

NO. 35492-6-II

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

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STATE OF WASHINGTON, Respondent

v.

JASON ZACHARY BALASKI, DANIEL CARL JOHNSON and  
MICHAEL DARRIN O'DELL, Appellants

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE ROBERT A. LEWIS  
CLARK COUNTY SUPERIOR COURT CAUSE NO.  
05-1-01729-5, 05-1-01730-9 and 05-1-01731-7

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BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The State accepts, for the most part, the statement of facts set forth by the defendants in their briefs. Because of the nature of some of the issues raised by the defendants, additional information and references to the record will be made in the arguments portion of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR – ISSUE OF SEVERANCE

All three of the defendants have raised the question of severing of the trial into separate trials. Severance was raised multiple times during the pretrial and trial portions of the case. (Examples at RP 400, 767, 880, 2532, 2577, 3077). Different arguments were raised during these but the primary argument appears to be that there are antagonistic defenses being raised by the parties which would warrant separate trials. The primary motion in this matter was raised and argued on June 7, 2006. As a result of that, the trial court entered Findings of Fact and Conclusions of Law Re: Order Denying Defendant Balaski, Johnson and O'dell's Motions to Sever. (CP 152). A copy of the Findings of Fact and Conclusions of Law are attached hereto and by this reference incorporated herein.

Concerning these three defendants, the arguments appear to be quite different. In the case of defendant Balaski, it is noted in the Findings and Conclusions of Law that he withdrew the motion to sever. (RP 401).

He did this based upon the “condition that the State does not introduce a statement of defendant O’Dell that defendant Balaksi 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.” (Findings of Fact and Conclusions of Law Re: Order Denying Defendant Balaski, Johnson and O’Dell’s Motions to Sever, page 2 (CP 152)). It appears that even though Balaski is again raising this on appeal, he had withdrawn any claim of severance. (RP 401).

Defendant Johnson is in a different position also. Defendant Johnson testified in his own behalf at the time of trial and basically implicated himself in the criminal activities. This testimony that he gave, under oath, and subject to cross-examination by the other parties, was not induced by anything done by the State of Washington. This was his defense tactic. He acknowledged that Balaski and O’Dell were with him and that O’Dell was the driver of the vehicle.

Defendant O’Dell did not testify at trial but raised as his defense that he was the driver of the vehicle. He claimed he had no knowledge of the type of activities that were being planned by the others in the vehicle.

The fourth individual, Mr. Rekdahl, is still pending trial. He was in the State of Oregon fighting extradition and was not subject to this particular trial proceeding.

The appellate courts rarely overturn a trial court's denial of a motion to sever on the basis of mutually exclusive defenses, even when one defendant tries to blame the other. State v. Grisby, 97 Wn.2d 493, 508, 647 P.2d 6 (1982). In Grisby, for example, the State Supreme Court held that where two men killed a man during a drug dispute and both claimed that the other was the actual killer, the defense was not inherently antagonistic. Grisby, 97 Wn.2d at 508. Another example is found in State v. Larry, 108 Wn. App. 894, 34 P.3d 241 (2001). In Larry, Division I determined that two defendants did not have irreconcilable defenses where one defendant blamed the other, and the other defendant blamed a third party. State v. Larry, 108 Wn.App. at 911-912.

In yet another example, State v. Medina, 112 Wn. App. 40, 48 P.3d 1005 (2002), Division I found that where two defendants were both part of a group of people assaulting the victim and both denied actually hitting him, the defenses were not irreconcilable. State v. Medina, 112 Wn. App. at 53-54.

These cases are in line with the rule in Washington that mutually antagonistic defenses alone are insufficient to warrant separate trials. State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). Rather, the moving party must demonstrate "that the conflict is so prejudicial that

defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.” State v. Hoffman, 116 Wn.2d at 74. The burden is on the moving party to come forward with sufficient facts to warrant the exercise of discretion by the trial court in his favor. To warrant severance, the defenses must be “mutually exclusive to the extent that one must be believed if the other is disbelieved.” State v. McKinzy, 72 Wn. App. 85, 90, 863 P.2d 594 (1993).

Separate trials have never been favored in the State of Washington. State v. Herd, 14 Wn. App. 959, 963, 546 P.2d 1222 (1976); State v. Grisby, 97 Wn.2d at 506-507. The granting or denial of a motion for separate trials of jointly charged defendants is entrusted to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. State v. Barry, 25 Wn. App. 751, 756, 611 P.2d 1262 (1980); State v. Grisby, 97 Wn.2d at 507. One of the reasons that separate trials are not favored in the State of Washington is because of concerns for judicial economy, that is, concerns about the conservation of judicial resources and public funds. State v. Bythrow, 114 Wn.2d 713, 723, 790 P.2d 154 (1990). A defendant seeking to sever a trial from a codefendant has the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy. The mere existence of antagonism between defenses or the desire of one

defendant to exculpate himself by inculcating a codefendant is insufficient to compel separate trials. To be entitled to severance because of antagonistic defenses, a defendant must show that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that his conflict alone demonstrates that both defendants are guilty. State v. Hoffman, 116 Wn.2d at 74; United States v. Throckmorton, 87 F.3d 1069, 1072 (9<sup>th</sup> Cir. 1996).

In our case, O'Dell and Balaksi did not testify. They did a lot of finger pointing which primarily occurred during opening statements and closing arguments. However, those statements and arguments are not evidence and the jury was instructed accordingly. (Jury Instructions, CP 211 and 254). The State submits that there has been no showing that there are antagonistic defenses that have been presented to this jury. O'Dell argued and virtually admitted through his attorney that he was the driver of the vehicle that evening. Balaski withdrew the motion to sever. Johnson, clearly, puts himself in harms way by his admissions against interest as they relate to burglary in the first degree and felony murder. There is nothing irreconcilable or mutually exclusive about the nature of these defenses. This was not a massive and complex case. The actual factual pattern was very simple and tragic. The fact that one defendant attempts to exculpate himself by inculcating codefendants is not sufficient

to compel separate trials. In Re Personal Restraint of Davis, 152 Wn.2d 647, 712, 101 P.3d 1 (2004). The defendant has the burden of showing this specific prejudice which outweighs judicial economy. It has not been done in this case.

### III. RESPONSE TO ASSIGNMENT OF ERROR – WARRANTLESS SEARCH AND TERRY STOP

The next area of concern that all of the defendants raise concerns the warrantless stop of defendant O’Dell’s vehicle on August 6 – August 7, 2005. This matter also was raised in the motions heard on June 7, 2006, and was ultimately reduced to Findings of Fact and Conclusions of Law Re: Order Denying Defendant Balaski, Johnson and O’Dell’s Motions to Suppress Evidence Under “Terry”. (CP 140). A copy of these Findings of Fact and Conclusions of Law are attached hereto and by this reference incorporated herein.

The testimony at the hearing on June 7, 2006, revealed that on August 6, 2005, at approximately 11:40 pm, 911 was called on the report of shots fired just west of the area of 164<sup>th</sup> and Old Evergreen Highway. Several individuals called 911 and made reports. The information that was reported was thus aired via police radio by the 911 dispatchers. Michael Koenekamp, a private security guard, made a report of hearing gunshots and then seeing a suspicious white Chevy Tahoe vehicle (and the

only vehicle) (RP 209) in the immediate area of the gunshots. (RP 207-209). He further indicated that he was pretty confident the vehicle was associated with the gunshots. (RP 210). He was able to follow the vehicle for a short distance and obtained a full license plate and called it in to dispatch which in turn called it in to 911. Joseph Cottrell, a neighbor, also called in and reported seeing a white Chevy Tahoe parked in the same spot described as Koenekamp, traveled west a short distance (to the location of the gunshots) and then left to the east towards 164<sup>th</sup> towards where Koenekamp was able to obtain the license plate of the Tahoe. Neighbor Chuck Graham also called 911 and reported hearing the shots, and answering his door to a frightened Laura Harrington who also spoke with 911. Laura Harrington reported three men wearing masks and with long rifles coming in and shooting her friend and her husband. She also heard a vehicle speed off after the incident. Officers responded and found a severely wounded Gerald Newman and deceased Robert Harrington. Both had been shot. Newman also described the gunmen similar to Laura Harrington but added he thought they were "black" in race (despite neither Laura Harrington nor Gerald Newman ever actually seeing anyone's skin color uncovered). Police put out on the radio all of this information and more, including that the suspects had firearms, were dressed in camouflage and wearing ski masks.

Within 50 minutes, CCSO Deputy Todd Young was coming home from his shift working at the Clark County Fairgrounds. He had been listening to all radio communications regarding this case since the first incident was reported. He was actively looking for the white Chevy Tahoe. He found the Tahoe via the full license plate provided. He did not stop the vehicle, but rather followed it waiting for back up. (RP 285-286). The vehicle stopped and pulled over at a residence and four males, some of them wearing camouflage, exited the vehicle and at that point Deputy Young detained the men at gunpoint. One of the men ran from the scene and was not apprehended until months later. The other three (later identified as defendants Balaski, Johnson and O'Dell) complied with orders to be detained.

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention, short of a traditional arrest. United States v. Brignoni-Ponce, 422 U.S. 873, 878, 45 L. Ed. 2d 607, 95 S. Ct. 2574 (1975); see also Davis v. Mississippi, 394 U.S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969). A person is “seized” within the meaning of the Fourth Amendment only when, by means of physical force

or a show of authority, his freedom of movement is restrained. United States v. Mendenhall, 446 U.S. 544, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980). There is a seizure when, in view of all of the circumstances, a reasonable person would have believed that he was not free to leave. *Id.*

In the present case, the defendants were “seized” for purposes of a Fourth Amendment analysis when Deputy Todd Young activated his emergency lights, illuminated the defendants using a spotlight, and initiated a high risk stop by pulling his gun and ordering the four defendants onto the ground with their hands at their sides. The defendants were not free to leave at this point. Therefore, the next inquiry, under the Fourth Amendment, is whether the seizure was reasonable and constitutional.

Consideration of the constitutionality of such seizures involves a weighing of (1) the gravity of the public concern, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty. Brown v. Texas, 443 U.S. 47, 61 L. Ed. 2d 357, 99 S. Ct 2637 (1979). The ultimate test for reasonableness of an investigative stop involves weighing the invasion of personal liberty against the public interest to be advanced. State v. Samsel, 39 Wn. App. 564, 694 P.2d 670 (1985). Officers may do far more if the suspect

conduct endangers life or personal safety than if it does not. State v. Thierry, 60 Wn. App. 445, 448, 803 P.2d 844 (1991); citing to State v. McCord, 19 Wn. App. 250, 253, 576 P.2d 892, review denied, 90 Wn.2d 1013 (1978).

Police officers may make a brief investigatory stop of a moving vehicle, consistent with the requirements of the Fourth Amendment, if under the totality of circumstances, they are aware of articulable facts leading to the reasonable or founded suspicion that the person has been, is, or is about to be engaged in criminal activity. Terry v. Ohio, 392 U.S. 1, 22, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1969); see also State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002); State v. Mendez, 137 Wn.2d 208, 223, 970 P.2d 722 (1999). A Terry detention is not rendered unreasonable solely because the officer did not rule out all possibilities of innocent behavior before initiating the investigation. State v. Anderson, 51 Wn. App. 775, 780, 755 P.2d 191 (1988). Probable cause is not required for a Terry detention because it is significantly less intrusive than an arrest. Mendez, 137 Wn.2d 208, 223; citing to Brown v. Texas, 443 U.S. 47, 50.

When reviewing the merits of an investigatory detention, a court must evaluate the totality of circumstances presented to the investigating officer. This includes information given to the officer, observations the officer makes, and inferences and deductions drawn from his or her

training and experiences. United States v. Cortez, 449 U.S. 411, 66 L. Ed. 2d 621, 101 S. Ct. 690, 694-696 (1981). In evaluating the lawfulness of the stop, the “totality of circumstances – the whole picture – must be taken into account. Based on that whole picture, detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *Id.* At 417-418.

Further, an investigatory stop is not transformed into an arrest because an officer orders a suspect out of a car. Pennsylvania v. Mimms, 434 U.S. 106, 109-112, 54 L. Ed. 2d 331, 98 S. Ct. 330, 332-333 (1977); United States v. White, 648 F.2d 29, 36-40 (D.C. Cir.), cert. denied, 454 U.S. 924 (1981). As noted in State v. Thornton, 41 Wn. App. 506, 513, 705 P.2d 271 (1985), no hard and fast rule governs the display of weapons in an investigatory 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 approach of police...all of which bear on the issue of reasonableness.” Citing United States v. Harley, 682 F.2d 398, 402 (2d Cir. 1982); accord, United States v. Nargi, 732 F.2d 1102, 1106 (2d Cir. 1984).

In the case at bar, CCSO Deputy Todd Young was listening to his police radio for upwards of 50 minutes. During that time, he was made aware of a very serious shooting that occurred around midnight on a

Saturday night which caused the death of one person and almost the death of another. He knew that long guns or rifles were used. He knew that the suspects were at least three in number (four if he reasonably considered that another person must have been driving if three entered the home). He knew that the suspects had on camouflage clothing and masks covering their identity. He knew that they were males, and possibly black in color. He knew they were armed. He knew that a lone suspicious vehicle was seen at or near the location of the gunshots and that it was a white Chevy Tahoe and he knew the exact full license plate number of the suspect vehicle. He knew that at least three witnesses (Koenekamp – a Metro Watch security guard, Cottrell – a neighbor, and Laura Harrington – a surviving victim) had either heard or seen the Tahoe first parked suspiciously, and then moving rapidly west toward the scene and then east away from the scene right after the shooting.

Upon finding the suspected vehicle and matching the plate, Deputy Young followed the vehicle. He then witnessed, as the vehicle stopped on its own accord, four males, some wearing camouflage, exit the vehicle. Immediately, one of the males fled the scene. Simultaneously to this, he initiated his Terry detention based upon what he knew.

Considering the totality of the circumstances, Deputy Young possessed the requisite amount of information to initiate the Terry stop and investigate further on behalf of the public.

IV. RESPONSE TO ASSIGNMENT OF ERROR – INSUFFICIENCY OF EVIDENCE OF ASSAULT IN THE FIRST DEGREE AS IT RELATES TO MRS. HARRINGTON

The final area raised by all three defendants deals with insufficiency of evidence of Assault in the First Degree as it relates to Laura Harrington.

The Court's Instructions to the Jury dealing with Ms. Harrington were found at Instruction No. 22, 23, and 24 (each are identical except for the name of the defendant) (CP 254).

The elements contained indicate the following elements needed to be proven beyond a reasonable doubt:

- (1) That on or about August 6, 2005, the defendant, or an accomplice, assaulted Laura Harrington;
- (2) That the assault was committed with a firearm or by a force or means likely to produce great bodily harm or death;
- (3) That the defendant, or an accomplice, acted with intent to inflict great bodily harm or death; and
- (4) That this act occurred in the State of Washington.

(CP 254, Instructions 22, 23, and 24)

The definition of an assault included the full three paragraphs of the standard instruction and read as follows:

Instruction No. 31

An assault is an intentional touching or striking or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or shooting is offensive if the touching or striking or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

(CP 254, Instruction No. 31).

The jury was also instructed on accomplice liability. That instruction read as follows:

Instruction No. 12

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

(CP 254, Instruction No. 12).

Laura Harrington testified for the State in its case in chief. She indicated that she did not know any of the defendants and to her knowledge she had never met any of them. (RP 702-703). She indicated that she and her husband had known Mr. Newman, the owner of the residence that was burglarized, for quite some time. They had all grown up in the same community. (RP 703). In fact, she indicated that they lived in close proximity to him at this time. (RP 704).

She knew that Mr. Newman had gone to prison for distributing drugs at some time earlier in his life but he had told them that he was clean now and not dealing with any types of drugs. (RP 705).

On August 6, 2005, they met at about 8:00 or 8:30 at his residence for a barbeque. (RP 707). She indicated that she had had a couple glasses of wine but was not feeling the effects. (RP 710).

She indicated that they were still there later that evening after the other guests had left, when the door to the house burst open and three men dressed in camouflage clothing, masks and carrying automatic weapons entered. She indicated that all three of them were armed with some type of firearm. (RP 712-714).

She told the jury that her husband grabbed her by the arm and started pushing her out through the door that was right behind them. While they were doing so, she heard a gunshot. (RP 714-715).

She remembers tripping on the deck and her husband helping her to get up. She indicated she then fell and he helped her up again and that they then both fell on the steps. She recalled that her husband was still holding her arms. They looked up and they saw a man standing over them. (RP 716). She indicated that he was pointing a gun at them; that they were begging for their lives. Her husband was telling him that they could not identify any of them and that she was indicating that she had children and grandchildren. She then indicated that they started to run across the yard and as they got about halfway across the yard, she heard a gunshot and she heard her husband cry out "God, oh my God". (RP 717).

She indicated that she still kept running towards the hedge at which time she heard approximately four or five more shots as she was attempting to crawl through the hedge to get to safety. (RP 717).

She testified for the jury that she crawled across the street and into a flowerbed. She indicated that she could hear the gunman in the shrubbery looking for her. She heard someone yell to him “come on man, we got to get the fuck out of here” and she heard footsteps, car doors, and then the car leaving. (RP 718).

On cross-examination, she told the jury that the gunman, when they had tripped on the porch, was standing approximately two to three feet away from them. (RP 756). She and her husband were very close together and the gun was pointed at them. (RP 757). She thought at that time that he was going to let them go and so they started running across the yard. She indicated they got about halfway across the yard when her husband was shot. (RP 758). She further indicated that the entire time from the multiple shots to the time when she had hid in the shrubbery and someone yelled at the gunman to leave was no more than ten to twelve seconds. (RP 754). She indicated “it was that fast”. (RP 754, L.22).

She testified that she feared for her safety and that she was afraid that she was going to be shot. (RP 721, L.10-12).

On cross-examination, she further clarified and set out what it was that she recalls about this very emotional and tragic incident.

QUESTION (Deputy Prosecutor): Okay. Okay. Mr. Harlan also asked you, Ms. Harrington, about the timing of the shots, and we've painstakingly gone over that with you again and again.

For clarification, the first shot outside, Ms. Harrington, when you heard that first shot, which way were you facing and which way was your husband facing in relation to the gunman?

ANSWER (Laura Harrington): My husband was directly behind me (inaudible) to the southwest - - or, southeast, I'm sorry.

QUESTION: Were you running towards or away from the gunman? I mean, which - - in relation to him?

ANSWER: Away (inaudible).

QUESTION: Okay. And your husband - - I guess the follow-up question is where was your husband in relation to you when you heard that first shot?

ANSWER: Right behind me.

QUESTION: Okay.

ANSWER: Holding my arms.

QUESTION: How did you decide which way you were gonna go after that shot?

ANSWER: I honestly don't know. My husband just had ahold of my arms and was basically guiding me and - - out in front of him. Quickest - - the quickest way to get out of the yard is what we were doing.

QUESTION: Okay. And then from that moment to the moment that you wonder what it was gonna feel like to die, how - - when were the next volley of shots in relation to that?

ANSWER: After my husband was shot the first time, I was almost to the shrubbery area. I couldn't get through the shrubs.

QUESTION: Okay.

ANSWER: Four or five more shots started ringing out. I instantly dropped to the ground and went under the shrubs, got a way to get under the shrubs.

(Inaudible) was crawling across the road to the other shrubbery area, and, I mean, it was all within seconds.

(RP 778, L. 21 – 780, L.8)

Dr. Dennis Wickham, M.D., the Medical Examiner for Clark County, testified concerning the autopsy he did on Mr. Harrington. He described six gunshot wound pathways in his body. (RP 1561). He told the jury that there was one entrance wound in the front of Mr. Harrington, that there were three in his back, and then there were two in his left side. (RP 1570).

A jury may infer specific intent to create fear if a defendant points a gun at a victim, unless the victim knows the weapon is unloaded. State v. Miller, 71 Wn.2d 143, 146, 426 P.2d 986 (1967); State v. Karp, 69 Wn. App. 369, 374-375, 848 P.2d 1304 (1993); State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996). This line of reasoning has also been

approved again by our State Supreme Court in State v. Smith, 159 Wn.2d 778, 788, 154 P.3d 873 (2007).

The question of accomplice liability has also been raised as part of this sufficiency of evidence on the assault in the first degree against Laura Harrington. State v. Roberts, 142, Wn.2d 471, 512, 14 P.3d 713 (2000), reaffirmed the long standing rule that an accomplice need not have specific knowledge of every element of the crime committed by a principle, provided he has general knowledge of that specific crime. Accomplice liability is predicated on the general knowledge of the crime and not on specific knowledge of the elements of the participants' crime. State v. Sweet, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999); State v. Hoffman, 116 Wn.2d 51, 104, 804 P.2d 577 (1991).

Finally, in a claim of insufficient evidence, a reviewing court examines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in a light most favorable to the State. State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). Determinations of credibility are for the fact finder and are not reviewable on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The appellate court need not be convinced of a defendant's guilt beyond a reasonable doubt, only that substantial

evidence supports the State's case. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). Circumstantial and direct evidence are equally reliable. State v. McNeal, 98 Wn. App. 585, 592, 991 P.2d 649 (1999) affirmed, 145 Wn.2d 352, 37 P.3d 280 (2002). All reasonable inferences must be drawn in favor of the State and interrupted most strongly against the defendants. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The evidence in this case clearly establishes that Mr. and Mrs. Harrington did not know any of the individuals involved in the ransacking of Mr. Newman's home. It is a reasonable inference that the shooting of Mr. Harrington was for the purposes of eliminating a witness. It would make no sense to eliminate one witness and let the other one live. What makes logical sense in this situation is that Mr. Harrington's body shielded Mrs. Harrington while she was able to make her escape, hid in the flowerbed, and was able to ultimately survive because the defendants panicked and needed to leave the area as quickly as possible. If the scenario is correct, that they were attempting to eliminate witnesses, then the assault in the first degree against Mrs. Harrington is obviously supported by substantial evidence in this record.

V. RESPONSE TO ASSIGNMENTS OF ERROR AS THEY  
RELATE SPECIFICALLY TO DEFENDANT MICHAEL  
O'DELL

A. RESPONSE TO ASSIGNMENT OF ERROR C –  
DEALING WITH THE SEARCH WARRANTS  
EXECUTED AT HIS HOME AND SHOP

Assignment of Error C raised by defendant O'Dell only deals with the search warrants related to his home and shop. The claim is that the search warrant affidavits were not based on probable cause.

The affidavit for the search warrant was attached to the Motion to Suppress the Evidence filed by the defense. (CP 81). A copy of the Affidavit for Search Warrant was also then made an exhibit to the hearing which was conducted on June 7, 2006. After the hearing, the trial court entered its Findings of Fact and Conclusions of Law. A copy of the affidavit for search warrants and search warrant are attached hereto and by this reference incorporated herein. (part of CP 81). Further, a copy of the Findings of Fact and Conclusions of Law Re: Order Denying Defendant O'Dell's Motion to Suppress Evidence (CP 349) is attached hereto and by this reference incorporated herein.

As the Findings of Fact and Conclusions of Law entered indicate, the court was considering only the information within the four corners of the probable cause affidavit in support of the search warrant in making its ruling. (Conclusion of Law No. 3). Further, there were no disputed facts

submitted. (Finding of Fact No. 1). The affidavit and the reduction to the findings and conclusions clearly demonstrate that the trial court had found that there was a significant nexus between certain items sought in the warrant and the murder/assault; and that there was probable cause to believe that the defendant was one of the participants in the alleged crime and that some of this information or evidence could be found at his residence or shop. As the trial court sets forth, there was evidence of matching radios being used by the various individuals in this conspiracy, the vehicles of the other participants were found in close proximity to the residence and shop belonging to Mr. O'Dell, there was written documentation found at another location connecting all of the suspects together in this enterprise, and it was reasonable for officers to infer that evidence concerning the firearms used in the crime or the ammunition would be present at the residences since the defendant had no opportunity to remove those items. Finally, the court notes that there is a significant nexus between the defendant Rekdahl, who was still at large, and the residence of defendant O'Dell because there was known to be a phone call presumably from Rekdahl made from the residence. All of this information indicated to the court that the affidavit supported the warrant and established probable cause to search these various locations.

A search warrant may issue for probable cause when a magistrate can reasonably infer from the facts and circumstances that criminal activity is occurring or contraband exists at certain locations. In Re Personal Restraint of Yim, 139 Wn.2d 581, 594, 989 P.2d 512 (1999). Probable cause is governed by the probability of criminal activity. In Re Personal Restraint of Yim, 139 Wn.2d at 594-595; State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). The determination of probable cause is given great deference, and the decision to issue a warrant is reviewed for abuse of discretion. Any doubts relating to the existence of probable cause will be resolved in favor of the warrant. In Re Personal Restraint of Yim, 139 Wn.2d at 595; State v. Dobyms, 55 Wn. App. 609, 620, 779 P.2d 746 (1989).

It is obvious from our situation that the court exercised its discretion in determining the decision made by the independent magistrate in Oregon concerning the issuance of the warrant. The trial court entered detailed findings and conclusions relating to what it felt was the appropriate way to look at the search of the defendant's residence in Portland and his business which was located a short distance from his house. The State submits that there is substantial evidence that exists to support the trial court's findings and those findings in turn support the trial

court's conclusions of law. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). The trial court used a common sense approach in reviewing the affidavit for search warrant. This is in line with the standard rule that affidavits for search warrants are tested in a common sense, non-hyper technical manner. State v. Chamberlin, 161 Wn.2d 30, 41, 162 P.3d 389 (2007).

B. RESPONSE TO ASSIGNMENT OF ERROR E – DENIAL OF MOTION FOR MISTRIAL AFTER OPENING STATEMENT

The next assignment of error by defendant O'Dell only deals with a denial of the motion for mistrial after opening statement where argument was put forth by Balaski's attorney that the defendant O'Dell has construed to be a comment on his right to remain silent. The claimed violation dealt with a statement that Mr. O'Dell "Did not know about a plan. That may be. He's got some explaining to do, though, you'll see." (RP 657).

At the time that the comment was made, an objection was made to an improper argument in opening statement. (RP 657, L.24-25). The trial court admonished the attorney giving the opening statement to keep it as a summary of the evidence that he expected to produce at trial, the attorney said that he would and the argument continued. (RP 658).

At the end of the opening statements by the prosecution and the three defense attorneys, the attorney for Mr. O'Dell made a motion for severance and for mistrial based on the opening statement and that the opening statement was a comment on his client's right to remain silent under the Fifth Amendment and shifted the burden of producing evidence. It is to be recalled that the State had absolutely nothing to do with this particular claim. This is a dispute between a couple of the defense attorneys. (RP 671).

The trial court in denying the motion for mistrial and also denying the severance made note that all of the defendants were pointing at each other as the culprit, so to speak. The trial court summed it up in this way:

THE COURT: All right, well, your motion for mistrial is denied. I don't believe that the jury would construe that as a comment on the right to remain silent. All of them indicated that you're going to be explaining things, it's not necessarily that someone would be testifying or not testifying as a result. So the motion for mistrial is - - on that ground, is denied.

(RP 672, L.8-15).

The purpose of an opening statement is to permit the parties to give an outline of the anticipated evidence and the reasonable inferences to be drawn from the evidence. State v. Campbell, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984). Testimony may be anticipated so long as counsel has a

good faith belief that such testimony will be produced at trial. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). The trial court has broad discretion in determining whether the prosecutor or another party acted in good faith, and the defendant making the motion for mistrial has the burden of establishing bad faith. Campbell, 103 Wn.2d at 16.

It is interesting to note that the attorney for O'Dell was stating in his opening that Mr. O'Dell, even though he was the driver of the vehicle, knew absolutely nothing about what the others had planned or what they were attempting to do. He was merely driving, dropping them off, and waiting to pick them up. It certainly sounded like O'Dell was going to testify at trial. He did not testify at trial, nor was this any part of statements that he had given to the police or others. But, nevertheless, this is the type of approach being taken by defendant O'Dell in opening statement.

OPENING STATEMENT (Michael Brace, Attorney for Defendant O'Dell) . . .

What the evidence will show is that there is an individual named Adrian Rekdahl that's not here today, and he is the one that the evidence will show had some plan, and it involved those two (indicating Defendant Johnson and Defendant Balaski), not Mr. O'Dell. . .

(RP 645, L.22 – 646, L.2)

Mr. Balaski invites O'Dell and Johnson and Rekdahl to go to his place. Well, O'Dell doesn't really know Balaski. He doesn't know where that is, but that's okay.

It's suggest that O'Dell brought a - - he's got an access to a car that can accommodate them all, his licenses aren't suspended, his tabs are current to go to Balaski's. So that's where they go.

On the way, he's told to stop. He follows the directions. He's told to stop, he stops. Three guys get out of the car. He's told to stay. They leave.

He sits, doesn't think much of it at first, and then they told him to stay. So what does he do? He calls his wife. Calls his wife and says, "Something's not right here. We're supposed to be going to Balaksi's, this guy's house. They tell me to stay. Something's not right."

They talked for somewhere between seventy and eighty seconds, which is a fairly short conversation. He's not frantic, but he's concerned.

Within minutes of that, shots (inaudible). The Tahoe doesn't leave the spot where it's stopped except to - - to leave the scene.

(RP 648, L.12 – 649, L.12) . . .

Ladies and gentlemen, it's undisputed, no one will tell you that Mr. O'Dell hurt anyone, he didn't shoot anyone, he didn't beat anyone up, and there's no evidence whatsoever that there was a plan that he was involved in. He didn't know what these guys were gonna do. He didn't know. Thank you.

(RP 651, L. 11-17)

It is in that type of discussion with the jury in opening statement by the attorney for O'Dell that the other comment that was objected to was

made. It is also in light of that type of statement that the judge made the ruling that he did concerning the opening statement. He did not believe that this was comment on the right to remain silent or anything else. Rather, all of them were arguing that they did not know about any plan. And this included Mr. O'Dell.

Counsel on appeal has couched this in terms of trial irregularity. However, reversal is not required unless, within reasonable probabilities, the outcome of the trial has been material affected by the irregularity. State v. Halstien, 65 Wn. App. 845, 850, 829 P.2d 1145 (1992). The State submits that given the tenor of the statements previously made by the attorney for O'Dell, that in a sense he opened the door for the type of comment that was made by another defense attorney. The judge appropriately interpreted this as not being a comment on the right to remain silent, but on the fact that all of them are maintaining explanations are going to be necessary and will be made by the parties involved. The Court's Instructions to the Jury (CP 371) include the admonition as part of Instruction No. 1 that: "The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark,

statement, or argument that is not supported by the evidence or the law in my instructions.” (Court’s Instructions to the Jury, part of No. 1, (CP 371)). Also as part of the Court’s Instructions to the Jury was No. 7 which reads as follows: “A defendant is not compelled to testify, and the fact that a defendant has not testified cannot be used to infer guilt or prejudice him in any way.” (Court’s Instructions to the Jury, Instruction No. 7 (CP 371)). The jury is presumed to follow the court’s instructions. State v. Krause, 82 Wn. App. 688, 697, 919, P.2d 123 (1996).

The State submits that there has been no error demonstrated here that would require a mistrial. The trial court properly analyzed this in reference to the foregoing arguments by the other parties. There was no State involvement in this and it only appears to be finger pointing between the defendants who are all indicating that explanations need to be made. The trial court properly determined that this was not a comment on someone’s right to remain silent but was merely a continuation of arguments that had been previously started by Mr. O’Dell.

C. RESPONSE TO ASSIGNMENT OF ERROR F –  
JUDGMENT AND SENTENCE AND SAME CRIMINAL  
CONDUCT

Defendant O’Dell claims that his conviction for Count 1 (Murder in the First Degree) and Count 4 (Burglary in the First Degree) should merge for purposes of sentencing.

In the Felony Judgment and Sentence (CP 493), counts 1 and 4 were treated as separate conduct thus he was sentenced appropriate to that determination. There was also firearm enhancements placed on the four convictions.

As part of the Court's Instructions to the Jury (CP 371) were the elements instructions dealing with the counts 1 and 4.

Concerning Murder in the First Degree, Instruction No. 16 sets forth the five elements that had to be proven beyond a reasonable doubt.

Those elements are as follows:

- (1) That on or about August 6, 2005, Robert Harrington was killed;
- (2) That the defendant, Michael Darrin Odell, or an accomplice, was committing burglary in the first degree;
- (3) That the defendant, Michael Darrin Odell, or an accomplice, cause the death of Robert Harrington in the course of or in furtherance of such crime or in immediate flight from such crime;
- (4) That Robert Harrington was not a participant in the crime; and
- (5) That the acts occurred in the State of Washington.

Also part of the jury instructions are the elements necessary for Burglary in the First Degree as charged in Count 4. Those elements, set forth in Instruction No. 28, are as follows:

- (1) That on or about August 6, 2005, the defendant, Michael Darrin Odell, or an accomplice, entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building the defendant, Michael Darrin Odell, or an accomplice, in the crime charged was armed with a deadly weapon or assaulted a person; and
- (4) That the acts occurred in the State of Washington.

Further, the jury was provided with special interrogatories dealing with whether or not the individuals were armed with a deadly weapon (firearm) at the time of the commission of these actions and the jury responded that they were.

The State submits that regardless of the elements, the trial court was within its rights to use the burglary anti-merger statute, RCW 9A.52.050, to find that the burglary and underlying offenses can be separately charged and punished. The fact that an assault committed during a burglary elevates the burglary to a first degree does not indicate that there is a merger with that burglary and thus the defendant could be punished for both the assault and the burglary. State v. Davison, 56 Wn. App. 554, 784 P.2d 1268 (1990); State v. Fryer, 36 Wn. App. 312, 673, P.2d 881 (1983).

In this situation, there is another way to also approach this. The Burglary in the First Degree can be proven if Mr. O'Dell or an accomplice while in the commission of committing a burglary is either armed with a deadly weapon or assaults a person. Clearly, in our case, the jury has found by special interrogatory that each of Mr. O'Dell's accomplices was armed with a deadly weapon (firearm) and also it is uncontraverted that Mr. Newman, the homeowner, was assaulted in his home. Defendant Johnson talks about the defendants arming themselves with firearms, that in fact he watches Mr. Newman shot in the hip and that he (Johnson) also pistol whips him there in his residence. Thus, the Burglary in the First Degree can be established and proven beyond a reasonable doubt without including the tragic death of Mr. Harrington.

Multiple crimes encompass "the same criminal conduct" if they result from the same criminal intent, involve the same victim, and occur at the same time and place. RCW 9.94A.589(1)(a). The appellate court gives deference to the court's same criminal conduct determination and will not reverse a sentence unless there is clearly abuse of discretion or misapplication of the law. State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440 (1990). Each of the elements of the test must be satisfied for multiple offenses to encompass the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

The State submits that under either the anti-merger statute or because of the unique facts in our situation, merger would not be appropriate and the trial court properly determined that it was separate conduct and punished accordingly.

VI. RESPONSE TO ASSIGNMENTS OF ERROR AS THEY RELATE SPECIFICALLY TO DEFENDANT JASON BALASKI

A. RESPONSE TO ASSIGNMENT OF ERROR NO. 3 – TRIAL COURT DID NOT REMOVE JUROR

The defendant Balaski only argues that the trial court abused its discretion in denying that State's motion to dismiss juror Romano for cause. Further, he claims the court should have held a fact-finding hearing to determine whether extraneous information was introduced into jury deliberations.

As set forth in defendant Balaski's brief at pages 29 and 30, juror Romano during voir dire had indicated that he had been at the Newman house for purposes of photographing it for preparation for selling of the house. He discussed having seen the interior of the house and possibly may have known that something unusual had occurred there or in the immediate neighborhood. When asked if the fact that he had been in the house would effect his view of the case, the prospective juror Romano stated that it would not. (RP – Voir Dire – page 8).

The State of Washington challenged the juror for cause. Balaski, through his attorney, opposed the State's motion joining with counsel for defendant O'Dell in this opposition. (RP – Voir Dire – page 15-16). The trial court denied the motion to remove Ramono for cause. (RP – Voir Dire – page 17).

Even though defendant Balaksi opposed the removal of the juror, he now wants to claim that this was inappropriate and further that the trial court should have looked at it in further detail after the conviction. The State submits that there is absolutely nothing established in this record to demonstrate that this in any way has prejudiced any of the defendants and certainly not Balaski who opposed the removal of the juror in the first place. In a sense, this is close to the concept of an invited error on the part of defendant Balaski. The purpose of the doctrine of invited error is to prevent a party from making a tactical maneuver in pursuit of some real or hoped for advantage, and then later arguing that his own action, or inaction, is a ground for reversal. State v. Lewis, 15 Wn. App. 172, 176-177, 548 P.2d 587 (1976).

To establish juror misconduct, the defendant must establish prejudice for error to exist. In State v. Vasquez, 130 ARIZ. 103, 107, 634 P.2d 391, 395 (1981), the court stated:

We are only justified in disturbing the verdict of guilty on a count of an alleged misconduct of a juror when it is shown that such misconduct was prejudicial to the rights of the defendant, or when such a state of facts is shown that it may fairly be presumed there from that the defendant's rights were prejudiced.

Whether such prejudice exists is a matter of fact within the discretion of the trial court. State v. Young, 89 Wn.2d 613, 630, 574 P.2d 1171 (1978). The questioning on voir dire of the prospective juror showed absolutely no indications of prejudice.

In instances of claimed juror misconduct, the defendant must show prejudice to merit a new trial. State v. Barnes, 85 Wn. App. 638, 669, 932 P.2d 669 (1997). To assess whether prejudice has occurred, the particular misconduct must be considered in light of all the facts and circumstances of the trial. As a neutral trained person observing both the verbal and non-verbal features of the trial, the trial judge is best equipped to make this comparison. State v. Tigano, 63 Wn. App. 336, 341-342, 818 P.2d 1369 (1991). A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant receives a fair trial. State v. Jungers, 125 Wn. App. 895, 901-902, 106 P.3d 827 (2005). The appellate court reviews the trial court's denial of a motion for a mistrial for abuse of discretion. Jungers, 125 Wn. App. at 902.

Coupled with this concept is the generally accepted view in the State of Washington that the appellate courts are reluctant to inquire in to how a jury arrives at its verdict. There must be a strong affirmative showing of misconduct in order to overcome the long standing policy in favor of stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury. State v. Balisok, 123 Wn.2d 114, 117-118, 866 P.2d 631 (1994).

Defendant Balaski in his appellate brief offers nothing but wild speculation as to what may or may not have occurred. He offers no evidence of any kind other than an indication that at the time that this occurred defendant Balaski and his attorney chose not to object to it. It is also of note that the other defendants did not object either. Defendant O'Dell, together with Balaski, argued against the removal of the perspective juror for cause. Defendant Johnson took no position one way or the other. Clearly, none of them felt that it was of such significance that it would cause irreparable harm or prejudice to them. This is in line then with the finding by the trial court when it rejected the State's motion to remove for cause. There simply was no indication that there was anything inappropriate that the perspective juror would offer to prevent the defendants from receiving a fair trial. Further, on appeal, there has been absolutely no showing by defendant Balaski of anything that has

prevented him from receiving a fair trial. This is an invited error by defendant Balaski in an attempt to create an issue where none exists.

B. RESPONSE TO ASSIGNMENT OF ERROR NO. 4 –  
INEFFECTIVE ASSISTANCE OF COUNSEL

The fourth assignment of error raised by defendant Balaksi only deals with an ineffective assistance of counsel as it relates to this voir dire question. Counsel cites on page 60 and 61 of his brief that he acknowledges the normal rule that a defense attorney's actions during voir dire are presumed to be matters of trial strategy. Hughes v. Unites States, 258 F.3d 453, 457 (6<sup>th</sup> Cir. 2001). Nevertheless, he is trying to maintain that the actions of the defense attorney at the time of voir dire prevented his client from receiving a fair trial. Counsel on appeal mentions that he could have asked the perspective juror, who was taking photographs of the Newman residence, the name of his employer, who hired him, who paid him, did he receive a portion of the sale price for his work or was he paid a flat fee, etc. (Balaski Appellate Brief page 62). Yet, as previously discussed, the other capable defense attorneys and the judge had no problem in keeping the perspective juror in the pool.

To establish ineffective assistance of counsel, the defendant must show that the attorney's performance was both deficient and prejudicial.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The appellate court accords great deference to trial counsel's performance in order to eliminate the distorting effects of hindsight. In that regard there is presumption of reasonable performance. Strickland, 466 U.S. at 689; State v. Hermann, 138 Wn. App. 596, 605, 158 P.3d 96 (2007). A decision concerning trial strategy or tactics will not establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The appellate must show both that counsel's performance was defective and that error changed the outcome of the trial. Strickland, 466 U.S. at 687.

The State submits that here has been absolutely nothing in this record to establish or show that the trial attorney's performance was defective or that any error that may have been claimed has changed the outcome of the trial. This issue is totally without merit.

C. RESPONSE TO ASSIGNMENT OF ERROR NO. 6 –  
CUMULATIVE ERROR

The sixth assignment of error raised is of cumulative error that requires a new trial.

A defendant may be entitled to a new trial when errors cumulatively produced at trial were fundamentally unfair. In Re Personal Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The

defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. Lord, 123 Wn.2d at 332. The cumulative error doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

The State submits that there has been no showing of error in this case and thus there is no reason to use the cumulative error doctrine.

VII. RESPONSE TO ASSIGNMENTS OF ERROR AS THEY RELATE SPECIFICALLY TO DEFENDANT DANIEL JOHNSON

A. RESPONSE TO ASSIGNMENT OF ERROR NO. 1 – SPEEDY TRIAL

The first assignment of error raised by defendant Daniel Johnson alone deals with a claim of violation of his speedy trial rights. Specifically, the defendant indicates that he had waived speedy trial from December 23, 2005, to February 21, 2006. This is consistent with the waiver of right to speedy trial that was filed on December 6, 2005. (CP 46). The scheduling order was entered setting the trial date of February 21, 2006, and a readiness hearing date of February 16, 2006. It is also to be noted that this was a scheduled trial date with all defendants being prosecuted at one time.

Defendant Johnson has raised the claim that he had been separated out from the other defendants and thus would have had a separate trial but for the continuance beyond the February 21, 2006, trial date. He uses this to claim that this is an obvious prejudice to him and that he would have had a separate trial. Further, he claims that this allowed the State an opportunity to file an additional class A felony charge against him. The State submits that these claims by the defendant are not supported by the record.

Shortly after the defendants Balaski, Johnson, and O'Dell were arrested, the State filed its initial information charging all of them jointly with Murder in the First Degree, Attempted Murder in the First Degree (against Mr. Newman) and Burglary in the First Degree. That information was filed on August 11, 2005, over my signature as Senior Deputy Prosecutor in charge of the major crimes unit. (CP 9).

As more information began to arrive, this matter was then subject of amended information filed by the deputy prosecutor assigned to the case. This amended information charged all the defendants jointly with Murder in the First Degree, Attempted Murder in the First Degree (against Mr. Newman), Attempted Murder in the First Degree (against Laura Harrington) and Burglary in the First Degree. This document was dated August 23, 2005. (CP 12).

A second amended information was then filed on November 14, 2005, and the document being dated November 10, 2005. This contains the same allegations of murder, attempted murders and burglary as the amended information but cleaned up some of the language involved in the case and added the firearm enhancements. The allegations of firearm enhancements were added to all four counts. (CP 35).

It is true that after that there was an amended information related to Mr. Johnson only. That document was dated December 1, 2005, but was superseded prior to the trial date of February 21, 2006, by the Third Amended Information (for Balaski, O'Dell and Rekdahl) dated February 7, 2006, and filed that date. In the Third Amended Information (CP 98), the defendants are all charged jointly with Murder in the First Degree with the firearm enhancement; Assault in the First Degree (against Mr. Newman) with the firearm enhancement; Assault in the First Degree (against Laura Harrington) with the firearm enhancement and Burglary in the First Degree with the firearm enhancement. A copy of the Third Amended Information (CP 98) is attached hereto and by this reference incorporated herein.

The claim by defendant Johnson that the violation of a speedy trial allowed the State an opportunity to increase the stakes against him is wrong. As explained by the deputy prosecutor:

(By Mr. Senescu, Deputy Prosecutor): I would just point to the record and note that this case was under 4.3(a) and (b) joined. Multiple defenses and multiple defendants were joined in a single charging document by way of an Information filed on August 11<sup>th</sup>, at which - - at one point Defendant Johnson did somehow get a separate trial date from the others. There was no order of severance, there was no hearing. And subsequently to that date, Defendant Johnson has waived speedy trial and was rejoined as prior with the other defendants.

(RP 410, L.22 – 411, L.7)

The critical date in this discussion of speedy trial took place on February 9, 2006. At that time and prior to the readiness hearing scheduled for February 16, 2006, and in anticipation of a February 21, 2006, trial date, the parties were discussing with the court the status of the case, what needed to be done, and trying to arrive at a realistic timeframe for getting the work done. On that date, the attorney for Mr. Balaski submitted a motion to continue and requested a continuance of the trial date. (RP 151). He notes that all three defense attorneys have investigators and that they have been in the process of arranging interviews prior to trial. The attorney indicated that there were approximately 34 interviews that had not been conducted as of that date. (RP 152). The trial court questioned the attorney concerning what they have been doing for six-and-half months and the attorney indicated that it

has become extremely difficult to fit together schedules with all of the attorneys, their investigators, and the prosecutor's office. (RP 153).

The attorney for Mr. O'Dell then joined with this request for a continuance. He indicated to the court that there were well over 2,000 pages of discovery and reports. He and his partner have both had to cut back on their other routine office work to try to get this put into place as quickly as possible. He also indicated that to properly represent Mr. O'Dell it was necessary for them to give up their criminal contract and reduce their additional caseload to allow them an opportunity to begin to handle the volumes of paperwork and witness interviews needed. (RP 154-155).

Both of the attorneys at that point were asking for a continuance of at least 12 weeks to allow them an opportunity to begin to get a handle on the matters. Neither of their clients opposed the set overs or continuance requests. (RP 156-157).

As one of the attorneys for Mr. O'Dell put it:

(Michael Brace, co-counsel for defendant O'Dell): But the bottom line is, Mr. O'Dell, and we're his counsel, aren't prepared to go forward on the current trial date. If it were to go forward, he would not receive competent representation, and so we'd ask the Court to continue it.

(RP 157, L.23 – 158, L.2)

The court then inquired of the defense counsel for defendant Johnson. He indicated that Mr. Johnson was not willing to waive his speedy trial rights in this matter but the court was concerned after what it had heard from the other attorneys as to whether or not he would be in a position to go to trial on the date in question.

(Gerry Wear, counsel for Mr. Johnson): Mr. Johnson is not anxious to waive speedy trial. We've been provided authority by the State standing for the proposition that the Court has inherent power to and discretion to basically carry him along with the other co-defendants with or without a waiver of speedy trial.

THE COURT: But he thinks he's ready to go on the 21<sup>st</sup>, huh? Or do you think you're ready to go on the 21<sup>st</sup>?

MR. WEAR: No. No. So that's our position. He's not prepared to waive speedy trial, recognizing that continuance is likely.

(RP 159, L.3-14)

The court then used the additional time set on that date to put together not only a realistic trial date but also to make sure discovery was done in a timely fashion and that the parties had an opportunity to have all the various motions that they wished to bring presented to the court. It was after this date then that the motions to suppress, sever, and 3.5 hearings were all conducted. It was also during this period that the vast bulk of interviews were completed by the parties.

The appellate court reviews a trial court's decision to grant a continuance using the abuse of discretion standard. State v. McKinzy, 72 Wn. App. 85, 87, 863 P.2d 594 (1993). On appeal, the defendant must establish both the trial court abused its discretion and that he suffered prejudice. State v. Torres, 111 Wn. App. 323, 330, 44 P.3d 903 (2002). The trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). It is not a manifest abuse of discretion for a trial court to grant a continuance to allow defense counsel more time to prepare for trial, even over defendant's objection, to ensure effective representation and a fair trial. State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984).

The right to a speedy trial must sometimes yield to considerations of judicial economy. Separate trials are not favored. Torres, 111 Wn. App. at 332. A court may properly rely on the policy favoring joint trials and continue a defendant's case so that it will coincide with the trial of other defendants charged with a related crime. State v. Melton, 63 Wn. App. 63, 66-67, 817 P.2d 413 (1991). When defendants are jointly charged, severance to protect the speedy trial right of one of the

defendant's is not mandatory. State v. Eaves, 39 Wn. App. 16, 19, 691 P.2d 245 (1984); State v. Nguyen, 131 Wn. App. 815, 820, 129 P.3d 821 (2006).

It was obvious at the hearing on February 9, 2006, that none of the defense attorneys felt that they were ready to proceed to trial on the date scheduled in February, 2006. All of them were overwhelmed by the volume and extent of the reports and witnesses potentially that could be called. The trial court was exercising extreme caution in making sure that all of the defendants received their full panoply of rights which included pretrial discovery and adequate representation. All of the attorneys indicated that more time was needed to accomplish this.

**B. RESPONSE TO ASSIGNMENT OF ERROR NO. 5 –  
INEFFECTIVE ASSISTANCE OF COUNSEL**

The fifth assignment of error raised by defendant Johnson alone deals with a claim of ineffective assistance of counsel during cross examination by one of the attorneys for a co-defendant. There is a claim that the questions and answers dealt with defendant Johnson having done something like this on a previous occasion and that somehow this would pertain to the assault charge against Mrs. Harrington and “that speculation is likely what convinced the jury that Johnson was guilty of the assault on Mrs. Harrington.” (Johnson Appellate Brief, page 36).

When the context of the area where this questioning takes place is reviewed, it is obvious that it has absolutely nothing to do with the assault charge on Mrs. Harrington. It is dealing primarily with acknowledged conduct that he did against Mr. Newman, the home owner. The appellate court reviews a claim of ineffective assistance de novo. State v. Rainey, 107 Wn. App. 129, 135, 28 P.3d 10 (2001). The appellate must show both that counsel's performance was defective and that the error changed the outcome of the trial. Strickland, 466 U.S. at 687.

Given the nature of the defendant Johnson's defense, it is hard to conceive of how this small portion of testimony would have been able to affect the outcome of the trial.

The defendant Johnson, on direct examination, indicated that he was wearing camouflage clothing and that he was armed with a firearm (RP 2589). He further indicated that he was aware that they were going to a residence to steal the man's money. (RP 2587, 2610).

Once there at the residence, he indicates that he was armed with a firearm and entered the residence with Balaski and Rekdahl. He sees Rekdahl shoot Newman and then he (Johnson) grabs the homeowner (Newman) by the shirt, puts him on the ground and assaults him with his pistol by striking him on the back of his head. (RP 2594). Elsewhere during cross examination, defendant Johnson indicates that he hit him hard

several times with the firearm and, he was not sure, but he thought that the strikes would have been strong enough to fracture the man's skull.  
(RP 2621-2622).

The State submits that given this type of testimony, the defendant has clearly acknowledged a burglary in the first degree while armed with a firearm and further has put himself in harms way as it relates to the potential of felony murder. If there were any error in the questioning, it would not have changed the outcome of the trial. There must be a reasonable probability that except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). There has been absolutely no showing that there would be a reasonable probability that the outcome would have been any different. Further, the grounds being raised in the appeal deal with the assault on Laura Harrington. Clearly, there is nothing that implicates the conduct being referred to in the questioning with the assault on Laura Harrington or, for that matter, the tragic murder of her husband in the backyard. All the discussion deals with the assault and subduing of the homeowner in the residence.

VIII. CONCLUSION

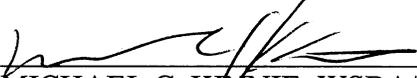
The trial court should be affirmed in all respects as it relates to each of the defendants involved in this case.

DATED this 24 day of October, 2007.

Respectfully submitted:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

By:

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

**APPENDIX "A"**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW RE:  
ORDER DENYING DEFENDANT BLASASKI, JOHNSON AND O'DELL'S  
MOTION TO SEVER**

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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

CLARK COUNTY PROSECUTING ATTORNEY  
PO BOX 5000  
VANCOUVER, WASHINGTON 98666-5000  
(360) 397-2261 (TEL)

159

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

#### CONCLUSIONS OF LAW

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

1  
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.* <sup>RA</sup>

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

14 Presented by:

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

18 Copy received/Objections noted/Consent to entry:

19  
20  
21 BRIAN WALKER, WSBA #27391  
22 Attorney for Defendant Balaski

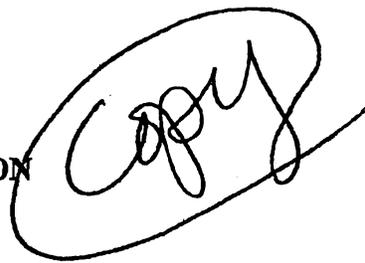
23 GERALD L. WEAR, WSBA #  
24 MARK AXUP  
25 Attorneys for Defendant Johnson

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

**APPENDIX "B"**

**AFFIDAVIT FOR SEARCH WARRANTS  
SEARCH WARRANTS**

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
2 FOR MULTNOMAH COUNTY



3 STATE OF OREGON ) AFFIDAVIT FOR  
4 COUNTY OF MULTNOMAH ) SEARCH WARRANT  
5

6 I, the undersigned, upon my oath, do hereby depose and say;  
7

8 My name is Lawrence R Zapata and I have been employed as a Police Officer for over 13 years.  
9 I am presently employed by the City of Vancouver and have been so employed for 10 years. I  
10 am currently assigned as a Detective to the Violent Crime Unit and have served in this capacity  
11 for the past 3 years. My prior experience includes a 4 year assignment as a Detective with the  
12 Clark County Interagency Gang Task Force and a 3 year assignment with the Vancouver Police  
13 Patrol Division. I have also served 3 years with the New Orleans Police Department prior to my  
14 employment with the City of Vancouver.

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16 I also hold the position of a Special Deputy for the Multnomah County Sheriffs Office in  
17 addition to my commission in Washington State. I have held this position since December 3<sup>rd</sup>,  
18 1999.  
19

20  
21 I have completed numerous hours of training over the course of my career. The training is as  
22 follows; 480-hour certified basic training academy from the state of Louisiana. 80-hour  
23 certified equivalency academy from the state of Washington, 24-hours of training with the BATF  
24 for gun identification and the investigation of gun crime, 32-hours of Violent Crime  
25 Investigation, and 48-hours of basic Homicide Investigation.  
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**IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR MULTNOMAH COUNTY**

Laura stated Jerry went to a wedding earlier in the day; when he got home he invited over some friends, including her and her husband. She stated they stopped by Jerry's around 2100-2130 hours. She stated there was a small group of people already at Jerry's, some whom she did not know. She stated there did not appear to be any problems or disturbances.

Laura stated sometime around 2300 or so, everyone had left to go home and the only three that were still at the residence were Jerry, her husband, and herself. She stated they were talking and drinking wine when all the sudden three masked gunmen rushed in the front door with guns. She stated her first thought was "this is a joke". She stated the

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them. She stated the gunmen just started shooting right away at Jerry.

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Laura stated her husband grabbed her by the arm and said "run, run, run" as Jerry was being shot. She stated they ran out the back patio door and onto the patio where they fell on the deck. She stated a gunman stood over them with a long barreled military style rifle pointed as they were on the deck. She stated her husband began pleading with the gunmen stating "please, please, please, we don't have anything to do with this, please, please". She stated while her husband was pleading he was trying to gain distance on the ground from the gunmen by inching away from the gunman towards the edge of the deck. She stated her husband then yelled at her to "run" and she got up and ran off



1                                   **IN THE CIRCUIT COURT OF THE STATE OF OREGON**  
2                                   **FOR MULTNOMAH COUNTY**

3 Michael drove east on SE Evergreen Highway, towards SE 164<sup>th</sup> Avenue; a short distance from  
4 where he heard the gunshots, he saw a white Chevrolet Tahoe SUV parked on SE Evergreen  
5 Highway. Michael estimated the distance from where he heard the gunshots to the location of  
6 the parked Tahoe was 2 blocks. This Tahoe was parked on the shoulder, but partially blocking  
7 the roadway.

8  
9 Michael stated he drove to the intersection of SE Evergreen Highway and SE 164<sup>th</sup> Avenue and  
10 called his Dispatcher to report the gunshots. As he was talking to his dispatcher, the Tahoe  
11 passed him. Michael said he was positive it was the same Tahoe he had just seen along SE  
12 Evergreen Highway. The Tahoe had darkened windows, so Michael couldn't see the people  
13 inside. Michael thought that the Tahoe could have been involved with the gunshots, so he  
14 decided to follow it.

15  
16 Michael stated he followed the Tahoe as it turned left onto northbound SE 164<sup>th</sup> Avenue, and  
17 then as it turned right on to eastbound SR14, towards Camas. He saw and broadcast the Oregon  
18 vehicle license plate to this Dispatcher. Michael said the Tahoe then began what he described as  
19 "evasive" driving. The Tahoe changed lanes across all the lanes of travel on SR14, and then  
20 slowed down to approximately 45 MPH. Michael became concerned that the subjects in the  
21 Tahoe might be preparing to shoot at him, so he slowed down, then decided not to follow the  
22 Tahoe further.

23  
24 Michael stated that he did not lose sight of the Tahoe from when he saw it pass him on SE  
25 Evergreen Highway until he broke off following it at SR14.

1                                   **IN THE CIRCUIT COURT OF THE STATE OF OREGON**  
2                                   **FOR MULTNOMAH COUNTY**

3 I read a dispatch printout from the call at 15807 SE Evergreen Hwy that at approximately 0039  
4 hours, Clark County, WA Sheriff's Deputy Todd Young reported to 911  
5 Emergency Services that he had the suspect Tahoe stopped at 8708 NE 161<sup>st</sup> Avenue  
6 in the City of Vancouver, WA. Deputy Young reported that he detained (3) suspects, but a  
7 fourth ran off.  
8

9 I read a police report prepared by Clark County Sheriffs Detective Kevin Harper for an address  
10 in the state of Washington and discovered that Deputy Young further reported that he identified  
11 Michael D Odell as the driver of the Tahoe. I also read that the (3) suspects, who where  
12 identified as Daniel Carl Johnson DOB 4/27/71, Jason C Balaski DOB 1/17/72, and Michael  
13 Darren Odell DOB 8/27/65, were later transported to Vancouver Police Department's East  
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17 I read a police report prepared by Vancouver PD Officer Darren McShea. The report states the  
18 following in part that Officer McShea seized the clothing of Daniel C Johnson, Jason C Balaski,  
19 and Michael D Odell while at Vancouver PD East Precinct.  
20

21 I also read a police report prepared by Detective Harper which states that Officer Darren McShea  
22 also reported that at 0212 hrs, he read Daniel Carl Johnson, date of birth 4/27/1971, his rights.  
23 He stated that Daniel Johnson was wearing a white crew neck "T" shirt over a white tank style  
24 "T" shirt, camouflage style pants and muddy boots. The mud on Daniel Johnson's boots was  
25 reddish in color. Officer McShea said that Daniel Johnson also had a reddish substance on one  
26 boot and on his pant leg that appeared to be blood.



1                                   **IN THE CIRCUIT COURT OF THE STATE OF OREGON**  
2   **FOR MULTNOMAH COUNTY**  
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4       During the course of the search Detective Smith also recovered (6) .223 caliber cartridges from  
5       the east lawn; the cartridges were scattered in the surrounding area in which deceased  
6       victim Robert Harrington lay.  
7

8       I read a police report prepared by Deputy Young which state in part the following:

9               At approximately 2350 hours Deputy Young became aware of shooting at 15708 SE  
10              Evergreen Hwy in the City of Vancouver.

11             At approximately 0005 hours Deputy Young received information that Vancouver Police  
12             were looking for a white Chevy Tahoe, bearing Oregon vehicle license 097BLX, in  
13             regards to the homicide.  
14

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15  
16             At approximately 0035 hours, Deputy Young was traveling north on NE Ward Rd from  
17             NE Davis Rd when he noticed a white sport utility vehicle traveling south towards him.  
18             He slowed down and as the SUV approached he noted the front vehicle license was  
19             Oregon 097BLX. He turned around and advised dispatch via the radio that he was  
20             behind the white Chevy Tahoe.  
21

22             As Deputy Young was following the white Chevy Tahoe he was not able to tell how  
23             many occupants were in the vehicle. Due to the suspect(s) being armed with rifles he  
24             kept a safe distance from the Chevy Tahoe as he was waiting for additional units before  
25             attempting to stop the Chevy Tahoe.  
26

1                                   **IN THE CIRCUIT COURT OF THE STATE OF OREGON**  
2                                   **FOR MULTNOMAH COUNTY**

3           The Chevy Tahoe continued south on NE Ward Rd from NE Davis. In the 8800 block of  
4           NE Ward Rd the Chevy Tahoe moved in to the right lane. As the Chevy Tahoe continued  
5           through the intersection of NE Ward Rd and NE 162nd Ave he noticed the right turn  
6           signal activated and the Chevy Tahoe began to slow. The Chevy Tahoe turned north on  
7           NE 160th Ave from NE Ward Rd then turned east on NE 85th St from NE 160th Ave.  
8           The Chevy Tahoe continued east on NE 85th St where the roadway turns north and  
9           becomes NE 161st Ave. He continued to follow the Chevy Tahoe waiting for cover  
10          units.  
11

12  
13          As the Chevy Tahoe continued north on NE 161st Ave Deputy Young noticed the vehicle  
14          slow and the right turn signal activated. The Chevy Tahoe was pulling over in about the

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16          Tahoe. When the Chevy Tahoe came to a stop he noticed all four doors on the Tahoe  
17          open and subjects begin to exit. He advised dispatch and other units the vehicle had  
18          stopped and provided his location.  
19

20          Deputy Young stated he observed all four subjects began to exit the Tahoe Deputy Young  
21          activated his emergency overhead lights, and illuminated the subjects with the spot light,  
22          and initiated a high risk stop. He advised the subjects to lie down on their stomachs and  
23          put there hands out to their sides. He could hear the subjects saying "What the fuck?"  
24          "Whats going on?" "Where just coming home from the Dancing Bear." He noticed a  
25          couple of the subjects were dressed in camouflage. He advised the subjects to do as he  
26

1                   **IN THE CIRCUIT COURT OF THE STATE OF OREGON**  
2                                   **FOR MULTNOMAH COUNTY**

3           asked and they would be advised why later. The four subjects moved out into the middle  
4           of the street and three of them began to lay down, and the four took off running north.  
5           He advised dispatch and other units one subject was fleeing on foot to the north and  
6           provided a description. At this time other deputies began to arrive and the three suspects  
7           were secured.  
8

9           A K-9 search for the unidentified person was unsuccessful.  
10

11          On Monday, August 08, 2005, I asked Detective Scott Smith if he recovered any forensic  
12          evidence from the clothing of the suspects and he stated he had. He stated he processed the  
13          seized clothing of suspect Daniel Johnson for blood evidence and recovered blood evidence from  
14          both of Mr. Johnson's pant legs and boots. He concluded based on the location of blood spatter  
15          evidence recovered from the interior of the home that it is highly probable that the blood on Mr.

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16          Johnson's clothing is from victim Jerry Newman's wounds.  
17

18          On Monday, August 08, 2005, I asked Detective John Thompson if any of the suspects provided  
19          a statement regarding the homicide and he stated yes. He stated Mr. Odell invoked his rights  
20          immediately, but Mr. Johnson and Mr. Balaski provided statements.  
21

22          Detective Thompson stated Mr. Johnson's statement was brief and consisted of Mr. Johnson  
23          explaining how he received fresh injuries to his body. He stated Mr. Johnson explained his  
24          injuries, which consisted of numerous scratches and a head bump as injuries received as a result  
25          of re-roofing his house. He stated Mr. Johnson then invoked his rights and no further questions  
26          were asked.



















1                                   **IN THE CIRCUIT COURT OF THE STATE OF OREGON**  
2                                   **FOR MULTNOMAH COUNTY**

3 owner. The license plate on the boat trailer also listed the same name, but showed an address in  
4 St. Helens, Oregon.

5

6 Tracy identified Mr. Rekdahl from the booking photograph that the detectives showed her. She  
7 also confirmed that her husband and Adrian had been friends since they were both very young.  
8 She said that she knew 'Sonny' and that she had met him one time when he was with Mr.  
9 Rekdahl.

10

11 Tracy told detectives that her husband left the house "after dark" on Saturday night and she did  
12 not know where he went or who he was with.

13

14 While detectives were at Tracy's house, Dirk and Tabitha arrived. Dirk said he received a call

~~15 from Mr. Rekdahl who had been at Tracy's house on Saturday night.~~

16

17 Detective Harper talked with Dirk and Dirk told him that he received a telephone call at  
18 approximately 1030 hours (Sunday) from Mr. Rekdahl asking him if the police had been at  
19 Dirk's house looking for him. Dirk told Mr. Rekdahl that they were there the previous night and  
20 said he encouraged Mr. Rekdahl to contact the detectives. Dirk said the conversation was short  
21 and ended with Mr. Rekdahl telling him he would "talk to him later."

22

23 Dirk told Detective Harper that his caller ID showed the call from Mr. Rekdahl was from Tracy's  
24 telephone number; 503-341-4327.

25

26 Tracy denied that Mr. Rekdahl used her phone and said she did not know why the call showed

1                                   **IN THE CIRCUIT COURT OF THE STATE OF OREGON**  
2                                   **FOR MULTNOMAH COUNTY**

3   that it originated from her phone number. She said that phone number is the glass company's  
4   work number and is a cell phone number. She said Mr. Rekdahl did not have the cell phone and  
5   he could not have made the call from that number. Tracy said Mr. Rekdahl does not have a key  
6   to the house and that there were no signs of forced entry into her house.

7  
8   Tracy refused to allow the detectives to search the house for Mr. Rekdahl. Tracy initially said  
9   with complete certainty that Mr. Rekdahl was not inside her house. She later told Detective  
10   Kipp, "I don't think he is inside, I didn't let him in, but I have not checked the basement."  
11   Detective Kipp offered to have police search the basement for Mr. Rekdahl and she again refused  
12   to allow a search of her residence for Mr. Rekdahl.

13  
14   The detectives impounded Mr. Rekdahl's black 4X4 Chevrolet pickup from the street in front of

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17

18   I know based on my training and experience that firearms have a high value to those in the  
19   criminal subculture. Firearms are difficult items for criminals to obtain and possess, being that  
20   criminals must hide the firearms from would be snitches, Probation Officers, and Law  
21   Enforcement in general. Based on this, criminals have a difficult time replacing firearms and  
22   therefore often hide their firearms in their homes, vehicles, on their property, and in the homes,  
23   vehicle, and on the property of girlfriends, and other sympathetic family members. In this case  
24   the firearms used to Murder and Assault victims Robert Harrington, Jerry Newman and Laura  
25   Harrington have not been recovered

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**IN THE CIRCUIT COURT OF THE STATE OF OREGON**  
**FOR MULTNOMAH COUNTY**

other material or items of evidence that would establish an identification of suspects, which a relationship can be made to the Murder /Attempt Murder /Assault I of Robert Harrington, Jerry Newman and Laura Harrington.

14. Any notes, writings, diagrams, maps, email and /or electronic method of correspondence which would establish proof of a conspiracy between Mr. Odell, Mr. Johnson, Mr. Balaski and Mr. Rekdahl to commit the crimes of Murder in the First Degree (RCW 9A.32.030) (ORS 163.115), Attempt Murder in the First Degree (RCW 9A.32.030) (ORS 163.115), and Assault in the First Degree (RCW 9A.36.011) (ORS 163.185).

15. Any computer, computer laptop, computer hard drive, computer external hard drive, and /or any electronic storage device which could store any notes, writings, diagrams, maps, email and /or electronic method of correspondence which would establish proof of a

~~conspiracy between Mr. Odell, Mr. Johnson, Mr. Balaski and Mr. Rekdahl to commit the~~  
crimes of Murder in the First Degree (RCW 9A.32.030) (ORS 163.115), Attempt Murder in the First Degree (RCW 9A.32.030) (ORS 163.115), and Assault in the First Degree (RCW 9A.36.011) (ORS 163.185). AND AUTHORIZATION TO ANALYZE ANY COMPUTER DATA

16. Any photographs, developed or undeveloped, and /or any home made videos, which would establish proof that a relationship exist between suspects Mr. Odell, Mr. Johnson, Mr. Balaski and Mr. Rekdahl.

17. any items of identification which would prove residency, and /or prove of ownership of any property where items of evidence may be stored, and /or any rental agreement which would identify locations where items of evidence may be stored.

18. And authorization to analyze any computer data.

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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR MULTNOMAH COUNTY

/s/ [Signature] 1195  
Affiant

SUBSCRIBED AND SWORN TO before me this 9 day of Aug 2005

/s/ [Signature]  
Judge

ORIGINAL *gmaur*  
*[Signature]*

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County of Multnomah

IN THE NAME OF THE STATE OF OREGON

TO ANY PEACE OFFICER IN THE STATE OF OREGON, GREETINGS:

You are hereby commanded to search the premises located in City of Portland, County of Multnomah, and State of Oregon, described as follows:

718 N Winchell St Portland, OR 97217; a single story, white colored single family dwelling with an off white trim, and the address numbers 718 attached to the right of the front door, and the business name of Commercial Storefront & Glass imprinted on the front plate glass window.

And a vacant commercial building described as having no visible physical address, but being the only vacant commercial building next to 8138 N. Albina Street, Central Machine Works. The commercial building is identifiable as it is a light colored square building with a brownish trim, and a glass façade with (2) flood lights on either end of the building, and it's surrounded by overgrown blackberry bushes. ~~(The attached photograph is a photograph reference of the vacant commercial building to be searched).~~

For the following items of evidence consistent with, but not limited to, the criminal acts of Murder in the First Degree (RCW 9A.32.030) (ORS 163.115), Attempted Murder in the First Degree (RCW 9A.32.030) (ORS 163.115) and Assault in the First Degree (RCW 9A.36.011) (ORS 163.185):

1. The person of Adrian Edward Rekdahl, DOB 10/21/72, a Convicted Felon under Oregon Law for Burglary in the First Degree, Robbery in the First Degree, Controlled Substance Offense – Deliver, and (2) counts of Attempt Use/Carry Dangerous Weapon,
2. Any .223 caliber semi-automatic rifle
3. Any .223 caliber cartridges, bullet casings and /or bullets

- 1 4. Any .223 caliber rifle parts
- 2 5. Any rifle cases or boxes
- 3 6. Any rifle and or handgun cleaning supplies
- 4 7. Any documentation or receipts relating to the purchase, sale, or possession of a .223
- 5 caliber rifle, and /or other items relating to the ownership, use, or storage of a .223 rifle
- 6 8. Any safe, gun safe, lock box, container, garage, and /or shed where any .223 rifle or any
- 7 .223 rifle part may be stored.
- 8 9. Any rifle and /or any firearm in which a relationship can be made to the Murder
- 9 /Attempt Murder /Assault I of Robert Harrington, Jerry Newman and Laura Harrington.
- 10 10. Any rifle and /or any firearm cartridges, bullet casings and /or bullets, which a
- 11 relationship can be made to the Murder /Attempt Murder /Assault I of Robert
- 12 Harrington, Jerry Newman and Laura Harrington.
- 13 11. Any documentation or receipts relating to the purchase, sale, or possession of any rifle
- 14 and /or firearm, and /or other items relating to the ownership, use, or storage of any rifle
- 15 ~~and /or firearm, which a relationship can be made to the Murder /Attempt Murder~~
- 16 /Assault I of Robert Harrington, Jerry Newman and Laura Harrington.
- 17 12. Any safe, gun safe, lock box, container, garage, and /or shed where any rifle and /or any
- 18 firearm may be stored, which a relationship can be made to the Murder /Attempt Murder
- 19 /Assault I of Robert Harrington, Jerry Newman and Laura Harrington.
- 20 13. Any bloody clothing, blood evidence, trace evidence, and /or any other biological
- 21 evidence, including any tissue, hair, fabric or fiber impressions, fingerprints, and /or any
- 22 other material or items of evidence that would establish an identification of suspects,
- 23 which a relationship can be made to the Murder /Attempt Murder /Assault I of Robert
- 24 Harrington, Jerry Newman and Laura Harrington.
- 25 14. Any notes, writings, diagrams, maps, email and /or electronic method of correspondence
- 26 which would establish proof of a conspiracy between Mr. Odell, Mr. Johnson, Mr.

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Balaski and Mr. Rekdahl to commit the crimes of Murder in the First Degree (RCW 9A.32.030) (ORS 163.115), Attempt Murder in the First Degree (RCW 9A.32.030) (ORS 163.115), and Assault in the First Degree (RCW 9A.36.011) (ORS 163.185).

15. Any computer, computer laptop, computer hard drive, computer external hard drive, and /or any electronic storage device which could store any notes, writings, diagrams, maps, email and /or electronic method of correspondence which would establish proof of a conspiracy between Mr. Odell, Mr. Johnson, Mr. Balaski and Mr. Rekdahl to commit the crimes of Murder in the First Degree (RCW 9A.32.030) (ORS 163.115), Attempt Murder in the First Degree (RCW 9A.32.030) (ORS 163.115), and Assault in the First Degree (RCW 9A.36.011) (ORS 163.185). AND TO ANALYZE ANY COMPUTER DATA.

16. Any photographs, film developed and /or undeveloped, storage devices for digital cameras and video recording devices and/or any other form of electronic storage

~~device which would store photographic or video evidence, which~~

would establish proof that a relationship exist between suspects Mr. Odell, Mr. Johnson, Mr. Balaski and Mr. Rekdahl.

17. And any items of identification which would prove residency, and /or prove of ownership of any property where items of evidence may be stored, and /or any rental agreement which would identify locations where items of evidence may be stored.

and to seize the aforesaid objects of the search; and

You are further directed to make return of this warrant to me within five (5) days after execution thereof.

 This warrant may be executed at any time of the day or night.

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( ) This warrant may be executed more than five (5) but not more than ten (10) days from its date of issuance.

ISSUED over my hand on August 9 2005 at 10<sup>20</sup> a.m. / p.m.

Frank Maurer  
Signature of Magistrate  
Judge  
Title of Magistrate

**APPENDIX "C"**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW RE:  
ORDER DENYING DEFENDANT BALASKI, JOHNSON, AND O'DELL'S  
MOTIONS TO SUPPRESS EVIDENCE UNDER "TERRY"**

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**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

CLARK COUNTY PROSECUTING ATTORNEY  
PO BOX 5000  
VANCOUVER, WASHINGTON 98666-5000  
(360) 397-2261 (TEL)

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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.

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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

**APPENDIX "D"**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW RE:  
ORDER DENYING DEFENDANT O'DELL'S  
MOTION TO SUPPRESS EVIDENCE**

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**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,**

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW RE:**

**v.**

**ORDER DENYING DEFENDANT  
ODELL'S MOTION TO SUPPRESS  
EVIDENCE**

**MICHAEL D. O'DELL,**  
  
**Defendant.**

**SEARCH OF 718 WINCHELL STREET  
(O'DELL'S HOME) AND BUILDING AT  
8115 NORTH ALBINA STREET  
(O'DELL'S BUSINESS)**

**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 Defendant present and represented by Defense Attorneys Michael W. Brace and Beau D. Harlan and the Court having heard the arguments of counsel, having reviewed the search warrant and probable cause affidavit in support of the warrant at issue, and considered the briefing of the parties herein, the Court makes the following:

**UNDISPUTED FINDINGS OF FACT**

1. There are no disputed facts.
2. The Defendant seeks to suppress the police search of his home at 718 Winchell Street in Portland, Oregon and business building at 8115 North Albina Street in Portland, Oregon.

**FINDINGS AND CONCLUSIONS RE:  
ORDER DENYING MOTION TO SUPPRESS  
EVIDENCE - 1**

**CLARK COUNTY PROSECUTING ATTORNEY  
PO BOX 5000  
VANCOUVER, WASHINGTON 98666-5000  
(360) 397-2261 (TEL)**

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3. Detective Lawrence R. Zapata of the Vancouver Police Department, as a Special Deputy for the Multnomah County Sheriff's Office, by way of an affidavit for a search warrant, applied for and obtained a search warrant to search for certain items at the location of Defendant O'Dell's residence and business building.
4. A Circuit Court of the State of Oregon Judge for Washington County, Jean Maurer, reviewed the affidavit and signed a warrant based upon the affidavit for both the residence and business building of Defendant O'Dell.
5. In reviewing the affidavit, the affidavit supports that there were at least three individuals involved in an attack resulting in a murder.
6. The affidavit supports the belief that Defendant O'Dell was one of the individuals involved in the attack.
7. The affidavit indicates that the gunmen had broke in to the alleged victims' home and each suspect was armed with a weapon, wearing masks. Further, walkie/talkie radios were found on the persons of some of the suspects and also in the suspect vehicle, when the suspects were apprehended.
8. The affidavit indicates that documentation connecting some of the suspects together was found during a search of a home of one of the other suspects.
9. The affidavit indicates that three of the suspects vehicles were found close in proximity to each other at Defendant O'Dell's residence (Rekdahl's truck) and Defendant O'Dell's business building (Balaski's Blazer and Johnson's Durango).
10. The affidavit indicates information supporting the belief that then outstanding Defendant/Suspect Rekdahl lived at Defendant O'Dell's residence, his truck was parked in front of the residence, and he may have called or had communications since the attack, from a phone located at the residence.
11. The affidavit indicates that Defendant O'Dell's residence is approximately three blocks from the business building.

#### **CONCLUSIONS OF LAW**

1. The Court presumes the warrant was properly issued, affords deference to the issuing magistrate, and presumes that the warrant is valid.

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2. The Court employs a commonsense approach to scrutiny of the search warrant supporting affidavit using all reasonable inferences allowed to the issuing magistrate.
3. The Court shall consider, and has only considered here, information within the four corners of the probable cause affidavit in support of the search warrant in making its ruling.
4. The Court shall not consider, and has not considered here, any information outside the four corners of the probable cause affidavit in support of the search warrant in making its ruling. This includes not considering subsequent information made known to the officers, subsequent items found in the search, or subsequent actions by the parties.
5. A search warrant which calls for multiple locations and/or items may be found to be valid as to some locations and/or items and may be found invalid as to other locations and/or items.
6. The Court finds no valid supporting probable cause for the search of the home for the firearms used in the alleged crime because there is no evidence from which a magistrate could have found that this home was a likely hiding place for the firearms, any bloody clothing, or trace evidence.
7. The Court does find a sufficient nexus to certain items sought in the warrant, specifically items that would establish planning, knowledge, pre-meditation, accomplice liability or a conspiracy.
8. It was reasonable to conclude that based upon the fact that there is probable cause that the Defendant was one of the participants in the alleged crime, it is reasonable to infer that there would be evidence of the planning of the alleged crime. This is based upon known evidence of radio's, a coordinated effort, the close proximity location of the found vehicles of each suspect including the Defendant, and written documents found at another location connecting the suspects together.
9. The Court also finds that the affidavit supported the warrant in so far as the likelihood of reasonably inferring that the police might find evidence connecting the Defendant to the firearms used in the alleged crime, or cartridge evidence in

1 the location of the Defendant's home and in his possession, since the Defendant  
2 had no opportunity to remove these items after the alleged crime.

3 10. The Court also finds that there was a sufficient nexus from the crime, to the  
4 location to be searched (with respect to Defendant O'Dell's residence) to  
5 reasonably find evidence of Defendant Rekdahl's person, based upon the  
6 information known connecting Rekdahl to the residence (and the phone call  
7 presumably from Rekdahl made from the residence).

8 11. There was a sufficient nexus from the crime, location to be searched and items  
9 to be found at that location, as to the items mentioned above. The search  
10 warrant is valid to that end and items found at Defendant O'Dell's residence and  
11 business building should not be suppressed.

12 12. Defendant O'Dell's motion to suppress is hereby denied.

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

14  
15 

16 THE HONORABLE ROBERT A. LEWIS  
17 Judge of the Superior Court

18 Presented by:

19  
20   
21 JAMES D. SENESCU, WSBA #27137  
22 Deputy Prosecuting Attorney

23 Objections noted/Presentment waived/Copy received:

24  
25  
26 MICHAEL W. BRACE, WSBA #21253  
27 BEAU D. HARLAN, WSBA #23924  
28 Attorneys for Defendant  
29

FINDINGS AND CONCLUSIONS RE:  
ORDER DENYING MOTION TO SUPPRESS  
EVIDENCE - 4

CLARK COUNTY PROSECUTING ATTORNEY  
PO BOX 5000  
VANCOUVER, WASHINGTON 98666-5000  
(360) 397-2261 (TEL)

**APPENDIX "E"**  
**AMENDED INFORMATION**

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**FILED**  
**FEB 07 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.

**THIRD AMENDED INFORMATION**

JASON ZACHARY BALASKI

No. 05-1-01729-5

and

MICHAEL DARRIN ODELL

No. 05-1-01731-7

and

ADRIAN EDWARD REKDAHL

No. 05-1-01737-6

**FOURTH AMENDED INFORMATION**

DANIEL CARL JOHNSON

No. 05-1-01730-9

Defendants.

(VPD 05-15393)

COMES NOW the Prosecuting Attorney for Clark County, Washington, and does by this inform the Court that the above-named defendants are guilty of the crime(s) committed as follows, to wit:

**COUNT 01 – FELONY MURDER IN THE FIRST DEGREE - 9A.08.020/9A.32.030(1)(c)(3)**

That they, JASON ZACHARY BALASKI and MICHAEL DARRIN ODELL and ADRIAN EDWARD REKDAHL, and DANIEL CARL JOHNSON, together and each of them, in the County of Clark, State of Washington, on or about August 6, 2005 did commit or attempt to commit the crime of burglary in the first degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, the Defendant, or another participant, caused the death of a person other than one of the participants, to-wit: Robert Harrington; contrary to Revised Code of Washington 9A.08.020 and 9A.32.030(1)(c)(3)

THIRD AMENDED INFORMATION - 1  
jkw

CLARK COUNTY PROSECUTING ATTORNEY  
1013 FRANKLIN STREET • PO BOX 5000  
VANCOUVER, WASHINGTON 98666-5000  
(360) 397-2261 or (360) 397-2183

84  
of

1 And further, that the defendant, or an accomplice, did commit the foregoing offense while armed  
2 with a firearm as that term is employed and defined in RCW 9.94A.602 and RCW 9.94A.533(3)  
[FIREARM]

3 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act  
4 (RCW 9.94A.030(28), RCW 9.94A.505(2)(a)(v) and RCW 9A.94A.570).

5 **COUNT 2 – ASSAULT IN THE FIRST DEGREE – 9A.08.020/9A.36.011(1)(a)**

6 That they, JASON ZACHARY BALASKI and MICHAEL DARRIN ODELL and ADRIAN  
7 EDWARD REKDAHL, and DANIEL CARL JOHNSON, together and each of them, in the County  
8 of Clark, State of Washington, on or about August 6, 2005, with intent to inflict great bodily  
9 harm, did assault another person, to wit: Gerald Newman, with a firearm or any deadly weapon  
or by any force or means likely to produce great bodily harm or death; contrary to Revised Code  
of Washington 9A.08.020 and 9A.36.011(1)(a).

10 And further, that the defendant, or an accomplice, did commit the foregoing offense while armed  
11 with a firearm as that term is employed and defined in RCW 9.94A.602 and RCW 9.94A.533(3).  
[FIREARM]

12 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act  
13 (RCW 9.94A.030(28), RCW 9.94A.505(2)(a)(v) and RCW 9.94A.570).

14 **COUNT 3 – ASSAULT IN THE FIRST DEGREE – 9A.08.020/9A.36.011(1)(a)**

15 That they, JASON ZACHARY BALASKI and MICHAEL DARRIN ODELL and ADRIAN  
16 EDWARD REKDAHL, and DANIEL CARL JOHNSON, together and each of them, in the County  
17 of Clark, State of Washington, on or about August 6, 2005, with intent to inflict great bodily  
18 harm, did assault another person, to wit: Laura Harrington, with a firearm or any deadly weapon  
or by any force or means likely to produce great bodily harm or death; contrary to Revised Code  
of Washington 9A.08.020 and 9A.36.011(1)(a).

19 And further, that the defendant, or an accomplice, did commit the foregoing offense while armed  
20 with a firearm as that term is employed and defined in RCW 9.94A.602 and RCW 9.94A.533(3).  
[FIREARM]

21 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act  
22 (RCW 9.94A.030(28), RCW 9.94A.505(2)(a)(v) and RCW 9.94A.570).

23 **COUNT 04 - BURGLARY IN THE FIRST DEGREE - 9A.08.020/9A.52.020(1)(a)/  
9A.52.020(1)(b)**

24 That they, JASON ZACHARY BALASKI and MICHAEL DARRIN ODELL and ADRIAN  
25 EDWARD REKDAHL, and DANIEL CARL JOHNSON, together and each of them, in the County  
26 of Clark, State of Washington, on or about August 6, 2005 with intent to commit a crime against  
27 a person or property therein, did enter or remain unlawfully in the building of Gerald Newman,  
28 located at 15708 SE Evergreen Hwy, Vancouver, Washington, and, in entering or while in the  
building or in immediate flight therefrom, the defendant or another participant in the crime was  
armed with a deadly weapon and/or did intentionally assault any person therein; contrary to  
Revised Code of Washington 9A.08.020 and 9A.52.020(1)(a)(b).

1 And further, that the defendant, or an accomplice, did commit the foregoing offense while armed  
2 with a firearm as that term is employed and defined in RCW 9.94A.602 and RCW 9.94A 533(3).  
[FIREARM]

3 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act  
4 (RCW 9.94A.030(28), RCW 9.94A.505(2)(a)(v) and RCW 9A.94A.570).

5 ARTHUR D. CURTIS  
6 Prosecuting Attorney in and for  
Clark County, Washington

7 Date: February 7, 2006

8  
9 BY:   
10 JAMES D. SENESCU, WSBA #27137  
Deputy Prosecuting Attorney

DEFENDANT: JASON ZACHARY BALASKI			
RACE: W	SEX: M	DOB: 1/17/1972	
DOL: BALASJZ284BP WA		SID: WA22794548	
HGT: 510	WGT: 205	EYES: HAZ	HAIR: BRO
WA DOC:		FBI: 94539NA4	
LAST KNOWN ADDRESS(ES):			
HOME - 8708 NE 161ST AVE, VANCOUVER WA 98682			

DEFENDANT: MICHAEL DARRIN ODELL			
RACE: W	SEX: M	DOB: 8/27/1965	
DOL: 3675949 OR		SID: WA15453451	
HGT: 511	WGT: 190	EYES: BLU	HAIR: BLN
WA DOC:		FBI: 140208NA3	
LAST KNOWN ADDRESS(ES):			
HOME - 718 N WINCHELL ST, PORTLAND OR 97217			

DEFENDANT: ADRIAN EDWARD REKDAHL			
RACE: W	SEX: M	DOB: 10/21/1972	
DOL: 4473907 OR		SID: OR08530487	
HGT: 505	WGT: 140	EYES: BRO	HAIR: BRO
WA DOC:		FBI: 477926MA9	
LAST KNOWN ADDRESS(ES):			
DOL - 502 SW EASTMAN CT, GRESHAM OR 97080			
FORS - NO RECORD,			
JIS - 6160 SW 45TH AVENUE, PORTLAND OR 97221			

