Johnson’s testimony admitted felony murder—it was tantamount to a confession without benefit of consideration by the State---and it constituted a legal suicide, defensively speaking. A jury choosing to believe Johnson’s testimony would have no logical choice but believe that Balaski was guilty as well. Johnson’s testimony therefore not only made the defenses antagonistic, but requires that each be found guilty.

A further problem arose in this case because the presence of Johnson in Balaski’s trial served to highlight the fact that Balaski had exercised his constitutional right against self-incrimination at trial when he did not take the witness stand. Emphasizing the defendant’s assertion of his privilege against self incrimination is error. *See, e.g., State v. Holmes*, 122 Wn. App. 438, 93 P.3d 212 (2004) (comment on post-arrest silence); *State v. Fiallo-Lopez*, 78 Wn. App. 717, 899 P.2d 1294 (1995) (comment on failure to testify).

Joinder produced a tremendous benefit for State at the expense of Balaski's right to a fair trial. The trial court's refusal to sever the defendant's was an abuse of discretion under CrR 4.4; it also denied Balaski his constitutional right to due process and infringed his constitutional privilege against self-incrimination. *Johnson v. Bett, supra; Holmes, supra.*

The court should have granted Balaski's motions for severance and its failure to do so requires reversal

2. **THE TRIAL COURT ABUSED ITS DISCRETION AT THE CrR 3.6 HEARING, BECAUSE THERE WAS NO REASONABLE SUSPICION GIVEN THE LACK OF SIMILARITY BETWEEN THE DESCRIPTIONS OF THE SUSPECTS AND THE DEFENDANT.**

a. **The admissibility of the evidence seized and statements obtained by law enforcement the morning of August 7, 2005 is dependent on the legality of the initial Terry investigative detention.**

The trial court erred in concluding Deputy Young made a lawful Terry stop.<sup>6</sup> The Terry stop was unlawful because there were insufficient facts to show a reasonable suspicion of criminal activity. In addition, Deputy Young exceeded the scope of a valid Terry stop when he drew his gun and pointed it at the men and enacted what he termed a "high risk"

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<sup>6</sup> Conclusion of Law 5 and 6.

stop.

Appellate courts will not independently review evidence admitted at a suppression hearing. *State v. Maxfield*, 125 Wn.2d 378, 385, 886 P.2d 123 (1994), *reversed on other grounds sub nom., In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 945 P.2d 196 (1997). Accordingly, review in this case is limited to a *de novo* determination of whether the trial court derived proper conclusions of law from the unchallenged findings of fact and whether the challenged findings were supported by substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *State v. O’Cain*, 108 Wn. App. 542, 548, 31 P.3d 733 (2001).

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. *Mapp v. Ohio*, 367 U.S. 643, 647, 81 S. Ct. 1684, 1687, 6 L. Ed. 2d 1081, 84 A. L. R. 2d 933 (1961). Its “key principle,” or “ultimate standard,” is one of “reasonableness.” *Dunaway v. New York*, 442 U.S. 200, 219, 99 S. Ct. 2248, 2260, 60 L. Ed. 2d 824 (1979) (White, J., concurring). This key principle has many specific applications. Of those involving the detention of persons, undoubtedly the most fundamental is that it is reasonable for an officer to detain a person indefinitely, e.g., for appearance in court or prosecution, only if the officer has probable cause

to believe the person has committed a crime. *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S. Ct. 854, 863, 43 L. Ed. 2d 54 (1975); *State v. Broadnax*, 98 Wn.2d 289, 293, 654 P.2d 96 (1982).

Another, narrower application is that even in the absence of probable cause, it is reasonable for an officer to detain a person briefly, for investigation, if the officer harbors a reasonable suspicion, arising from specific and articulable facts, that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1879, 20 L. Ed. 2d 8898 (1968); *State v. Kennedy*, 107 Wn.2d 1, 5-6, 726 P.2d 445 (1986).

A warrantless, investigatory stop must be reasonable under the Fourth Amendment and Article I, § 7 of the Washington State Constitution. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The State must prove an investigatory stop's reasonableness. *Id.* An investigatory stop is reasonable if the arresting officer can attest to specific and objective facts that provide a reasonable suspicion that the person stopped has committed or is about to commit a crime. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). An investigatory stop occurs at the moment when, given the incident's circumstances, a reasonable person would not feel free to leave. *Armenta*, 134 Wn.2d at 10, 948 P.2d 1280; *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984).

It is generally recognized that crime prevention and crime

detection are legitimate purposes for investigative stops or detentions. *State v. Kennedy*, 107 Wn.2d at 5-6, 726 P.2d 445. However, there must be sufficient articulable facts supporting a reasonable suspicion of criminal activity to justify a temporary investigative stop. See *State v. Thornton*, 41 Wn. App. 506, 705 P.2d 271 (1985); *State v. Samuel*, 39 Wn. App. 564, 694 P.2d 670 (1985).

b. **The Terry Stop Was Not Supported By A Reasonable Suspicion of Criminal Activity.**

The initial interference with the suspect's freedom of movement must be justified at its inception in order for a *Terry* stop to be lawful. *Williams*, 102 Wn.2d at 739 (citing *Terry*, 392 U.S. at 19-20.) A *Terry* stop must be based on articulable facts, taken together with a rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21; *State v. Gluck*, 83 Wn.2d 424, 426, 518 P.2d 703 (1974). The reasonableness of the officer's suspicion is determined by the totality of circumstances known to the officer at the inception of the stop. *Kennedy*, 107 Wn.2d at 6. The level of articulable suspicion required to justify a *Terry* stop is "a substantial possibility that criminal conduct has occurred or is about to occur." *Id.* The facts justifying a *Terry* stop must be more consistent with criminal than with innocent conduct. *State v. Pressley*, 64 Wn. App. 591, 596, 825 P.2d 749 (1992).

According to the trial court's ruling and written findings, the chronology of the police encounter with the Tahoe was that Deputy Young initiated a *Terry*-type investigative detention of the already-parked vehicle based on the assertion that the Tahoe and the license plate matched a vehicle reported by two people to have been seen shortly after shots were fired.<sup>7</sup>

The police officer lacked reasonable, articulable suspicion for the *Terry* stop. Absent a legal initial detention, the resulting arrest and search incident to arrest were illegal, and the evidence and statement obtained as a result should have been suppressed. *State v. Knighten*, 109 Wn.2d 896, 897, 748 P.2d 1118 (1988).

- c. **Balaski was seized by the police when Deputy Young illuminated the Tahoe with his lights, drew his weapon, and demanded that Balaski and the others get on the ground.**

A seizure occurs if “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *State v. Aranguren*, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985) (citing *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980)). Here Balaski was seized in the constitutional sense when Deputy Young ordered him to get on the

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<sup>7</sup>Finding of fact 7 and 8.

ground. *See, e.g., United States v. Palmer*, 603 F.2d 1286, 1289 (8<sup>th</sup> Cir. 1979) (where officer stopped his car, got out, and called out to the defendants to stop, a seizure occurred). Additionally, another important circumstance strongly indicating a seizure in this case was the use by the of what he termed a “high risk” proceed or drawing his gun and ordering the men to lie on the ground, clearly indicating that Balaski was being investigated, and thus implying some type of compliance was compelled. *See e.g., United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 18709, 64 L. Ed. 2d 497 (1980); *State v. Ellwood*, 52 Wn. App. 70, 73, 757 P.2d 547 (1988) (telling citizen to “wait right here” is a seizure).

**d. Seizure requires reasonable, articulable suspicion.**

At the time of the seizure, Deputy Young was, however, not in possession of reasonable articulable suspicion. In order to prevail on his appeal of the lower court’s CrR 3.6 ruling, Balaski must establish that the seizure of his person by the deputy was not supported by reasonable articulable suspicion based on objective facts. *State v. Stroud*, 30 Wn. App. 392, 394, 634 P.2d 316 (1981), *review denied*, 96 Wn.2d 1025 (1982); *Terry v. Ohio*, 392 U.S. at 21.

As a general rule, a person is protected from seizure without probable cause. *See* U.S. Const., Fourth Amendment; Wash. Const.

Article I, § 7; *State v. Smith*, 102 Wn.2d 449, 452, 68 P.2d 146 (1984). A seizure is reasonable only if an officer has “a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.” *State v. Larson*, 93 Wn.2d 638, 644, 611 P.2d 771 (1980) (citing *Brown v. Texas*, 443 U.W. 47, 51, 99 S. Ct. 2637, 2641, 61 L. Ed. 2d 357 (1970)); *see also State v. Kennedy*, 107 Wn.2d 1, 5, 726 P.2d 445 (1986).

With regard to investigation of current criminal activity, if a police officer reasonably suspects that a person is engaged in criminal activity, the officer may, without probable cause, briefly detain and question the suspect. *Smith*, 102 Wn.2d at 452 (citing *Terry v. Ohio*, 392 U.S. at 21). In order to justify a *Terry* stop based on suspicion of criminal activity, an officer must point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Terry*, 392 U.S. at 21.

**f. The Use of a Drawn Weapon Pointed at the Men Converted An Ostensible Terry Stop Into an Arrest From Its Inception.**

In order for a *Terry* stop to be lawful, the degree of intrusion must also be reasonably related in scope to the circumstances that justified the interference in the first place. *Williams*, 102 Wn.2d at 7639 (citing *Terry*, 392 U.S. at 19-20). The degree of physical intrusion is an issue here. The trial court found that Deputy Young had his gun drawn and pointed at the

four men. Finding of Fact 13. An ostensible investigative stop is converted into an arrest from its inception where the amount of force to effect the stop is not reasonably related in scope to the circumstances faced by the officer at the time. *Williams*, 102 Wn.2d at 739-41; *State v. Belieu*, 112 Wn.2d 587, 595, 773 P.2d 46 (1989).

There is no bright line standard for determining the degree of invasive force that may convert an investigative stop into an arrest for which probable cause is needed. An officer must have a reasonable fear for his own safety to justify force. This fear is reasonable if it is based on “particular facts” from which reasonable inferences of danger may be drawn.” *Belieu*, 112 Wn.2d at 599. No hard and fast rule governs the display of weapons in an investigative stop. Rather, the court must look at the nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day and the reaction of the suspect to the police. *Id.* at 600. To justify the use of drawn weapons in accomplishing the initial phase of an investigative stop, officers must have sufficient specific information about a person upon which to base a reasonable fear for their own safety. *Id.* at 605.

The trial court did not conclude Deputy Young had a reasonable fear for his own safety. Because the trial court here failed to find facts that would support a conclusion that the deputy had a reasonable fear for

safety, this Court must presume the State failed to prove those facts. *State v. Kull*, 155 Wn.2d 80, 86 n.5, 118 P.3d 307 (2005); *Armenta*, 134 Wn.2d at 14; *Burns v. McClinton*, 135 Wn. App. 285, 143 P.3d 630, 636 (2006). (“Absent an express finding upon a material fact, it is deemed to have been found against the party having the burden of proof.”). Absent findings of fact to support a reasonable fear for officer safety, the trial court’s determination that the officers conducted a lawful *Terry* stop must fall because the use of drawn weapons was not reasonably related in scope to the circumstances which justified the interference in the first place. *Williams*, 102 Wn.2s at 739-40, 741; *Belieu*, 112 Wn.2d at 595, 599.

This should be the end of the analysis, and the Court should reverse on this basis alone. “When the state prevails in a suppression hearing it has a further obligation to prepare, present and have entered findings of fact and conclusions of law which will, standing alone, withstand an appellate court’s scrutiny for constitutional error.” *State v. Poirier*, 34 Wn. App. 839, 841, 664 P.2d 7 (1983). The appellate court on review is thus bound by the trial court’s findings of fact in determining whether its legal conclusions were correct. *Id.* 34 Wn. App. at 840-41; *O’Cain*, 108 Wn. App. at 548; *Armenta*, 134 Wn.2d at 9. Appellate courts will not independently review evidence admitted at a suppression hearing and make its own findings of fact because “it is not the function of an

appellate court to substitute its judgment for that the trial court or to weigh the evidence or the credibility of witnesses.” *Davis. v. Department of Labor and Industries*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980); *Maxfield*, 125 Wn.2d at 385.

*State v. Belieu* offers an instructive contrast to Balaski’s case. In *Belieu*, the court held the use of drawn weapons did not exceed the scope of an ostensible *Terry* stop because officers articulated specific facts that justified an inference that the suspects were armed. *Belieu*, 112 Wn.2d at 597. Specifically, the police were aware weapons had been repeatedly burglarized from residences in the area; the suspects matched the description of those involved in the previous burglaries; and the suspects had made several furtive gestures inside a darkened car after observing police. *Id.* at 590, 597.

“[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.” *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). The balance tips in favor of Balaski here, as the deputy’s maximum show of force without a reasonable fear for safety was too intrusive to be justified under either the Fourth Amendment or Article I, § 7.

f. **The investigative stop of Balaski was not supported by reasonable suspicion because he did not adequately resemble the suspects described by Newman.**

At the time the vehicle came to a stop, Deputy Young had the following information: a shooting had occurred in Vancouver and to be on the lookout for a white Tahoe with Oregon plates 097 BLX. The victim of a shooting that night described his assailants as being three black males. He did not know whether there was more than one occupant in the vehicle, or whether that person or any others in the vehicle were involved in criminal activity.

Deputy Young did not have a description of any suspects other than being black. He did not know their age, height, hair color, hair length, weight. The three suspects at Newman's house were reported as being black. The four people exiting the Tahoe were white. They were *a priori* not the suspects as described by Newman. Deputy Young did not have reasonable, particular facts to detain them nor did he have a basis for reasonable suspicion that Balaski was the person who had been involved in the reported shooting. The lack of detail of the descriptions, and the dissimilarity of the descriptions, did not amount to justification for the investigative stop. *Compare United States v. Scheets*, 188 F.3d 829, 833, 837-38 (7<sup>th</sup> Cir. 1999) (reasonable suspicion to detain suspect who

matched robber's description as to age, race, height, weight, hair, color, facial hair, and limp). For example, in *State v. Brooks*, the Court found the following description of a fleeing felon to be too vague to justify a stop based on appearance, the described suspect was a fuzzy-haired black male, about 20 years old, and dressed in a ¾ length, black leather jacket and dark clothing. The police stopped the defendant, who had on a dark ¾ length, black leather jacket and dark grayish-colored Levis. He was a young, bushy-haired black male. *State v. Brooks*, 3 Wn. App. 769, 770-71, 479 P.2d 544 (1970). The stop was upheld only because the defendant's location when stopped was 1 and ¾ blocks from the crime scene, within a minutes of the dispatch, and he was first observed by police on 20<sup>th</sup> Avenue after just being reported as being headed in the direction of that street. *State v. Brooks*, 3 Wn. App. at 770-71, 775 (also stating the defendant was spotted within moments of the dispatch call).

And in *United States v. Jones*, 619 F.2d 494, 497-98 (5<sup>th</sup> Cir. 1980), the police conducted in illegal stop where the suspect matched the following description: "black male, 5 feet 6 inches to 5 feet 9 inches tall and weighing between 150 and 180 pounds, with a medium afro hair style, who was wearing jeans and a long denim jacket." This description and appearance was deemed too vague and could fit too many people to justify an investigative detention. As the Court stated, Officer Herrington acted

on the basis of an incomplete and stale description of a suspect that could, plainly, have fit many people. *Jones*, 629 F.2d at 498. Similarly, in *United States v. Rias*, 524 F.2d 118, 121 (5<sup>th</sup> Cir. 1975), the description of two black men driving a black or blue Chevrolet was too common a description to allow a *Terry* stop.

In this case the allegation was not adequate to establish reasonable suspicion for a *Terry* stop. *Compare State v. Harvey*, 41 Wn. App. 870, 707 P.2d 146 (1985) (stop of defendant justified where defendant matched burglary suspect's description received by officer, defendant was walking one and one-half blocks from scene of burglary a few minutes after the radio report, and defendant was pointed out as the suspect by a taxicab driver). The vague and differing descriptions of the prior suspects were not adequately similar to Balaski's appearance to merit his investigative detention by Deputy Young.

**g. All evidence obtained as a result of the stop must be suppressed.**

Evidence which is the product of an unlawful search or seizure is not admissible. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 16684, 6 L. Ed. 2d 1081 (1961). Evidence will be excluded as 'fruit' [of the illegal seizure] unless the illegality is [not] the cause of the discovery of the evidence and suppression is required where 'the challenged evidence is in some sense

the product of illegal governmental activity.” *Segura v. United States*, 468 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599, 615 (1984) (quoting *United States v. Crews*, 445 U.S. 463, 471, 100 S. Ct. 1244, 1249, 63 L. Ed. 2d 537 (1989)).

Here, the evidence would not have been obtained by law enforcement but for Deputy Young’s illegal detention of Balaski. The evidence was discovered as a product of illegal governmental activity, and the evidence must be suppressed.

**h. Reversal is required.**

The constitutional reversible error standard applies to erroneous admission of evidence seized as a result of a putative but illegal *Terry* stop by police. *See, e.g., State v. Knighten*, 109 Wn.2d at 897. The State bears the burden of showing a constitutional error was harmless beyond a reasonable doubt. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S.1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).

**3. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE STATE’S MOTION TO DISMISS JUROR ROMANO FOR CAUSE AND BY DENYING CO-DEFENDANT O’DELL’S AND JOHNSON’S MOTION FOR A NEW TRIAL WITHOUT HOLDING A FACT-FINDING HEARING TO DETERMINE WHETHER EXTRANEOUS INFORMATION WAS INTRODUCED INTO**

**JURY DELIBERATIONS, AND, IF SO, WHAT  
EFFECT THE DELIBERATIONS HAD ON  
THE JURY**

a. **A Jury’s Consideration of Prejudicial  
Evidence Not Admitted at Trial Violates a  
Criminal Defendant’s Constitutional  
Right to Trial by a Fair and Impartial  
Jury.**

A criminal defendant’s right to trial by an impartial jury is guaranteed by federal<sup>8</sup> and state<sup>9</sup> constitutional provisions as well as Washington statutory law<sup>10</sup> and court rule.<sup>11</sup> A criminal defendant’s federal and state constitutional right to due process also ensures the right to a fair trial.<sup>12</sup> The constitutional right to trial by impartial jury includes the right to an unbiased and unprejudiced jury. *State v. Stiltner*, 80 Wn.2d 47, 53, 491 P.2d 1043 (1971).

The Washington Constitution guarantees the right to trial by jury. Const. art. 1, § 21. This right contemplates trial by an unbiased and

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<sup>8</sup> Article III, section 2[3] of the United States Constitution provides, “The Trial of all Crimes . . . shall be by jury . . . .” The Sixth Amendment to the United States Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .” See, *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (Sixth Amendment right to jury trial is incorporated into Fourteenth Amendment and, consequently, is applicable in state criminal prosecutions).

<sup>9</sup> Article 1, section 21 of the Washington Constitution provides, “The right of trial by jury shall remain inviolate . . . .” Article 1, section 22 of the Washington Constitution provides, “In criminal prosecutions the accused shall have the right . . .to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed. . . .”

<sup>10</sup> RCW 10.01.060 (right to jury trial, which may be waived).

<sup>11</sup> CrR 6.1(a) (right to trial by jury, unless waived).

<sup>12</sup> U.S. Const. amend. 14; Const. art. 1, §§ 3, 22.

unprejudiced jury, free of disqualifying jury misconduct. *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369, *rev. denied*, 118 Wn.2d 1021 (1991).

Juries have a duty to consider only that evidence produced in open court. *See, Turner v. Louisiana*, 3769 U.S. 466, 472-73, 13 L.Ed.2d 424, 85 S.Ct. 546, 549-50 (1965). Where the jury considers material extrinsic evidence during the deliberation process, the jury commits misconduct and the defendant's constitutional right to trial by a fair and impartial jury is compromised. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). Extrinsic evidence is "information that is outside all the evidence admitted at trial." *Richards v. Overlake Hosp. Med. Ctr.* 59 Wn. App. 266, 270, 796 P.2d 737 (1990). It is highly improper for a juror to introduce into the discussion in the jury room his own unsworn testimony about extrinsic matter that are material to the issues in the case. *Ryan v. Westgard*, 12 Wn. App. 500, 503-04, 530 P.2d 687 (1975). It is misconduct for a juror to inject into deliberations extraneous, case-specific information learned outside of the trial. *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990), *rev. denied*, 116 Wn.2d 1014 (1991); *State v. Briggs*, 55 Wn. App. 44, 54, 776 P.2d 1347 (1989). The danger in such extrinsic evidence is that it is not subject to explanation, objections, rebuttal, or cross examination. *Halverson v. Anderson*, 82 Wn.2d 746,

748-49, 513 P.2d 827 (1973); *State v. Balisok*, 68 Wn. App. 277, 286, 843 P.2d 1086 (1992), *reversed on other grounds*, 123 Wn.2d 114, 866 P.2d 631 (1994). Moreover, where the jury is exposed to information that the trial judge ruled was so potentially harmful it could not be directly offered as part of the State's case, "for it is then not tempered by protective procedures." *Pete*, 152 Wn.2d at 553.

In this case, counsel for O'Dell and Johnson moved for arrest of judgment and new trial. Among the issues raised was the failure of the court to remove juror Romano for cause. RP at 2925-27. Counsel argued that "the circumstances of prior information concerning the facts of the case were known to the juror and that that should have in and of itself been a basis for granting the challenge for cause." RP at 2927.

If jury misconduct has occurred, the court must determine in the second part of its inquiry whether the misconduct resulted in prejudice. The prejudice inquiry is objective rather than subjective. The question is whether the extraneous information could have affected the jury's determination not whether it actually did. *State v. Tigano*, 63 Wn. App. at 341. A new trial should be granted if there are reasonable grounds to believe the defendant has been prejudiced. *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943, (1968). Any doubt that the misconduct affected the verdict must be resolved against the verdict. *Halverson*, 82 Wn.2d at 752.

It is a long-standing rule in Washington that consideration by the jury of matters not properly admitted into evidence necessitates a new trial if there is a *reasonable ground to believe that the defendant may have been prejudiced*. *Pete*, 152 Wn.2d at 555 n.4 (emphasis in original) (citing *State v. Rinkes*, 70 Wn.2d 854, 862, 425 P.2d 658 (1967) (citing *State v. Burke*, Wash. 632, 215 P.31 (1923); *Marshall*, 360 U.S. 310)). The court must be satisfied beyond a reasonable doubt that the misconduct did not affect the verdict. *State v. Briggs*, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989). Once misconduct is shown and there is a reasonable doubt as to its effect, the doubt must be resolved against the verdict. *State v. Cummings*, 31 Wn. App. 427, 430, 642 P.2d 415 (1982).

A trial court's denial of a motion for a new trial must be reversed on appeal if there is a showing of abuse of discretion. *Pete*, 152 Wn.2d at 552. An abuse of discretion occurs when no reasonable judge would have reached the same conclusion. *Id.* However, a much lesser showing of abuse is required to set aside an order denying a request for new trial than where the trial court granted the request. *Cummings*, 31 Wn. App. at 430. If the record on appeal reflects that juror misconduct occurred and there is a reasonable ground to believe the defendant may have been prejudiced, an abuse of discretion is established. *Pete*, 152 Wn.2d at 555 n. 4.

Here, the trial court failed to determine the misconduct issue,

noting that two parties opposed the State's request to strike Romano, that a third took no position in the matter, and that that the court has "absolutely no evidence that [Romano] allowed any extraneous information to go to the jury as part of his process." RP at 2933.

Balaski submits that the trial court should have conducted further inquiry into whether juror misconduct did occur. The trial court has an obligation to resolve any factual issues in determining whether juror misconduct has occurred. *State v. Cummings*, 31 Wn. App. 427, 431-32, 642 P.2d 415 (1982); see also *State v. Young*, 89 Wn.2d 613, 629-30, 574 P.2d 1171 (1978) (in motion for new trial, the court appropriately took it upon itself to examine a juror to result this fact full issue). In *Cummings*, the defendant moved for new trial, claiming a juror had access to prejudicial information about the defendant that was not admitted during trial. Without conducting a hearing, the trial court considered the affidavits and concluded that the jury's consideration of the defendant's prior record could not constitute juror misconduct as a matter of law. The Court of Appeals disagreed and remanded the case for a hearing to determine whether juror misconduct had occurred. *Cummings*, 31 Wn. App. at 431.

Here, the implications of Romano's specialized knowledge of the house become overt when Johnson testified. Johnson told the jury that

Balaski left the house through the back and then reentered the house the same way, eventually leaving with the others through the front door. The testimony raised the implication that Balaski was present when Robert Harrington was shot, or that he murdered him. For his part, Johnson said that he never left the foyer. The knowledge of the interior of the house thus became pivotal to evaluate the truthfulness of Johnson's assertion. Someone with knowledge of the house would know whether the statement could be true or not. A person who had not been inside the house would question whether it was possible to know whether Balaski had left the house from the back from the vantage point of the foyer, which is where Johnson said he was standing. Romano would have been in a position, due to his knowledge of the layout of the house, to know whether it was possible for Johnson to have been in the foyer and had a clear line of sight to see if Balaski left the house through the back as claimed.

In sum, extrinsic information regarding Romano's knowledge of the house was potentially highly damaging to Balaski's defense and compromised his right to a fair trial and a verdict free from juror bias.

Given the implications of Johnson's testimony, the trial court should have conducted a fact-finding hearing. As in *Cummings*, this case, at the very least, should be remanded for an evidentiary hearing to determine what extrinsic information, if any, was conveyed to the jury by

Romano and to determine what prejudicial effect any such information and on deliberations.

4. **BALASKI WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.**

a. **A criminal defendant is guaranteed the effective assistance of counsel.**

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. Similarly, Article I, § 22 of the Washington State Constitution declares that “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, § 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)).

Defense counsel must employ “skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn. App. 207 at 2725, 27 P.3d 237 (2001). Counsel’s performance is evaluated against the entire record. *Lopez*, at 275.

The test for ineffective assistance of counsel consists of two

prongs: (1) whether defense counsel's performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn. App. 429, 957 P.2d 1278 (1998), citing *Strickland, supra*. A strong presumption exists that defense counsel provided adequate assistance. *Holm, supra* at 1281. Furthermore, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Holm, supra*, at 1281. Finally, a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonable based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Saunders*, 91 Wn. App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d

610 (2001).

A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn. App. 401 at 409, 996 P.2d 1111 (2000).

**b. Counsel's performance was deficient.**

**i. Counsel's performance during *voir dire* was deficient.**

Among the most essential responsibilities of defense counsel is to protect his (or her) client's constitutional right to a fair and impartial jury by using *voir dire* to identify and ferret out jurors who are biased against the defense. *Miller v. Francis*, 269 F.3d 609 at 615 (6<sup>th</sup> Circuit, 2001). *Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. *Rosales-Lopez v. United States*, 451 U.S. 182 at 188, 101 S. Ct. 1629, 68 L. Ed.2d 22 (1981). *Voir dire* also "serves the dual purpose of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges." *Mu'Min v. Virginia*, 500 U.S. 415 at 431, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991).

Defense counsel's actions during *voir dire* are presumed to be matters of trial strategy. *See Hughes v. United States*, 258 F.3d 453, 457 (6<sup>th</sup> Cir.2001). A strategic decision cannot be the basis for an ineffective

assistance claim “unless counsel’s decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness.” *Hughes* at 457. Despite this strong presumption, an assertion of “strategy” does not inevitably defeat a claim of ineffective assistance. The strategy “must be reasonable... it must be within the range of logical choices an ordinarily competent attorney ... would assess as reasonable to achieve a specific goal.” *Miller v. Francis*, at 616. A reviewing court must assess whether the strategy itself was constitutionally deficient. *Washington v. Hofbauer*, 228 F.3d 689, at 704 (6<sup>th</sup> Cir.2000).

c. **Counsel’s failure to question and challenge juror Romano after an admission that he had met Newman, had seen stains in the house, and had a detailed knowledge of the house constituted deficient performance.**

Here, defense counsel was made aware that juror Romano had met Jerry Newman in November, 2005. RP (*voir dire*) at 5. At that time Newman was still suffering from the gunshot wound. RP (*voir dire*) at 5. His house was for sale. The carpet in the master bedroom was torn up. Romano saw stains in the house that he later learned was blood. RP (*voir dire*) at 6. Obviously something very traumatic had occurred in Newman’s life. Ramono learned later that there had “been a murder in that same area ....” RP (*voir dire*) at 5.

Romano was at the house because he “was on a FSBO shoot[,]” which he explained meant that it was a “For Sale By Owner” shoot. RP (*voir dire*) at 3. Regarding his work, he said “we go over to the client’s house who does for sale by owner, and we photo shoot the home.” RP (*voir dire*) at 4. Counsel did not ask him the name of his employer, whether he was a private contractor or whether he was hired directly by Newman. The possibility existed that Romano was hired directly by Newman, or that his payment depended upon the sale of the house. Despite this, defense counsel made no further inquiry into the relationship. RP (*voir dire*) at 9. Balaski’s counsel made no effort to determine what if any fiduciary relationship existed between Newman and Romano. The house, he stated, was being sold as a “for sale by owner.” Nevertheless, Newman apparently had contracted a business to sell houses. How was Romano paid for his photography? Was he paid by an independent contractor? Did Newman pay him directly? Did he receive a portion of the sale price for his work or was he paid a flat fee? Even the most basic of questioning would likely have elected further information regarding Romano’s relationship with Newman.

The potential of a business relationship between the victim’s and the prospective juror suggests at least the possibility of bias. The

prospective juror's contact with a victim within months of a horrific experience, seeing the damage to his home, seeing the physical injury, was even more problematic. A reasonably competent attorney would have inquired regarding if any effect seeing Newman's physical and personal circumstances several months after the shooting had on Romano. Furthermore, there is no legitimate strategic justification for the failure to inquire, since basis questions of this type could not possibly alienate prospective jurors. Because of this, counsel's performance was deficient in this regard.

The State moved to dismiss Romano for cause. Balaski's counsel was opposed to the motion. RP (*voir dire*) at 15-16. Defense counsel's failure to question Juror Romano at length and his failure to challenge the juror for cause constituted deficient performance. "The question of whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction. *Hughes*, at 463.

6. **THERE WAS INSUFFICIENT EVIDENCE TO PROVE FIRST DEGREE ASSAULT AS TO COUNT THREE, INVOLVING LAURA HARRINGTON.**

c. **First Degree Assault Required Proof of Specific Intent to Cause Bodily Injury In**

**Harrington, or Specific Intent to Cause  
Her to Have Apprehension of Harm.**

In order to convict Balaski of assault in the first degree as alleged in count 3, the State had to prove, beyond a reasonable doubt, that, with the intent to inflict great bodily harm, he, as principal or accomplice, assaulted her with a firearm. RCW 9A.36.011(1)(a); *see* CP at 20. In addition to being given the instruction on first degree assault, the jury was instructed on the three forms of “assault” recognized in Washington: (1) an intentional touching that is harmful or offensive (actual battery); (2) an act done with intent to inflict bodily injury on another but failing to do so (attempted battery); and (3) an act done with intent to put another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm (frequently referred to as “common law” assault). CP at 244. Instruction No. 31. *See State v. Nicholson*, 119 Wn. App. 855, 860, 84 P.3d 877 (2003).

The State was required to prove “assault” in order to prove first degree assault. *State v. Krup*, 36 Wn. App. 454, 457, 676 P.2d 507, *review denied*, 101 Wn.2d 1008 (1984); *see also* RCW 9A.04.060 (common law provisions supplement criminal statutes).

Because Laura Harrington was not subjected to assault by actual battery, the State was required to prove that Balaski or an accomplice

specifically intended to harm her. Of the three forms of assault, assault by actual battery requires only the general intent to do the physical act constituting the assault, and does not require specific intent. *State v. Hall*, 104 Wn. App. 56, 62, 14 P.3d 884 (2000). In contrast, assault by attempting to inflict bodily injury (attempted battery) requires the specific intent to cause bodily injury, and assault by placing a person in reasonable apprehension of harm (“common law” assault) requires the specific intent to create apprehension of harm. *State v. Daniels*, 87 Wn. App. 149, 155, 940 P.2d 690 (1997) (citing *State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). Thus in *Byrd*, the Court stated,

the State must prove the Defendant acted with an intent to create in his or her victim’s mind a reasonable apprehension of harm.

*State v. Byrd*, 125 Wn.2d at 714 (citing *State v. Austin*, 59 Wn. App. 186, 192-93, 796 P.2d 746 (1990); *Krup*, 36 Wn. App. at 458-59).

The term “specific intent” means the intent to produce a result in addition to the intent to do the physical act which the crime requires, *State v. Esters*, 84 Wn. App. 180, 184, 927 P.2d 1140 (1996), while the term “general intent” means the intent to do the physical act which the crime requires. *State v. Nelson*, 17 Wn. App. 66, 72, 561 P.2d 1093, *review denied*, 89 Wn.2d 1001 (1977).

If Balaski or an accomplice had actually struck Harrington, his intent to fire the gun would be the only intent required to convict. *Daniels*, 87 Wn. App. at 155. But the present case was not contended as involving involve actual battery. Therefore, proof of assault of Laura Harrington required proof of specific intent to assault her.

d. **There Was No Evidence of Specific Intent to Cause Bodily Injury to Laura Harrington, or Specific Intent to Create Apprehension of Harm in her.**

A specific criminal intent “may be inferred from the conduct [of the accused] if is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). However, in Balaski’s case, there is no evidence that he or an accomplice possessed a specific intent to cause bodily injury to Harrington, or to create apprehension of harm. Harrington was not subjected to assault by battery, as she was not shot. *See State v. Garcia*, 20 Wn. App. 401, 403, 579 P.2d 1034 (1978).

6. **CUMULATIVE ERROR DENIED BALASKI A FAIR TRIAL.**

The combined effects of error may require a new trial, even when those errors individually might not require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *United States v. Preciado-*

*Cordobas*, 981 F.2d 1206, 1215 n.8 (11<sup>th</sup> Cir. 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the Appellant a fair trial. *Mak v. Blodgett*, 970 F.2d 614 (9<sup>th</sup> Cir. 1992); *United States v. Pearson*, 746 F.2d 789, 796 (11<sup>th</sup> Cir. 1984). In this case, the cumulative effect of the trial court's errors, the errors of law enforcement, in conjunction with the instance of ineffective assistance cited *supra* produced an unmistakable series of errors that prejudiced the Appellant and materially affected the outcome of the trial.

**E. CONCLUSION**

For the foregoing reasons, Jason Balaski respectfully requests that this Court reverse his convictions.

DATED: August 17, 2007.

Respectfully submitted,

THE TILLER LAW FIRM  
  
PETER B. TILLER-WSBA 20835  
Of Attorneys for Jason Balaski

A

SCANNED

FILED

AUG 22 2006

JoAnne McBride, Clerk, Clark Co.

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

STATE OF WASHINGTON,

Plaintiff,

v.

JASON Z. BALASKI,

DANIEL C. JOHNSON,

MICHAEL D. O'DELL,

Defendants.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW RE:

ORDER DENYING DEFENDANT  
BALASKI, JOHNSON AND O'DELL'S  
MOTIONS TO SEVER

No. 05-1-01729-5

No. 05-1-01730-9

No. 05-1-01731-7

THIS MATTER having come before the Court on June 7, 2006, the State of Washington represented by Deputy Prosecuting Attorney James D. Senescu and the Defendants, all present and represented by Defense Attorneys Brian Walker (Defendant Balaski), Gerry Wear and Mark Axup (Defendant Johnson), and Michael Brace and Beau Harlan (Defendant O'Dell), and the Court having heard the arguments of counsel and considered the briefing of the parties herein, the Court makes the following:

UNDISPUTED FINDINGS OF FACT

1. There are no disputed facts.

FINDINGS OF FACT AND CONCLUSIONS OF  
LAW RE: SEVERANCE - 1

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2. On 8-11-05, Defendants Balaski, Johnson, O'Dell and Rekdahl were all joined and charged in this case in one information listing all four defendants.
3. All charges arise from one burglary/shooting incident that occurred at 11:40pm on 8-6-05 where it is alleged all four defendants were involved in a planned home invasion burglary where one defendant drove and the other three defendants entered the home with radios, masks, guns and wearing camouflage clothing.
4. Defendants Balaski, Johnson and O'Dell are currently joined for trial to commence 8-14-06.
5. Defendant Rekdahl is not joined with the other three Defendants due to him not being back in the jurisdiction of this Court and by election of the State.

#### CONCLUSIONS OF LAW

1. Defendant Balaski withdraws his motion to sever based upon the condition that the State does not introduce a statement of Defendant O'Dell that Defendant Balaski was in the Tahoe giving directions to him (O'Dell) while he (O'Dell) drove, naming Defendant Balaski as a participant. The State has agreed to not introduce such statement.
2. Under CrR 4.3(a) and (b) both multiple offenses and multiple defendants were joined in a single charging document in this case.
3. Under CrR 4.3.1(a) offenses or defendants (in this case both) properly joined under rule 4.3 shall be consolidated for trial unless the court orders severance pursuant to rule 4.4.
4. There has been no order of severance in this case under CrR 4.4.
5. The State is not seeking to introduce any statements of any Defendant in violation of the defendants confrontation clause rights under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L. Ed. 2d 476 (1968).
6. Judicial economy supports a joint trial in this case based upon the facts of the three Defendants being charged under an accomplice theory of a single burglary incident involving all Defendants.

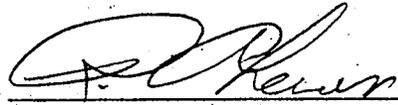
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2 7. The vast majority of the evidence as against all Defendants would be admissible  
3 in both joint and separate trials. No Defendant will be subjected to any  
4 identifiable evidence in a joint trial that they would not be subjected to in a  
5 separate trial.

6 8. ~~There are no~~ <sup>A</sup> antagonistic defenses ~~that would~~ <sup>do not</sup> warrant separate trials, *in these cases.*

7 9. No Defendant has supported their burden that a joint trial would be so manifestly  
8 prejudicial as to outweigh the concern for judicial economy.

9 10. Defendant Balaski's, Johnson's and O'Dell's motions to sever are hereby denied.

10 DONE in Open Court this 22<sup>nd</sup> day of August, 2006.

11   
12 \_\_\_\_\_  
13 THE HONORABLE ROBERT A. LEWIS  
14 Judge of the Superior Court

14 Presented by:

15   
16 \_\_\_\_\_  
17 JAMES D. SENESCU, WSBA #27137  
18 Deputy Prosecuting Attorney

19 Copy received/Objections noted/Consent to entry:

20 \_\_\_\_\_  
21 BRIAN WALKER, WSBA #27391  
22 Attorney for Defendant Balaski

23 \_\_\_\_\_  
24 GERALD L. WEAR, WSBA #  
25 MARK AXUP  
26 Attorneys for Defendant Johnson

27 \_\_\_\_\_  
28 BEAU D. HARLAN, WSBA #23924  
29 MICHAEL W. BRACE, WSBA #21253  
Attorneys for Defendant O'Dell

**B**

SCANNED

FILED

AUG 22 2006

JoAnne McBride, Clerk, Clark Co.

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

STATE OF WASHINGTON,

Plaintiff,

v.

JASON Z. BALASKI,

DANIEL C. JOHNSON,

MICHAEL D. O'DELL,

Defendants.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW RE:

ORDER DENYING DEFENDANT  
BALASKI, JOHNSON AND O'DELL'S  
MOTIONS TO SUPPRESS EVIDENCE  
UNDER "TERRY"

No. 05-1-01729-5

No. 05-1-01730-9

No. 05-1-01731-7

THIS MATTER having come before the Court on June 7, 2006, the State of Washington represented by Deputy Prosecuting Attorney James D. Senescu and the Defendants, all present and represented by Defense Attorneys Brian Walker (Defendant Balaski), Gerry Wear and Mark Axup (Defendant Johnson), and Michael Brace and Beau Harlan (Defendant O'Dell), and the Court having heard the testimony of Michael Koenekamp, Vancouver Police Department Officer Joe Graaff, and Clark County Sheriff's Office Deputy Todd Young, as well as arguments of counsel, the Court makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF  
LAW RE: "TERRY" DETENTION - 1

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**UNDISPUTED FINDINGS OF FACT**

1. There are no disputed facts.
2. On 8-6-05 at approximately 11:40pm, three calls were made to 911 dispatchers reporting certain observations regarding shots fired at a location near 15708 SE Evergreen Highway in Vancouver, WA.
3. The information from the calls was dispatched via oral radio traffic and via CAD (computer aided dispatch) computer text to law enforcement.
4. One call came from Metrowatch worker, Michael Koenekamp, who testified consistent with the information contained in the dispatched information.
5. Koenekamp is not a law enforcement officer.
6. Koenekamp testified that he witnessed within 100 yards, or fairly close, of where shots were heard and ultimately found to have been fired, he observed a White Chevy Tahoe bearing an Oregon license plate number parked on the nearby roadway, in an area where vehicles are usually not parked, with its lights off.
7. Koenekamp further testified that within less than two minutes of the shots being fired, a vehicle that he was reasonably certain was the same vehicle he saw parked by where the shots were fired, was seen driving by Koenekamp North towards 164<sup>th</sup>. Koenekamp either chased or followed the Tahoe and obtained an exact license plate of the vehicle of Oregon license plate #097-BLX. He reported this information to his dispatch, who reported the information to 911 dispatch, who in turn reported it via radio traffic and CAD to law enforcement.
8. Minutes later, dispatch also received a call from another person in the same area testifying that he saw a White Tahoe shortly after the shots were fired, speeding in area and heading in same direction as Koenekamp reported.
9. Minutes later a third person, one of the persons allegedly attacked in the incident, called from another residence and gave additional information to dispatch.
10. Both alleged victims were interviewed and both reported that they were attacked at gunpoint by three males wearing camouflaged clothing. One thought they were black and the other said that their identity was obscured with masks and

1 the camouflage clothing. One said that they were armed with possibly pistols  
2 and one said that they were armed with possibly long rifles.

3 11. Law enforcement arrived on scene and observed one deceased individual, an  
4 apparent gunshot victim, and another significantly injured person.

5 12. Within an hour of this time, Deputy Todd Young saw a vehicle matching the  
6 exact same license plate. Deputy Young followed the vehicle until it parked on  
7 its own and stopped and four doors opened and the occupants began getting out  
8 of the vehicle.

9 13. Deputy Young conducted, at this point, a high risk detention of the individuals,  
10 later identified as the Defendants, by illuminating his police patrol car lights and  
11 by ordering them verbally to get on the ground at gun point.

### 12 CONCLUSIONS OF LAW

- 13
- 14 1. Under the 4<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Article  
15 1, Section 7 of the Washington State Constitution, Deputy Young's detention of  
16 Defendants Balaski, Johnson and O'Dell was a warrantless detention and is per  
17 se unreasonable unless an exception applies.
  - 18 2. One exception to the rule against warrantless detentions is that outlined under  
19 *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968), which allows a  
20 police officer to conduct an investigative stop, or *Terry* stop, based upon less  
21 than probable cause to arrest.
  - 22 3. The initial "stop" or "detention" of the Defendants at issue occurred at the  
23 moment the Tahoe stopped, the four doors opened, the Defendants exited the  
24 vehicle and Deputy Young illuminated the scene with his lights, pointed his  
25 weapon and conducted a high risk detention of the Defendants.
  - 26 4. This moment in time is the point at which the Court must determine whether or  
27 not the police had a well founded suspicion, pointing to specific and articulable  
28 facts which, taken together with rational inferences from those facts, reasonably  
29 warrant the intrusion.
  5. In this case, a vehicle speeding away within two minutes from the area of where  
shots were fired, and the vehicle having been identified by an exact license plate

1 state and number, and that vehicle being found within an hour of the shots fired,  
2 and when that vehicle stops, four doors open, dictating that there were several  
3 people within that vehicle, represents a reasonable suspicion to detain the  
4 individuals and investigate further, which is the very purpose of a *Terry* stop.

5 6. Based upon the information known to the police about the nature of the weapons  
6 involved and the weapons used, the detention was further justified as a high risk  
7 stop as done by Deputy Young.

8 7. Defendant Balaski, Johnson and O'Dell's motion to suppress evidence regarding  
9 Deputy Young's *Terry* detention is hereby denied.

10 DONE in Open Court this 22<sup>nd</sup> day of August, 2006.

11  
12   
13 THE HONORABLE ROBERT A. LEWIS  
14 Judge of the Superior Court

15 Presented by:

16   
17 JAMES D. SENESCU, WSBA #27137  
18 Deputy Prosecuting Attorney

19 Copy received/Objections noted/Consent to entry:

20  
21 BRIAN WALKER, WSBA #27391  
22 Attorney for Defendant Balaski

23  
24 GERALD L. WEAR, WSBA #  
25 MARK AXUP  
26 Attorneys for Defendant Johnson

27  
28 BEAU D. HARLAN, WSBA #23924  
29 MICHAEL W. BRACE, WSBA #21253  
Attorneys for Defendant O'Dell

C

SCANNED

FILED

AUG 22 2006

JoAnne McBride, Clerk, Clark Co.

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

STATE OF WASHINGTON,

Plaintiff,

v.

JASON Z. BALASKI,

DANIEL C. JOHNSON,

MICHAEL D. O'DELL,

Defendants.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW RE:

ORDER ON CrR 3.5 HEARING  
(HELD 6-7-06)

No. 05-1-01729-5

No. 05-1-01730-0

No. 05-1-01731-7

THIS MATTER having come before the Court on 6-7-06, the State of Washington represented by Deputy Prosecuting Attorney James D. Senescu and the Defendants, all present and represented by Defense Attorneys Brian Walker (Defendant Balaski), Gerry Wear and Mark Axup (Defendant Johnson), and Michael Brace and Beau Harlan (Defendant O'Dell), and the Court having heard the testimony of Vancouver Police Department Detectives Darren McShea and Jon Thompson and Clark County Sheriff's Office Detective Eric O'Dell, as well as arguments of counsel, the Court makes the following:

**UNDISPUTED FINDINGS OF FACT**

1. There are no disputed facts.
2. On 8-6-05 at approximately 11:40pm, police responded to a report of a shooting at 15708 SE Evergreen Highway in Vancouver, Washington. It was alleged that

158

1 three males wearing masks, camouflage clothing and armed with firearms had  
2 entered the alleged victims' home and shot and wounded the homeowner and  
3 shot and killed a guest.

- 4 3. A vehicle was seen (and identified by full license plate number) leaving the  
5 immediate area of 15708 SE Evergreen Highway. *Red*
- 6 4. Approximately 50 minutes later, Clark County Sheriff's Officer Deputy Todd *Red*  
7 Young detained Defendant Balaski and Defendant O'Dell during the course of  
8 further investigation.
- 9 5. At least as of 2:40am, on 8-7-05, both Defendant's Balaski and O'Dell were in  
10 the custody of the police and not free to leave.
- 11 6. At approximately 2:45am on 8-7-05, before any questioning by police, or  
12 statements made by Defendant Balaski, Detective McShea advised Defendant  
13 Balaski of his Miranda warnings.
- 14 7. At approximately 3:00am on 8-7-05, before any questioning by police, or  
15 statements made by Defendant O'Dell, Detective McShea advised Defendant  
16 O'Dell of his Miranda warnings.
- 17 8. Detective McShea accurately and adequately recited the Miranda warnings to  
18 both Defendants.
- 19 9. After Defendant Balaski was advised of his Miranda warnings by Detective  
20 Darren McShea, Defendant Balaski was turned over to Detective Thompson for  
21 questioning.
- 22 10. Detective Thompson also fully and accurately advised Defendant Balaski of his  
23 Miranda warnings, going further to seek a verbal express waiver of Defendant  
24 Balaski's rights to remain silent.
- 25 11. After being advised of his Miranda warnings for the second time, Defendant  
26 Balaski indicated expressly and orally to Detective Thompson that he understood  
27 his rights and was willing to speak with the Detective.
- 28 12. After being advised of his Miranda warnings twice, Defendant Balaski made  
29 statements to Detective Thompson.
13. After being advised of his Miranda warnings, Defendant O'Dell was put into  
contact with Detective O'Dell for questioning.

- 1 14. Before speaking with Defendant O'Dell, Detective O'Dell confirmed with
- 2 Defendant O'Dell that he had been advised of his Miranda warnings.
- 3 15. Defendant O'Dell then made statements to Detective Eric O'Dell.
- 4 16. Defendant Balaski appeared to understand Detective Thompson's questions and
- 5 was able to communicate with him without misunderstanding.
- 6 17. Defendant O'Dell appeared to understand Detective Eric O'Dell's questions and
- 7 was able to communicate with him without misunderstanding.
- 8 18. There was no trickery or coercion on the part of the police during their contact
- 9 with Defendants O'Dell and Balaski, to get the Defendants to make statements.

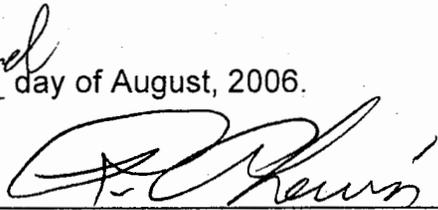
### CONCLUSIONS OF LAW

- 10 1. Defendant's Balaski and O'Dell were both in custody and were not free to leave,
- 11 at the time they made statements to police.
- 12 2. Defendant Balaski made a voluntary, knowing and intelligent decision to make
- 13 statements to Detective Thompson, after which time that he had been
- 14 adequately and accurately advised of his Miranda warnings twice.
- 15 3. Defendant O'Dell made a voluntary, knowing and intelligent decision to make
- 16 statements to Detective O'Dell, after which time that he had been adequately
- 17 and accurately advised of his Miranda warnings.
- 18 4. Defendant Balaski's statements to Detective Thompson are admissible at trial.
- 19 5. Defendant O'Dell's statements to Detective O'Dell are admissible at trial.
- 20 6. The statements made by both Defendant Balaski and Defendant O'Dell
- 21 ultimately invoking or asserting their rights to an attorney or to remain silent, are
- 22 inadmissible.
- 23 7. Subject to further orders of the Court, the State has agreed to limit admission to
- 24 the following statements by Defendant Balaski:
- 25
- 26 a. A statement to Detective Thompson that (1) he was earlier at the Dancin'
- 27 Bare club; and, (2) a statement to Detective Thompson when asked if he had
- 28 handled or fired a firearm recently, he responded "if I was to tell you
- 29 something, it would be very incriminating."

1  
2 8. Subject to further orders of the Court, the State has agreed to limit admission to  
3 the following statements by Defendant O'Dell:

4 a. A statement of Defendant O'Dell that: (1) he was driving the White Chevy  
5 Tahoe when contacted by police initially; and, (2) he was earlier at the  
6 Dancin' Bare club.

7  
8 DONE in Open Court this 22<sup>nd</sup> day of August, 2006.

9  
10   
11 THE HONORABLE ROBERT A. LEWIS  
12 Judge of the Superior Court

13 Presented by:

14   
15 JAMES D. SENESCU, WSBA #27137  
16 Deputy Prosecuting Attorney

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20 BRIAN WALKER, WSBA #27391  
21 Attorney for Defendant Balaski

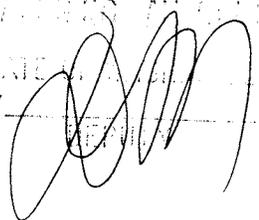
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23 BEAU D. HARLAN, WSBA#23924  
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26 Copy received:

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FINDINGS OF FACT AND CONCLUSIONS OF  
LAW ON 3.5 HEARING (HELD 6-7-06) - 4

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07/18/07 PM 1:13  
STATE OF WASHINGTON  
BY: 

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
JASON Z. BALASKI,  
  
Appellant.

COURT OF APPEALS NO.  
35492-6-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Appellant's Opening Brief and Motion for Leave to File Overlength Brief were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Jason Z. Balaski, Appellant, Lisa E. Tabbut, Attorney at Law, Mark W. Muenster, Attorney at Law, and Michael C. Kinnie, Clark County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on Friday, August 17, 2007, at the Centralia, Washington post office addressed as follows:

CERTIFICATE OF  
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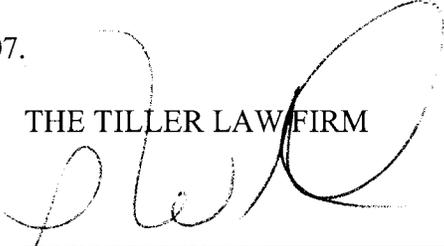
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W.C.C.  
P.O. Box 900  
Shelton, WA 98584

Dated: August 17, 2007.

THE TILLER LAW FIRM



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PETER B. TILLER – WSBA #20835  
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MAILING

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