NO. 93812-1

IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. 74300-7-I)

CITY OF KIRKLAND, 42466

Respondent,

v.

HOPE STEVENS,

Petitioner.

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WASHINGTON STATE
SUPREME COURT

MOTION FOR DISCRETIONARY REVIEW
TO THE SUPREME COURT OF WASHINGTON

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1. IDENTITY OF MOVING PARTY

Hope Stevens, Appellee in the King County Superior Court and Petitioner in the Court of Appeals, seeks the relief designated below.

2. DECISION

Petitioner seeks review of the Superior Court's decision of October 2, 2015 remanding the case to the Kirkland Municipal Court and finding an abuse of discretion by the lower court. *See App. A.*

3. ISSUES PRESENTED FOR REVIEW

RALJ 9.1, a little known rule which governs superior court appellate review of decisions of courts of limited jurisdiction, states that the "superior court ***shall*** accept those factual determinations ***that may reasonably be inferred from the judgment*** of the court of limited jurisdiction." RALJ 9.1(b)(2) (emphasis added). This case presents the following issues of substantial public interest regarding the proper application of this rule:

> 1. Does a superior court err when it reverses a decision of a court of limited jurisdiction because the trial court failed to enter written findings of fact and conclusions of law?
>
> 2. Does a superior court err when it reverses a decision of a court of limited jurisdiction because it believes that the transcript of the trial court proceedings does not include oral remarks by the trial court judge from which the necessary findings of fact can be inferred?
>
> 3. When the record unequivocally shows that the trial court judge knew the correct legal standard which governs CrRLJ 8.3 dismissals for governmental mismanagement, is it error for a superior court to reverse the dismissal when it can

> reasonably be inferred from the judgment of the dismissal that the trial court judge found prosecutorial mismanagement of the case which prejudiced the defendant?

In addition, this case presents the following issues regarding the application of the test which this Court adopted in *State v. Michielli*, 132 Wn.2d 229 (1997):

> 4. Is "simple mismanagement" of the discovery process by the prosecution sufficient to support a dismissal under CrRLJ 8.3(b), or must there be some form of "egregious misconduct" or "gross mismanagement"?
>
> 5. When prosecutorial mismanagement forces a defendant to choose between her right to receive discovery in time to adequately prepare for trial and her right to a speedy trial, is that sufficient to establish the type of misconduct which requires dismissal of the charges?

4. STATEMENT OF THE CASE

a. Trial Court Proceedings

On June 23, 2014, the City charged Stevens with assaulting Teresa Obert and C.O. *See App. B.* Stevens maintains that C.O. (her 6'9", 280 pound, 17-year-old nephew), attacked her with a broomstick handle, and that she did not assault anyone. *See App. C.* When to prepare for trial, the defense encountered serious difficulties obtaining discovery. Some of her difficulties were created by the City's witnesses. Other difficulties were created by the conduct of the prosecutors for the City of Kirkland.

The prosecution's witnesses repeatedly refused to comply with the trial court's discovery orders. On November 6, 2014, the Municipal Court

judge granted Petitioner's motion for leave to take their depositions. Although initially scheduled for November 26, 2014, at the request of the prosecution their depositions were rescheduled to December 2, 2014. *See App. Q* at 2. But on that date the witnesses failed to appear. *See id.* at 2-3. A new deposition date of December 19, 2014 was set, and the witnesses appeared for deposition on that date, but they refused to answer several relevant questions. *See id.* at 3. On December 30, 2014, the trial court ordered them to submit to another deposition on January 2, 2015, and to answer the relevant questions, but on that date the witnesses failed to appear again. *See id.* at 3-4. The trial judge issued yet another order directing them to appear for a deposition on January 8, 2015, but for the third time the witnesses failed to appear for deposition. *See id.* at 4-5.

Petitioner's counsel also encountered difficulties obtaining discovery from the prosecution. Although the Commissioner fails to mention it in her ruling, when Petitioner made a discovery request for copies of the prosecutor's notes of their own witness interviews, the City refused to produce them, claiming that they were protected by the work product privilege. The City persisted in refusing to produce these notes, even after Petitioner cited *State v. Garcia*, 45 Wn.App. 132 (1986). *See App. I.*

Petitioner filed a motion seeking an order of dismissal pursuant to CrRLJ 8.3, and the trial court judge held three separate hearings on this

motion. At the first hearing, held on December 30, 2014, the trial court judge ordered the City to immediately produce to Petitioner the prosecutors' notes of its own witness interviews. *See* RP I, 29. The court also faulted the prosecutor for delaying before setting a new deposition date when the witnesses failed to appear for their deposition on December 2, 2014. *See* RP I, 26. But the trial judge declined to dismiss the charges at that time, choosing instead to enter remedial orders.

Also on December 30, the City prosecutors chose to amend their witness list and to add four new witnesses including two expert witnesses. *See App. K.* As the trial judge later noted, the City never offered any explanation as to why these witnesses were not added until six months after the charges were initially filed. *See* RP IV, 13.

When the witnesses failed to appear for deposition on January 2, 2015, Petitioner filed a renewed motion to dismiss, and the trial judge heard that motion on January 6, 2015. For the second time, the trial judge declined to grant the motion, choosing instead to give the witnesses yet another chance to appear for deposition, and ordering Petitioner's counsel to see if he could obtain discovery from the prosecution's four new witnesses. *See* RP II, 30.

It was not until the trial court held its third hearing on Petitioner's motion to dismiss, that the trial court judge granted that motion on January

13, 2015. *See App.* N. At that hearing the trial judge was informed that Petitioner's counsel had not been able to interview any of the City's four new witnesses; both of the recently disclosed expert witnesses refused to be interviewed because they had not been subpoenaed by the prosecution for trial and because they had not been supplied with a patient release form. *See App.* N.

In his oral ruling granting Petitioner's motion to dismiss, the Municipal Court judge specifically faulted the City for disclosing four new witnesses two weeks before the readiness hearing, one of whom had left the State.

> [O]n December 30, 2014, ***more than six months after the government filed charges against the defendant, and less than two weeks before trial readiness, the City filed an additional witness list endorsing four additional witnesses.*** The witness list included two medical health professionals, a doctor and a physician's assistant. Both apparently took part in examining the alleged victim/witness after the assault.
>
> ***The defense again moved to dismiss charges, citing mismanagement on the part of the prosecutors by waiting over six months to endorse expert witnesses only days before the trial.*** Again, [on January 6th] the court chose to reserve ruling and urged defense counsel to attempt to interview the newly-endorsed witnesses with the time left before trial.
>
> Today, according to declarations filed by the defense, the two medical professionals have declined to discuss their involvement in this case citing privilege. ***It's interesting to note that the government has endorsed two doctor witnesses, albeit late, to testify as to the condition of the alleged victim following the altercation.*** Still, both medical

> witnesses are refusing to discuss the case with the defense. Consequently, the defendant will hear this crucial testimony for the first time during trial in front of the jury. The testimony, and that of others – this testimony, and that of others, will be a complete surprise to the defendant.
>
> According to defense counsel, ***the third witness endorsed by the City on December 30th, 2014*** is Jeffrey Obert. . . . Mr. Obert declined to appear for the [defense] interview.
>
> ***The fourth witness added to the government's list on December 30, 2014 is a Corey Parks***. According to the declaration filed by the defense, this witness lives in Florida and has also declined to be interviewed over the phone. According to the declaration, ***Ms. Parks states she has not received a subpoena to appear in court . . .***
>
> Consequently, there are four witnesses that have all refused to talk to defense counsel. ***These witnesses were added to the government's witness list less than two weeks before trial readiness and more than six months after charges were filed . . . .***

RP III, 12-14 (emphasis added). Acknowledging that "a dismissal of a criminal prosecution is an extraordinary remedy," the municipal court judge concluded that he had no choice but to grant the requested dismissal because "the government simply cannot force a defendant, a criminal defendant, to choose between" her right to a speedy trial, and her due process rights to adequately prepare for trial. RP III, 15-16.

When the trial judge orally granted the Petitioner's motion to dismiss, Petitioner's counsel raised the question of whether the court wanted to enter written findings. The court asked the prosecutor if she

wanted to be heard on that question but she declined the invitation to speak to that issue:

> MR. MAYBROWN: Your Honor, I have an order which reflects what the court has considered and incorporates the court's oral ruling. If that would be sufficient with the court, that would be sufficient with the defense. If the court wants us to prepare findings, we would prepare findings and conclusions. I'm satisfied either way, but I'll defer to the court. And perhaps the prosecutor would have –
>
> THE COURT: Does the prosecutor wish to be heard?
>
> MS. McELYEA: No, your Honor.
>
> THE COURT: Then I'll sign your order, Counsel.

RP III, 16-17.

The Municipal Court's written order dismissing the charges with prejudice states: "IN REACHING THIS DECISION the Court further incorporates its oral rulings of November 6, 2014, December 30, 2014, January 6, 2015 and January 13, 2015)." *App. P*

b. <u>Superior Court Proceedings</u>

The City appealed the dismissal to the King County Superior Court. Even though the City had expressly declined to comment when asked in the Municipal Court if the City thought written findings of fact and conclusions of law were necessary, in the Superior Court the City complained that the Municipal Court judge never made any finding that the City did something wrong. *See* RP IV, 7. Petitioner responded that the prosecution's delay in

waiting to identify four new witnesses, including two experts, until less than two weeks before readiness hearing, was governmental misconduct which "deprived the defense of any fair opportunity to prepare the case for trial, and the Court so found." RP IV, 7. But the Superior Court RALJ judge did not agree that it was clear that the Municipal Court "so found," and he faulted the Municipal Court judge for not entering any written findings of fact and conclusions of law:

> COURT: Well, I guess I'm, ***I'm not sure the Court so found.*** The Court certainly said that the defense was presented with enormous difficulties by this case. ***But obviously one of the problems we have here is there weren't actual written findings and conclusions entered. There are oral statements by the judge*** in making his decision. And certainly he substantially agrees with you, Mr. Maybrown, that there were enormous difficulties presented to the defense. ***I'm not sure that he actually made a finding that it, that it prevented the defense from, from going forward.***

RP IV, 7-8 (emphasis added).

Stevens' counsel replied noting that RALJ 9.1(b) requires the Superior Court to accept the "implicit" findings made by the trial court:

> MR. MAYBROWN: Well, first of all, under the RALJ rules, because the courts of limited jurisdiction are somewhat less formal than these provisions, ***there's a very specific rule, 9.1B that says the Court must accept all findings, both explicitly made and implicit in the Court's findings.***
>
> Here what the Court very clearly found is that endorsing these witnesses six months after the trial had been set, less than two weeks before readiness without any explanation or justification was mismanagement.

RP IV, 8 (emphasis added). Defense counsel also noted that the City had foregone the opportunity to have written findings entered. *See* RP IV, 8.

Petitioner's counsel pointed out that the Municipal Court judge's decision to dismiss was reviewable under the abuse of discretion standard which precludes reversal unless the appellate court concludes that no reasonable person could have reached the conclusion that the trial court judge reached. RP IV, 15. But the Superior Court judge asserted that this was *not* a correct statement of the abuse of discretion standard. RP IV, 15. The Superior Court judge said the proper standard was whether the trial court's decision rested on untenable grounds, and he went on to rule that the Municipal Court judge's decision was "untenable" because the Municipal Court judge did not make a finding of governmental misconduct:

> MR. MAYBROWN: . . . ***[T]he question is whether any reasonable judge in Washington, faced with these circumstances, could have reached the decision it [the Municipal Court] reached.***
>
> COURT: ***No, that's not the proper...*** I realize that there are cases that articulate the standard that way but that, ***that's a fundamental misstatement of what, what the, abusive [sic] discretion means.*** It's a decision made for untenable grounds or for untenable reasons. And ***the untenable grounds here is that there is no finding by the trial court*** of a governmental misconduct or arbitrary action.

RP IV, 15 (emphasis added). The Superior Court then entered this order:

> The above entitled court having heard a motion to remand this case back to the trial court for an abuse of discretion under 8.3 and 4.7.

> IT IS HEREBY ORDERED THAT this case be remanded back to the trial court for a trial. Court finds there was an abuse of discretion.

App. A.

c. <u>Petitioner's Motion for Discretionary Review</u>.

Petitioner sought discretionary review in the Court of Appeals. In support, Petitioner submitted numerous Appendices.

On June 7, 2016, the Commissioner issued a Ruling Denying Review. *See App. Q.* In that Ruling, the Commissioner focused upon the fact that Petitioner had failed to show that the Superior Court's decision was in clear conflict with any Washington case law. The Commissioner also noted that, in a general sense, dismissal is an extraordinary remedy and that the remedy would be unwarranted where "suppression of evidence may eliminate whatever prejudice is caused by governmental misconduct." *App. Q.* at 8 (*citing City of Seattle v. Holifield*, 170 Wn.2d 230, 237 (2010)). Yet the Commissioner failed to explain how such a remedy could have changed the result in this case, since all parties had acknowledged that suppression of the disputed evidence (witness testimony) would have necessarily resulted in dismissal of the charges.

Petitioner subsequently asked a panel of Division One to modify the Commissioner's Ruling. On October 4, 2016, the Court issued an Order denying that motion. *See App. R.*

5. GROUNDS FOR RELIEF AND ARGUMENT

a. Whether explicit "findings" are required when a Municipal Court dismisses a case, notwithstanding the fact that RALJ 9.1(b)(2) requires a reviewing Superior Court to accept all factual determinations "that may be reasonably inferred from the judgment," is an issue of public interest that should be decided by an appellate court. RAP 2.3(d)(3).

The Superior Court was fixated on what it erroneously saw as a "problem":

> But obviously one of the problems we have here is ***there weren't actual written findings and conclusions entered.*** There are oral statements by the judge in making his decision.

RP IV, 7 (emphasis added).

But the RALJ rules specifically recognize that written findings of fact are ***not required*** in courts of limited jurisdiction. RALJ 9.1(b), specifically refers to *two* types of "factual determinations." Subsection (b)(1) refers to factual determinations "which were expressly made by the court of limited jurisdiction" and subsection (b)(2) refers to factual determinations "that may reasonably be inferred from the judgment of the court of limited jurisdiction." The rule recognizes that sometimes a municipal court judge will "expressly" make factual determinations, but at other times the court will not say anything – either orally or in writing – about its factual determinations. In the latter situation the appellate court is

required to accept any factual determination that can reasonably be inferred "from the judgment."

RALJ 9.1(b)(2) accommodates the generally informal nature of judging that takes place in the municipal courts. The rule recognizes that it would be completely unworkable to require the judges of these courts to support all their decisions with written findings and conclusions. Instead, RALJ 9.1(b)(2) ***requires*** appellate courts to accept all reasonably inferable findings that ***could*** support the judgment of the lower court.

Notably, the Superior Court failed to follow the mandate of RALJ 9.1(g). After ordering the case sent back to the municipal court, the Superior Court's decision states only this: "Court finds there was an abuse of discretion." *App. A.* Why was there an abuse of discretion? The Superior Court's written decision doesn't say. But, at the same time, the Superior Court faulted the Municipal Court for failing to enter written findings fact, thereby ignoring RALJ 9.1(b).

In her ruling denying discretionary review, the Commissioner acknowledges that the Superior Court judge said that "one of the problems" with the Municipal Court's dismissal order was that "there weren't actual written findings and conclusions entered." *App. Q*, at 10. The Commissioner reasons, however, that because the Superior Court judge went on to make an additional statement about "the record," that there was

no violation of RALJ 9.1(b)(2). The Commissioner states:

> But the [Superior] court also stated:
>
> Well, I'm certainly happy to infer Mr. Maybrown, if you can point me to something in the record that, that would allow me to infer that the Court actually found governmental misconduct or arbitrary action on the basis of something, of, you know, but there, it isn't here.

Id. (*citing* RP IV, 16).

The Commissioner misconstrued RALJ 9.1(b)(2). The Rule mandates acceptance of findings that can be inferred "from the judgment." The Rule does *not* limit its mandate to findings that can be inferred from the municipal court's oral remarks.

The Commissioner claimed that the superior court judge "concluded that there was no evidence to support a finding, if any, of the City's misconduct or arbitrary action that would warrant dismissal." *App. Q*, at 10. But that is not an accurate statement of what the Superior Court judge actually said. What he explicitly said is that he was "not sure" what the Municipal Court judge found. Petitioner's counsel told the Superior Court "you have the City endorsing" four new witnesses "six months after the case was filed [and] less than two weeks before the readiness . . . . This deprived the defense of any fair opportunity to prepare the case for trial, *and the Court so found.*" RP IV, 7. And the Superior Court judge responded: "Well, I guess I'm, I'm not sure the Court so found." RP IV, 7.

The Superior Court judge did ***not*** say, there was insufficient evidence to support the Municipal Court judge's factual determinations. Instead, he said it was simply unclear to him what the Municipal Court judge found.

Moreover, the Commissioner's suggestion that what the Superior Court judge really did was find a lack of substantial evidence to support the Municipal Court's "inferred" finding of governmental mismanagement is completely inconsistent with the Superior Court's comment to Petitioner's counsel that he might still prevail on remand because the Municipal Court might ultimately enter the written findings that the Superior Court judge (erroneously) believed were required. The Superior Court judge said that while the municipal court discussed prejudice to the defendant, he did not discuss the requirement of governmental mismanagement. And yet he said this defect could be cured on remand: "Now, you may very well be able to accomplish the same result for your client upon remand." RP IV, 17.

Petitioner's counsel complained that the case should not have to go back for the entry of written findings when the City prosecutors were expressly asked whether they wanted written findings to be entered and they expressly declined to address that question. RP IV, 18. But the Superior Court ruled that nevertheless written findings were necessary: "And so I think that, that yes, that you need to go back to the trial court and go through

the process again." RP IV, 19.

Petitioner submits that the RALJ judge was wrong because no such written findings are necessary and RALJ 9.1(b)(2) explicitly says so. But RALJ 9.1(b)(2) is not a well-known rule. There is only one published decision that makes even a passing reference to RALJ 9.1(b). In *State v. Basson*, 105 Wn.2d 314 (1986), this Court noted that because the Superior Court was sitting as an appellate court, RALJ 9.1(b) applied, and thus it was improper for the Superior Court to make its own evaluation of the evidence. But *Basson* only addresses subsection (b)(1) which requires acceptance of all findings "supported by substantial evidence"; it does not address subsection (b)(2) which requires acceptance of all "reasonably inferred" findings.

Because there is no published opinion analyzing subsection (b)(2), this case presents a question of substantial public interest. In the absence of a published decision, other Superior Court judges are likely to make the same mistake that the Superior Court judge made in this case, and they too will fail to follow the Rule's mandate that they must accept all factual determinations that are reasonably inferable from the judgment.

In the present case, the record is replete with facts that support the trial court judge's decision and from which a finding of governmental

mismanagement of the case can reasonably be inferred from the judgment.[1] Notably, the Superior Court's decision remanding this case back to the trial court ignores all of the Municipal Court judge's oral statements, all the reasonable inferences that can be drawn from the judgment dismissing the case, and the clear command of the applicable RALJ rule. Anyone who reads the Municipal Court judge's two pages of comment regarding the City's addition of four new witnesses six months after charging and shortly before trial (*see* RP III, 12-14) can easily ***infer*** that the Municipal Court judge found governmental mismanagement.

b. The Superior Court's decision is in conflict with all numerous Supreme Court cases on dismissals pursuant to CrR 8.3(b). Gross mismanagement is not required; simple mismanagement is sufficient.

When he reversed the Municipal Court's dismissal order, the Superior Court judge faulted the lower court for failing to make a finding of "gross mismanagement" of the case by the City prosecutors. RP IV, 12. But it is well settled that gross mismanagement is not required, and that "simple mismanagement" is sufficient. *See State v. Dailey,* 93 Wn.2d 454,

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[1] For example, there was unrebutted evidence that the police failed to collect physical evidence that supported the self-defense defense; and the prosecutors delayed the deposition of their witnesses; failed to promptly reschedule them when the witnesses failed to appear; refused to provide discovery of their own interview notes; defended their refusal with a frivolous claim of work-product privilege; waited for six months to identify four new witnesses just two weeks before the readiness hearing; failed to subpoena their belatedly disclosed experts; and failed to provide their experts with medical releases thus making it impossible for defense counsel to interview them.

457 (1980) ("we have made it clear that "governmental misconduct" need not be of an evil or dishonest nature, ***simple mismanagement is sufficient.***"); *State v. Michielli,* 132 Wn.2d 229, 243 (1997) (same); *State v. Blackwell*, 120 Wn.2d 822, 831 (1993) (same); *State v. Brooks*, 149 Wn.App. 373, 384 (2009) (same).

The Commissioner did not directly address the conflict between the Superior Court's oral statement and the case law. Instead, she seems to reason that since the case law also says that a dismissal can only be ordered in cases of "egregious" conduct, that the Superior Court's use of the "gross mismanagement" standard is excusable:

> Stevens argues that "gross mismanagement" is not required and that "simple mismanagement" is sufficient. Governmental misconduct "need not be of an evil or dishonest nature; simple mismanagement is sufficient." But "Washington courts have clearly maintained that dismissal is an extraordinary remedy to which the court should resort only in 'truly egregious cases of mismanagement or misconduct.'"

App. Q at 12-13 (*citing* State *v. Wilson*, 149 Wn.2d 1, 9 (2003)).

Petitioner submits that the holdings of *Blackwell*, *Dailey*, *Michielli* and *Brooks* cannot be so easily evaded. If this Court thought that egregious misconduct was synonymous with gross mismanagement, it would never have explicitly held that gross mismanagement is ***not*** required. If this Court thought that the two phrases had the same meaning, then one would have to read all of the above cited opinions – and *Wilson* – as simultaneously

holding that gross mismanagement is ***not*** required and that gross mismanagement *is* required. Obviously, this Court cannot have meant that those two completely contradictory propositions are both true.

Here, it is undisputed that the prosecutors mismanaged the discovery process in this case and that Petitioner was prejudiced on account of that mismanagement. At the time of the final readiness hearing, the trial court noted the defendant had been forced into an untenable position – where she would be forced to choose between her right to a speedy trial and her right to a fair trial. Consequently, the Superior Court's explicit use of a standard which this Court has condemned calls for appellate review and correction by this court under both RAP 2.3(d)(1) and RAP 2.3(d)(4).

This Court decided *Michielli* nearly twenty years ago. Since then, the ruling has been diluted – and often ignored – by Washington's lower courts. This Court should grant review and remind the lower courts that it meant what it said: a defendant should not be unlawfully forced to go to trial unprepared or give up her right to a speedy trial. Here, there is no real dispute that the City's mismanagement of the discovery process created the precise "Hobson's Choice" that this Court sought to guard against. That circumstance cannot be swept aside as an inconsequential event. *See Michielli*, 132 Wn.2d at 245 ("Defendant's being forced to waive his speedy trial right is not a trivial event.").

6. CONCLUSION

Superior Court judges normally preside over trials. They are used to finding facts and to making decisions; they are not used to performing the task of appellate review. And yet every year there are hundreds of RALJ appeals decided by the Superior Courts of this State. Each one of these appeals requires a Superior Court judge to engage in the unfamiliar task of reviewing someone else's decision.

Superior Court judges are familiar with the process by which their own decisions are reviewed, and thus they are familiar with the court rules which require them to make written findings of fact and conclusions of law. *See* CrR 6.1(d) ("Trial Without Jury"); CrR 3.6(b) ("Suppression hearings—Duty of the Court"); and CR 52(a)(1) ("Decisions, Findings and Conclusions, Requirements")), and with the case law that discusses the requirements of these rules. *See, e.g.*, *State v. Head,* 136 Wn.2d 619 (1998); *State v. Gaddy,* 114 Wn.App. 702 (2002); and *Young v. Thomas*, 193 Wn.App. 427 (2016)). Thus, it not surprising that superior court judges might expect the rules for judges in courts of limited jurisdiction to be the same, and for them to expect that those judges are also required to enter findings of fact and conclusions of law when they make decisions.

But this expectation is simply wrong. The rule for courts of limited jurisdiction is ***very*** different. The applicable rule, RALJ 9.1(b)(2) expressly

sanctions the entry of decisions without written findings of fact and conclusions of law, and directs the superior court judges to accept all factual determinations that can reasonably be inferred from the judgments entered below. When superior courts erroneously assume that the same rules that apply to them also apply to courts of limited jurisdiction, they wreak havoc with the appellate review of the lower courts' decisions by requiring costly, inefficient, and time consuming remands for the entry of findings which are completely unnecessary. This Court should grant review in order to instruct superior courts as to their proper role when they sit as appellate judges in RALJ cases, so that mistakes like the one committed in this case no longer happen.

In addition, this Court should also grant review to reaffirm that it meant what it said in *Michielli* when it held that dismissals of criminal charges are required when simple mismanagement of discovery by the prosecution forces a defendant to choose between being inadequately prepared for a speedy trial, or being adequately prepared for an "un"-speedy trial.

Respectfully submitted this 1st day of November, 2016.

James Lobsenz by TM

James E. Lobsenz, WSBA # 8787

Todd Maybrown, WSBA # 18557

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Allen, Hansen, Maybrown & Offenbecher, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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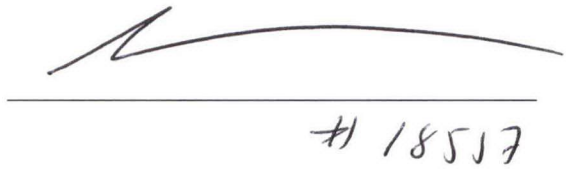

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Appendix K: December 29, 2014, *City's Addendum to Witness List* ..... K-1 to K-2

Appendix L: January 2, 2015, *Defendant's Renewed Motion to Dismiss Pursuant to CrR 8.3(b)* ..... L-1 to L-10

Appendix M: January 5, 2015, *Second Supplemental Declaration of Todd Maybrown in Support of Defendant's Motion to Dismiss* ..... M-1 to M-4

Appendix N: January 9, 2015, *Third Supplemental Declaration of Todd Maybrown In Support of Defendant's Motion to Dismiss* ..... N-1 to N-7

Appendix O: January 13, 2015 *Transcript Excerpt, Municipal Court Judge's Oral Ruling Granting Motion for Dismissal With Prejudice* ..... O-1 to O-4

Appendix P: January 13, 2015 *Municipal Court Order Granting Motion to Dismiss With Prejudice* ..... P-1 to P-2

Appendix Q: June 6, 2016 *Commissioner's Ruling Denying Discretionary Review* ..... Q-1 to Q-13

Appendix R: October 4, 2016 *Order Denying Motion to Modify* R-1

APPENDIX A

FILED
KING COUNTY, WASHINGTON
OCT 2 - 2015
SUPERIOR COURT CLERK
BY Jon Schroeder
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

~~STATE OF WASHINGTON~~ City of Kirkland Plaintiff vs. Stevens, Hope A Defendant	NO. 15-1-01772-8 SEA ORDER ON CRIMINAL MOTION

The above entitled court having heard a motion to remand this case back to the trial court for an abuse of discretion under 8.3 and 4.7.

IT IS HEREBY ORDERED that this case be remanded back to the trial court for a trial. Court finds there was an abuse of discretion

DATED: Oct. 2, 2015.

Douglass A. North
Judge Douglass A. North

Deputy Prosecuting Attorney/WSBA# 42466 Tamara L. McElyea

copy received

Attorney for Defendant/WSB #

APPENDIX B

FILED
JUN 23 2014
KIRKLAND MUNICIPAL COURT

IN THE MUNICIPAL COURT FOR THE CITY OF KIRKLAND
STATE OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff, v. STEVENS, HOPE A., Defendant,	NO. 38384 COMPLAINT 2 COUNTS (Assault in the Fourth Degree-Domestic Violence/Assault in the Fourth Degree-Domestic Violence) Gross Misdemeanor

COUNT I

The Prosecuting Attorney for the City of Kirkland, in the name and by the authority of the City of Kirkland, does accuse the defendant of the crime of Assault in the Fourth Degree (domestic violence), committed as follows:

That the defendant in the City of Kirkland, Washington, on or about 06/21/2014, did intentionally assault, Teresa L. Obert (DOB: 12/10/1971), a family or household member as defined in RCW 10.99.020.

Contrary to KMC, adopting by reference RCW 9A.36.041, and against the peace and dignity of the City of Kirkland.

COUNT II

And the Prosecuting Attorney, does further accuse the defendant of the crime of Assault in the Fourth Degree, Domestic Violence, a crime of the same or similar character as based on the same conduct as based on a series of acts connected together with Count I, which crimes were part of a common scheme or plan, and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

MOBERLY & ROBERTS, PLLC
12040 98th Avenue NE, Suite 101
Kirkland, WA 98034
425-284-2362
425-284-1205(f)

That the defendant in the City of Kirkland, Washington, on or about 06/21/2014, did intentionally assault, C.J.D.O. (DOB: 05/28/1997), a family or household member as defined in RCW 10.99.020.

Contrary to KMC, adopting by reference RCW 9A.36.041, and against the peace and dignity of the City of Kirkland.

AND COMES NOW PLAINTIFF, CITY OF KIRKLAND, AND HEREBY DEMANDS A JURY TRIAL IN THE ABOVE-ENTITLED CAUSE. SUCH DEMAND IS MADE PURSUANT TO CrRLJ 6.1.1(B).

Moberly & Roberts, PLLC

DATED: 6/23/2014

By: _____
Assistant Prosecuting Attorney, WSBA # 42466

The above-signed Prosecuting Attorney certifies, under penalty of perjury of the laws of the State of Washington, that there are reasonable grounds to believe, and the attorney does believe, that the defendant committed the offense contrary to law.

MOBERLY & ROBERTS, PLLC
12040 98th Avenue NE, Suite 101
Kirkland, WA 98034
425-284-2362
425-284-1205(f)

APPENDIX C

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 DECLARATION OF TODD MAYBROWN IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR FOR ALTERNATIVE RELIEF

I, Todd Maybrown, do hereby declare:

1. I am the attorney for the defendant, Hope Stevens, in the above-entitled case.

2. On or about June 23, 2014, the prosecuting attorney for the City of Kirkland filed a complaint charging Ms. Stevens with two counts of assault. Count I alleges that Ms. Stevens assaulted an individual identified as Teresa L. Obert on June 21, 2014. Count II alleges that Ms. Stevens assaulted an individual identified as C.J.D.O. on June 21, 2014. Ms. Stevens has entered a plea of not guilty to each of the charges; and she adamantly denies both charges. Moreover, Ms. Stevens claims that she used lawful force in defending herself after she was attacked by C.J.D.O. on June 21, 2014.

3. As reflected in the police reports, this incident stemmed from an argument and then a physical altercation involving C.J.D.O. and Ms. Stevens. For some unknown reason,

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Seattle, Washington 98101
(206) 447-9681

police reports do not include a description of C.J.D.O. In fact, C.J.D.O. is much larger than Ms. Stevens – approximately 6'9" in height and 280 pounds in weight. On June 21, C.J.D.O. took offense to a comment that was made by Ms. Stevens. C.J.D.O. became enraged and he attacked Ms. Stevens. As his anger grew, C.J.D.O. grabbed a broom stick handle and repeatedly hit Ms. Stevens over the head with the stick. C.J.D.O. used such great force during these blows that he broke the stick in half.

4. Ms. Stevens has consistently – and persistently – denied any claim that she assaulted the City's complaining witnesses. In fact, when first speaking with police investigators, Ms. Stevens denied the claims of assault and told the officers that she was the "victim" and that "[C.J.D.O.] hit me with a stick." Ms. Stevens told the officers that C.J.D.O. is a "scary person and that she was protecting herself." She also explained that C.J.D.O.'s mother, Teresa Obert, always protects her son. When the police officers advised Ms. Stevens that she was under arrest, Ms. Stevens repeatedly asked for an explanation and told the officers that she was the victim. Later, when being transferred to the police station, Ms. Stevens again asked why she was being arrested and denied the claim of assault.

5. Should this case proceed to trial, the defense is confident that we will demonstrate it was C.J.D.O., and not Ms. Stevens, who was the true aggressor during this incident. The defense will also present testimony to demonstrate that Ms. Stevens was seriously injured on account of his attack. The defense will present testimony to show that Ms. Stevens suffered a concussion on account of C.J.D.O.'s unlawful conduct.

6. The defense has attempted to investigate this case over the last several months. To that end, defense counsel has interviewed each police officer who was present at the Obert home following the incident of June 21, 2014. These officers have each confirmed that there is

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no independent evidence, other than the self-serving claims of C.J.D.O., that Ms. Stevens was somehow the first aggressor during the incident.[1]

7. The complaining witnesses in this case, Teresa Obert and C.J.D.O., have retained an attorney to represent them in these matters. That attorney, Mary Gaston, is employed by the Perkins Coie law firm in Seattle.

8. Over the last several months, I have made countless attempts to schedule defense interviews and/or depositions with Teresa Obert and C.J.D.O. The defense has been thwarted in these efforts and no interview and/or deposition has been completed as of today's date.

9. This obstruction was focused solely on defense counsel. I was advised that the complaining witnesses agreed to meet with the assigned prosecuting attorneys to discuss the case and that such a meeting was to be held on October 22, 2014. Before that meeting, one of the prosecuting attorneys wrote and advised me that I would not be permitted to attend any meeting between these witnesses and the prosecutor. *See Appendix A.* The City has yet to produce any discovery materials relating to that meeting.

10. This Court initially scheduled a readiness hearing in this case for November 12, 2014 and a motion hearing for November 4, 2014. Unfortunately, these hearings needed to be continued because Teresa Obert and C.J.D.O. had refused to cooperate with defense counsel. Accordingly, the defense filed a motion for leave to conduct depositions pursuant to CrRLJ 4.6.

---

[1] The police reports indicate that Teresa Obert has claimed that she was not present during the start of this altercation, so she would not be able to shed much light on this crucial issue.

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11. The parties appeared before this Court on November 4, 2014. After hearing argument, the Court granted the defendant's motion and ordered that the defense was authorized to depose the two complaining witnesses. *See Appendix B* (Order of November 4, 2014). Counsel for the complaining witnesses was present when the Court issued this ruling, so there can be no doubt that the complaining witnesses had fair notice of the Court's decision.

12. Over the last month, I have expended considerable efforts in an attempt to arrange the depositions of Teresa Obert and C.J.D.O. Yet, as discussed further below, these depositions have not been completed and it now appears that the "witnesses" will not comply with any Orders of this Court.

13. CrRLJ 4.6(b) sets forth the procedure for arranging depositions in a criminal case. The rule provides that the party scheduling the deposition must prepare a "written notice" and that such notice must state "the time and place for taking the depositions." *Id.*

14. On November 5, 2014, I wrote to Ms. Gaston and asked if she would accept notices on behalf of her clients. Ms. Gaston responded that she would agree to accept such notices. *See Appendix C.* Ms. Gaston asked for me to arrange a date for these depositions with the assigned prosecutors.

15. On November 13, 2014, I wrote to all counsel and explained that I was hoping to schedule depositions for the afternoon on November 25. *See Appendix D.* In that correspondence, I advised the parties that it was imperative that we complete the depositions sometime during the week of November 24. Having heard no objections, I served all parties with written notice for these depositions on the following day. *See Appendix E.* These same notices were filed with the Court.

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16. But no deposition went forward on November 25 as scheduled. Rather, on November 14, 2014, one of the assigned prosecutors contacted me by email and asked if I would reschedule the depositions for a later date. In particular, the prosecutor asked if I would agree to set the deposition for the afternoon of December 2. As a matter of professional courtesy, I agreed to reschedule the depositions for December 2.

17. On November 17, 2014, my assistant emailed a copy of the amended notices to counsel for all the parties. *See Appendix F.* These notices were surely received by Ms. Gaston. In fact, later that same date, Ms. Gaston responded to my assistant and confirmed her receipt and explained that she did not need to receive hard copies. *See id.*

18. But, once again, no deposition went forward on December 2. On the morning of December 2, Ms. Gaston emailed a "notice of unavailability" in which she explained that her clients had never received subpoenas for any deposition. *See Appendix G.* I immediately responded to Ms. Gaston and explained that I was shocked by her claims. Along with that email message, I sent Ms. Gaston a copy of all emails relating to the deposition – including her confirmation of receipt of the notices.

19. Later that same date, Ms. Gaston's assistant wrote to me and explained that Ms. Gaston was not in the office. She then claimed, for the very first time, that her clients did not intend to appear for depositions based upon her contention that the notices she received were somehow defective. Apparently, citing CR 45 (rather than the appropriate criminal rules), Ms. Gaston decided to make an 11th hour claim that her clients would not appear unless they were given subpoenas.

20. Ms. Gaston's claim is untenable – and simply another example of gamesmanship. Accordingly, I promptly wrote to the prosecuting attorneys and explained:

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> As you know, this is a criminal case and the criminal rules of procedure apply. CrRLJ 4.6 does not require service of a subpoena. To the contrary, the rule requires a "notice," and nothing more:
>
> > (b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every other party reasonable **written notice** of the time and place for taking the deposition. The **notice** shall state the name and address of each person to be examined. On motion of a party upon whom the **notice** is served, the court for cause shown may extend or shorten the time and may change the place of taking.
>
> *Id.* Moreover, the thought that Ms. Gaston would accept service of these notices on November 17 and then "lay in the weeds" for two weeks so that she could offer up this sort of bogus objection is remarkable.
>
> Once again, I am forced to file a motion with the court.

See Appendix H.

21. One of the prosecutors wrote back and, quite remarkably, she suggested that Ms. Gaston's claim might have some merit. She also asked Ms. Gaston to consider another possible date for these depositions. To this point, Ms. Gaston has failed to respond to that message.

22. Defense counsel cannot fairly or effectively prepare this case for trial without completing the depositions of Teresa Obert and C.J.D.O. in a time and manner that would allow for follow-up investigation. *See, e.g., State v. Ray,* 113 Wn.2d 531, 548 (1991) ("Failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest."); *State v. Jury,* 13 Wn.App. 256, 264 (1978) (Sixth Amendment violated where defense counsel failed to interview the State's witnesses). These

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interviews are critical to the defense and must be completed before the defense can complete its investigation and file pre-trial motions.

23. This Court has previously authorized defense counsel to depose Teresa Obert and C.J.D.O. regarding these matters. Yet, after more than a month of efforts, both of these witnesses have refused to appear for a deposition. This intransigence and obstructionism is unfathomable – particularly so given that these witnesses have voluntarily met with the prosecuting attorneys at a time that the prosecuting attorneys refused to allow defense counsel to be present.[2]

24. Under CrR 4.7(g), this Court is authorized to manage the discovery procedures in any case. These rules are designed to ensure that each side – not just the prosecuting attorney – is provided a fair opportunity to investigate a case.

25. In cases involving violations of the discovery rules, CrRLJ 4.7(g)(7)(i) provides that the Court may enter such "order as it deems just under the circumstances." CrRLJ 4.7(g)(7)(ii) specifically provides: "The Court may at any time dismiss the action if the court determines that failure to comply with an applicable discovery rule or an order issued pursuant thereto is the result of a willful violation or of gross negligence and that the defendant was prejudiced by such failure." *Id.*

26. The defense has been seriously prejudiced by the actions of the City's witnesses in this case. Although defense counsel has repeatedly advised the prosecutors and counsel for these witnesses that "time was of the essence" and that we needed to complete these depositions as soon as possible, the witnesses have chosen to thumb their nose at these

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requests. In fact, it now appears that these witnesses will never cooperate or appear for depositions. Because of these actions, the witnesses have made it virtually impossible for counsel to prepare for pre-scheduled hearings and trial.

27. This Court is also authorized to dismiss this action pursuant to CrRLJ 8.3, where the defense is prejudiced due to "arbitrary action" relating to the proceedings. In one significant case, *State v. Michielli*, 132 Wn.2d 587 (1997), the Washington Supreme Court explained that a defendant suffers significant prejudice if she is forced to request a continuance (and to waive her speedy trial rights) due to the improper action of another participant in the litigation. That principle applies with great force given the circumstances of this case.

28. As the Court knows, Ms. Stevens is a professional athlete. The defense has made great efforts to proceed with this case in an expeditious fashion to ensure that Ms. Stevens' professional obligations were not compromised. Unfortunately, due to the intransigency of the City's complaining witnesses, the trial in this case was continued to January 2015. Now, in light of the continued intransigence of the City's complaining witnesses, the defense has been deprived of an opportunity to prepare the case for the January hearings. This Court should not force the defense to continue these matters a second time. Rather, consistent with CRLJ 4.7 and 8.3, this case should be dismissed. Such a dismissal is consistent with the interests of justice.

29. At a minimum, and in the alternative, this Court should conclude that Teresa Obert and C.J.D.O. will not be permitted to testify at any trial of these matters.

---

[2] To this point, the prosecuting attorneys have failed to provide any discovery information regarding these interviews in violation of CrRLJ 4.7(a)(1)(i) which requires production of "the

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(206) 447-9681

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

DATED at Seattle, Washington this 9th day of December, 2014.

ALLEN, HANSEN & MAYBROWN, P.S.

Todd Maybrown, WSBA #18557
Attorney for Defendant

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent by mail / ~~email~~ / ~~messenger~~ a copy of the document to which this certificate is affixed to Tamara McElyea and Lacey Offutt

Dated: 12/10/2014

substance of any oral statements" of the witnesses.

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APPENDIX A

Todd Maybrown

From: Tammy McElyea <tmcelyea@moberlyandroberts.com>
Sent: Wednesday, October 22, 2014 2:01 PM
To: Todd Maybrown
Cc: Lacey Offutt
Subject: Re: Hope Stevens Discovery

Hello;

It is our understanding that Ms. Gaston has provided you with two different opportunities to interview both Teresa and C[redacted]. One on Friday October 17th and then this coming Friday October 24th. Based on that information we would be objecting to a motion for depositions. Under 4.6 (a) a deposition is only appropriate where "upon showing that a prospective witness...refuses to discuss the case with either lawyer..." That clearly is not the case in this situation. If you are not planning to attend the scheduled 11:00 interview on Friday then I suppose you have that option to contact the court. But understand we will argue to the court that you have been given two different occasions to interview the victims and have chosen not to take advantage of those opportunities. We know that having a third attorney involved is difficult but that is the hand we have been dealt in this situation. We have little to no control over that obstacle. So please let us know if you plan on attending on Friday.

In addition, you will not be involved in our meeting with our witnesses. Our meeting is designed for trial prep and as you are very aware that is considered "work product" and is not subject to the discovery rules. I will assure you that if any exculpatory evidence that was not previously disclosed comes to light, we will provide you that information in writing.

Thank you.

Tammy

On Wed, Oct 22, 2014 at 12:59 PM, Todd Maybrown <Todd@ahmlawyers.com> wrote:

Please see attached. We will send a package with the interview transcripts via hard mail.

Todd

Todd Maybrown

Allen, Hansen & Maybrown, P.S.

One Union Square

600 University Street, Suite 3020

Seattle, Washington 98101-4105

APPENDIX B

FILED

KIRKLAND
MUNICIPAL COURT

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 [PROPOSED] ORDER RE DEFENDANT'S MOTION FOR DEPOSITIONS

This matter came before the above-entitled Court upon Defendant's Motion for Depositions. The Court having reviewed the pleadings filed herein and heard oral argument, does hereby ORDER that Defendant's Motion for Depositions is Granted. The defense may schedule depositions with witnesses TO & CO at counsel's discretion.

DONE in open court this 4 day of November, 2014.

Municipal Court Judge
Michael J. Lambo

Presented by:

Todd Maybrown, WSBA #18557
Attorney for Defendant

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

APPENDIX C

Paula Smeltzer

From: Gaston, Mary P. (Perkins Coie) <MGaston@perkinscoie.com>
Sent: Thursday, November 06, 2014 12:52 PM
To: Todd Maybrown
Cc: Paula Smeltzer
Subject: Re: Depositions

Yes. I assume you will coordinate with us on the date. Thanks. M.

Mary P. Gaston

On Nov 5, 2014, at 1:21 PM, Todd Maybrown <Todd@ahmlawyers.com> wrote:

> Mary:
>
> Will you accept service of deposition notices for your clients? Please let me know.
>
> **Todd**
>
> **Todd Maybrown**
> **Allen, Hansen & Maybrown, P.S.**
> **One Union Square**
> **600 University Street, Suite 3020**
> **Seattle, Washington 98101-4105**
> **(206) 447-9681 - Phone**
> **(206) 447-0839 - Fax**
>
> **www.ahmlawyers.com[ahmlawyers.com]**
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APPENDIX D

Todd Maybrown

From: Todd Maybrown
Sent: Thursday, November 13, 2014 9:14 AM
To: 'Tammy McElyea'; Lacey Offutt; Gaston, Mary P. (Perkins Coie)
Cc: Paula Smeltzer
Subject: Depositions of CO and TO

Counsel:

I am planning to schedule the court-ordered depositions as follows:

Witness: CO
Location: Law Office of Allen, Hansen & Maybrown, PS
Date: November 25, 2014
Time: 1:00 PM

Witness: TO
Location: Law Office of Allen, Hansen & Maybrown, PS
Date: November 25, 2014
Time: 2:30 PM

I may be able to adjust the date – as I am also available on November 24 and 26 – but the depositions will need to be completed during the week of November 24. Unless I hear back by close of business today, I will send notices to all counsel. Ms. Gaston has previously agreed to accept service of the notices on behalf of the witnesses.

Todd

Todd Maybrown
Allen, Hansen & Maybrown, P.S.
One Union Square
600 University Street, Suite 3020
Seattle, Washington 98101-4105
(206) 447-9681 - Phone
(206) 447-0839 - Fax

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APPENDIX E

Todd Maybrown

From: Sarah Conger
Sent: Friday, November 14, 2014 10:47 AM
To: mgaston@perkinscoie.com
Cc: tmcelyea@moberlyandroberts.com; loffutt@moberlyandroberts.com; Todd Maybrown; Paula Smeltzer
Subject: City of Kirkland v. Hope Stevens, No. 38384
Attachments: NOTICE OF DEPOSITION (Teresa Obert).pdf; NOTICE OF DEPOSITION (C[redacted] O[redacted]).pdf

Ms. Gaston:

Attached please find copies of the Notices of Deposition for Teresa Obert and C[redacted] O[redacted]. A hard copy is being delivered to your office today via legal messenger.

Thank you for your attention to this matter.

Take care,

Sarah Conger
Legal Assistant
Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, WA 98101
Phone: 206-447-9681
Fax: 206-447-0839

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IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 NOTICE OF DEPOSITION

TO: Teresa Obert
c/o Mary Gaston, Esq.
Perkins Coie LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101-3099

AND TO: Tamara McElyea and Lacey Offutt, Attorneys for Plaintiff

PLEASE TAKE NOTICE that the testimony of Teresa Obert will be taken on oral examination at the instance and request of Defendant Hope Stevens in the above-entitled action, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington, on November 25, 2014, commencing at the hour of 2:30 p.m., the said oral examination to be subject to continuance or adjournment from time to time or place to place until completed.

DATED this 14th day of November, 2014.

Todd Maybrown, WSBA #18557
Attorney for Defendant

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 NOTICE OF DEPOSITION

TO: [redacted]
c/o Mary Gaston, Esq.
Perkins Coie LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101-3099

AND TO: Tamara McElyea and Lacey Offutt, Attorneys for Plaintiff

PLEASE TAKE NOTICE that the testimony of [redacted] will be taken on oral examination at the instance and request of Defendant Hope Stevens in the above-entitled action, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington, on November 25, 2014, commencing at the hour of 1:00 p.m., the said oral examination to be subject to continuance or adjournment from time to time or place to place until completed.

DATED this 14th day of November, 2014.

Todd Maybrown by Cooper Offenbecher #40610
Todd Maybrown, WSBA #18557
Attorney for Defendant

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

APPENDIX F

Todd Maybrown

From: Sarah Conger
Sent: Monday, November 17, 2014 1:17 PM
To: mgaston@perkinscoie.com
Cc: loffutt@moberlyandroberts.com; tmcelyea@moberlyandroberts.com; Todd Maybrown; Paula Smeltzer
Subject: RE: City of Kirkland v. Hope Stevens, No. 38384
Attachments: Notice of Deposition (Teresa Obert - 12.2).pdf

Ms. Gaston:

Attached please find a new Notice of Deposition for Teresa Obert which contains the new deposition date. Please let me know if you require a hard copy delivered to your office.

Thank you,

Sarah Conger
Legal Assistant
Allen, Hansen & Maybrown, P.S.
Phone: 206-447-9681

From: Sarah Conger
Sent: Monday, November 17, 2014 9:22 AM
To: Todd Maybrown
Cc: 'loffutt@moberlyandroberts.com'; 'tmcelyea@moberlyandroberts.com'; 'mgaston@perkinscoie.com'; Paula Smeltzer
Subject: RE: City of Kirkland v. Hope Stevens, No. 38384

Counsel:

This morning I spoke with Jeff from Kirkland Municipal Court. He needed something to replace the notice that contained C.O.'s full name. Attached is a copy of the new Notice of Deposition (which also contains the new date) that will be replacing the one that was sent to the Court on Friday. The notice containing C.O.'s full name will be destroyed, having never been entered into the file.

Thank you,

Sarah Conger
Legal Assistant
Allen, Hansen & Maybrown, P.S.
Phone: 206-447-9681

From: Sarah Conger
Sent: Friday, November 14, 2014 2:25 PM
To: Todd Maybrown

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 NOTICE OF DEPOSITION

TO: C.O.
c/o Mary Gaston, Esq.
Perkins Coie LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101-3099

AND TO: Tamara McElyea and Lacey Offutt, Attorneys for Plaintiff

PLEASE TAKE NOTICE that the testimony of C.O. will be taken on oral examination at the instance and request of Defendant Hope Stevens in the above-entitled action, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington, on December 2, 2014, commencing at the hour of 1:00 p.m., the said oral examination to be subject to continuance or adjournment from time to time or place to place until completed.

DATED this 17th day of November, 2014.

Todd Maybrown by Cooper Offenbecher #40690
Todd Maybrown, WSBA #18557
Attorney for Defendant

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 NOTICE OF DEPOSITION

TO: Teresa Obert
c/o Mary Gaston, Esq.
Perkins Coie LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101-3099

AND TO: Tamara McElyea and Lacey Offutt, Attorneys for Plaintiff

PLEASE TAKE NOTICE that the testimony of Teresa Obert will be taken on oral examination at the instance and request of Defendant Hope Stevens in the above-entitled action, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington, on December 2, 2014, commencing at the hour of 2:30 p.m., the said oral examination to be subject to continuance or adjournment from time to time or place to place until completed.

DATED this 17th day of November, 2014.

Todd Maybrown by Cooper Offutt-Acker
Todd Maybrown, WSBA #18557 #40690
Attorney for Defendant

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

Sarah Conger

From: Gaston, Mary P. (Perkins Coie) <MGaston@perkinscoie.com>
Sent: Monday, November 17, 2014 1:19 PM
To: Sarah Conger
Subject: Re: City of Kirkland v. Hope Stevens, No. 38384

No hard copy is necessary. Thank you.

On Nov 17, 2014, at 1:16 PM, Sarah Conger <Sarah@ahmlawyers.com> wrote:

Ms. Gaston:

Attached please find a new Notice of Deposition for Teresa Obert which contains the new deposition date. Please let me know if you require a hard copy delivered to your office.

Thank you,

Sarah Conger
Legal Assistant
Allen, Hansen & Maybrown, P.S.
Phone: 206-447-9681

From: Sarah Conger
Sent: Monday, November 17, 2014 9:22 AM
To: Todd Maybrown
Cc: 'loffutt@moberlyandroberts.com'; 'tmcelyea@moberlyandroberts.com'; 'mgaston@perkinscoie.com'; Paula Smeltzer
Subject: RE: City of Kirkland v. Hope Stevens, No. 38384

Counsel:

This morning I spoke with Jeff from Kirkland Municipal Court. He needed something to replace the notice that contained C.O.'s full name. Attached is a copy of the new Notice of Deposition (which also contains the new date) that will be replacing the one that was sent to the Court on Friday. The notice containing C.O.'s full name will be destroyed, having never been entered into the file.

Thank you,

Sarah Conger
Legal Assistant
Allen, Hansen & Maybrown, P.S.
Phone: 206-447-9681

APPENDIX G

Todd Maybrown

From: Gaston, Mary P. (Perkins Coie) <MGaston@perkinscoie.com>
Sent: Tuesday, December 02, 2014 5:55 AM
To: Todd Maybrown
Cc: Lacey Offutt; Tammy McElyea
Subject: Notice of Unavailability

Dear Todd,

I have confirmed with my clients and my office that the Oberts still have not been subpoenaed for depositions. Please be advised, I will be out of the country and unavailable from Dec 10-16. I will have at best only sporadic email during that time. Therefore, please let this serve as my notice of unavailability during that period and my notice that I will be unable to accept service of subpoenas on behalf of my clients during that time. Accordingly, if you wish to serve subpoenas on the Oberts for depositions during that period please use one of the normal means of service under Rule 45 so that the Oberts are assured of timely notice.

Thank you,

Mary

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

APPENDIX H

Todd Maybrown

From: Todd Maybrown
Sent: Tuesday, December 02, 2014 11:59 AM
To: 'Tammy McElyea'; Lacey Offutt
Cc: Sarah Conger; Paula Smeltzer
Subject: FW: Mary Gaston email

Importance: High

Tammy and Lacey:

As you know, this is a criminal case and the criminal rules of procedure apply. CrRLJ 4.6 does not require service of a subpoena. To the contrary, the rule requires a "notice," and nothing more:

> (b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every other party reasonable **written notice** of the time and place for taking the deposition. The **notice** shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time and may change the place of taking.

Id. Moreover, the thought that Ms. Gaston would accept service of these notices on November 17 and then "lay in the weeds" for two weeks so that she could offer up this sort of bogus objection is remarkable.

Once again, I am forced to file a motion with the court.

Todd

Todd Maybrown
Allen, Hansen & Maybrown, P.S.
One Union Square
600 University Street, Suite 3020
Seattle, Washington 98101-4105
(206) 447-9681 - Phone
(206) 447-0839 - Fax

www.ahmlawyers.com

The information contained in this message is intended only for the addressee or addressee's authorized agent. The message and enclosures may contain information that is privileged, confidential, or otherwise exempt from disclosure. If the reader of this message is not the intended recipient or recipient's authorized agent, then you are notified that any dissemination, distribution or copying of this message is prohibited. If you have received this message in error, please notify the sender by telephone and return the original and any copies of the message by mail to the sender at the address noted above.

DECLARATION OF MAILING
I declare under penalty of perjury under the laws of the State of Washington that on 12/12/14 I sent this document via United States mail, first class, postage prepaid, to the address of the witness indicated below.

Signed by _____, in Kirkland, WA on 12/12/14.

FILED
DEC 15 2014
KIRKLAND
MUNICIPAL COURT

IN THE MUNICIPAL COURT FOR THE CITY OF KIRKLAND
STATE OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff, v. STEVENS, HOPE A., Defendant.	NO. 38384 SUBPOENA FOR DEPOSITION

TO: Teresa Obert

In the name of the City of Kirkland, State of Washington, you are required to appear on **December 19, 2014, at 2:30 p.m.**, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington for oral examination in the above-titled case.

YOU ARE ADVISED THAT YOUR FAILURE TO APPEAR HEREIN MAY RESULT IN A CONTEMPT OF COURT

Given under my hand this 12th day of December, 2014.

Moberly & Roberts, PLLC

By: _____
Assistant Prosecuting Attorney, WSBA # 42446

MOBERLY & ROBERTS, PLLC
12040 – 98th Avenue NE, Suite 101
Kirkland, WA 98034
425-284-2362
425-284-1205(f)

DECLARATION OF MAILING
I declare under penalty of perjury under the laws of the State of Washington that on 12/12/14 I sent this document via United States mail, first class, postage prepaid, to the address of the witness indicated below.

Signed by: [illegible] in Kirkland, WA on 12/12/14

FILED
DEC 15 2014
KIRKLAND
MUNICIPAL COURT

IN THE MUNICIPAL COURT FOR THE CITY OF KIRKLAND
STATE OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff, v. STEVENS, HOPE A., Defendant.	NO. 38384 SUBPOENA FOR DEPOSITION

TO: C.O.

In the name of the City of Kirkland, State of Washington, you are required to appear on **December 19, 2014, at 1:00 p.m.**, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington for oral examination in the above-titled case.

YOU ARE ADVISED THAT YOUR FAILURE TO APPEAR HEREIN MAY RESULT IN A CONTEMPT OF COURT

Given under my hand this 12th day of December, 2014.

Moberly & Roberts, PLLC

By: [signature]
Assistant Prosecuting Attorney, WSBA # 42466

MOBERLY & ROBERTS, PLLC
12040 – 98th Avenue NE, Suite 101
Kirkland, WA 98034
425-284-2362
425-284-1205()

APPENDIX D

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 MOTION FOR DEPOSITION

COMES NOW the defendant, Hope Stevens, through her attorney Todd Maybrown, and moves pursuant to CrRLJ 3.6 for an order compelling the deposition of C.O. and T.O., the alleged victims who have refused to be interviewed or cooperate with defense counsel as evidenced by the Declaration of Todd Maybrown and attachments thereto.

DATED this 23rd day of October, 2014.

Todd Maybrown, WSBA #18557
Attorney for Defendant

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent by ~~mail~~ / email / ~~messenger~~ a copy of the document to which this certificate is affixed to Tamara McGhee
Moberly & Roberts
Dated: 10/23/14
[signature]

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

APPENDIX E

FILED

KIRKLAND
MUNICIPAL COURT

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 [PROPOSED] ORDER RE DEFENDANT'S MOTION FOR DEPOSITIONS

This matter came before the above-entitled Court upon Defendant's Motion for Depositions. The Court having reviewed the pleadings filed herein and heard oral argument, does hereby ORDER that Defendant's Motion for Depositions is Granted. The defense may schedule depositions with witnesses TO & CO at counsel's discretion.

DONE in open court this 4 day of November, 2014.

Municipal Court Judge
Michael J. Lambo

Presented by:

Todd Maybrown, WSBA #18557
Attorney for Defendant

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

APPENDIX F

FILED

NOV 14 2014

KIRKLAND
MUNICIPAL COURT

1/6
1 p.m.
3

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 NOTICE OF DEPOSITION

TO: Teresa Obert
c/o Mary Gaston, Esq.
Perkins Coie LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101-3099

AND TO: Tamara McElyea and Lacey Offutt, Attorneys for Plaintiff

PLEASE TAKE NOTICE that the testimony of Teresa Obert will be taken on oral examination at the instance and request of Defendant Hope Stevens in the above-entitled action, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington, on November 25, 2014, commencing at the hour of 2:30 p.m., the said oral examination to be subject to continuance or adjournment from time to time or place to place until completed.

DATED this 14th day of November, 2014.

Todd Maybrown by Copy
Todd Maybrown, WSBA #18557
Attorney for Defendant

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

APPENDIX G

FILED
NOV 17 2014
KIRKLAND
MUNICIPAL COURT

1/6
1 pm
(3)

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 NOTICE OF DEPOSITION

TO: C.O.
c/o Mary Gaston, Esq.
Perkins Coie LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101-3099

AND TO: Tamara McElyea and Lacey Offutt, Attorneys for Plaintiff

PLEASE TAKE NOTICE that the testimony of C.O. will be taken on oral examination at the instance and request of Defendant Hope Stevens in the above-entitled action, at the Law Offices of Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, Washington, on December 2, 2014, commencing at the hour of 1:00 p.m., the said oral examination to be subject to continuance or adjournment from time to time or place to place until completed.

DATED this 17th day of November, 2014.

Todd Maybrown by Gopa Ghosh
Todd Maybrown, WSBA #18557
Attorney for Defendant
#40690

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

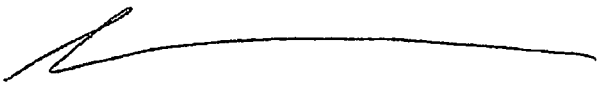
APPENDIX H

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

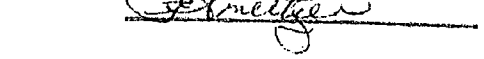
CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 MOTION TO DISMISS OR FOR ALTERNATIVE RELIEF

COMES NOW the defendant, Hope Stevens, through her attorney Todd Maybrown, and moves pursuant to CrRLJ 4.7 and CrRLJ 8.3 to dismiss this action or for alternative relief because the City's witnesses have refused to be interviewed and/or deposed as evidenced by the Declaration of Todd Maybrown and attachments thereto.

DATED this 9th day of December, 2014.



Todd Maybrown, WSBA #18557
Attorney for Defendant

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent by mail / ~~email~~ / ~~messenger~~ a copy of the document to which this certificate is affixed to Tamara McElyea and Lacey Offutt
Dated: 12/10/2014


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Seattle, Washington 98101
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APPENDIX I

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 SUPPLEMENTAL DECLARATION OF TODD MAYBROWN IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR FOR ALTERNATIVE RELIEF

I, Todd Maybrown, do hereby declare:

1. I am the attorney for the defendant, Hope Stevens, in the above-entitled case. This declaration is submitted to supplement the Declaration of Todd Maybrown in Support of Defendant's Motion to Dismiss or For Alternative Relief dated. December 9, 2014.

2. On December 11, 2014, after the Court scheduled a hearing on Defendant's Motion to Dismiss, the City's prosecutors notified me that the city's key witnesses, Teresa Obert and C.J.D.O., would agree to appear for depositions on December 19, 2014.

3. These depositions went forward as scheduled. However, as discussed further below, these depositions have not improved the situation in any respect. To the contrary, it is now even more apparent that the defendant is entitled to relief from this Court.

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(206) 447-9681

4. I do not yet have transcripts of these recent depositions, but I have asked the court reporter to expedite the production of these transcripts. Given the current trial schedule, and acting as an officer of this Court, I will do my best to summarize what transpired during these interviews.

Obstructionist Tactics During the Depositions

5. The depositions commenced at approximately 1:10 p.m. on December 19. The first deponent was C.J.D.O. Following introductions and some generalized discussion, I asked C.J.D.O. if he was presently using any medication. C.J.D.O. answered "yes," but his counsel advised him not to tell me what medication he was using. I asked C.J.D.O. if he was using that same medication on the date of the June 21, 2014 incident. Again the witness answered "yes," but his counsel advised him not to tell me what medication he was using.

6. Thereafter, I asked C.J.D.O. why he did not attend the deposition that was scheduled for December 2, 2014. The witness told me he was "in the hospital" at the time. I asked C.J.D.O. if this hospital stay was related to his claims in this case, and he answered "yes." But, once again, C.J.D.O.'s counsel advised him not to answer any questions regarding his stay in this hospital.

7. From the outset, C.J.D.O.'s counsel argued that I was not permitted to ask questions that, in her view, were "outside the scope" of this Court's Order granting the defense Motion for Depositions. I advised the attorney that she was not a party to these proceedings and that the Court did not set any limits on the "scope" of the depositions. I also advised the attorney that it was improper for her to attempt to make relevancy objections or to obstruct the deposition process.

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8. Finally, after about twenty minutes, I went off the record and telephoned the Kirkland Municipal Court in the hope that the Court could be conferenced in to resolve the dispute regarding the witnesses' objections and unwillingness to answer relevant questions. Unfortunately, I was advised that Judge Lambo was not available at that time.

9. Accordingly, I was faced with a dilemma. I could terminate the depositions and attempt to present these issues to the Court at the hearing scheduled for December 30, 2014. Or I could proceed with the depositions even though it was clear that the witnesses (and their attorney) would make it impossible to obtain critical information relating to the claims in the case. I chose to proceed with the depositions under protest.

10. During the remainder of the depositions, the witnesses' attorney and the witnesses refused to answer numerous questions that could assist the defense in preparing the case for trial. For example, the witnesses refused to answer questions regarding: (a) C.J.D.O.'s mental health history, including his recent mental health problems; (b) C.J.D.O.'s history of behavioral problems; (c) C.J.D.O's recent 14-day stay at a local hospital; (d) C.J.D.O.'s supposed head injuries; and (e) C.J.D.O.'s statements (and texts) regarding the incident of June 14, 2014.

11. All of this information is material to the defense for several reasons. First, C.J.D.O. and his mother are now claiming that C.J.D.O.'s emotional problems are somehow the result of the incident on June 21, 2014. In fact, during the deposition, C.J.D.O. has claimed that he suffered a "traumatic brain injury" and currently has severe memory difficulties – and that these difficulties were somehow caused by the incident on June 21, 2014. Notwithstanding these claims, C.J.D.O. and his mother refused to answer questions relating to the basis for these current contentions and claims.

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12. The City attorneys made no comments during the entire deposition process. Thus, they offered no assistance and sat silent while the witnesses repeatedly blocked my efforts to obtain information that was obviously relevant to the claims in this case.

The Witnesses' Strategy of Intimidation

13. Although the City's witnesses refused to answer questions that were clearly relevant to the claims in this case, these same witnesses frequently interjected irrelevant and unsubstantiated allegations regarding Ms. Stevens. Most all of these scurrilous allegations related to events that occurred long before the alleged incident, and they would never be admissible at any criminal trial. Thus, I will not deign to repeat them here.

14. Suffice it to say, as the depositions progressed, it became clear that these witnesses arrived at the depositions with an agenda. The witnesses refused to answer any questions that could be used as impeachment at a trial. At the same time, Ms. Obert repeatedly made malicious claims about Ms. Stevens.

15. It is my firm opinion that Ms. Obert made a calculated decision to interject this information during the deposition as a form of intimidation. I believe that Ms. Obert presented this testimony in an attempt to frighten Ms. Stevens from proceeding to trial. In essence, Ms. Obert hoped to send a clear message that she would use these proceedings as a forum to damage Ms. Stevens' reputation.

The Witnesses' Newly-Contrived Claims

16. The City's key witnesses, Ms. Obert and C.J.D.O., provided written statements to the police shortly after the incident. Both witnesses carefully reviewed their respective

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statements and made substantive changes to ensure their accuracy. Then, after completing their review, each witness signed their statement under penalty of perjury.[1]

17. For the last five months, the defense assumed that the City would proceed on the bases of these allegations. As it now turns out, defense counsel was misinformed, for both of these witnesses are now claiming that their statements to the police were inaccurate and incomplete.

18. It is unclear whether the City prosecutors were operating under this same misimpression. Although these prosecutors have interviewed the witnesses on at least one occasion, they have steadfastly refused to provide any discovery regarding the interviews.

19. To my surprise, both C.J.D.O. and Ms. Obert are now providing radically different statements regarding the alleged incident. I will not document each change in this pleading – as such a process would take numerous pages. Instead, I will summarize a few of the most significant changes for the Court's consideration.

20. First, it is noteworthy that C.J.D.O. and Ms. Obert have changed their statements so that they now closely mirror each other.[2] For example, on June 21, 2014, Ms. Obert told the police that she was in the bathroom and did not know what happened when the altercation between C.J.D.O. and Ms. Stevens commenced. But, Ms. Obert is now claiming that she was present when the altercation commenced.

21. Second, both C.J.D.O. and his mother are now claiming that C.J.D.O. suffered a "traumatic brain injury" during the incident on June 21, 2014. This is a fantastical claim, but

---

[1] Ms. Obert provided a follow-up statement to Kirkland police officers on June 22, 2014.

[2] In fact, during the depositions these witnesses repeatedly answered "we" when asked about their own actions during the evening in question.

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both C.J.D.O. and his mother now contend that Ms. Stevens slammed C.J.D.O.'s head against the concrete 5-10 times at the time of the incident. Neither witness made any similar claim when they spoke to police officers on June 21, 2014. Nor did C.J.D.O. make such a claim when he was seen by a doctor soon after the incident. Notwithstanding this contention, both C.J.D.O. and his mother have refused to provide any details regarding this supposed "new" diagnosis.

22. Third, both C.J.D.O. and his mother are now claiming that Ms. Stevens pushed Ms. Obert down a flight of stairs during the incident. Neither witness made any similar claim when they spoke to police officers on June 21, 2014.

23. It is the defense position that these witnesses have collaborated and concocted these new claims in an effort to respond to the defense claims in this litigation. But, as discussed further below, the prosecution has blocked the defendant's attempts to obtain information pertinent to these matters.

The Prosecutors Continue to Withhold Crucial Evidence

24. As previously noted, Ms. Obert and C.J.D.O. agreed to a voluntary meeting with the prosecutors on October 22, 2014. On December 19, each witness testified that these meetings lasted between 90-120 minutes and that at least one prosecutor was taking notes during these interviews. Yet, notwithstanding the clear dictates of CrRLJ 4.7(a)(1)(i), the prosecutors have refused to provide discovery regarding any statements of these witnesses. This failing has severely prejudiced the defendant's effort to prepare for trial

25. Apparently, the prosecutors would like to claim that these witness statements are protected by work product. This is not the case. *See State v. Garcia*, 45 Wn.App. 132, 147 (1986).

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26. Moreover, in light of the witnesses' newly-minted testimony, it is now clear that these statements are discoverable pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. The United States Supreme Court has made clear that the prosecutors are required to produce all evidence that could be used for impeachment purposes. *See, e.g., Giglio v. United States*, 405 U.S. 150 (1972).

27. The prosecution should have produced these statements well in advance of the depositions. Nevertheless, once again, I have formally requested production of these statements. *See Appendix A*. There is now no doubt that these statements are discoverable pursuant to *Brady*. On the one hand, the defense is entitled to know if the witnesses have only recently changed their testimony regarding the June 21 events. On the other hand, the defense is entitled to know if the witnesses had already provided revised statements when they met with the prosecutors on October 22, 2014 – and how they attempted to justify these inconsistent statements in light of their written statements following the incident.

28. It is clear that the City has failed to comply with the dictates of CrRLJ. 4.7 and due process principles.

The City's Witnesses Have Destroyed Key Items of Evidence

29. The defense is claiming that C.J.D.O. grabbed a broomstick handle and repeatedly hit Ms. Stevens over the head with the stick. Curiously, although Ms. Stevens' told Kirkland Police officers that she was the "victim" and that C.J.D.O. had hit her with a stick, the police investigators never took custody of this item of evidence following the incident. In fact, the police never even took a photograph of this evidence.

30. On December 19, 2014, C.J.D.O. testified that the stick he had used in this altercation has recently been destroyed. Apparently, Ms. Obert and C.J.D.O. decided to burn

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(206) 447-9681

the stick before it could be presented as evidence in this case. Now that the stick has been destroyed, C.J.D.O. is attempting to downplay the violent nature of his attack by claiming that it was not a very big stick.

31. In addition, the police reports indicate that C.J.D.O. may have used a gun at some point during the incident. The police investigators also claim that, soon after the incident, they asked C.J.D.O. to show them the gun he had used, but C.J.D.O. claimed he couldn't find it.

32. On December 19, 2014, C.J.D.O. testified that the gun has now been destroyed. Apparently, Ms. Obert and C.J.D.O. decided to hide or destroy the gun before it could be presented as evidence in this case.

33. Once again, these witnesses have taken affirmative steps to thwart Ms. Steven's attempts to present a defense in this case.

Conclusions

34. The prosecutors and the City's key witnesses have made it virtually impossible for the defense to prepare for trial. On December 19, 2014, less than 30 days before trial is scheduled to commence, the City's witnesses finally agreed to appear for court-ordered depositions. Yet, even during the deposition process, these witnesses have refused to provide information that is surely relevant to the defense in this case.

35. While much of this misconduct was caused by the actions of the City's key witnesses, the City's prosecutors have only exacerbated matters by refusing to disclose necessary discovery information. Moreover, because of the lax nature of the City's investigation, it is now clear that the City's witnesses were permitted to destroy critical items of evidence.

36. Given all of these factors, the defense has been deprived of any fair opportunity to defend this case at trial. It is clear that the defense is entitled to additional discovery –

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Seattle, Washington 98101
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including a deposition process in which the City's key witnesses answer all pertinent questions, discovery regarding C.J.D.O.'s recent medical claims, disclosure of all witness statements, etc. Yet, given the delays that have been caused by the City and the City's witnesses, there is no reasonable possibility that this information can be available for the scheduled trial date.

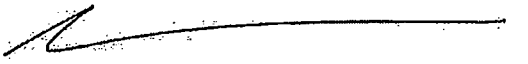
37. This Court should not force the defense to continue these matters a second time. Rather, consistent with CrRLJ 4.7 and 8.3, this case should be dismissed. Such a dismissal is consistent with the interests of justice.

38. At a minimum, and in the alternative, this Court should conclude that Teresa Obert and C.J.D.O. will not be permitted to testify at any trial of these matters.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

DATED at Seattle, Washington this 23rd day of November, 2014.

ALLEN, HANSEN & MAYBROWN, P.S.



Todd Maybrown, WSBA #18557
Attorney for Defendant

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

APPENDIX A

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December 23, 2014

sent by mail and email

Tamara McElyea, Esq.
Lacey N. Offutt, Esq.
Moberly & Roberts
12040 98th Ave NE, #101
Kirkland, WA 98034-4217

Re: *Kirkland v. Stevens, Kirkland Municipal Court No. 38384*
Request for Additional Discovery Materials Pursuant to CrR 4.7
Brady v. Maryland, 373 U.S. 83, 87 (1963) and *Giglio v. United States*, 405 U.S. 150, 154 (1972)

Dear Ms. McElyea and Ms. Offut:

In light of the information provided during the depositions on December 19, 2014, I am providing you with the following supplementary discovery request.

I. ADDITIONAL MATERIALS REQUESTED

1. Copies of all notes taken during the meetings with City witnesses, and the substance of any other oral statements

Please provide copies of notes that were taken during the meetings with the City witnesses. Also, please provide a summary of any other oral statements that were made to the City or its agents by the witnesses.

2. Any Other *Brady* Materials:

Although the City's obligations to obtain and disclose *Brady* (*Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)) and *Giglio* (*Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)) materials are self-executing, I write to renew my request for all such materials or information.

II. AUTHORITY

1. CrRLJ 4.7 Requires the City to Disclose All Witness Statements

CrRLJ 4.7 (a)(1)(i) requires the City to disclose to the defense "any written or recorded statements and the substance of any oral statements of" witnesses whom the prosecutor intends to call at trial. I understand that you are claiming that your notes from these meetings are work product.

State v. Garcia, 45 Wn.App. 132, 137, 724 P.2d 412, 415 (1986) addresses this precise issue. In *Garcia,* an eyewitness called the deputy prosecutor and recanted her prior statement regarding a stabbing. The defendant moved for the court to compel the prosecutor to turn over notes from the phone conversation, or in the alternative, to have the notes reviewed in camera. The trial court denied the request on the ground that the notes were work product. *Id.* at 136.

The court found that the "deputy prosecuting attorney failed to comply with CrR 4.7(a)(1)(i), (a)(3), and 4.7(h)." *Id.* at 139. The court highlighted the prosecutor's discovery obligations with respect to oral witness statements:

> The principles behind the broad criminal rules adopted in this state and the express language of CrR 4.7(a)(1)(i) and 4.7(h)(2) required the deputy prosecutor to immediately disclose to defense counsel the substance of the September 14 oral statement made by the only eyewitness to the crime. There is no exception to this obligation to disclose which would allow either the prosecutor or the court to determine whether the statement is false and, if so, to permit nondisclosure. A rule of disclosure which depended on the, perforce, subjective analysis of a deputy prosecutor made during preparation of a case would be meaningless. It is far too tempting to merely dismiss the unfavorable version as false.

Id. at 137.

The Court further disavowed any reliance on the faulty premise that disclosure of witness statements was limited to written statements:

> Moreover, the court erred in focusing solely on whether the oral communication was exculpatory. While this is an essential consideration under CrR 4.7(a)(3), the disclosure of the substance of the oral communication was also clearly compelled under CrR 4.7(a)(1)(i). There is no distinction between inculpatory and

> exculpatory evidence under this rule, and this court has expressly declined to forge such a distinction.

Garcia, 45 Wn.App. at 137.

Moreover, the court rejected the blanket claim that the prosecutor's notes constituted "work product."

> The State argues that a lawyer's notes are per se "work product." Neither federal nor state law supports this contention. Interpreting the Jencks Act, the United States Supreme Court has rejected the argument that the principles underlying the "work product" doctrine exclude a lawyer's writing if it otherwise fits the statutory definition of a producible statement. *Goldberg v. United States,* 425 U.S. 94, 102, 96 S.Ct. 1338, 1344, 47 L.Ed.2d 603 (1976). Our courts, in interpreting CrR 4.7, have also refused to insulate materials from discovery simply because a statement was taken or notes compiled by an attorney. *State v. DeWilde,* 12 Wash.App. 255, 257, 529 P.2d 878 (1974).
>
> Thus, absent a representation by the State that the notes contain the type of material specifically protected by the work product rule, the State's reliance on the exception embodied in CrR 4.7(f) is not well-taken.

Garcia, 45 Wn.App. at 138.

2. The Nature of the City's Obligations Pursuant To State Court Discovery Rules and the State and Federal Constitutions

Washington Court Rules and case law recognize that pre-trial discovery is the foundation for all trial preparation, including the formation of case °°theories, cross examination of witnesses and selection of rebuttal witnesses. CrRLJ 4.7; *State v. Yates,* 111 Wn.2d 793, 797, 765 P.2d 291 (1988) (citing Criminal Rules Task Force, *Washington Proposed Rules of Criminal Procedure* 77 (West Pub'g. Co., ed. 1971)). Accordingly, Washington law requires comprehensive pre-trial discovery to minimize surprise and to allow attorneys to provide effective representation. *Id. See also State v. Dunivin,* 65 Wn.App. 728, 733, 829 P.2d 799 (1992). The Court has broad authority to enforce the discovery rules and to craft appropriate remedies for violation of the rules. CrRLJ 4.7(h)(7)(i); *Dunivin,* 65 Wn.App. at 731.

The City has self-executing obligations to preserve and disclose exculpatory information under the federal and state constitutions as well as

the Rules of Court. U.S. Const. Amends. V, XIV; Wash. Const. Art I, § 3; CrRLJ 4.7 (a)(3). *See, e.g., Brady v. Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution); *State v. Coe,* 101 Wn.2d 772, 783, 684 P.2d 668 (1984) (state law independently requires the prosecution to disclose any exculpatory information).

3. The Scope of the Prosecutor's Obligation to Disclose Exculpatory Information

Brady holds that the prosecutor violates constitutional due process when he or she fails to disclose material evidence favorable to the accused. The *Brady* rule relies on the principal that a criminal trial is a search for truth. "[T]he State's obligation is not to convict, but to see that, as far as possible, truth emerges." Note, *Brady v. Maryland and the Search for Truth in Criminal Trials,* 63 U. Chi. L. Rev. 1673, 1673-74 (1996), quoting *Giles v. Maryland,* 386 U.S. 66, 98 (1967) (Fortas, J., concurring).

Brady held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady,* 373 U.S. at 87.

> [U]nder *Brady,* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

Amadeo v. Zant, 486 U.S. 214, 222, 108 S. Ct. 1771, 100 L. Ed. 2d 249 (1988) (internal quotation and citation omitted). The fact that non-disclosure of conviction records is inadvertent on the part of an individual prosecutor is irrelevant. *See State v. Copeland,* 89 Wn.App. 492, 496-9, 949 P.2d 458 (1998) (prosecutor's failure to disclose impeachable conviction of witness constitutes misconduct requiring reversal of conviction, regardless of inadvertence on the part of the individual prosecutor).

A prosecutor is thus required to disclose all *Brady* material prior to trial, whether or not he or she subjectively believes the evidence is "material" to the defense case. Prosecutors may not justify withholding *Brady* material based on their subjective assessment of the evidentiary value of the item or evidence. *State v. Garcia,* 45 Wn.App. 132, 137, 724 P.2d 412 (1986) (prosecutor's duty

to disclose witness's recantation was not discharged simply because prosecutor believed the recantation was false). Any doubts or "close calls" should be resolved in favor of disclosure. *United States v. Agurs*, 427 U.S. 97, 108, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); *United States v. Alvarez*, 86 F.3d 901, 903-05 (9th Cir. 1996) (prosecutor wrongfully failed to turn over police officer's notes based on prosecutor's assessment that statements in the notes were untrue).

As to what can be considered "favorable" evidence, any evidence relating to guilt or punishment "and which tends to help the defense by either bolstering the defense's case or impeaching prosecution witnesses" is favorable. *United States v. Sudikoff*, 36 F. Supp.2d 1196, 1199 (C.D. Cal. 1999).

As to what constitutes "evidence" that must be disclosed, the *Sudikoff* court considered and rejected the notion that it is limited only to admissible evidence. *Brady* "requires disclosure of exculpatory information that is either admissible *or is reasonably likely to lead to admissible evidence.*" *Sudikoff*, 36 F. Supp.2d at 1200 (emphasis supplied). *See also United States v. Lloyd*, 992 F.2d 348, 350-51 (D.C. Cir. 1993) (defining "materiality" under Fed.R.Crim.P 16(a)(1)(C) to include information that could play an important role in uncovering admissible evidence); *United States v. LaRouche Campaign*, 695 F. Supp. 1265, 1279 (D. Mass. 1988) (exculpatory evidence under *Brady* includes not only documents or testimony admissible in evidence, but also inadmissible materials which, if defendant had access to them, might lead to admissible materials).

4. Any Information Which May Cast Doubt On the Credibility of a City Witness is Discoverable Under *Brady* and *Giglio*

Impeachment evidence must also be disclosed under *Brady*. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Accordingly, prosecutors are obligated to disclose criminal records bearing on the credibility of City witnesses. *United States v. Strifler*, 851 F.2d 1197, 1201 (9th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989); *See also East v. Scott*, 55 F.3d 996, 1004 (5th Cir. 1995).

There is a wide variety of other information which might impeach the credibility of a prosecution witness. *Giglio* 405 U.S. at 154. While *Giglio* is commonly understood to require the prosecution to disclose impeaching information such as plea agreements, promises of leniency, inducements to testify, and financial assistance offered by the government, it is not limited to these items. Any material affecting the credibility of a witness is subject to disclosure. *See, e.g., Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997) (*en*

banc), cert. denied, 523 U.S. 1133 (1998) ("material evidence required to be disclosed includes evidence bearing on the credibility of government witnesses"). The United States Supreme Court has made clear that, for *Brady* purposes, there is no difference between impeachment evidence and any other form of exculpatory evidence. *Bagley,* 473 U.S. at 682.

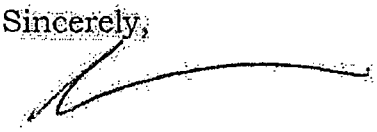
5. "Information or Knowledge" Is Not Limited To Papers Or Tangible Evidence

The City's obligation under the State criminal discovery rules and the Constitution includes disclosure of "knowledge as well as tangible evidence." *State v. Krenik,* 156 Wn.App. 314, 318, 231 P.3d 252 (2010).

III. CONCLUSION

Thank you for your attention to these additional discovery requests. Please contact me if I can provide you any further information regarding these requests or if we need to discuss further your ability to provide these materials.

Sincerely,



Todd Maybrown
Attorney at Law

APPENDIX J

#17

FILED
DEC 30 2014
KIRKLAND
MUNICIPAL COURT

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 ORDER ON DEFENDANT'S MOTION TO DISMISS OR FOR ALTERNATIVE RELIEF

THIS MATTER came on for hearing before the above-entitled Court, and the Court having reviewed and considered the records and files herein, including the Defendant's moving papers, Plaintiff's responsive pleadings, and all documents filed in support of each, and having heard argument;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants' Motion to Dismiss or for Alternative Relief is GRANTED; and further

IT IS ALSO ORDERED that

① The prosecutor shall produce all notes & recordings from interviews of CO & T.O no later than 4:30 PM today

② Witnesses CO & T.O. must appear for a second deposition on JANUARY 2, 2015 at 8:30 AM at

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the Kirkland Municipal Courthouse. The depositions shall be unsealed in accordance with my oral ruling.

DATED this 30 day of December, 2014.

HONORABLE MICHAEL LAMBO
Municipal Court Judge

Presented by:

TODD MAYBROWN, WSBA #18557
Attorney for Defendant

Approved as to Form; Notice of Presentation Waived; Copy Received:

TAMARA McELMAA, WSBA #42466
LACEY OFFUTT, WSBA #45655
Assistant City Attorneys

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APPENDIX K

FILED
DEC 29 2014
KIRKLAND
MUNICIPAL COURT

IN THE MUNICIPAL COURT FOR THE CITY OF KIRKLAND
STATE OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff, vs. STEVENS, HOPE A. Defendant.	NO. 38384 CITY'S ADDENDUM TO WITNESS LIST

In addition to the witnesses identified in the pre-trial order, the City intends to call the following individuals and a summary of their intended testimony:

1. Dr. Jing Jin: Immediate Clinic Rose Hill 13131 NE 85th St. Kirkland, WA. 425-702-8002. Will testify to her interactions, observations, and medical diagnosis of Teresa Obert and C.O. on June 21, 2014.
2. Lindsay Taylor, PA-C: Immediate Clinic Rose Hill. (See contact information above)Will testify to her interactions, and observations of Teresa Obert and C.O. on June 21, 2014.
3. Jeff Obert: Will testify to his observations on the morning of June 21, 2014 and to the type of equipment he uses for work. He will testify to the type of broomstick that C.O. grabbed that morning.
4. Cori Parks: Will testify to her observations of Ms. Stevens, Teresa Obert, and C.O. demeanors prior to the assaults.

Moberly & Roberts, PLLC
12040 98th Ave. NE Suite 101
Kirkland, Washington 98034
Tel: (425) 284-2362
Fax: (425) 284-1205

DATED this 29th day of December, 2014.

Respectfully submitted,

Moberly & Roberts, PLLC

By _____
Tamara L. McElyea, WSBA #42466
Assistant Prosecuting Attorney

_____
Lacey Offutt, WSBA #45655
Assistant Prosecuting Attorney

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APPENDIX L

#10

FILED
JAN -2 2015
KIRKLAND
MUNICIPAL COURT

IN THE MUNICIPAL COURT FOR THE CITY OF KIRKLAND
STATE OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 DEFENDANT'S RENEWED MOTION TO DISMISS PURSUANT TO CrR 8.3(b) AND SUPPORTING MEMORANDUM

I. INTRODUCTION

The Court has scheduled pre-trial matters are currently scheduled for January 6, 2015; and a readiness hearing is scheduled for January 14, 2015. Over the last several months, this case has been delayed due to the obstructionist tactics and arbitrary conduct of the City's key witnesses. Moreover, these difficulties have been greatly exacerbated by the failure of the City's prosecutors to provide necessary discovery information.

On December 30, 2014, the parties appeared for a hearing on Defendant's Motion to Dismiss pursuant to CrRLJ 4.7 and 8.3(b). The Court delayed ruling on the defense motion, but ordered remedial relief before issuing any final decision.

That very same day, the defense received notice that the City had filed an "Addendum" to its Witness List. This addendum names four additional witnesses, including two expert witnesses. In light of the history of this matter, the City's handling of this case as it has proceeded to trial constitutes gross mismanagement warranting the imposition of an

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extraordinary remedy. Accordingly, the defendant, by and through undersigned counsel, once again moves this Court for an order dismissing this prosecution under CrR 8.3(b).

II. BACKGROUND FACTS

On or about June 23, 2014, the prosecuting attorney for the City of Kirkland filed a complaint charging Ms. Stevens with two counts of assault. These charges was based on an incident that occurred on June 21, 2014. Count I alleges that Ms. Stevens assaulted an individual identified as Teresa L. Obert on June 21, 2014. Count II alleges that Ms. Stevens assaulted an individual identified as C.J.D.O. on June 21, 2014. Ms. Stevens has entered a plea of not guilty to each of the charges; and the City has known from the outset that Ms. Stevens contends that she used lawful force in defending herself after she was attacked by C.J.D.O.

On December 9, 2014, the defense filed a Motion to Dismiss or for Alternative Relief. This motion was supported by: (1) Declaration of Todd Maybrown dated December 9, 2014 (with attachments) and (2) Supplemental Declaration of Todd Maybrown dated December 23, 2014 (with attachments). These declarations documented the obstructionist tactics and arbitrary conduct of the City's key witnesses. These declarations also emphasized the prosecutions failure to comply with basic discovery rules.

On December 29, 2014, the City filed its Response to the Defendant's Motion. The City did not submit any evidence to contradict or rebut the factual claims in the declarations submitted by defense counsel. Instead, the City claimed that it should not be blamed for the misconduct of its witnesses and emphasized that the prosecutors had not engaged in misconduct or mismanagement of the case.

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The parties appeared for a hearing on the Defendant's Motion to Dismiss on December 30, 2014, at which time the City stressed that the prosecutors had not engaged in any delaying tactics or improper conduct. The Court delayed ruling on these matters, and ordered certain remedial relief in light of the concerns that were raised by the unrebutted evidence. Among other things, the Court directed the prosecutors to produce all notes and recordings of their interviews of the City's key witnesses. The Court also directed the City's key witnesses to appear for a second deposition on January 2, 2015.

That very same day, the defense received a document entitled City's Addendum to Witness List. *See Appendix A*. In this addendum, the City has now identified four new witnesses it hopes to call at trial: two fact witnesses and two expert medical witnesses. The City has provided a cursory summary of the proffered testimony of these witnesses, but it has failed to provide the defense any reasonable opportunity to prepare for this testimony at trial.

The City can offer no justification for these 11th hour disclosures. The City cannot seriously claim that it has only recently "discovered" the identities of these witnesses for the City has had full access to the police investigators (and all police reports) since June 21, 2014. Moreover, it is now clear that the City had extensive interviews with its two key witnesses on October 24, 2014. Thus, the City cannot provide any excuse for the failure to identify these witnesses when the parties appeared in Court on November 6, 2014. Nor can the City provide any excuse for the failure to identify these witnesses at this late date – and only after the defense had completed initial depositions of the City's key witnesses and after the City had filed is response to Defendant's Motion to Dismiss.[1]

---

[1] The City's disclosure of the medical witnesses is particularly hard to fathom in light of the prosecutions claim during oral argument on December 30, 2014 that the City did not have any medical release from either Ms. Obert of C.O.

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The Court has scheduled pre-trial hearings for January 6, 2015. Moreover, a readiness hearing is scheduled for January 14, 2015. It is impossible for the defense to prepare to interview these "new" witnesses at this late date – particularly so since the defense has for months been deprived of any reasonable opportunity to complete interviews/depositions with the City's key witnesses. It is likewise impossible for the defense to consult with potential defense rebuttal expert witnesses and conduct other required investigation regarding the disclosed witnesses, such as obtain transcripts from prior trial testimony and other impeachment evidence.

III. ARGUMENT

1. General Principles

CrRLJ 8.3(b) provides that:

> **(b) On Motion of Court.** The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

This rule is virtually identical to its cognate, CrR 8.3(b), which is found in the Superior Court rules.

A long line of appellate decisions in Washington has interpreted this rule to provide for dismissal of criminal charges, pursuant to CrR 8.3(b), where governmental misconduct, or even mismanagement, has prejudiced the defense.

For example, in *State v. Stephans*, 47 Wn.App. 600 (1987), the Court reasoned that dismissal is appropriate where there has been:

> a showing of some governmental misconduct or arbitrary action materially infringing upon a defendant's right to a fair trial. The purpose of the rule is to ensure that, once an individual has been charged with a crime, he or she is treated fairly.

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Id. at 603. And in *State v. Sulgrove*, 19 Wn.App. 860, 863 (1978), the Court stated:

> It should be noted that governmental misconduct need not be of an evil or dishonest nature; *simple mismanagement* also falls within such a standard.

Id. at 863 (emphasis supplied). *Accord State v. Dailey*, 93 Wn.2d 454 (1980); *State v. Wright*, 87 Wn.2d 783, 790–91 (1976) ("of course, in circumstances where the entire body of material evidence in a case has been disposed of . . . dismissal is warranted.").

More recently, in *State v. Brooks*, 149 Wn.App. 373, 383 (2009), the Court reiterated that, while CrR 8.3(b) requires a showing of "arbitrary action or governmental misconduct," such misconduct "need not be of an evil or dishonest nature, simple mismanagement is enough." And in *State v. Michielli*, 132 Wn.2d 229 (1997), the Washington Supreme Court explained:

> Two things must be shown before a court can require dismissal of charges under CrR 8.3(b). First, a defendant must show arbitrary action or governmental misconduct. . . . . Governmental misconduct, however, "need not be of an evil or dishonest nature; *simple mismanagement is sufficient*." *Blackwell*, 120 Wn.2d at 831, 845 P.2d 1017. . . .

Id. at 239-240 (emphasis in original).

Washington Courts have not been shy to impose dismissal as a sanction when the mismanagement so impedes the defendant's right to a fair trial. *See, e.g., State v. Brooks*, 149 Wn.App. 373 (2009) (State's failure to provide timely discovery and dumping large amounts of discovery on defendant the day of trial was mismanagement which satisfied the requirements of the rule for a dismissal in that it affected the defendant's right to a speedy trial); *State v. Dailey*, 93 Wn.2d 454, 457 (1980) (multiple discovery violations and delays by State resulted in Supreme Court affirming dismissal of prosecution, the Court explaining: "we have made it clear that 'governmental misconduct' need not be of an evil or dishonest

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nature, simple mismanagement is sufficient"); *State v. Sulgrove*, 19 Wn.App. 860 (1991) (State not being prepared for trial as well as charging a defendant under an improper statute was sufficiently careless to be grounds for dismissal in the furtherance of justice where the trial court properly concluded that the State's being unprepared, which conflicted with the speedy trial rule, was grounds for dismissal); *State v. Martinez*, 121 Wn.App. 21, 30 (2004) (trial court was justified in dismissing first degree assault case prior to retrial, where the State failed to disclose exculpatory evidence until the middle of the first trial, and where the jury hung 10-2 in favor of acquittal).

2. Blatant Disregard for the Defendant's Constitutional Right to Adequately Prepare for Trial within the Speedy Trial Period is Sufficient to Warrant Dismissal

While the defendant must show that such misconduct prejudiced his right to a fair trial, "such prejudice includes the right to a speedy trial and 'right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.'" *State v. Michielli*, 132 Wn.2d 229, 240 (1997). As *Michielli* explains:

> [d]efendant's being forced to waive *his speedy trial right is not a trivial event*. This court, "as a matter of public policy, has chosen to establish speedy trial time limits by court rule and to provide that *failure to comply therewith requires dismissal of the charge with prejudice*." *State v. Duggins*, 68 Wn.App. 396, 399-400, 844 P.2d 441 (1993). The State's delay in amending the charges, coupled with the fact that the delay forced Defendant to waive his speedy trial right in order to prepare a defense, can reasonably be considered mismanagement and prejudice sufficient to satisfy CrR 8.3(b).

Id. at 245 (emphasis supplied).

Likewise, in *State v. Sherman*, 59 Wn.App. 763, 770-71 (1990), the Court of Appeals affirmed a trial court's dismissal of a complex felony theft case where, among other missteps,

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the State filed a motion to add a previously undisclosed expert witness on the day of trial. The Court stated

> We agree that if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. ***Such unexcused conduct by the State cannot force a defendant to choose between these rights.***

State v. Sherman, 59 WnApp. 763, 770 (1990) (*quoting State v. Price*, 94 Wn.2d 810, 814 (1980)) (emphasis in *Sherman*). Significantly, the *Sherman* Court clarified that the Court need not grant a continuance where the discovery violation is a blatant violation of the defendant's right to a speedy trial with adequate time to prepare for trial:

> we disagree with *Coleman* to the extent that it arguably stands for the proposition that the appropriate remedy for discovery problems must be a continuance. *See* 54 Wash.App. at 750, 775 P.2d 986. We believe that the question of whether dismissal is an appropriate remedy is a fact-specific determination that must be resolved on a case-by-case basis.

Sherman, 59 Wn.App. at 770-71.

3. The City's Mismanagement of this Case Calls for Dismissal

The defense is well aware that "dismissal is an extraordinary remedy" and reserved only for select cases involving serious mismanagement. *State v. Wilson*, 149 Wn.2d 1, 9 (2003). Nevertheless, as discussed above, Washington Courts have not hesitated to impose this remedy in appropriate circumstances.

The City's gross mismanagement in this case calls for the extraordinary remedy of dismissal. The case has been pending since June 2014 and the defense has made clear, on numerous occasions, that time was of the essence.

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Despite these many months of proceedings, it was not until December 30, 2014 that the City finally notified the defense that it intended to call these several new witnesses. The defense cannot be prepared to effectively represent Ms. Stevens at trial given these wholly inadequate disclosures at the very last minute.

Because of the City's mismanagement, Ms. Stevens has been place in the untenable position of being forced to proceed to trial unprepared to meet expert testimony, or waive his speedy trial rights to accommodate the significant continuance required to meet the City's new witnesses. He is put in this position solely because of the City's dilatory handling of this matter. "Such unexcused conduct by the [prosecution] cannot force a defendant to choose between these rights." *Sherman*, 59 Wn.App. at 770.

V. THERE IS NO "JUST CAUSE" FOR A CONTINUANCE

The City's failure to prepare its case in a timely fashion does not provide "just cause" for a continuance of the trial date. Moreover, Ms. Stevens has been preparing for trial on January 20, 2015 and any further continuance would severely prejudice the defense.

In the alternative, should this Court decline to order dismissal pursuant to CrRLJ 8.3(b), the Court should strike the State's last-minute witnesses. Such a remedy is certainly appropriate and consistent with CrR 4.7 and due process principles.

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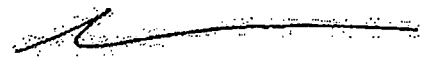
VI. CONCLUSION

For the foregoing reasons, and in the interests of justice, this Court should dismiss this case with prejudice.

DATED this 31st day of December 2104

Respectfully submitted,



Todd Maybrown, WSBA #18557
Attorney for Defendant

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Seattle, Washington 98101
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CERTIFICATE OF SERVICE

I certify that on the 31st day of December, 2014, I caused a true and correct copy of the foregoing document to be served on the following:

By Email

Tamara McElyea, Esq.
Lacey Offut, Esq.
City of Kirkland Prosecuting Attorney's Office

By: _____
Todd Maybrown, Attorney for Defendant

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APPENDIX M

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 SECOND SUPPLEMENTAL DECLARATION OF TODD MAYBROWN IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

I, Todd Maybrown, do hereby declare:

1. I am the attorney for the defendant, Hope Stevens, in the above-entitled case. This declaration is submitted to further supplement the Declaration of Todd Maybrown in Support of Defendant's Motion to Dismiss or For Alternative Relief dated December 9, 2014, and the Supplemental Declaration of Todd Maybrown in Support of Defendant's Motion to Dismiss or For Alternative Relief dated December 23, 2014. This declaration is also submitted in support of the Defendant's Renewed Motion to Dismiss dated December 31, 2014.

2. On December 30, 2014, the parties appeared before this Court for hearing on Defendant's Motion to Dismiss. After hearing argument, the Court deferred its ruling on Defendant's Motion.

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3. Nevertheless, in light of the very significant difficulties that the defense has faced over the last several months, the Court ordered certain "remedial" relief. First, the Court directed the City prosecutors to disclose all notes and recordings from the interviews with the City's key witnesses, Teresa Obert and C.O. Second, the Court ordered these witnesses to appear for a second deposition at the Kirkland Justice Center on January 2, 2015.

The City's Notes Include Compelling Impeachment Evidence

4. On December 30, 2014, the City prosecutors disclosed approximately 20 pages of handwritten notes as directed by the Court. These notes included several pages of notes that purported to document the City prosecutors' interviews of Ms. Obert and C.O. on October 24, 2014.

5. These notes include a considerable amount of impeachment evidence that only further undermines the claims of the City's key witnesses in this action. By way of example, the witnesses are contending that Ms. Stevens was intoxicated at the time of the June 21 incident and that she had been drinking (and was presumably intoxicated) before she entered the Obert home. This contention is false and it is belied by the notes of the City prosecutors on October 24, 2014. A note from the interview of C.O. includes the following information: "Tell she had been drinking? No, tired and had been crying."

6. I have identified many other notes that include similar inconsistencies and I planned to question the City's witnesses regarding these matters during the January 2 depositions. I feel strongly that the defense should have received all notes from the interviews of October 24, 2014 soon after the interviews were completed. Such information was clearly discoverable under CrRLJ 4.7. Moreover, and perhaps more importantly, disclosure of this information was compelled by the Due Process Clause of the United States Constitution.

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The City's Witnesses Did Not Appear at the Court-Ordered Depositions

7. Following the December 30 hearing, I made considerable efforts to prepare for the January 2 depositions. First, I arranged for a court reporter to appear at the second depositions. Second, I changed travel plans that otherwised required me to be present in Spokane on January 2. Third, I reviewed all available discovery information and prepared questions for the second depositions.

8. On January 2, 2015, I appeared at the Kirkland Justice Center at approximately 8:25 a.m. to conduct these second depositions. The City's prosecutors and a court reporter were also present. Neither Teresa Obert nor C.O. appeared for their second depositions.

9. It is my firm belief that Teresa Obert and C.O. had notice of this Court's order of December 30, 2014 and the directive for each of them to appear for a second deposition on January 2, 2015. I understand that the City's prosecutors provided several forms of notice to these witnesses following the December 30 hearing. Moreover, this Court's December 30 "remedial" ruling was widely publicized in the national and local news media. Based on the witnesses' previous statements to the prosecutors and their answers during the first depositions, it is clear that the City's witnesses have been very closely following all news coverage regarding this case.[1] Thus, it is the defense position that the City's key witnesses simply refused to abide by this Court's order of December 30 and that they willfully failed to appear for their second depositions.

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[1] In fact, during the deposition of December 19, 2014, Ms. Obert testified that she was planning to sue certain news media outlets based on their reporting of the case.

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10. Given all of these factors, the defense has been deprived of any fair opportunity to defend this case at trial. The case against Hope Stevens should be dismissed with prejudice.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

DATED at Seattle, Washington this 5th day of January, 2015.

ALLEN, HANSEN & MAYBROWN, P.S.

Todd Maybrown, WSBA #18557
Attorney for Defendant

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent by ~~mail~~ / email / ~~messenger~~ a copy of the document to which this certificate is affixed to Tamara McElyea and Lacey Offutt

Dated: 1/5/2015

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APPENDIX N

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FILED
JAN - 9 2015
KIRKLAND
MUNICIPAL COURT

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~~JAN 0 8 2014~~
KIRKLAND
MUNICIPAL COURT

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 THIRD SUPPLEMENTAL DECLARATION OF TODD MAYBROWN IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

I, Todd Maybrown, do hereby declare:

1. I am the attorney for the defendant, Hope Stevens, in the above-entitled case. This declaration is submitted to further supplement the Declaration of Todd Maybrown in Support of Defendant's Motion to Dismiss or For Alternative Relief dated December 9, 2014, the Supplemental Declaration of Todd Maybrown in Support of Defendant's Motion to Dismiss or For Alternative Relief dated December 23, 2014, and the Second Supplemental Declaration of Todd Maybrown in Support of Defendant's Motion to Dismiss or For Alternative Relief dated January 5, 2015. This declaration is also submitted in support of the Defendant's Renewed Motion to Dismiss dated December 31, 2014.

2. On January 6, 2015, the parties appeared before this Court for previously scheduled hearings. After hearing argument, the Court deferred its ruling on Defendant's

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Motion to Dismiss. The Court also deferred ruling on the issues that were raised during the Defendant's Renewed Motion to Dismiss.

3. During the course of the hearing, the Court also noted that the City's case was dependent upon the testimony of the material witnesses, Teresa Obert and C.O. The Court reiterated that the defense was entitled to answers to all relevant questions prior to trial. In the exercise of caution, the Court afforded the City an additional opportunity to make these witnesses available prior to trial. The Court noted that time was of the essence and that the readiness hearing was scheduled for January 14, 2015. The City's prosecutors assured the Court that the witnesses could be available for interviews this week. After hearing from all parties, the Court entered a third order for depositions and scheduled these depositions for January 8, 2015 at the Kirkland Municipal Court beginning at 8:30 a.m. The Court also directed me to attempt to interview the witnesses that were first disclosed on December 30, 2014.

Once Again, the City's Witnesses Failed to Appear for Depositions

4. Following the January 5 hearing, I made considerable efforts to prepare for the January 8, 2015 depositions. First, I arranged for a court reporter to appear at the depositions. Second, I reviewed all available discovery information and prepared questions for these depositions. Third, I attempted to interview the new witnesses that had been only recently endorsed by the City.

5. On January 8, 2015, I appeared at the Kirkland Municipal Court at approximately 8:15 a.m. to conduct depositions. The City's prosecutors and a court reporter were also present. Neither Teresa Obert nor C.O. appeared for these depositions.

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6. Once again, it is my firm belief that Teresa Obert and C.O. had notice of this Court's order of January 6, 2015, including the directive for each of them to appear for a second deposition on January 8, 2015.[1] I understand that the City's prosecutors provided several forms of notice to these witnesses following the January 6 hearing. One of the assigned prosecutors, Lacey Offutt, told me that she provided notice to the witnesses' attorney, Mary Gaston, during a phone conversation on January 6, 2015. Thus, once again, it is the defense position that the City's key witnesses simply refused to abide by this Court's order of January 6 and that they willfully failed to appear for their second depositions.

The City's New Witnesses Are Unable or Unwilling to be Interviewed

7. As instructed by the Court, I have attempted to interview the City's new witnesses over the last several days. All of my efforts have been unsuccessful.

8. I have attempted to interview the City's medical witnesses, Dr. Jing Jin and Lindsey Taylor. On January 7, 2015, I was contacted by Sapna Jain who is an attorney representing the Immediate Clinic. Ms. Jain advised me that these medical providers would not (and could not) provide any information regarding their patients since the clinic had no release of information on file. Moreover, Ms. Jain explained that these witnesses had not been served with any subpoena for trial. *See Appendix A* (email of Sapna Jain, Esq.).

9. On January 6, 2015, I asked the prosecutors to arrange for the interview of Jeffrey Obert. I did not feel comfortable attempting to contact Mr. Obert directly, since he resides with Teresa Obert and C.O. and both of these witnesses are represented by counsel. I specifically

[1] Also, I am confident that the witnesses were aware of the Court's prior Order and the directive for them to appear for depositions on January 2, 2015.

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asked the prosecutors to arrange for me to interview Mr. Obert on January 8 following the depositions of Teresa Obert and C.O. Mr. Obert did not appear for his interview.

10. On January 6, 2015, I asked an investigator, Stephen Robinson, to attempt to contact Cori Parks. I now understand that Ms. Parks is related to the Oberts. I also understand that Ms. Parks lives in the State of Florida. Ms. Parks advised Mr. Robinson that she has yet to decide if she will travel to Washington for this trial. Ms. Parks agreed to let us know if she would be available for an interview if she decides to travel to Washington.

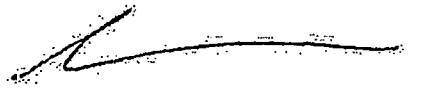
Conclusions

11. Given all of these factors, the defense has been deprived of any fair opportunity to defend this case at trial. Accordingly, the case against Hope Stevens should be dismissed with prejudice.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

DATED at Seattle, Washington this 8th day of January, 2015.

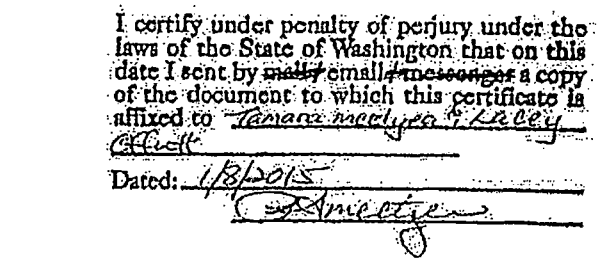
ALLEN, HANSEN & MAYBROWN, P.S.



Todd Maybrown, WSBA #18557
Attorney for Defendant

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent by ~~mail/~~ email ~~/messenger~~ a copy of the document to which this certificate is affixed to Tamara McClyea & Lacey Offutt

Dated: 1/8/2015



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APPENDIX A

Todd Maybrown

From: Jain, Sapna <SJain@Ensigngroup.net>
Sent: Wednesday, January 07, 2015 4:10 PM
To: Todd Maybrown
Subject: RE: City vs. Stevens - Request for interviews

Todd,

As I mentioned, to the best of my knowledge, the Immediate Clinic does not have a release for records from the patients and without such authorization, our clinicians would not be able to speak to you without violating privacy considerations. Additionally, Ms. Taylor has not been served with a subpoena to date. Please feel free to contact me if there is any additional information you require regarding the clinic.

Best,

Sapna S. Jain
Associate General Counsel
Ensign Services, Inc.
27101 Puerta Real, Suite 450
Mission Viejo, CA 92691
Direct: (949) 540-2052
Fax: (949) 540-3007
sjain@ensigngroup.net

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From: Todd Maybrown [mailto:Todd@ahmlawyers.com]
Sent: Wednesday, January 07, 2015 3:02 PM
To: Jain, Sapna
Subject: City vs. Stevens - Request for interviews

Nice speaking with you. Thanks for your help.

Todd

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CASE NUMBER 14-25956

KIRKLAND POLICE DEPARTMENT
STATEMENT FORM

DATE 6-21-14 TIME 0052 PLACE 10615 124th Ave NE Kirkland, WA 98033

STATEMENT OF: Christian J.D. Obert (NAME) 5-28-97 (DATE OF BIRTH)

10615 124th Ave NE Kirkland, WA 98033 (ADDRESS) 425-786-3509 (PHONE)

CONCERNING THE FACTS OF:

C.O. pointed it at her and she kept coming at me. She didn't leave but walked around for from me "Circling me like a shark." I then grabbed a mop in order to hurt her because I was scared and nothing I did kept her out or got her to leave. C.O.

C.O. I correction, I called her a "cunt face as soon as she called me fat, then I went to the rec room C.O.

C.O. the gun actually came out before she left initially I put the gun away because she left. Then she came in started fighting with my mom again and I grabbed the mop. C.O.

I HAVE READ THIS STATEMENT OF 3/3 PAGES AND I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING STATEMENT IS TRUE AND CORRECT. I AM SIGNING OF MY OWN FREE WILL WITHOUT ANY FEAR, FORCE, THREAT, OR PROMISE OR FAVOR.

WITNESS E Voss #612 SIGNATURE Christian Obert

WITNESS

KPD 2012-006

APPENDIX O

1 witnesses. The witness list included two medical health
2 professionals, a doctor and a physician's assistant. Both
3 apparently took part in examining the alleged
4 victim/witness after the assault.
5 The defense again moved to dismiss charges, citing
6 mismanagement on the part of the prosecutors by waiting
7 over six months to endorse expert witnesses only days
8 before trial. Again, the court chose to reserve ruling and
9 urged defense counsel to attempt to interview the
10 newly-endorsed witnesses with the time left before trial.
11 Today, according to declarations filed by the defense,
12 the two medical professionals have declined to discuss
13 their involvement in this case citing privilege. It's
14 interesting to note that the government has endorsed two
15 doctor witnesses, albeit late, to testify as to the
16 condition of the alleged victim following the altercation.
17 Still, both medical witnesses are refusing to discuss the
18 case with the defense. Consequently, the defendant will
19 hear this crucial testimony for the first time during trial
20 in front of the jury. The testimony, and that of others --
21 this testimony, and that of others, will be a complete
22 surprise to the defendant.
23 According to defense counsel, the third witness endorsed
24 by the City on December 30th, 2014 is Jeffrey Obert.
25 Working with the prosecuting attorney, the defense arranged

1 to interview Mr. Obert on January 8th, immediately
2 following the depositions. Mr. Obert declined to appear
3 for the interview.
4 Interesting to note, according to the declarations filed
5 by the City prosecutors, it was Mr. Obert that answered the
6 door or otherwise talked to police officers prior to the
7 January 8th deposition and advised the police officers that
8 the other witnesses had left the state. Consequently, it's
9 clear to this court that Mr. Obert was at home and
10 available for the interview but declined.
11 The fourth witness added to the government's list on
12 December 30, 2014 is a Corey Parks. According to the
13 declaration filed by the defense, this witness lives in
14 Florida and has also declined to be interviewed over the
15 phone. According to the declaration, Ms. Parks states she
16 has not received a subpoena to appear in court. Apparently
17 Ms. Parks stated to investigators that she will let the
18 defense know if she decides to come to Washington.
19 Consequently, there are four witnesses that have all
20 refused to talk to defense counsel. These witnesses were
21 added to the government's witness list less than two weeks
22 before trial readiness and more than six months after
23 charges were filed. Now trial readiness is tomorrow. All
24 witnesses have refused to speak to defense counsel. There
25 are two witnesses who are avoiding interviews with defense

1 counsel and twice declined a court-ordered deposition.
2 Because the defendant's speedy trial right expires February
3 2nd, 2015, this matter must proceed to trial this month and
4 begin on January 20. Defense counsel has not had a
5 sufficient opportunity to adequately prepare a material
6 part of the defense and the defendant will clearly be
7 impermissibly prejudiced if the trial were to proceed this
8 month.
9 A dismissal of a criminal prosecution is an
10 extraordinary remedy, as both counsel bring up many times,
11 available only if the accused rights have been prejudiced
12 to the degree that the accused right to a fair trial has
13 been materially affected. Here the defendant's right to a
14 fair trial has been materially affected, in that the
15 defendant is now at the point where she is compelled to
16 choose between two distinct rights, either proceed as
17 scheduled and hear testimony from many witnesses for the
18 first time during trial, thereby violating her effective
19 assistance of counsel, right to confront witnesses, and
20 right to fair due process, or give up her right to speedy
21 trial and ask for yet another extension in hopes the
22 witnesses may cooperate. The government simply cannot
23 force a defendant, a criminal defendant, to choose between
24 these rights.
25 Defense motion to dismiss pursuant to Criminal Rule 4.7

1 and 8.3 is granted. All charges are dismissed.
2 MS. MCELYEA: Your Honor, there is a no-contact order in
3 effect for two different people under the same cause
4 number, but so -- but on this particular it doesn't specify
5 the two, so I don't know if we need two separate ones
6 that --
7 THE COURT: We probably should have two separate ones --
8 MS. MCELYEA: Okay.
9 THE COURT: -- that indicate the names of each on the
10 order.
11 MS. MCELYEA: All right, thank you.
12 And, your Honor, in light of your ruling, when -- when
13 could we anticipate it in writing?
14 THE COURT: That's up to counsel. If you want to
15 present an order to me.
16 MS. MCELYEA: Okay.
17 MR. MAYBROWN: Okay, your Honor --
18 THE COURT: Be happy to review it and sign it.
19 MR. MAYBROWN: Your Honor, I have an order which
20 reflects what the court has considered and incorporates the
21 court's oral ruling. If that would be sufficient with the
22 court, that would be sufficient with the defense. If the
23 court wants us to prepare findings, we would prepare
24 findings and conclusions. I'm satisfied either way, but
25 I'll defer to the court. And perhaps the prosecutor would

APPENDIX P

IN THE KIRKLAND MUNICIPAL COURT, KING COUNTY
STATE OF WASHINGTON

CITY OF KIRKLAND, Plaintiff, v. HOPE STEVENS, Defendant.	NO. 38384 ORDER ON DEFENDANT'S RENEWED MOTION TO DISMISS

THIS MATTER came on for hearing before the above-entitled Court, and the Court having reviewed and considered the records and files herein, including the Defendant's moving papers, Plaintiff's responsive pleadings, and all documents filed in support of each, and having heard argument,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants' Motion to Dismiss ~~or for Alternative Relief~~ is GRANTED; and further

IT IS ALSO ORDERED that All charges are dismissed with prejudice pursuant to CrRLJ 4.7 and 8.3b.

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IN REACHING THIS DECISION, the Court further incorporates its oral rulings of November 6, 2014, December 30, 2014, January 6, 2015 and January 13, 2015.

DATED this 13 day of January, 2015.

HONORABLE MICHAEL LAMBO
Municipal Court Judge

Presented by:

TODD MAYBROWN, WSBA #18557
Attorney for Defendant

Approved as to Form; Notice of Presentation Waived; Copy Received:

TAMARA McELYEA, WSBA #42466
LACEY OFFUTT, WSBA #45655
Assistant City Attorneys

Allen, Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

APPENDIX Q

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

CITY OF KIRKLAND, Respondent, v. HOPE STEVENS, Petitioner.	)	No. 74300-7-I COMMISSIONER'S RULING DENYING DISCRETIONARY REVIEW

This case comes to this Court on a motion for discretionary review of a superior court decision entered in a proceeding to review a municipal court decision under RALJ (rules for appeal of decisions of court of limited jurisdiction). Hope Stevens, charged with fourth degree assaults in municipal court, seeks discretionary review of a superior court decision that reversed the dismissal of the charges and remanded for trial. The superior court concluded that there is no supportable finding of governmental misconduct warranting the extraordinary remedy of dismissal and that the municipal court conflate the prosecutor's discovery obligations with witnesses' conduct. Stevens argues that the superior court rejected the established abuse of discretion standard of review and failed to accept the municipal court's implicit findings of governmental mismanagement. But she fails to show that the superior court decision is in conflict with any Washington case, that her appeal involves an issue of public interest that should be determined by an appellate court, or that the superior court so far departed from the accepted and usual course of judicial proceedings as to call for review by this Court. Review is denied.

FACTS

In June 2014, the City of Kirkland charged Hope Stevens with two counts of domestic violence fourth degree assault in Kirkland Municipal Court. The City alleged that Stevens intentionally assaulted her half-sister Teresa Obert and Obert's teenage son (Stevens' nephew) C.O. Stevens pleaded not guilty to the assault charges. She asserts that she was the victim and that she was hit by her nephew C.O. with a stick.

Stevens' counsel sought to either depose Obert and C.O. or interview them with a court reporter. Obert and C.O. retained independent legal counsel. Counsel for Obert and C.O. agreed to an informal interview, but not any recording other than Stevens' counsel taking notes, or participation by any "extraneous people," including a court reporter.[1] Stevens filed a motion for depositions. On November 4, 2014, the trial court granted her motion and allowed her counsel to schedule depositions of Obert and C.O.

Stevens' counsel scheduled the depositions of Obert and C.O. for November 25, 2014 but re-scheduled the depositions for December 2, 2014 at the City's request. Stevens' counsel served all parties with notices of the depositions. On the morning of December 2, counsel for Obert and C.O. notified Stevens' counsel and the City's counsel that C.O. was hospitalized. Counsel also asserted that neither Obert nor C.O. had been subpoenaed for the depositions. Stevens' counsel responded that this case is governed by Criminal Rules for Courts of Limited Jurisdiction (CrRLJ) 4.6, which requires only a notice of deposition, not a subpoena. Obert and C.O. did not appear at the depositions.

Stevens filed a motion to dismiss under CrRLJ 4.7 and 8.3 or for alternative relief

[1] Appendix to Answer to Motion for Discretionary Review (City App.) C(A) at 2 (October 23, 2014 6:01PM email).

for Obert's and C.O.'s refusal to be "interviewed and/or deposed."[2] The trial court scheduled a hearing on the motion for December 30, 2014. Meanwhile, the City's counsel arranged for Obert and C.O. to be available for depositions on December 19, 2014 and subpoenaed them to appear at the depositions.

On December 19, 2014, Obert and C.O. appeared with their counsel. Each of their depositions lasted about 90 minutes. Both answered Stevens' counsel's questions, but not all of them. In particular, C.O. did not answer questions about what medications he was using at the time of the incident, his medical history, and his recent hospital stay. C.O.'s counsel objected to those lines of questions by asserting doctor-patient privilege.

After the depositions, Stevens' counsel filed a supplemental declaration in support of the pending motion to dismiss. The transcript of the depositions was not available then, but counsel asserted that Obert's and C.O.'s counsel made improper objections and that the witnesses refused to answer questions that could be used to impeach them at trial. Counsel asserted that during the depositions, Obert "repeatedly made malicious claims" about Stevens.[3] Counsel also asserted that C.O. admitted having burned the stick he used to hit Stevens. Counsel also complained that the City had refused to provide its prosecutor's notes from the City's October 2014 interview of Obert and C.O.

On December 29, 2014 (22 days before the trial was set to begin on January 20, 2015), the City filed an amended witness list. The City added four witnesses and disclosed their contact information and a summary of the witnesses' expected testimony.

On December 30, 2014, about 1:00 p.m., the trial court conducted a hearing on Stevens' motion to dismiss. After the hearing, the court ordered Obert and C.O. to

[2] Appendix to Motion for Discretionary Review (Stevens App.) H.
[3] Stevens App. I (supplemental declaration of Todd Maybrown) at 4 ¶ 14.

appear three days later on January 2, 2015 for second depositions to answer questions about C.O.'s medical history and medications the court found relevant. The court also ordered the City to produce its prosecutor's interview notes by the end of that day over the City's objection that the notes were privileged attorney work product.[4] The City produced the notes on that day and prepared subpoenas for Obert and C.O. to appear for the ordered depositions. Because the postal service had gone out, the City arranged for personal service by a Kirkland police officer. The City later reported that the officer could not serve the subpoenas because no one answered the door. Counsel for Obert and C.O was out of the country. About 4:30 p.m. on that day, the City's counsel called Obert to inform her of the depositions. Obert said: "I don't know if we can make that."[5]

On January 2, 2015, Obert and C.O. did not appear at the ordered depositions. Stevens filed a renewed motion to dismiss under CrRLJ 8.3(b), arguing that the "City's gross mismanagement in this case calls for the extraordinary remedy of dismissal."[6]

On January 6, 2015, about 1:00 p.m., the trial court conducted a hearing and ordered Obert and C.O. to appear two days later on January 8, 2015 for depositions. The court also ordered all parties to reconvene on January 13, 2015. The City prepared subpoenas for the witnesses to appear for the ordered depositions and again arranged for a Kirkland police officer to personally serve the witnesses with the subpoenas. The City's counsel later reported that Jeff Obert answered the door when the officer attempted to serve the subpoenas and that Jeff Obert told the officer that Teresa Obert

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[4] See State v. Garcia, 45 Wn. App. 132, 137-38, 724 P.2d 412 (1986) (prosecutor's notes are not per se work product, and the State failed to show the notes were protected work product when the prosecutor did not assert that her notes contained her opinions, theories, or conclusions but resisted disclosure on the basis that the notes were incomplete).

[5] City App. F (declaration of Lacey Offutt) at 3 ¶ 22.

[6] Stevens App. L (renewed motion to dismiss) at 7.

and C.O. were out of the state. The City's counsel unsuccessfully attempted several times to make direct contact with Teresa Obert. On the same day (January 6), the prosecutor gave a notice of the depositions to counsel for Obert and C.O. by phone. On January 8, Obert and C.O. did not appear at the ordered depositions.

On January 13, 2015, the trial court conducted a hearing and dismissed all charges under CrRLJ 4.7 and 8.3(b). The court incorporated its oral rulings of November 6 and December 30, 2014 and January 6 and 13, 2015. The court noted that the "pattern of the City's witnesses' failure to cooperate with defense interviews is well documented."[7] It also noted that the City filed an amended witness list to add four witnesses "more than six months after the government filed charges against the defendant, and less than two weeks before trial readiness[.]"[8] The court noted that according to Stevens' counsel, the added witnesses had refused to talk to counsel. The court stated that because Stevens' speedy trial right would expire on February 2, 2015, the case would have to go to trial on January 20, 2015. The court stated that the City could not force Stevens to choose between her right to speedy trial on one hand and her right to effective assistance of counsel, confrontation, and due process on the other:

> A dismissal of a criminal prosecution is an extraordinary remedy, as both counsel bring up many times, available only if the accused rights have been prejudiced to the degree that the accused right to a fair trial has been materially affected, in that the defendant is now at the point where she is compelled to choose between two distinct rights, either proceed as scheduled and hear testimony from many witnesses for the first time during trial, thereby violating her effective assistance of counsel, right to confront witnesses, and right to fair due process, or give up her right to speedy trial and ask for yet another extension in hopes the witnesses may cooperate. The government simply cannot force a defendant, a criminal defendant, to

[7] Stevens App. P; RP (Jan. 13, 2015) at 10.
[8] Stevens App. P; RP (Jan. 13, 2015) at 12.

choose between these rights.[9]

The City appealed the dismissal to King County Superior Court. The City argued that the trial court abused its discretion in resorting to the extraordinary remedy of dismissal without considering any less drastic remedy. It argued that adding witnesses 22 days before trial did not rise to the level of egregious governmental conduct found by the courts to justify dismissal. The City argued that the trial court improperly conflated the City's obligations with the witnesses' conduct.

Stevens responded that the trial court found "very clear discovery violations" when "these witnesses are willfully failing to abide by these orders. And that's sufficient."[10] She argued that CrRLJ 4.7 "does not say in that section anywhere that the willful violation of the order must be by the prosecutor. It doesn't say that."[11] She also argued that the trial court found the City's mismanagement based on its adding witnesses six months after the setting of the trial and less than two weeks before trial readiness.

After a hearing, the superior court reversed the dismissal as an abuse of discretion and remanded to the municipal court for trial. The court reasoned that dismissal "requires willful or arbitrary action on the part of the government, not on the basis of the witnesses."[12] The court rejected Stevens' argument that if it believed the municipal court did not enter sufficient findings, it could remand for the municipal court to enter finings of "gross mismanagement" or "gross negligence on the part of the prosecutors."[13] The superior court explained that "there wouldn't be any basis for

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[9] Stevens App. P; RP (Jan. 13, 2015) at 15.
[10] City App. S; RP (Oct. 2, 2015) at 8.
[11] City App. S; RP (Oct. 2, 2015) at 9.
[12] City App. S; RP (Oct. 2, 2015) at 14.
[13] City App. S; RP (Oct. 2, 2015) at 11.

entering those findings."[14] The court said:

> There, there clearly is not evidence of gross mismanagement or arbitrary action, or willful violations by the prosecuting agency. Now there is by the witnesses. But, but, but you're conflating the witnesses with the prosecuting entity.[15]

Stevens filed a notice for discretionary review to this Court.

DECISION

Stevens seeks discretionary review of the superior court's decision that reversed the dismissal and remanded to the municipal court for trial. This Court may accept review of a superior court decision entered on review of a municipal court decision, only if the petitioning party (Stevens) satisfies one of the following criteria under RAP 2.3(d):

> Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:
>
> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
>
> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
>
> (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.[16]

Stevens seeks review under RAP 2.3(d)(1) (conflict), (3) (issue of public interest), and (4) (far departure from the accepted and usual course of judicial proceedings). She makes two primary arguments. First, she argues that the superior court erroneously

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[14] City App. S; RP (Oct. 2, 2015) at 11.
[15] City App. S; RP (Oct. 2, 2015) at 12.
[16] RAP 2.3(d).

rejected the established abuse of discretion standard of review. Second, she argues that the court violated RALJ 9.1(b), which requires the court to accept all findings, including unspoken ones that can reasonably be inferred from the lower court's decision. But neither argument demonstrates any conflict with Washington precedent, any issue of public interest that should be determined by this Court, or such a far departure from the accepted and usual course of judicial proceedings that calls for review by this Court.

The municipal court dismissed the charges under CrRLJ 4.7 and 8.3(b). Under CrRLJ 4.7, a trial court may dismiss the action "if the court determines that failure to comply with an applicable discovery rule or an order issued pursuant thereto is the result of a willful violation or of gross negligence and that the defendant was prejudiced by such failure."[17] Under CrRLJ 8.3(b), a court "may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order."[18] A dismissal of charges "is an extraordinary remedy, one to which a trial court should turn only as a last resort."[19] A trial court should consider "intermediate remedial steps" before "ordering the extraordinary remedy of dismissal."[20] Our Supreme Court has repeatedly and "unequivocally" stated that dismissal "is unwarranted in cases where suppression of evidence may eliminate whatever prejudice is caused by governmental misconduct."[21]

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[17] CrRLJ 4.7(g)(7)(ii).
[18] CrRLJ 8.3(b).
[19] City of Seattle v. Holifield, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010) (citation omitted).
[20] Holifield, 170 Wn.2d at 237 (citation omitted).
[21] Id. (citation omitted).

A dismissal of charges is reviewed for a manifest abuse of discretion.[22] Stevens quotes the following dialogue between her counsel and the superior court to argue that the court erroneously rejected the proper abuse of discretion standard of review:

> COUNSEL: But here we're, the question is whether any reasonable judge in Washington, faced with these circumstances, could have reached the decision it reached?
>
> COURT: No, that's not the proper . . . I realize that there are cases that articulate the standard that way but that, that's a fundamental misstatement of what, what the, abusive discretion means. It's a decision made for untenable grounds or for untenable reasons. And the untenable grounds here is that there is no finding by the trial court of a governmental misconduct or arbitrary action.[23]

"Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons."[24] A trial court's decision is "manifestly unreasonable" if the court adopts a view "that no reasonable person would take."[25] A trial court abuses its discretion "if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law."[26] If "there is no evidence of arbitrary prosecutorial action nor governmental misconduct (including mismanagement of the case . . .), the court's dismissal will be reversed."[27]

Here, the superior court's oral ruling, viewed in its entirety, appears to apply the correct standard. The court concluded that the dismissal was based on untenable

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[22] State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).
[23] City App. S; RP (Oct. 2, 2015) at 15 (emphasis added).
[24] Michielli, 132 Wn.2d at 240 (emphasis added).
[25] Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 458-59, 229 P.3d 735 (2010) (citation omitted); State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) ("An appellate court finds abuse only 'when no reasonable judge would have reached the same conclusion.'")
[26] State v. Slocum, 183 Wn. App. 438, 449, 333 P.3d 541 (2014).
[27] State v. Blackwell, 120 Wn.2d 822, 832, 845 P.2d 1017 (1993) (citation omitted).

grounds – dismissal without a supportable finding of *the City's* arbitrary action or misconduct warranting dismissal. Specifically, the court concluded that the trial court improperly conflated the City's obligations with the witnesses' conduct. Stevens' contrary argument does not satisfy any of the criteria for review under RAP 2.3(d).

Stevens asserts that the superior court was "fixated on" the lack of written findings and conclusions, inconsistent with RALJ 9.1(b)(2). The rule provides as follows:

> The superior court shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction."[28]

In support of her assertion, Stevens quotes the following statement by the superior court: "But obviously one of the problems we have here is there weren't actual written findings and conclusions entered."[29] But the court also stated:

> Well, I'm certainly happy to infer Mr. Maybrown, if you can point me to something in the record that, that would allow me to infer that the Court actually found governmental misconduct or arbitrary action on the basis of something, of, you know, but there, it isn't there.[30]

The superior court concluded that there was no evidence to support a finding, if any, of the City's misconduct or arbitrary action that would warrant dismissal.[31] Under RALJ 9.1(b)(2), a finding must be supported by substantial evidence. The record does not appear to support the premise of Stevens' apparent argument that the superior court reversed the dismissal simply because the municipal court failed to enter written findings.

In her reply brief, Stevens argues that the evidence supports a finding of the City's mismanagement, that the City's failure to timely provide discovery constitutes

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[28] RALJ 9.1(b).
[29] City App. S; RP (Oct. 2, 2015) at 7.
[30] City App. S; RP (Oct. 2, 2015) at 16.
[31] City App. S; RP (Oct. 2, 2015) at 12.

mismanagement, and that the superior court's decision is in conflict with Brooks[32] and Michielli.[33] But her motion for discretionary review did not cite Brooks or Michielli or argue that these cases present a conflict for review under RAP 2.3(d)(1). "An issue raised and argued for the first time in a reply brief is too late to warrant consideration."[34]

I did consider Stevens' argument in her reply brief. But Brooks and Michielli appear distinguishable and do not present a conflict for review. Also, Stevens' argument about the sufficiency of the evidence is specific to the facts of this case and does not present an issue of public interest that warrants discretionary review. Nor does she explain how the superior court so far departed from the accepted and usual course of judicial proceedings in concluding that the evidence did not support the City's misconduct or mismanagement sufficient to justify the extraordinary remedy of dismissal. At most, she asserts a legal error, not a far departure from the judicial proceedings.

Brooks involved "severe governmental mismanagement," including a failure to produce 60-page victim statement, lead detective's report, the entire police file, witness names, and multiple other documents routinely produced in discovery.[35] The State's failure to comply with its discovery obligations forced the court to continue trial. The trial

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[32] State v. Brooks, 149 Wn. App. 373, 203 P.3d 397 (2009).

[33] State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997).

[34] Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In her motion for discretionary review, Stevens argued in one sentence and a footnote, without citation to any authority, that "the record is replete with facts that support the trial court's judge's decision and from which a finding of governmental mismanagement of the case can reasonably be inferred." Motion for Discretionary Review at 20, 20 n.18. An appellate court may decline to consider argument raised in a footnote or without sufficient analysis. See State v. N.E., 70 Wn. App. 602, 606 n.3, 854 P.2d 672 (1993) (declining to address argument raised in a footnote); Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

[35] Brooks, 149 Wn. App. at 393 ("The trial court here faced very difficult decisions caused by the severe governmental mismanagement, which in turn affected the accuseds' ability to receive a fair trial.").

court in Brooks stated: "Dumping the amount of information into the lap of the defense attorneys subsequent to the omnibus hearing and on the day of trial when it was not newly created or discovered and which had been available for weeks is simply unfair and unacceptable."[36] On appeal from the dismissal, Division Two of this Court stated that although dismissal is an extraordinary remedy, Brooks was "an extraordinary case" where the trial court, despite multiple continuances, "was unable to get the State to comply with its discovery order, even on the eve of trial."[37]

Michielli involved a prosecutor's decision to add four new *charges* three business days before trial, although the prosecutor admittedly had all the information and evidence supporting those charges months earlier.[38] The Supreme Court stated that the facts "strongly suggest that the prosecutor's delay in adding the extra charges was done to harass Defendant."[39] The court held that the trial court did not abuse its discretion in dismissing the charges under CrR 8.3(b), stating: "Even though the resulting prejudice to Defendant's speedy trial right may not have been extreme, the State's dealing with Defendant would appear unfair to any reasonable person."[40]

In view of the record, neither Brooks nor Michielli appears analogous to the facts of this case. Stevens argues that "gross mismanagement" is not required and that "simple mismanagement" is sufficient. Governmental misconduct "need not be of an evil or dishonest nature; simple mismanagement is sufficient."[41] But "Washington courts have clearly maintained that dismissal is an extraordinary remedy to which the court

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[36] Brooks, 149 Wn. App. at 387.
[37] Id. at 393.
[38] See Michielli, 132 Wn.2d at 233, 244.
[39] Id. at 244.
[40] Id. at 246.
[41] State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003).

should resort only in 'truly egregious cases of mismanagement or misconduct.'"[42] For example, when the State's key witness (victim) refused to cooperate with the defense and did not meet court-imposed deadlines for an interview by the defense, our Supreme Court held that dismissal was improper and was properly reversed where the prosecutor "did not engage in unfair gamesmanship, nor did he egregiously neglect his obligation."[43]

Stevens fails to demonstrate that the superior court's decision is in conflict with any Washington precedent, that her appeal involves an issue of public interest that should be determined by this Court, or that the superior court so far departed from the accepted and usual course of judicial proceedings as to call for review by this Court. Discretionary review is not warranted under RAP 2.3(d).

Therefore, it is

ORDERED that discretionary review is denied.

Done this 7th day of June, 2016.

Masako Hanagawa
Court Commissioner

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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[42] Wilson, 149 Wn.2d at 9.
[43] Id. at 11.

APPENDIX R

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

CITY OF KIRKLAND, Respondent, v. HOPE STEVENS, Petitioner.	)	No. 74300-7-I ORDER DENYING MOTION TO MODIFY

Petitioner, Hope Stevens, has filed a motion to modify the commissioner's June 7, 2016 ruling denying her motion for discretionary review. The respondent, City of Kirkland, has not filed a response. We have considered the motion under RAP 17.7 and have determined that it should be denied. Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Done this 4th day of October, 2016.

Spearman, J

Dwyer, J.

Cox, J.

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STATE OF WASHINGTON

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SUPREME COURT

NO. _____

IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. 74300-7-I)

CITY OF KIRKLAND,

Respondent,

v.

HOPE STEVENS,

Petitioner.

ORIGINAL

SUPPLEMENTAL APPENDICES TO MOTION FOR DISCRETIONARY REVIEW TO THE SUPREME COURT OF WASHINGTON

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STATE OF WASHINGTON
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ORIGINAL

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Allen, Hansen, Maybrown & Offenbecher, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

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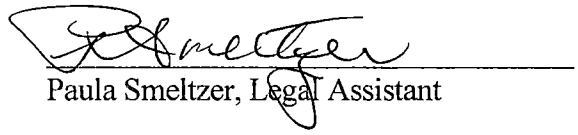
DATED this 3rd day of November, 2016.



Paula Smeltzer, Legal Assistant

RP I

Kirkland Municipal Court

12/30/2014

1
2
3 KIRKLAND MUNICIPAL COURT
4

5 CITY OF KIRKLAND,	
6 Plaintiff,	No. 38384
7 vs.	
8 HOPE A. STEVENS,	
9 Defendant.	

10

11 VERBATIM REPORT OF PROCEEDINGS
12 FROM ELECTRONIC RECORD
13 MOTION PROCEEDINGS
14 DECEMBER 30, 2014
15

16 APPEARANCES:
17
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20 For the Defendant: TODD MAYBROWN
Attorney at Law
21
22 Before: THE HONORABLE MICHAEL J. LAMBO
23
Prepared by: Linda A. Owen
24 425-466-8543
25

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PROCEEDINGS

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THE COURT: All right. Counsel, did we want to take Ms. Stevens first, or did you have some other matters you'd like to take out of order?

MS. OFFUTT: Yes, your Honor, we are prepared with the Stevens case. For the record, Lacey Offutt on behalf of the City. This is cause number 38384.

THE COURT: All right. Counsel, good afternoon.

MR. MAYBROWN: Good afternoon, your Honor.

THE COURT: All right. Well, I've read all of the briefing. This is your motion, Mr. Maybrown, so I'll let you go ahead and start.

MR. MAYBROWN: Thank you, your Honor. We filed two declarations that I prepared, both under oath, and an initial declaration and then a supplemental declaration. The City has responded, but they haven't filed any declarations or anything that disputes the facts that we've claimed, so I'm going to assume for purposes of the motion that the City agrees with all the facts that are stated in our motion. They're all true, but I think that that's the fairway to proceed, since they haven't rebutted or suggested that any of the facts are anything but accurate.

I do think I need to give a little background, because

1 this has been quite a moving target for us. We were -- the
2 incident was from June 2014. We've been trying to prepare
3 the case for trial since then. We wanted to go to trial in
4 November. We talked about it at the initial hearing.
5 Unfortunately, that became impossible because the City's
6 witnesses refused to cooperate, would not participate in
7 interviews. We came to court, we had a hearing, I think on
8 November 4th. The court granted our order -- or motion for
9 depositions.
10 Promptly, within a day or two, I said we need to get
11 these depositions scheduled. They need to go in -- I think
12 I said no later than November 20th, because we need to
13 prepare the case after these interviews so we can do some
14 follow-up investigation and go to trial.
15 I told the court at the time of the last hearing that we
16 were reluctantly agreeing to continue the case because we
17 needed to but that we were very firm that we needed the
18 case to be resolved in January. That was our hope and that
19 was our goal.
20 What happened after we submitted our information? What
21 did we discover was that depositions didn't go as
22 scheduled, December 2nd. We all thought there were going
23 to be depositions. The witnesses at the last minute make
24 what I consider to be a very bogus objection and don't show
25 up. We file a motion to dismiss after that. The witnesses

1 contact us through the prosecutors and say, oh, now we'll
2 appear but we can't do it until December 19th, right before
3 the holiday.
4 At that point the court had already scheduled a motion,
5 but I thought I needed to at least go forward and see
6 what's going to happen. We went forward with the
7 depositions, and to my dismay, it was, from the outset, a
8 terrible experience. I mean right from the beginning, the
9 witnesses are refusing to answer my questions when they're
10 very relevant to the case. Their attorney is saying that
11 my questions are outside the scope, as if the attorney gets
12 to decide what the scope of the proper deposition is. I
13 move forward for a few minutes, and I finally said this is
14 just not tenable. This is not a fair way to prepare a
15 case.
16 I actually tried to call the court, since we were both
17 together. The prosecutors were both present. I learned
18 that the judge was not available. You were not in the
19 building. So I came back on the record and reluctantly
20 said that I would proceed under protest because we couldn't
21 reach the court to help us move the case forward.
22 I got no assistance from the City at all. They never
23 tried to advance the ball, never tried to speak with the
24 lawyer or the witnesses and ask them to answer questions.
25 And the thing that's so hard about this is that these

1 witnesses met with the police not once, but twice, and
2 answered all their questions. These witnesses met with the
3 prosecutors and answered all their questions. The
4 prosecutor said I'm not allowed to be present when they
5 were meeting with the witnesses, even though I had asked
6 for an opportunity. I asked that it be recorded. I've
7 received no discovery, nothing, about those interviews.
8 When the depositions continued, I learned some things
9 about the incident. I learned that their testimony
10 completely changed from what they had told the police, that
11 they claimed the police reports were false. I never had
12 any idea or expectation that would happen, and then it went
13 on and on from there with them refusing to provide any of
14 the background information I needed but answering specific
15 questions about the day of the incident.
16 The problems we face now is these delays have all been
17 caused by the City's witnesses and we're backed up against
18 a trial date again. The questions that I needed answers to
19 they flatly refused to answer. A few examples, I hear from
20 the witnesses, including C.O., that he was on medication at
21 the time of the deposition and the time of the incident.
22 Will he tell me what it was? No. I ask him about his
23 change of story. He says he has memory difficulties
24 because he had a traumatic brain injury. He claims it was
25 caused during the incident. Will he tell me anything about

1 it? No. I find out that he was recently in a 14-day
2 hospitalization. He says it was because of the incident.
3 I ask them to explain. They refuse. They won't provide
4 any of that information.
5 And there seems to be an incredible double standard. I
6 have no indication that they refused to answer any of the
7 questions that the City had put to them, or the police, but
8 whenever I'm asking questions that are clearly relevant to
9 the information in the case, they won't answer.
10 I also find out that they destroyed important evidence
11 that would have been apparent to everybody from the
12 beginning that we needed, and how that happened, when that
13 happened, why that happened, we have no way of knowing, and
14 we don't know that it happened before or after they met
15 with the prosecutors, because the prosecutors have flatly
16 refused to give me any discovery. I pointed out in my
17 motion that under the Criminal Rules 4.7(1)(i)(a), these
18 are statements of witnesses, they need to be produced. We
19 should have gotten them before the depositions. And, in
20 fact, we now know that they're clearly also Brady
21 information because if the witnesses were changing their
22 stories when they met with the prosecutors, I needed to
23 know that. If they decided to change their stories only
24 now, we needed to know that either way. It should have
25 been produced and I should have gotten it before the

1 depositions.

2 The only objection I've heard is from the prosecutors.
3 They say it's work product. In my pleading you see that
4 there's a case, State v. Garcia, that says notes of a
5 prosecutor are not work product if they're the statements
6 of a witness. They have to be turned over. If the City
7 chose not to record those interviews for strategic reasons
8 or otherwise, that doesn't matter. Their notes are still
9 discoverable. We get the summary of the statements under
10 the rule.

11 And also, the thing that's -- that strikes me is you
12 would think in a situation like this, the prosecutors would
13 want to help. They would try to facilitate getting the
14 information available to the defense so we can properly
15 move forward, but I've gotten no assistance at all.

16 Now, the legal standards for the court, I actually think
17 this is a 4.7 issue more than it's an 8.3(b) issue, and
18 there clearly have been discovery violations, and I agree
19 that dismissal is an extraordinary remedy, but this is an
20 extraordinary type of case and situation. I've never faced
21 anything like this before. The only fair remedy when the
22 witnesses have so highjacked the proceedings I think is --
23 would be for a dismissal. When they've destroyed and
24 hidden evidence, the only fair remedy would be dismissal.
25 And when the City's prosecutors won't give you statements

1 of these key witnesses, even though we're just a few weeks
2 before trial, and they wouldn't give them to me before the
3 depositions, the only remedy would be dismissal.
4 Now, there is a case also about suppressing the
5 testimony, State v. Hutchinson, and that's a very
6 interesting case. It was a claim of diminished capacity,
7 and the defendant refused to answer questions about the
8 incident when the prosecutors asked him to because under
9 the rules, the defendant has to submit to an examination
10 and answer questions if there's that type of defense. The
11 trial court said if the witness is refusing to answer those
12 questions, the defense can't put on the expert. The expert
13 witness can't testify, because it would be unfair. This is
14 exactly the same circumstance. These witnesses won't
15 answer my questions, so they shouldn't be allowed to come
16 to court and testify when they won't answer appropriate
17 questions.
18 The Hutchinson court, Supreme Court decision, affirmed
19 the court and said that that's a reasonable remedy. It's
20 up to the trial court to fashion an appropriate remedy, but
21 the question is, is there another possible remedy? I
22 suppose the court could order a second deposition and try
23 to force them to answer questions again. But given the
24 timing, given the way they've behaved, I don't know why we
25 would put us on that merry-go-round some more, given what

1 we've been through. The court should also consider the
2 impact of the witnesses, and these are important witnesses,
3 but also the impact on the defense is extraordinary. The
4 prejudice to the non-violating party, that's us, the
5 prejudice is extreme, given how much time they've delayed,
6 given the way they've behaved, given what they've put us
7 through. And another question is whether it was bad faith,
8 and clearly in this instance it's got to be bad faith.
9 I can't see how any further order of this court would
10 remedy the situation and give Ms. Stevens an opportunity
11 for a fair trial. I just don't see how it can under these
12 circumstances, given their refusal to appear, the court
13 orders them to appear, they refuse to appear again, we're
14 forced to file a motion. Once the motion is filed then
15 they come to the depositions reluctantly.
16 I mean I can't tell you -- one of these witnesses was
17 screaming at me at the top of her lungs during this
18 deposition, to the point where we had to cancel and I had
19 to say that we're not going to be able to go forward unless
20 you can behave yourself, and this was going on and on and
21 on through the whole process.
22 We should not be forced to have to go through this
23 again, and certainly Ms. Stevens shouldn't be forced to
24 have to waive her speedy trial rights and ask for another
25 continuance under these circumstances. I know this is a

1 very significant case, it's an important case for
2 everybody, but both sides deserve a right to a fair trial.
3 Both sides deserve an opportunity to prepare.
4 The City has cited the Brady cases, which is
5 interesting. Those are cases post verdict, and in a Brady
6 situation you ask yourself, was the testimony -- was the
7 evidence that was withheld material, meaning would it have
8 made a difference to the verdict, but that's not what you
9 decide pretrial. Pretrial discovery, if the side is
10 entitled to it, it has to be turned over. It's not for the
11 court or the prosecutors to decide what's important and
12 what's not. That's exactly what the Garcia court said.
13 They can't pick and choose and decide what they want to
14 have us have -- have us see. And, frankly, to avoid a
15 Brady problem, that's why you have these discovery rules
16 and these disclosure standards.
17 So we think that this is an appropriate case for that
18 extraordinary remedy of dismissal, but at the least, we ask
19 the court to rule that these witnesses cannot testify at
20 this case, given what they've put us through, and given how
21 it's now going to be impossible for us to do anything more
22 in the next week or two weeks to get prepared for hearings
23 we have on January 6th and then at trial, which is soon
24 thereafter.
25 And I would be open to any other ideas that the court

1 had or any other remedy. I know that the prosecutor said,
2 well, the court should review the entire transcripts. I've
3 been calling the court reporter and asking when they'll be
4 completed, but obviously the witnesses' delay, delay,
5 delay, delay, and pushed her right up to the holiday, and
6 we haven't seen them yet. I've asked that they be
7 expedited, and if the court wants to see them, we'd ask to
8 provide them ex parte so the court could review them. But
9 since the City has not disputed one fact that we've
10 claimed, I don't think it's even necessary under the
11 circumstances.
12 Unless the court has any questions, I will just be
13 willing to provide any other information that the court
14 would need to make a proper ruling.
15 THE COURT: All right, thank you, Mr. Maybrown.
16 Ms. Offutt?
17 MS. OFFUTT: Thank you, your Honor. As Mr. Maybrown
18 stated, we're here based on his motion that was filed on
19 December 11, 2014. In that motion he asked for dismissal
20 by the court under 4.7 and CrRLJ 8.3. 8.3 dictates that
21 the court dismiss the case in the interest of justice. So
22 that's what the City is operating under the assumption,
23 that that's the motion that we're here on today.
24 It's the City's position, first and foremost, that that
25 motion, as we sit here today, is moot because the

1 depositions did, in fact, take place on December 19th. And
2 despite the characterizations by defense counsel, it's the
3 City's position that the witnesses were cooperative with
4 regard to answering questions on the night in question, and
5 I'll get to those other concerns that counsel cited in a
6 moment.
7 But first, a motion to dismiss under CrRLJ 8.3 requires
8 the defendant to show two things. First, arbitrary action
9 or governmental misconduct on the part of, in this case,
10 the City, the prosecutorial authority. As Mr. Maybrown
11 stated, depositions were scheduled for December 2nd, 2014.
12 On the morning of December 2nd, all parties involved -- and
13 Mr. Maybrown did state this. All parties involved found
14 out that the witnesses' independent counsel, Mary Gaston,
15 was canceling those depositions based on her interpretation
16 of certain statutes, as well as the fact that the witness,
17 C.O., was in the hospital at the time.
18 Ms. McElyea and I had cleared our schedules for that
19 afternoon in order to partake in those depositions, and as
20 soon as we found out that those depositions were not going
21 to take place that afternoon, we immediately supplied
22 counsel with two alternative dates, December 12th and
23 December 15th, during which we would be available and we
24 would attempt to get the witnesses there to conduct the
25 depositions. Those dates did not work for the independent

1 counsel, Ms. Mary Gaston, and so Mr. Maybrown then filed
2 the current motion before the court on December 11th.
3 That same day Ms. McElyea confirmed with the witnesses
4 that they would be available on December 19th for
5 depositions. C.O. was then out of the hospital and
6 everybody would be present and accounted for.
7 And I have the e-mails, your Honor, if you would like to
8 take a look at those, that show Ms. McElyea's diligence in
9 coordinating these depositions and the City's willingness
10 to work with all parties involved.
11 In order to avoid any confusion, based on Ms. Gaston's
12 misinterpretation or different interpretation of the
13 statutes, the City did send subpoenas for the witnesses to
14 appear in court. We sent those on December 12th, they were
15 filed with the court, they were sent to both witnesses, and
16 then the depositions were held on December 19th. So as far
17 as that first prong that the defendant must show, arbitrary
18 action or governmental misconduct, the City doesn't believe
19 that they've been able to meet that burden. The rule does
20 not provide for dismissal based on actions of witnesses or
21 of independent counsel. It is based on the prosecutorial
22 misconduct, and that was not the case here.
23 The second prong then, your Honor, that the defendant
24 must show is that the right to fair trial was prejudiced.
25 In this case there can be no prejudice found. Counsel

1 cited the Micheli case, in which the court found prejudice
2 when the State filed four brand new charges only three
3 business days before trial, when in that case the State had
4 no new investigation or additional facts to support a new
5 charge. In that case it was only three days before trial.
6 In this case the deposition occurred more than a month
7 before the trial is scheduled. We're not scheduled to
8 commence until January 20th. The depositions happened on
9 December 19th. Under the facts of the Micheli case and the
10 facts here, counsel has had ample time before trial to
11 continue to investigate and to prepare for trial.
12 Therefore, just based on the dismissal that's before the
13 court here today, your Honor, under 4.7 and 8.3, this
14 extraordinary remedy is not one that's appropriate here,
15 because the defendant has not met those burdens.
16 Counsel in his December 23rd declaration appeared to add
17 numerous issues for the court to address. It is the City's
18 position first and foremost that doing so by declaration
19 was not only inappropriate but did not provide the City
20 ample time to respond to his concerns, given the fact that
21 was only five days ago. We received it seven days ago, I
22 apologize.
23 However, I will address those as Mr. Maybrown has also
24 done. First he cites the witnesses' obstructionist tactics
25 in not answering questions regarding C.O.'s medical

1 history. Second, he adds the issue of the witnesses'
2 strategy of intimidation and he cites malicious statements,
3 attempts to intimidate, and says that Teresa Obert in
4 particular used the proceedings as a forum to damage
5 Ms. Stevens' reputation. I'm going to address each one of
6 these in turn, your Honor.
7 The other additional statement that Mr. Maybrown
8 included in his declaration was the witnesses'
9 newly-contrived claims, statements that the depositions
10 differed from statements to the police when the witnesses
11 spoke with the police in June.
12 And, finally, Mr. Maybrown also included the issue that
13 witnesses destroyed items of evidence.
14 All of those issues overall the City objects to, your
15 Honor. First of all, they were not properly briefed. They
16 were brought to the court's attention under a declaration
17 that was attached to a motion to dismiss under 8.3 and 4.7.
18 They were not brought to the court's attention under a
19 Knapstad motion or a 3.6. Those are both noted according
20 to the pretrial order for the 6th of January, not for
21 today's consideration.
22 However, each of those also relies on Mr. Maybrown's own
23 perceptions, recollections, and representations of the
24 events of the depositions. He himself is stating to the
25 court how he remembers those depositions occurring. He has

1 provided no transcript of the deposition, and therefore
2 everything that he is stating under his declaration is
3 hearsay. He's telling the court what the witnesses said
4 when there is no transcript of what they said under penalty
5 of perjury. The deposition does provide that those --
6 those statements that they are making are made under
7 penalty of perjury, but we haven't seen those, and your
8 Honor hasn't had a chance to review those. By doing so,
9 Mr. Maybrown is then making himself a witness and
10 attempting to improperly testify as to the facts of the
11 case, because those deposition transcripts have not been
12 provided. He is only filtering what the court hears today
13 through his own memory.
14 He's asking the court, by introducing these additional
15 issues, to make a determinations of evidence based on the
16 facts that he's, in the City's opinion, improperly
17 presented to the court. Those facts that he's presented to
18 the court are the proper province of the jury. They are
19 not for the court to address and decide here today. As
20 I've already stated, if he wants to bring those motions,
21 the proper forum is a 3.6 motion or a Knapstad motion,
22 neither of which are here today. And for the record, your
23 Honor, the City does disagree with Mr. Maybrown's
24 characterization of all of the facts in his declaration and
25 this court should not assume that the City is in agreement

1 with those facts.

2 Turning to each of those issues in turn, your Honor,
3 regarding the obstructionist tactics, as Mr. Maybrown so
4 states, the majority of those concerns in his declaration
5 were because of the victims', the alleged victims' refusal
6 to answer questions regarding C.O.'s medical history and
7 his medical care. The victim is represented by an
8 independent attorney. The victim's right statute, RCW
9 7.69.030, subsection 10, allows that victims are permitted
10 to have a support person present of their choosing. They
11 have chosen to have independent counsel. Independent
12 counsel was there at the deposition and chose to make
13 objections and instruct her individual witnesses not to
14 answer certain questions. Those questions were with regard
15 to C.O.'s medical history. The City has no ability or
16 authority to disclose evidence that it is not in control of
17 or not in possession of. 4.7 only covers material in
18 prosecutor's possession and control. We don't have a
19 medical release signed here today for C.O. We don't have
20 access to those medical records, and if Mr. Maybrown wants
21 those medical records, he needs to properly go through
22 Ms. Gaston, the victims' attorney.

23 In addition, I believe that it came out eventually, your
24 Honor, though it was maybe improperly stated during the
25 deposition, that this was actually an objection based on

1 the doctor-patient privilege, and had we had copies of the
2 transcript, I think that that would have been shown.
3 With regard to the witnesses', quote, strategy of
4 intimidation, Mr. Maybrown alleges that these were
5 malicious statements, attempts to intimidate, use of
6 proceedings as a forum to damage Ms. Stevens' reputation.
7 The City wholeheartedly agrees with this characterization,
8 both of us having been there and been present for those
9 depositions. Again, this is Maybrown -- Mr. Maybrown's
10 perception, as there is no full transcript.
11 Finally, Mr. Maybrown is a very experienced trial
12 attorney. It can come as no surprise that victims of an
13 assault such as this would be emotional and react
14 accordingly when questioned by somebody who they view as
15 opposing them. That can come as no surprise. And, in
16 fact, the City would characterize that as exactly what
17 happened.
18 Furthermore, your Honor, Mr. Maybrown indicates that he
19 is seeking information, and by noting the witnesses'
20 strategy of intimidation as he so puts it, he's got his
21 impeachment evidence. That is what the purpose of these
22 meetings and depositions are, is for him to examine how the
23 witnesses react, what their credibility looks like, how
24 they might testify on the stand, and he's now received that
25 information, because the depositions lasted for an hour and

1 a half of each of the individual people, and he had more
2 than ample opportunity to delve into the facts of the case
3 that night and get his impeachment evidence.
4 Third, your Honor, Mr. Maybrown cites the witnesses'
5 newly-contrived claims. Once again, it can come as no
6 surprise to an experienced trial attorney that on occasion,
7 and probably often, witnesses' statements when they're
8 given to the police officers the night of an event,
9 particularly one that was so fraught with emotion between
10 family members, as here, would add or misremember things
11 that then they clarify later, and, again, that is the
12 purpose for the deposition. Once again, Mr. Maybrown has
13 uncovered that information. He has ample opportunity to
14 explore that, as evidenced by the fact that he did, in
15 fact, get to ask the witnesses about their inconsistent
16 statements. He's got his impeachment evidence, if that's
17 what he was seeking.
18 And, finally, your Honor, the fact that the witness has
19 destroyed items of evidence, also this comes under
20 impeachment evidence. It goes to the credibility of
21 witnesses at trial, and all of these claims that
22 Mr. Maybrown is stating are in support of a motion to
23 dismiss are, in fact, more properly heard before a jury, so
24 that the jury can weigh the credibility of the witnesses
25 and hear all of the evidence presented to them.

1 Finally, your Honor, Mr. Maybrown addresses the
2 prosecutor withholding evidence, or the prosecutors in this
3 case withholding evidence. Once again, I'll note the
4 City's position is that this was not properly briefed for
5 this hearing, based on the motion to dismiss under 8.3.
6 However, Mr. Maybrown has requested the prosecutors to give
7 him all of our notes from the interviews that we conducted
8 with the Oberts. He also notes that he was not permitted
9 to be there. And, again, as an experienced trial attorney,
10 it can come as no surprise that the City would conduct
11 independent interviews of their witnesses in order to
12 prepare for trial and to understand all of those additional
13 details.
14 I believe your Honor has said before in the past that
15 trial preparation is much like a snowball, and that's
16 exactly what's happened here, your Honor.
17 Regarding the Brady violation, a Brady violation must
18 have three things. First, the evidence at issue is
19 favorable to the accused, either because it is exculpatory
20 or because it is impeaching. As I've already stated, your
21 Honor, Mr. Maybrown conducted a successful deposition of
22 the witnesses with regard to any and all facts that
23 happened that night and has the ability to then delve into
24 those issues and conduct further investigation into those
25 statements that they made.

1 Number two for a Brady violation, evidence must have
2 been suppressed by the State, either willfully or
3 inadvertently, and this is the one that absolutely has not
4 happened, because he's had a chance to depose these
5 witnesses. The State hasn't suppressed these statements,
6 even if it's -- arguably, if there are any, because
7 Mr. Maybrown has had a chance to depose the witnesses.
8 And, finally, prejudice must have ensued. Again, we're
9 talking about a deposition that happened more than a month
10 prior to trial. A month of trial preparation, based on the
11 depositions and the information that the witnesses provided
12 at the deposition is more than enough for Mr. Maybrown to
13 prepare for trial. A Brady violation does not arise if the
14 defendant, using reasonable diligence, could have obtained
15 the information herself in this case. That's exactly what
16 happened here. Mr. Maybrown conducted the deposition using
17 reasonable diligence. He obtained the information that
18 he's seeking. The prosecutor is not required to hand over
19 her entire file or point out proof of lines of questioning
20 that would assist the defense theory. We only have to
21 provide access to the witnesses, which has been done, per
22 the court's order, as we sit here today.
23 Under State v. Mullen, if a prosecutor provides a
24 pretrial opportunity to examine the City's witnesses, all
25 Brady obligations have been satisfied with respect to the

1 contents of a witness's testimony. I can't say it enough.
2 It's already happened. The deposition took place on the
3 19th.
4 In this case, your Honor, the City has satisfied its
5 obligation. Our notes are our work product. They contain
6 trial strategy and preparation materials, and the defendant
7 is not entitled to them. If the defendant would like to
8 challenge that, there are ways of doing that, but today is
9 not the forum to do so because he has not properly briefed
10 it. In short, your Honor, the City's position is that the
11 defendant has not met the burden for dismissal under CrRLJ
12 8.3, subsection (b), and the additional allegations that
13 he's included in his declaration should not be considered
14 today by your Honor.
15 THE COURT: Okay, thank you, Counsel.
16 Anything further, Mr. Maybrown?
17 MR. MAYBROWN: Very briefly. Your Honor, obviously time
18 has been of the essence for a long time here, and I
19 provided information to the court as quickly as I could,
20 because we've been trying to move the case. I don't hear
21 the City disputing any of the facts in my declaration, and
22 we would be happy to provide the full transcripts, because
23 they're actually worse than my characterization in my
24 declaration, and I welcome the court to look at that, but I
25 don't think it's necessary.

1 I should say, about 8.3(b), the provision is
2 mismanagement by the prosecutors or arbitrary action. It
3 doesn't say arbitrary action by the prosecutors, and I
4 think that what we have here is arbitrary action. We have
5 destruction of evidence, we have refusal to participate in
6 interviews, we have all of the type of arbitrary,
7 unreasonable action that you could ever imagine in a case
8 of this sort.
9 And lastly, I don't even hear and understand why they're
10 refusing to turn over summaries of the witnesses'
11 statements. Criminal Rule 4.7 says that they're required
12 to provide all oral statements of their witness -- of these
13 witnesses. And State v. Garcia says, and I'm quoting:
14 Notes taken by prosecutors are not work product. So,
15 frankly, I don't understand why we have to go through this.
16 I've made it clear in my motion, initially, that I was
17 seeking this information in advance of even filing a
18 supplemental declaration.
19 So it seems to me the court has all of the information
20 necessary. Some remedy is absolutely necessary because of
21 these discovery violations. If the court has some
22 alternatives, I'm open to discussing all possibilities. I
23 came back from a vacation to be here today because this is
24 so important to us to move forward. But given the way
25 these witnesses have behaved, I think the court can easily

1 decide that the only fair remedy would be to suppress their
2 testimony and ultimately I think the case should be
3 dismissed.
4 THE COURT: Okay, thank you, Counsel.
5 All right. Well, I've read the memorandum and briefing
6 of both counsel, and as both counsel recall, I heard the
7 motions earlier, back on November 4th, when defense moved
8 for depositions because of the reputed repeated refusal of
9 the material witnesses to sit for a reported interview.
10 This court granted that motion on November 4th.
11 Gleaning from the memorandum that I've reviewed, and
12 hearing the oral testimony here today, shortly thereafter
13 the defense contacted all parties, and November 25th, 2014
14 was scheduled for the depositions. Defense counsel
15 properly issued written notices of the depositions
16 confirming the date and time. Those were provided to all
17 counsel involved in this case, both the prosecuting
18 authority and apparently the witnesses' private --
19 privately-retained counsel.
20 On November 14, 2014, one of the prosecuting attorneys
21 called and asked defense counsel to reschedule the
22 deposition for the afternoon of December 2nd. Now, in the
23 briefing I didn't see any reason for this requested delay.
24 I'm now hearing in oral argument that it was because the
25 witness was in the hospital. As a professional courtesy,

1 defense counsel agreed and rescheduled the deposition. The
2 defense e-mailed amended notices to all parties. According
3 to the briefing and attachments, private counsel for the
4 government witnesses acknowledged receipt of the e-mail and
5 stated she did not need to receive hard copies.
6 Still, on December 2nd, defense counsel received an
7 e-mail notice of unavailability from the private attorney.
8 Included were additional comments that her clients had
9 never received subpoenas for any deposition. Later,
10 according to the briefing, the attorney's assistant wrote
11 to defense counsel that the attorney was not in the office
12 and that the witnesses did not intend to appear at the
13 deposition.
14 Subsequent to this delay, according to the briefing
15 filed, the prosecutor told defense counsel she asked the
16 witnesses' private attorney to consider another date. As
17 of December 9th, neither the prosecutor nor private
18 attorney for the government witnesses responded.
19 Understandably, defense counsel filed a motion to dismiss,
20 based on the material witnesses' continued refusal to sit
21 for a court-ordered deposition. On December 11th, 2014,
22 after the court scheduled this hearing to address defense
23 counsel's motion to dismiss, the prosecutors called defense
24 counsel indicating that the witnesses would now agree to a
25 deposition on December 19th, 2014. That deposition took

1 place.

2 During the deposition, amongst other things, defense
3 counsel asked the first witness if he was using any
4 medication. The witness stated, according to the briefing,
5 that he was. Defense counsel asked him what the medication
6 was. Private counsel interrupted and instructed the
7 witness not to answer. Apparently, according to briefing,
8 the prosecuting attorney remained silent. Defense counsel
9 asked the witness if he was using the medication at the
10 time of the alleged assault. The witness stated he was.
11 Defense counsel asked him what the medication was. Again,
12 private counsel instructed the witness not to answer.
13 Again, according to the briefing, the prosecuting attorney
14 remained silent.

15 These are relevant inquiries of a material witness.
16 Just as it is relevant to know whether a witness is under
17 the influence of intoxicants at the time he or she is
18 testifying in court or at a deposition or at the time he or
19 she is witnessing an event, so is it relevant to know if a
20 witness is under the influence of medication that may or
21 may not contain narcotics, hallucinogens, depressants,
22 sleep aids, et cetera.

23 According to the briefing, the witness also advised
24 defense counsel that he was unable to attend the December
25 2nd deposition because he was in the hospital. Defense

1 counsel asked if the witness was in the hospital related to
2 his claims in this case. The witness stated yes. Private
3 counsel then instructed the witness to not answer any
4 questions regarding his stay at the hospital. Apparently,
5 according to briefing, the prosecuting attorney remained
6 silent as to this line of questioning as well.
7 This, likewise, was a relevant inquiry. If the material
8 witness went to the hospital as a result of the alleged
9 assault or altercation, the doctor's assessment and other
10 physical and mental conditions having to do with this
11 hospital stay are relevant and discoverable.
12 In addition, according to briefing, one of the material
13 witnesses is now saying she was present during the
14 altercation. This is noteworthy and important for purposes
15 of discovery because, according to briefing, this same
16 witness stated to the police and signed a written statement
17 confirming she was not present during the altercation.
18 Further, one of the witnesses is now stating that the
19 defendant slammed his head against a cement wall five to
20 ten times during this event. According to briefing, this
21 witness made no such statement to the police during their
22 investigation.
23 The defendant is now moving to dismiss the charges in
24 this case in the furtherance of justice and due to a
25 violation of her right to effective assistance of counsel

1 and fair due process. The City is resisting the motion,
2 arguing that the deposition occurred as ordered. Further,
3 that this court should not make a ruling concerning the
4 alleged obstructionist efforts of government witnesses
5 until this court has reviewed the transcripts of the
6 deposition. Still, defense counsel mentions in his
7 briefing that he presents some summaries of the deposition
8 for the court as an officer of the court. The prosecuting
9 authority has not denied the validity or substantive
10 language of the defense summaries presented to this court
11 in her briefing. This court will nonetheless delay ruling
12 on defense motions until transcripts are available.
13 In the meantime, however, this court will issue the
14 following remedial orders: The substantial change in
15 observations, medical conditions and/or injuries and the
16 material witnesses' versions of the events herein has now
17 changed the recent private witness interviews between the
18 prosecuting attorney and the two material witnesses from
19 work product to discovery. Consequently, it is an order of
20 this court that all prosecutor notes and recordings, if
21 any, concerning those interviews be turned over to defense
22 counsel by today at 4:30 p.m.
23 Further, a second deposition is hereby ordered to take
24 place this Friday, January 2nd, at 8:30 a.m., here at
25 Kirkland Municipal Court in the Totem Lake Room. My

1 clerical staff will direct all parties to that location.
2 The prosecutors are to be present and assist with the
3 interview.
4 Evidence is often discoverable but may not always be
5 admissible at trial. This is a criminal case involving the
6 defendant's constitutional rights to fair due process,
7 confrontation of witnesses, and effective assistance of
8 counsel. At the deposition this Friday, so long as the
9 inquiries are relevant, the interview should be unfettered.
10 This will include inquiries concerning the witnesses' use
11 of alcohol, drugs or prescribed medicines at the time of
12 the incident, mental health issues, hospital stays that
13 occurred as a result of this criminal case, et cetera. If
14 there are questions and answers appearing in the transcript
15 of this second deposition that the prosecutor feels is
16 inadmissible during trial, they should be highlighted and
17 addressed to the court at the motion hearing currently
18 scheduled for January 6th at 1 p.m.
19 That concludes my ruling.
20 MS. OFFUTT: Thank you, your Honor.
21 MR. MAYBROWN: Thank you, your Honor. I'll step back
22 and try to prepare an order consistent with the court's
23 ruling.
24 (PROCEEDINGS ADJOURNED.)
25 --o0o--

1 **CERTIFICATE**

2

3 STATE OF WASHINGTON)
) ss.
4 COUNTY OF KING)

5

6

7 I hereby declare under penalty of perjury that the foregoing
8 transcript of proceedings was prepared by me or under my
direction from electronic recordings of the proceedings,
9 monitored by me and reduced to typewriting to the best of my
ability;
10
That the transcript is, to the best of my ability, a full, true
11 and correct record of the proceedings, including the testimony
of witnesses, questions and answers and all objections, motions
12 and exceptions of counsel made and taken at the time of the
proceedings;
13
That I am neither attorney for, nor a relative or employee of
14 any of the parties to the action; further, that I am not a
relative or employee of any attorney or counsel employed by the
15 parties hereto, nor financially interested in its outcome.

16
Dated this 10th day of June, 2015.
17

18

19 Linda A. Owen

20 Linda A. Owen

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RP II

Kirkland Municipal Court

1/6/2015

1
2
3 KIRKLAND MUNICIPAL COURT
4
5 CITY OF KIRKLAND,)
6 Plaintiff,) No. 38384
7 vs.)
8 HOPE A. STEVENS,)
9 Defendant.)
10
11 VERBATIM REPORT OF PROCEEDINGS
12 FROM ELECTRONIC RECORD
13 MOTION PROCEEDINGS
14 JANUARY 6, 2015
15
16 APPEARANCES:
17
18 For the City: TAMMY McELYEA
LACEY N. OFFUTT
19 Attorney at Law
20 For the Defendant: TODD MAYBROWN
Attorney at Law
21
22 Before: THE HONORABLE MICHAEL J. LAMBO
23
Prepared by: Linda A. Owen
24 425-466-8543
25

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2 --o0o--

3

4 THE COURT: All right, this is the 1 o'clock motions
5 calendar. We have a number of items on the calendar. Why
6 don't we start off with the Stevens matter, Kirkland versus
7 Hope Stevens, cause 38384.
8 MR. MAYBROWN: Good afternoon, your Honor.
9 THE COURT: Good afternoon, Counsel.
10 MR. MAYBROWN: Your Honor, I won't rehash all that's
11 been before the court. I'm sure the court recalls, because
12 we were here just a few days ago for a hearing on our
13 motion to dismiss.
14 THE COURT: Yes.
15 MR. MAYBROWN: And at the time the court deferred ruling
16 and provided what I think was termed remedial relief, and
17 my reading was that the court was hoping that the City
18 could get this case back in shape, that we could move
19 forward, and give the defense the proper information so we
20 would obtain due process and go forward with the trial as
21 scheduled. The best laid plans sometimes do not work out.
22 The court scheduled depositions here at the Justice Center
23 for January 2nd, 2015. The court also ordered the City to
24 turn over their notes.
25 I should note for the court that yesterday I obtained

1 transcripts from the first depositions. I have them with
2 me here today. I've not had sufficient time to redact all
3 of the names and information that would need to be redacted
4 to file them, because of the schedule, but if the court
5 wishes to see them, I could provide them to the court, and
6 we should discuss a mechanism. But, frankly, I think that
7 given what happened after the court's ruling, I don't
8 believe the court needs to review them now, although I'll
9 leave that to your Honor.
10 The depositions were scheduled for January 2nd, 2015.
11 We did everything necessary to make that happen. I
12 obtained a court reporter, I canceled other appearances
13 that I had in Spokane for that day, and I did all the
14 review and prepared all the questions that I would need to
15 do at that time.
16 I understand that the City personally notified the
17 witnesses that they needed to be here and the court had
18 directed them to be here. In paragraph 22 of Mr. Offutt's
19 declaration, she confirms that they had actual notice of
20 the court's ruling. She spoke with Teresa Obert and told
21 her what the court had ruled, and what Ms. Obert said, and
22 I'm not paraphrasing here: I don't know if we can make
23 that, as if it was an invitation and they could come if
24 they chose to, and they chose not to.
25 I had no idea that there was ever any hesitation. I

1 came here with the understanding that we would have
2 depositions. We sat there for more than half an hour.
3 They just did not show up. And it was a willful violation
4 of this court's order. There's nothing more that you can
5 say about it. There's no excuse. There's no
6 justification. And we had no notice, and since then we've
7 heard nothing more.
8 I should point out, and I know it's not -- it's not
9 perfectly analogous, but Ms. Stevens sits here, she's made,
10 of course, all court appearances and she's supposed to be
11 with the U.S. National Soccer Team training in California
12 today, but she made arrangements, she got permissions to be
13 here for this proceeding, as that was what was a priority
14 and was necessary, and she's done that and she will
15 continue do that. But obviously this is a difficult
16 situation for the defense, and that's why we've been trying
17 to move the case as quickly and as expeditiously as we
18 could.
19 I also want to talk about the notes that we received,
20 because that creates a further problem. I've told the
21 court that we should have seen them before the depositions.
22 It's now absolutely clear that these notes include
23 impeachment information and important contradictory
24 information that we had never seen before the depositions.
25 And I should point out that before these interviews took

1 place, I specifically asked the prosecutors how they
2 planned to document these interviews. I was told I could
3 not be present, but I assumed that they would document
4 them. Now what we find out is they chose not to document
5 them. That was a conscious choice not to properly document
6 them through a recording or some other means. We got the
7 notes. We believe the notes have important impeachment
8 information. Of course, I need to talk to the witnesses,
9 but they're refusing to answer questions.
10 And I think Ms. Offutt tried to suggest that the note
11 might mean something different than the plain words of one
12 of the notes that I pointed out to the court. That doesn't
13 make any sense, but of course that's a concern that they've
14 created, and it's impossible for us to follow up on,
15 because the witnesses did not appear as the court ordered.
16 In addition to these problems, I think I filed as soon
17 as possible after I got back to my office, a renewed
18 motion, because we got four additional witnesses after we
19 were in court for the hearing, and two of the witnesses are
20 lay witnesses, one of them who was uncooperative with the
21 police and we've never seen any statement of. The other
22 one is a new name that we just discovered or heard about
23 recently.
24 The second set of witnesses are two medical experts. We
25 don't have CVs. We don't have background information. We

1 don't have anything more about them. And at the last
2 proceeding, the prosecutors notified the court that they
3 don't have medical releases. So even if I wanted to
4 interview these witnesses before trial, without releases,
5 how could I? And that goes right to the heart of the
6 problem here. The City would like to use medical
7 information. It's conceded, basically, that medical
8 information is relevant to the proceedings. The witnesses
9 said that medical information is relevant, but they've
10 flatly refused to answer appropriate questions about --
11 that are relevant to the case, and in the end will
12 contradict all of the claims that they would like to make
13 at trial.
14 So it seems to me that they want it both ways. They
15 want the court to move forward with the proceeding, but
16 only if it's on their terms. They don't want to answer
17 questions that they think might hurt them at trial or might
18 undermine their testimony. I understand that the City
19 doesn't have absolute control over these witnesses, but
20 given the court's ruling and given the fact that these
21 witnesses basically thumb their nose at the court's ruling,
22 and we did all that we could possibly do to come to these
23 depositions, you would think that we would have another
24 date, we would have an explanation, we would have some
25 suggestion of how to go forward. We have none of that.

1 So it seems to me that the court at this point really
2 has no choice. The witnesses have made it very clear that
3 they will not follow orders of this court, that they could
4 assist the defense in preparing the case for trial, and
5 without that information, we can't fairly defend the case.
6 We would be prepared for trial in mid-January, if all of
7 this hadn't been created by the misconduct of these
8 witnesses, and I suppose the witnesses could have claimed
9 that they -- their lawyer wasn't available, but from what I
10 understand, Ms. Gaston was back in town on January 2nd.
11 She -- I was told she came back on January 1st. She works
12 at Perkins Coie. It's I think the largest law firm in the
13 City of Seattle. They have more lawyers, paralegals and
14 assistants than any other law firm I've ever been in in
15 Seattle. And to this point, it's January 6th, we have no
16 justification except for willfulness that they didn't
17 appear.
18 Your Honor, unless the court has more questions, I just
19 don't see how we could fairly get this case ready for
20 trial, no matter how hard we've tried, because of the
21 misconduct of the witnesses and the mismanagement of the
22 City.
23 THE COURT: Okay, thank you, Mr. Maybrown.
24 Ms. McElyea or Ms. Offutt, I don't know who's going to
25 make their presentation, but --

1 MS. MCELYEA: Combination of both, your Honor.
2 THE COURT: Go ahead, I'll hear from you.
3 MS. MCELYEA: Ms. Offutt first. Did you want to
4 address --
5 MS. OFFUTT: (Inaudible).
6 MS. MCELYEA: Okay. Well, your Honor, I'll -- Tammy
7 McElyea, one of the prosecutors for the City. I'll start
8 off by -- we were not -- we're going on the premise of a
9 supplemental motion that Mr. Maybrown provided to us on
10 January 2nd. We were never served with the actual brief
11 that he filed with the court. We're under the assumption
12 it's the same one that we got on January 2nd, so we'll
13 start off with that.
14 In regards to the additional witnesses, the four
15 individuals that we had asked, that we had placed on that
16 list, one of them had been -- was already in the police
17 report. Mr. Obert was already listed in the police report,
18 so it should be no surprise to the defense that the City
19 might call the individual. Up to the point of the
20 depositions, we had not placed him on the list. Some
21 information that came out from those depositions in regards
22 to the actual broomstick was part of his work tools and the
23 fact that we no longer have that information, it made sense
24 to the City that if somebody could explain what exactly the
25 dimensions or the length or the status of that particular

1 piece of evidence, it would be the individual who uses them
2 on a daily basis. So that was the reasoning that the City
3 added Mr. Obert to the witness list at that time. And as I
4 said, that came from the information that was gleaned out
5 of the depositions from December 19th.
6 In regards to Corey Park, that was also a name that had
7 come out in regards that she was there during the incident
8 prior to the actual alleged assaults that had occurred.
9 She could testify to the demeanor of the defendant as well
10 as the demeanor of other individuals. Once -- after the
11 depositions it appeared that that person could provide the
12 trier of fact with some additional information that wasn't
13 provided elsewhere, more independent individual who wasn't
14 a party to what occurred after the fact but certainly could
15 glean some light on the situation at hand.
16 In regards to the two medical individuals -- and when
17 this case first came about, there was a medical release
18 that was signed by both of the witnesses in this case.
19 They saw a doctor on -- later on -- this happened in the
20 early morning hours. They saw the individuals later on
21 that day. At some point in the process, those medical
22 releases were rescinded, so we no longer had the ability to
23 obtain those. We did get a copy of those at the end of
24 November from the witnesses' attorney with the idea that
25 they could be used in our trial, provided a copy of those

1 to defense. Within those medical reports, both of these
2 individuals were listed on there, contact information was
3 on there, both a phone number as well as an address, and
4 the -- the individuals -- obviously there was enough time,
5 and the City provided a copy of those medical reports on
6 December 3rd. So, again, it should be no surprise to
7 defense that the City may be calling them.
8 THE COURT: So let me ask you --
9 MS. MCELYEA: Okay.
10 THE COURT: -- to make sure I'm following you correctly.
11 So at the end of November, the rescinded medical releases
12 were reinstated, and then --
13 MS. MCELYEA: For that particular day, yes, your Honor.
14 THE COURT: And so it was at that time that you endorsed
15 the doctors as government witnesses?
16 MS. MCELYEA: Yes, your Honor.
17 THE COURT: And you provided that information to defense
18 counsel at that time?
19 MS. MCELYEA: Correct, on -- I believe we sent -- there
20 was a deposition that was supposed to be scheduled. I was
21 going to take a copy for Mr. Maybrown on -- I think at the
22 end of November. That didn't occur, so then in the next
23 couple of days I was able -- after the holiday I was able
24 to send him a copy of that. I believe it was December 3rd.
25 THE COURT: So prior to the December 19th deposition, it

1 was your intent to call the doctor to testify in your case
2 in chief?
3 MS. MCELYEA: Yes.
4 THE COURT: All right. Go ahead, continue.
5 MS. MCELYEA: Thank you, your Honor. In regards to --
6 in regards to timing wise, the rules under the discovery
7 rules, under 4.7 for prosecutors, there isn't a specific
8 time frame to give defense the witness list. Even though
9 in that same -- in that same rule there for the defense
10 there's a specific rule that says before 14 days prior to
11 the trial they should provide the City or the State with
12 any witnesses that they're going to have, addresses,
13 testimony, that type of thing. So the City was going on
14 that time frame. We sent this well before 14 days prior to
15 this trial, and so if there was some type of issue in
16 regards to that, the rules were clear. The case law that
17 Mr. Maybrown cited in his -- in his brief, in his
18 supplemental brief, focused on cases where the prosecution
19 either gave additional witnesses the day before the trial,
20 the day of the trial, mid trial.
21 That is certainly not the situation that we have here.
22 We've given this list of individuals well before the
23 14-days expectation. Mr. Maybrown also provided us with a
24 expert doctor testimony on December 15th. So everybody's
25 been throwing now witnesses out there. We believe that

1 based on the fact that this was given well before, and the
2 limited testimony of at least the two civilian witnesses
3 should not be a burden in this case.
4 In regards to there was -- in regards to the medical
5 releases, there seems to be some confusion about that. We
6 do not have any medical release for the information that
7 Mr. Maybrown was wanting the second deposition for. We
8 have no medical release for those. We have no medical
9 reports from that particular thing.
10 The medical reports that we provided to defense counsel
11 were from the June 21st, when this incident first occurred.
12 That was the original medical release that ultimately was
13 rescinded by the witnesses, and then ultimately they took
14 that back and did provide us with those medical reports,
15 which we did provide to the defense counsel.
16 So the idea that that that's like a blanket medical
17 release is incorrect. The medical release was specifically
18 for that immediate care clinic, which is the reports that
19 we provided.
20 MS. MCELYEA: Do you want to do your part?
21 MS. OFFUTT: Sure.
22 Your Honor, I'd like to take just a moment to clarify
23 the timeline that seems to have been a matter of some
24 confusion when we were last here.
25 Mr. Maybrown indicated that he had contacted Ms. McElyea

1 and myself via e-mail about an original date of November, I
2 believe it was 24th or 25th, and it was sometime later that
3 I responded that we would not be available. Well,
4 Ms. McElyea and I at that time were in court, or were
5 scheduled to be in court on the date that Mr. Maybrown had
6 originally set those depositions for, and therefore
7 obviously were not available to be there. That was the
8 reason that Mr. Maybrown agreed to change the date of the
9 deposition to December 2nd. And I will clarify that I did
10 make it quite clear to Mr. Maybrown that the reason that
11 the City did not respond immediately as to the timing was
12 because we were trying to coordinate between five people
13 with both Ms. McElyea and myself being in and out of court.
14 We were trying to coordinate not only amongst ourselves but
15 two witnesses and their private attorney, Ms. Mary Gaston.
16 We've already hashed out the December 2nd date, your
17 Honor. And I will note for the record, however, that prior
18 to the December 2nd date, Mr. Maybrown primarily contacted
19 Ms. Gaston in order to coordinate dates. It wasn't until
20 after the December 2nd date where Ms. Gaston indicated that
21 she and her clients would not be available for the December
22 2nd deposition, that Mr. Maybrown began really contacting
23 the City primarily to coordinate schedules and such, which
24 made our job understandably a little more difficult.
25 There was also some discussion of the prosecutors'

1 silence during the December 19th depositions. I'll note
2 that in the City's response brief filed just this morning,
3 there are discovery rules that prevent the City and the
4 City's attorneys from interfering with an investigation,
5 and, in fact, there was at least one instance where
6 Mr. Maybrown instructed us not to speak at a previous
7 interview with one of the officers.
8 The witnesses have their own attorney, and their
9 attorney was there for the purpose of making sure that the
10 witnesses' legal rights were protected, and that's exactly
11 what she did. She objected when she felt that it was
12 necessary, and it wasn't the province of the prosecutor to
13 interfere with those rights as she was instructing her own
14 clients.
15 I'd like to address the prosecutor's notes that
16 Mr. Maybrown indicated were actually given on -- they were
17 faxed to his office approximately an hour before the
18 court's deadline of 4:30 on the 30th. It's the City's
19 position that -- still that these are work product.
20 However, they have been deemed to be discovery --
21 THE COURT: Let's move -- let's move past that. I've
22 ruled on that, Counsel.
23 MS. OFFUTT: Thank you, your Honor. I would like to --
24 Mr. Maybrown addressed some of the notes that I myself took
25 on October 24th. What he's done is he's cherry-picked one

1 line and then misinterpreted it. It's the City's position
2 that this is precisely why these were work product. I
3 understand your Honor has already ruled on it. I would
4 simply like to point out, though, that it's naturally going
5 to cause some confusion when these notes were intended for,
6 truthfully, my eyes only as a memory jot, and that the
7 facts of the case and any impeachable material that
8 Mr. Maybrown thinks he has uncovered in those notes is the
9 proper province of the jury.
10 Finally, your Honor, I will simply note that the
11 witnesses have been cooperative with Ms. McElyea and I,
12 They've been cooperative with the police investigation, and
13 what Mr. Maybrown claims is obstruction tactics by the
14 witnesses is no more than them simply making sure that
15 their own legal rights have not been undermined, and they
16 shouldn't be penalized for doing so.
17 MS. MCELYEA: Your Honor, the final piece that we would
18 like to address is part of the reason or part -- one of the
19 points that case law is clear about in regards to the
20 defense asking the court to dismiss this case under 8.3,
21 that there needs to be prejudice shown for a fair trial.
22 Mr. Maybrown has been given the opportunity to interview
23 the witnesses, maybe not to his satisfaction or in his eyes
24 to glean enough information of what he wanted, but that's
25 not what the law requires of the City. The law requires

1 that the City produce the witnesses, allow them to be
2 interviewed, which is exactly what the City has done at
3 this point. This isn't -- anything beyond that is outside
4 of the City's control.
5 As far as the second deposition goes, this was based on
6 the defense's speculation that there was more evidence that
7 hasn't been revealed or maybe something that hasn't been,
8 you know, revealed by forcing them to talk about privileged
9 information. During the initial depositions on the 19th,
10 both private counsel and the witnesses themselves objected
11 to the questions in regards to talking about the privilege,
12 doctor privilege -- doctor-patient privileged information,
13 and they didn't want to talk about those particular
14 records.
15 Mr. Maybrown has now told us that the transcripts are
16 available. Up to this point they have not been available
17 to either the court or the City, and in order for the court
18 to get a full picture of the questions that were asked in
19 regards to those issues and what the answers were, there
20 isn't a -- there isn't a full record here, and so the
21 defense is asking the court to make a ruling on a very
22 limited and basically the -- both counsel's limited
23 recollection of events, which is an extraordinary ruling.
24 Case law is very clear that to dismiss a case under 8.3,
25 it's an extraordinary ruling and should be used very

1 narrowly.

2 Under State v. Mines, which is a Division I case, the
3 court found that defense counsel have an obligation to
4 ferret out all the relevant evidence, material and
5 favorable, to a defendant, but that may not be performed --
6 that duty may not be performed by breaching a
7 physician-patient privilege, and that's exactly what he's
8 asking the court to force these witnesses to do.

9 And in closing, basically this case doesn't contain
10 complicated facts. This isn't a murder trial. This isn't
11 a theft conspiracy trial where there's a whole lot of
12 twists and turns. The facts are very straightforward. The
13 facts of that night is what we're here to discuss or to
14 determine, not what may or may not happen several months
15 after the fact, and really it comes down to this is a --
16 these are facts that go before the trier of fact to
17 determine the credibility of these witnesses and the facts,
18 find what's credible and find what's not. Everything else
19 is just muddying the waters at this point in this process.

20 Defense counsel makes several references in his brief
21 that the City is not prepared for trial and that there was
22 an issue in there in regards to there's no just cause for
23 continuance. Not in the last two months has the City ever
24 suggested or asked the court for a continuance or suggested
25 to defense counsel that we are not ready for court -- for

1 trial. We are ready for trial, and at this point we are
2 asking that the -- that the court not dismiss this matter.
3 THE COURT: Okay, anything further?
4 MR. MAYBROWN: Your Honor, I think absence is somehow a
5 greater proof than argument. They have made no mention
6 that anything that's happened since these witnesses refused
7 to follow this court's order on January 2nd, seems clear
8 from their silence that these witnesses have decided that
9 they're not going to abide by this court's rulings, and at
10 this point the court has every reason to make a finding
11 that they've willfully and intentionally refused to abide
12 by the court's rulings.
13 This fields like a motion for reconsideration, although
14 the City has not filed a motion for reconsideration, and it
15 wouldn't be proper because the court made what I considered
16 to be an appropriate ruling, a remedial ruling, given the
17 circumstances we faced.
18 You can see how unfair this matter is by just focusing
19 on one particular issue, and that's the medical issue.
20 This is the first I've learned that the way they got the
21 medical records is that counsel for these witnesses
22 selectively chose to give them some medical records, even
23 though there was no medical release. As the court probably
24 would understand, if I tried to contact those doctors and
25 interview them without a release, they would tell me to

1 take a hike. They would not talk to me, and I cannot
2 interview them now even, but the City has told you that
3 back in November they knew that they were going to call
4 these witnesses and that they had endorsed them, when they
5 didn't endorse them until December 30th.
6 But even today I could not question them about these
7 matters, and it's especially unfair because during the
8 depositions I asked very appropriate questions, what
9 medications were you on on January 21st? Are you on
10 medications now? Have you -- what was this
11 hospitalization? Did it have to do with this incident?
12 Yes. Did -- I could go on and on, but I don't want to
13 repeat myself. But they want to -- they want to have it
14 both ways. They want to present what limited medical
15 information they think might help them, even though it's
16 not true and perhaps would be unfair to do that, but they
17 want us to have no opportunity to examine or follow through
18 and get additional information, and that can't be what's
19 expected by the rules.
20 THE COURT: Were you aware of the medical professionals
21 that were going to be called as government witnesses?
22 MR. MAYBROWN: I wasn't. I thought that I got that
23 information as impeachment, because I didn't know how they
24 got it. I was going to ask about it, but I didn't know how
25 the City even obtained it. I got in the mail I think an

1 additional disclosure which had, I think, three or four
2 pages of medical records, and I assumed -- I assumed that
3 the attorney had provided it, but I never saw a release, I
4 didn't know how, and I was planning to ask questions of the
5 witnesses about the medical issues, but I was told over and
6 over again irrelevant, none of your business, you shouldn't
7 be asking those questions, whenever I asked about medical
8 information.
9 THE COURT: Plaintiff's counsel indicates that they
10 advised you at the end of November they were calling this
11 Dr. Jing Jen and endorsing her as a government witness.
12 Were you provided that information at the end of November?
13 MR. MAYBROWN: I was not. I should say in fairness, I
14 did get the records, and the records were typed out. And I
15 can show them to the court, they're very -- there are just
16 a few records. But I never got the names of the witnesses,
17 and I suppose I could have looked through those records and
18 tried to see who the medical providers were, but I didn't
19 have any context to it, except for they just came to me in
20 the mail.
21 And in contrast, when we were last in the court for a
22 pretrial, I listed our medical witness, Dr. Herring, who's
23 an expert on -- a national expert regarding concussions,
24 and since then I've provided his CV, I've provided medical
25 reports, and I provided additional information, and that's

1 what they received subsequent to us endorsing him as we --
2 as we did at the pretrial hearing. We haven't listed or
3 identified anybody new.
4 But think about what's -- what we have to do here. They
5 expect us to do these depositions, although the witnesses
6 won't respond and they won't appear. We would -- how are
7 we going to get the records that we need? How are we going
8 to interview these other witnesses who have just now been
9 named to us? And the reason I said way back when that we
10 needed to have these depositions in November was because I
11 knew that they -- that they, meaning the witnesses, were
12 going to be difficult and they were going to ultimately try
13 to jam us to make it impossible for us to prepare for
14 impeachment for trial, and that's exactly what happened,
15 totally outside of our control.
16 When the City's prosecutors told me they couldn't be
17 available on a certain day, I said as a courtesy I'll
18 change it, but time is of the essence. I've been saying
19 that over and over and over again. And the issue about
20 just cause is that we think it would be totally unfair to
21 require us to ask for a continuance so we can chase down
22 all this additional information. I mean what's the court
23 to do? Arrest these folks and force them to come to
24 depositions? That's -- that's not what we're seeking. If
25 they refuse to come when they're notified of a court order,

1 what more can the court do?

2 So it seems to me at this point that we have been so

3 badly prejudiced because we can't respond to the

4 information -- I provided declarations to show some of the

5 impeachment. And Ms. Offutt says that the note is somehow

6 ambiguous. It says: Tell she had been drinking, question

7 mark? No. Tired and had been crying. What's to

8 misinterpret? The witness told her no when she asked if

9 he -- he could tell whether she had been drinking. And

10 that's exactly the information we needed to know, because

11 that's been our position all along, that Ms. Solo --

12 Ms. Stevens wasn't intoxicated, she was concussed when she

13 was hit over the head with a stick.

14 So it seems to me that at this point we've done

15 everything humanly possible, moved heaven and earth to get

16 this case prepared for trial, and we've been defeated at

17 every turn.

18 THE COURT: All right, anything further?

19 MS. OFFUTT: Your Honor, Mr. Maybrown has mentioned that

20 we've made no mention of the witnesses refusing to

21 cooperate because they haven't refused to cooperate. We

22 attempted to serve them personally with subpoenas to appear

23 on Friday, but we were given hours to do so, just over two

24 days, I believe it was. And they were notified that it was

25 going to happen, but they were not able to at that time

1 consult with their attorney. We had no idea at that time
2 if their attorney would be able to be present, and we
3 hadn't heard from them after that. So once we -- and it is
4 our understanding that at that time they had not been
5 served with subpoenas. So it's not that they were refusing
6 to cooperate, it's that they were not served with the
7 proper paperwork because their schedules weren't revolving
8 around this case.
9 Did you have anything else?
10 THE COURT: Does that conclude your comments?
11 MS. OFFUTT: Yes, your Honor.
12 MS. MCELYEA: Yes, your Honor.
13 THE COURT: All right. Well, at the risk of sounding
14 like a broken record, the court already decided that some
15 of the inquiries that defense counsel made during the first
16 deposition were relevant and the witnesses refused to
17 answer. Those inquiries included was the defendant taking
18 any medication at the time of the alleged event and the
19 recounting of that event to police investigators and was
20 the witness taking that medication during the testimony at
21 the deposition. Those are relevant inquiries, as I
22 mentioned, and, again, I've already stated this at the
23 earlier ruling.
24 But whether or not a witness is under the influence of
25 alcohol, narcotics, hallucinogens, sleep aids, antianxiety

1 drugs, anything like that, during the time that witness
2 witnesses an event and during the time that that witness
3 recounts what they observed to police investigators is
4 entirely relevant in an assault trial or any type of
5 criminal trial. So I ruled that the witnesses should have
6 answered those questions for defense counsel at the time,
7 and it was improper to order the witness not to answer
8 those questions. That was the reason for the dep -- the
9 second deposition, and it was a quick -- the court set a
10 fairly quick deposition because time is of the essence in
11 this case.
12 Trial is scheduled. People keep mentioning January
13 20th, but the readiness is a week away. At the readiness
14 hearing, both parties will announce to the court whether or
15 not they're ready to proceed to trial. So essentially both
16 parties have one more week to be prepared to go to trial.
17 If not, it's the readiness hearing when the parties should
18 announce to the court that they're not ready and what their
19 difficulties are, why they're not ready. Once the court
20 hears the reasons why one side or the other is not ready,
21 then the court is to issue remedies for that. That could
22 be a continuance or that could be an order requiring a
23 deposition, that can be a material witness warrant. So
24 it's not the 20th, it's the 14th, and that's about one week
25 away.

1 The court is certainly not going to send officers out to
2 arrest witnesses. The witnesses are not a party to this
3 action. Ms. Stevens is a party to this action, and the
4 City of Kirkland is a party to this action. However, the
5 witnesses are material witnesses.
6 Both parties have argued and I believe testified or
7 written in their briefs that the police have acknowledged
8 there are no other witnesses to this case. No police
9 officer that I'm aware of witnessed this case. It's the
10 two witnesses that the defense seeks to interview, so they
11 are material witnesses.
12 Case law is clear, the defense counsel has a right to
13 interview witnesses prior to trial. Defense does not have
14 to wait to hear answers to questions for the first time
15 while the jury is sitting there. The defense has a right
16 to examine witnesses and be prepared for trial. By not
17 answering questions concerning whether or not the defendant
18 was under the influence of medicines and narcotics and
19 alcohol by not answering questions concerning what the
20 defendant was seeing the doctor for, when the City is
21 endorsing a doctor as a government witness was improper.
22 Again, the impetus for the second deposition.
23 Now, the witnesses have chose not to respond to the
24 second deposition. That's up to the witnesses. And I have
25 also indicated that I wanted to review the transcripts of

1 the first deposition before I make a final ruling on the
2 motion to dismiss, and I'm going to do that, and I
3 understand you have that deposition transcribed for the
4 court, Mr. Maybrown. I'll take that opportunity to review
5 that.
6 In the meantime, I'm going to require that the
7 witnesses sit for a deposition once again so that
8 Mr. Maybrown can finish the interview of these people.
9 So Ms. McElyea or Ms. Offutt, tell me between now and
10 Friday what is the best day for your witnesses to appear
11 here at Kirkland Municipal Court so that they can finish
12 the interview with Mr. Maybrown?
13 MS. OFFUTT: Your Honor, I believe that both Ms. McElyea
14 and I are out of court on Friday. Thursday or Friday would
15 be amenable dates.
16 THE COURT: Thursday or Friday what?
17 MS. OFFUTT: Would be amenable dates.
18 THE COURT: Okay. Mr. Maybrown?
19 MR. MAYBROWN: Your Honor, I'm in Yakima for court on
20 Friday. I am available -- I can be available on Thursday,
21 but I would certainly prefer not to be jerked around, and
22 I'd like to get some notice about whether they're truly
23 going to appear, because they haven't given any indication
24 that they would. But I will clear any calendar necessary
25 if I truly hear they're going to appear. I don't want to

1 have to pay for another court reporter if they're not going
2 to show up, but I'll do it if it's necessary. I would --
3 as an officer of the court, I will provide the depositions,
4 but they're going to clearly show everything that I've
5 already testified to in my declaration and more.
6 THE COURT: I'll review them in camera. So let's have
7 the deposition then on Thursday, January 8th at 8:30 at the
8 Kirkland Municipal Court.
9 Is there any reason -- let me ask plaintiff's counsel,
10 any reason why the witnesses cannot appear for that?
11 MS. OFFUTT: Not that I'm aware of, your Honor.
12 THE COURT: Okay. So Mr. Maybrown, there you go. I
13 know you are paying for the court reporter every time to
14 come out for this.
15 MR. MAYBROWN: Can I ask whether they've inquired
16 whether they would be willing to appear?
17 MS. OFFUTT: I don't know what their schedule is, if
18 that's their question.
19 MR. MAYBROWN: It's not scheduling. I don't think that
20 that's the issue at all. I don't think that they had
21 something else on the schedule. Have they said that they
22 would appear to the court's order, is I guess my question?
23 MS. OFFUTT: They have been very agreeable to the
24 court's orders so far. I have no reason to understand that
25 they would not follow the court's order at this point.

1 THE COURT: Okay. So let's have the deposition then
2 take place here, as I mentioned, Thursday, January 8th,
3 8:30. And then I'm going to have all parties reconvene
4 here again next Tuesday, January 13th at 1 p.m. That's the
5 day before the readiness. I will have had an opportunity
6 to review transcripts at that time and will have heard the
7 status of the second deposition by that time hopefully.
8 MS. MCELYEA: Your Honor, do you want an order to appear
9 made out for the 13th?
10 THE COURT: For the next motions hearing, yes.
11 MS. MCELYEA: Okay.
12 THE COURT: And then we'll need an order, a new order
13 for Thursday, January 8th at 8:30 as well for the
14 deposition for the two City witnesses.
15 MR. MAYBROWN: Your Honor, I spoke with Ms. Stevens, and
16 she would like to join the team for training, as is her
17 responsibilities. Would she be permitted to appear via
18 phone at the next proceedings, given these circumstances
19 and how things have changed outside of our control?
20 THE COURT: Sorry, are you speaking of the 13th and the
21 14th, so you know --
22 MR. MAYBROWN: Well, I'm thinking of the 13th and the
23 14th at this point, although I mean obviously if she needs
24 to be here, we'll consult with the team. But I'm so
25 suspicious about these witnesses showing up, and on top of

1 that, of course, the court hasn't even said anything about
2 these four new witnesses that I -- that I've just been
3 notified of.
4 MS. MCELYEA: And, your Honor, do you want a blank order
5 in regards to the witnesses (Inaudible)?
6 THE COURT: Yes.
7 MS. MCELYEA: I need to go out. We don't have any blank
8 orders in the --
9 THE COURT: Mr. Maybrown, it would be the court's intent
10 to address the endorsing of additional witnesses at next
11 Tuesday's motion hearing.
12 MR. MAYBROWN: Okay. Thank you, your Honor, and --
13 THE COURT: I guess I would also indicate that you
14 should, if it's your intent to interview them prior to
15 trial, you should make every effort to do that this week as
16 well so that I can hear about any difficulties you might
17 have next Tuesday.
18 MR. MAYBROWN: Okay.
19 (END OF RECORDING.)
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1 **CERTIFICATE**

2

3 STATE OF WASHINGTON)
) ss.
4 COUNTY OF KING)

5

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7 I hereby declare under penalty of perjury that the foregoing
8 transcript of proceedings was prepared by me or under my
direction from electronic recordings of the proceedings,
9 monitored by me and reduced to typewriting to the best of my
ability;
10
That the transcript is, to the best of my ability, a full, true
11 and correct record of the proceedings, including the testimony
of witnesses, questions and answers and all objections, motions
12 and exceptions of counsel made and taken at the time of the
proceedings;
13
That I am neither attorney for, nor a relative or employee of
14 any of the parties to the action; further, that I am not a
relative or employee of any attorney or counsel employed by the
15 parties hereto, nor financially interested in its outcome.

16
Dated this 10th day of June, 2015.
17

18

19 Linda A. Owen

20 Linda A. Owen

21

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25

RP III

Kirkland Municipal Court

1/13/2015

1
2
3 KIRKLAND MUNICIPAL COURT
4

5 CITY OF KIRKLAND,	
6 Plaintiff,	No. 38384
7 vs.	
8 HOPE A. STEVENS,	
9 Defendant.	

10

11 VERBATIM REPORT OF PROCEEDINGS
12 FROM ELECTRONIC RECORD
13 MOTION PROCEEDINGS
14 JANUARY 13, 2015
15

16 APPEARANCES:
17
18 For the City: TAMMY McELYEA
Attorney at Law
19
For the Defendant: TODD MAYBROWN
20 Attorney at Law
21
Before: THE HONORABLE MICHAEL J. LAMBO
22
23 Prepared by: Linda A. Owen
425-466-8543
24
25

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1 PROCEEDINGS

2 --o0o--

3

4 THE COURT: All right, let's take the Stevens matter

5 first.

6 MS. MCELYEA: Thank you, your Honor, Tammy McElyea for

7 the City. It's the Hope Stevens matter, 38384.

8 THE COURT: All right, I did have a chance to review the

9 last briefing from both counsel. Let me -- since we're

10 still proceeding with the motion to dismiss, Mr. Maybrown,

11 and that's your motion, I'll hear from you first, and then

12 I'll let the City respond, if they like.

13 MR. MAYBROWN: Thank you, your Honor, and I'm going to

14 try not to repeat the arguments that have been made. I'm

15 sure that the court recalls. I do want to just highlight a

16 couple of things that have happened since the last court

17 hearing.

18 Obviously the court gave the City one additional chance

19 to try to produce the necessary witnesses. The court also

20 deferred ruling on the motion to dismiss based on the late

21 disclosed witnesses, the four witnesses that we hadn't had

22 notice of before the end of the year, and I've tried to

23 handle both.

24 Of course, we came for a deposition, as had been ordered

25 on January 8th. The witnesses did not appear. We had no

1 prior explanation, notice, anything. What we've heard
2 since then, I think the court saw, that someone in the
3 household told a police officer that the witnesses were out
4 of state. I don't believe it for a minute. And, frankly,
5 I did a little bit of follow-up, because I know that
6 Ms. Obert has a business in Bellevue and that I sent an
7 investigator, it's open to the public, to see what was
8 going on there, and it's open, from all appearances it's
9 remained open over the last weeks, and Ms. Obert was there
10 this morning. And I have a declaration from the
11 investigator who saw her there at 8:30.
12 So if the City really intended to locate these people,
13 it's very easy, if they truly wanted to, or if the
14 witnesses were telling the truth, we wouldn't see them
15 working when supposedly they're claiming they're not
16 available or they're not in state. I just don't think it's
17 believable. I think at this point the court has given
18 every opportunity for the City to produce these two
19 material, critical witnesses to answer questions, and
20 they're just not going to appear and they're going to lie
21 and they're going to deceive the court, and I think that
22 that's outrageous conduct.
23 Secondly, the court asked me to follow up and find the
24 four witnesses, or at least see if I could interview them.
25 The two medical witnesses, not a surprise to me, have no

1 release, they're unwilling to speak with me at all, and, in
2 fact, I got an e-mail from their lawyer, which I attached,
3 just so the court could see, and the witne -- and she told
4 me that they haven't even been subpoenaed as far as she's
5 heard from the witnesses. So to her knowledge they were
6 not going to participate at all in the case, and they
7 certainly wouldn't talk to me.
8 Jeff Obert, who is a family member of the complaining
9 witnesses here, we found out from the City, was actually at
10 home. I asked to interview him on the 8th, after I
11 completed the interviews with -- or the depositions with
12 the other witnesses. He didn't show up either. And the
13 last witness, who is Ms. Parks, we had an investigator try
14 to contact her. She's in the state of Florida. She's
15 basically said she's not decided if she's even going to
16 come to Washington to this trial and she's not agreed to an
17 interview unless she decides she's going to come.
18 So I've struck out on all counts. I mean we've been
19 placed in an untenable situation. There are six witnesses,
20 four of whom who have just recently been revealed to us who
21 won't cooperate in any way and can't be interviewed. We've
22 got the two material witnesses, and I know the court has
23 had a chance to look at the deposition transcripts, and I
24 think they bear out everything that I reported to the court
25 and maybe a lot more as well. But clearly Ms. Stevens has

1 been advising the City and the court that we wanted to go
2 forward with this trial as scheduled. We were forced to
3 continue it once because the witnesses wouldn't cooperate,
4 and the court had to schedule depositions. They didn't
5 cooperate with -- at the depositions. They finally came
6 but refused to answer numerous material questions. This
7 court has ordered them to come to depositions since then
8 twice to try to remedy the situation. They've refused.
9 I don't think that we should be forced to go to trial
10 unprepared or to request a continuance, and that's exactly
11 what the cases say makes out an 8.3 type of violation. At
12 this point we'd ask the court to dismiss the case with
13 prejudice. I don't see how we could have a fair trial, no
14 matter how hard we tried, given the position that we've
15 been placed in, and numerous witnesses who are unwilling to
16 cooperate and shouldn't be allowed to testify at a trial.
17 THE COURT: Thank you, Counsel.
18 City care to respond?
19 MS. MCELYEA: Thank you, your Honor. In regards to
20 Mr. Maybrown's original motion to dismiss, was completely
21 based on the fact that the two primary material witnesses
22 had not shown up for the deposition. Those depositions
23 have occurred. The court was given a copy of those
24 depositions at the last hearing last week, and when you
25 look at the amount of material that was provided in that --

1 in those two transcripts, one 81 pages long, the other one
2 84 pages long, numerous -- there were very, very few
3 questions that they refused to answer. The questions
4 regarding the specific incident, they had no problem
5 answering.
6 The questions that they refused to answer were based on
7 medical privilege, doctor-patient privilege, and that was
8 invoked, and as you saw going through the transcripts, you
9 saw where those were the specific things.
10 So the amount of information that was provided within
11 those -- that original December 19th deposition covered,
12 quite frankly, the majority of the information regarding or
13 the facts regarding this case. So the fact that counsel
14 says that they refused to answer so many questions is
15 rather inaccurate when you look at the amount of
16 information that was provided in those depositions.
17 So just based on his original motion to dismiss, it's a
18 moot point at this point, because those depositions did
19 occur. Again, the City goes back to case law that says,
20 yes, he's entitled to an interview of the City's witnesses.
21 He's not entitled to a perfect or successful one. And,
22 again, like I said, the information -- there was ample
23 opportunity to talk about the facts of this case, and that
24 was shown in the depositions, of the transcripts that was
25 provided.

1 As far as then the material witnesses not appearing for
2 the second deposition, we did the same thing that we did to
3 the prior, we attempted to serve them with subpoenas to
4 appear at that point. There were numerous contacts that
5 the police attempted to make in that short amount of time.
6 Officer McGrath was told by Mr. Obert at that point that
7 they were out of town. The City has no other way -- we
8 attempted to make contact with them. The voicemails --
9 excuse me, the voicemails that we got through to, basically
10 the box was full. We could not leave a message.
11 So the fact that Mr. Maybrown says she has a business,
12 it was open. Businesses are open whether the owners of
13 those businesses are there or not. To say that she was
14 there, he has no information providing that.
15 But the bottom line is, is that in this particular case,
16 again, his original motion to dismiss was based on that
17 depositions didn't happen. They didn't happen. Everything
18 else after that, there has not been an additional motion
19 noted at this point. It's just declarations of
20 supplementals from the original motion to dismiss. City
21 believes that the defense has had ample opportunity to
22 interview the two primary witnesses at this point and that
23 we would ask the court not to dismiss at this time and
24 continue this on the trial track.
25 As far as the additional four witnesses, we complied

1 with 4.7 by saying that these are witnesses that the City
2 may potentially call. There are oftentimes witnesses on a
3 list that we may or may not call. There are some officers
4 that are currently on the list. After talking with them
5 and going through defense interviews with them, that
6 they're not, they'll just be cumulative witnesses at this
7 point. So the City has complied with the 4.7 by
8 allowing -- or notifying the defense of who those witnesses
9 would be. So at this point we are asking that the court
10 not dismiss this case and allow it to proceed to trial.
11 THE COURT: All right, thank you, Counsel.
12 Anything further?
13 MR. MAYBROWN: Just so it's clear for the record, this
14 business is a solo operation. There's nobody else that
15 works there, and she was present today. If there was any
16 desire to make them available, as the court has ordered,
17 they could have just as easily made attempts to contact
18 them by going to where she's employed. They chose not to
19 because to be frank, I think that it's clear that they're
20 not going to answer appropriate questions. They'll answer
21 what they want to answer, but they won't provide me any
22 information that would be appropriate impeachment
23 information. That's just the way it is, and that's not
24 fair. That's not the way a proceeding should be. We've
25 got their notes, and there's no indication in those notes

1 that they refused to answer any of the prosecutor's
2 questions, and they discussed mental health in those notes.
3 So it's just been not -- a one-way street here, and that's
4 not the way the process should be.
5 THE COURT: All right, thank you, Counsel.
6 All right, well, as I mentioned when I first came out on
7 the bench, I've read all of the recent declaration and
8 memorandum, as I have since the very beginning of this
9 case, and this court makes the following comments, after
10 having had the opportunity to review as well both
11 transcripts generated as a result of the depositions in
12 this case.
13 The pattern of the City's witnesses' failure to
14 cooperate with defense interviews is well documented.
15 We've been here for hearings several times. In short, the
16 City's witnesses only agreed to speak initially to the
17 defense after the court ordered a deposition, several
18 months after the City filed charges against the defendant.
19 After the court ordered the deposition, the interview was
20 delayed several times but eventually took place. Of note,
21 during the one and only interview with defense counsel, the
22 witnesses declined to answer questions concerning the
23 witnesses' medical prescriptions he was taking and
24 apparently under the influence of at the time of the
25 alleged assault as well as medical and mental status at the

1 time of the alleged assault and at the time of the first
2 interview. The witnesses claimed lack of relevance and
3 privilege, and that's clearly indicated in the depositions.
4 Defense immediately moved to dismiss and the court
5 scheduled a hearing on the matter. The court ultimately
6 reserved ruling on the motion, however, and issued remedial
7 orders requiring the City's witnesses to sit for a
8 follow-up deposition in order to answer the relevant
9 questions. The witnesses declined to appear for this
10 court-ordered second interview. It was reported to this
11 court that police officers were not able to locate the
12 witnesses in order to apprise them of the new deposition
13 date. Still, one of the witnesses talked to the prosecutor
14 by phone, according to the prosecutor's own declaration,
15 and when told about the court-ordered interview, the
16 witness simply stated: I don't think I can make that.
17 The defense again moved to dismiss, and the court held
18 another hearing. Concerning the witnesses' failure to
19 attend the court-ordered interview, the City responded by
20 saying the court did not give the parties enough time, and
21 a holiday occurred in the interim making scheduling a
22 challenge.
23 With the trial readiness now only one week away, the
24 court ordered another interview. The court asked the
25 prosecutors what day during the remainder of the week would

1 be a good day for the attorneys and the witnesses to meet
2 with defense counsel for the follow-up interview.
3 Plaintiff's counsel advised the court Thursday was the best
4 day and indicated there was no reason why the attorneys and
5 witnesses could not be available at that time. The defense
6 continued to object and moved to dismiss, stating the
7 defendant would have little time to prepare for trial, even
8 if the witnesses appeared for a successful interview.
9 In addition, defense counsel made the court aware they
10 were having to schedule a stenographer for every attempted
11 interview and that defense counsel had other court
12 appearances throughout the state that were creating
13 substantial conflicts.
14 In light of the fact that trial was fast approaching,
15 the court ordered the interview anyway and ordered that it
16 occur on Thursday, January 8th, 2015, over the defense
17 objection.
18 It is now reported to this court that the witnesses
19 again failed to appear for a second time for the
20 court-ordered interviews. According to the declaration by
21 the prosecutors, both witnesses have left the state.
22 In addition, on December 30, 2014, more than six months
23 after the government filed charges against the defendant,
24 and less than two weeks before trial readiness, the City
25 filed an additional witness list endorsing four additional

1 witnesses. The witness list included two medical health
2 professionals, a doctor and a physician's assistant. Both
3 apparently took part in examining the alleged
4 victim/witness after the assault.
5 The defense again moved to dismiss charges, citing
6 mismanagement on the part of the prosecutors by waiting
7 over six months to endorse expert witnesses only days
8 before trial. Again, the court chose to reserve ruling and
9 urged defense counsel to attempt to interview the
10 newly-endorsed witnesses with the time left before trial.
11 Today, according to declarations filed by the defense,
12 the two medical professionals have declined to discuss
13 their involvement in this case citing privilege. It's
14 interesting to note that the government has endorsed two
15 doctor witnesses, albeit late, to testify as to the
16 condition of the alleged victim following the altercation.
17 Still, both medical witnesses are refusing to discuss the
18 case with the defense. Consequently, the defendant will
19 hear this crucial testimony for the first time during trial
20 in front of the jury. The testimony, and that of others --
21 this testimony, and that of others, will be a complete
22 surprise to the defendant.
23 According to defense counsel, the third witness endorsed
24 by the City on December 30th, 2014 is Jeffrey Obert.
25 Working with the prosecuting attorney, the defense arranged

1 to interview Mr. Obert on January 8th, immediately
2 following the depositions. Mr. Obert declined to appear
3 for the interview.
4 Interesting to note, according to the declarations filed
5 by the City prosecutors, it was Mr. Obert that answered the
6 door or otherwise talked to police officers prior to the
7 January 8th deposition and advised the police officers that
8 the other witnesses had left the state. Consequently, it's
9 clear to this court that Mr. Obert was at home and
10 available for the interview but declined.
11 The fourth witness added to the government's list on
12 December 30, 2014 is a Corey Parks. According to the
13 declaration filed by the defense, this witness lives in
14 Florida and has also declined to be interviewed over the
15 phone. According to the declaration, Ms. Parks states she
16 has not received a subpoena to appear in court. Apparently
17 Ms. Parks stated to investigators that she will let the
18 defense know if she decides to come to Washington.
19 Consequently, there are four witnesses that have all
20 refused to talk to defense counsel. These witnesses were
21 added to the government's witness list less than two weeks
22 before trial readiness and more than six months after
23 charges were filed. Now trial readiness is tomorrow. All
24 witnesses have refused to speak to defense counsel. There
25 are two witnesses who are avoiding interviews with defense

1 counsel and twice declined a court-ordered deposition.
2 Because the defendant's speedy trial right expires February
3 2nd, 2015, this matter must proceed to trial this month and
4 begin on January 20. Defense counsel has not had a
5 sufficient opportunity to adequately prepare a material
6 part of the defense and the defendant will clearly be
7 impermissibly prejudiced if the trial were to proceed this
8 month.
9 A dismissal of a criminal prosecution is an
10 extraordinary remedy, as both counsel bring up many times,
11 available only if the accused rights have been prejudiced
12 to the degree that the accused right to a fair trial has
13 been materially affected. Here the defendant's right to a
14 fair trial has been materially affected, in that the
15 defendant is now at the point where she is compelled to
16 choose between two distinct rights, either proceed as
17 scheduled and hear testimony from many witnesses for the
18 first time during trial, thereby violating her effective
19 assistance of counsel, right to confront witnesses, and
20 right to fair due process, or give up her right to speedy
21 trial and ask for yet another extension in hopes the
22 witnesses may cooperate. The government simply cannot
23 force a defendant, a criminal defendant, to choose between
24 these rights.
25 Defense motion to dismiss pursuant to Criminal Rule 4.7

1 and 8.3 is granted. All charges are dismissed.
2 MS. MCELYEA: Your Honor, there is a no-contact order in
3 effect for two different people under the same cause
4 number, but so -- but on this particular it doesn't specify
5 the two, so I don't know if we need two separate ones
6 that --
7 THE COURT: We probably should have two separate ones --
8 MS. MCELYEA: Okay.
9 THE COURT: -- that indicate the names of each on the
10 order.
11 MS. MCELYEA: All right, thank you.
12 And, your Honor, in light of your ruling, when -- when
13 could we anticipate it in writing?
14 THE COURT: That's up to counsel. If you want to
15 present an order to me.
16 MS. MCELYEA: Okay.
17 MR. MAYBROWN: Okay, your Honor --
18 THE COURT: Be happy to review it and sign it.
19 MR. MAYBROWN: Your Honor, I have an order which
20 reflects what the court has considered and incorporates the
21 court's oral ruling. If that would be sufficient with the
22 court, that would be sufficient with the defense. If the
23 court wants us to prepare findings, we would prepare
24 findings and conclusions. I'm satisfied either way, but
25 I'll defer to the court. And perhaps the prosecutor would

1 have --

2 THE COURT: Does the prosecutor wish to be heard?

3 MS. MCELYEA: No, your Honor.

4 THE COURT: Then I'll sign your order, Counsel.

5 MR. MAYBROWN: Okay.

6 THE COURT: If you have one ready.

7 MR. MAYBROWN: Would this be -- dismissal be with

8 prejudice, your Honor?

9 THE COURT: It will be with prejudice.

10 (INAUDIBLE COMMENTS.)

11 THE COURT: Perfect, perfect. Thank you.

12 MS. MCELYEA: And, your Honor, in regards to the

13 depositions that Mr. Maybrown provided to the court, the

14 City at this point, because they were not redacted, would

15 ask that those be sealed as part of the record.

16 MR. MAYBROWN: Your Honor, we would concur and think

17 it's most appropriate. If it turns out that there is a

18 need for an appeal, then we might return to the court and

19 ask to submit a redacted version, but at this point we'd be

20 satisfied with the record that's been made and we don't

21 think there's a need to file it. We think that the

22 Bone-Club factors would allow for a sealing under these

23 unusual circumstances, but would, of course, defer to the

24 court.

25 THE COURT: Let me reserve ruling on that, Mr. Maybrown

1 and Ms. McElyea. I want to reserve the criteria for that.
2 I think you are probably correct. However, the appellate
3 case law trending thus far is for open courts and open
4 files, and courts are to be slow to seal or close the
5 courtrooms to the public, so let me review the criteria,
6 and I'll just have my staff let you know one way or the
7 other. If I decide not to seal them, then I'll schedule a
8 hearing and let you both address the court concerning that.
9 MS. MCELYEA: Thank you, your Honor.
10 MR. MAYBROWN: Thank you very much, your Honor.
11 THE COURT: All right, I've signed the order.
12 MR. MAYBROWN: Thank you.
13 (PROCEEDINGS ADJOURNED.)
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1 **CERTIFICATE**

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3 STATE OF WASHINGTON)
) ss.
4 COUNTY OF KING)

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7 I hereby declare under penalty of perjury that the foregoing
8 transcript of proceedings was prepared by me or under my
direction from electronic recordings of the proceedings,
9 monitored by me and reduced to typewriting to the best of my
ability;
10
That the transcript is, to the best of my ability, a full, true
11 and correct record of the proceedings, including the testimony
of witnesses, questions and answers and all objections, motions
12 and exceptions of counsel made and taken at the time of the
proceedings;
13
That I am neither attorney for, nor a relative or employee of
14 any of the parties to the action; further, that I am not a
relative or employee of any attorney or counsel employed by the
15 parties hereto, nor financially interested in its outcome.

16
Dated this 10th day of June, 2015.
17

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19 Linda A. Owen

20 Linda A. Owen

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RP IV

King County Superior Court

10/2/2015

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF KIRKLAND, Plaintiff/Appellant, v. HOPE STEVENS, Defendant/Respondent.	NO. 15-1-01772-8 SEA

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 2nd day of October, 2015, King County Cause No. 15-1-01772-8 SEA came on for a Motion Hearing before the Honorable Judge Douglass North, sitting at the King County Courthouse, City of Seattle, State of Washington; and the parties being represented as follows:

TAMMY MCELYEA, City of Kirkland Prosecuting Attorney's Office, 123 Fifth Ave., Kirkland, WA 98033 for Plaintiff; and

TODD MAYBROWN, Allen, Hansen, Maybrown & Offenbecher, P.S., 600 University St., Suite 3020, Seattle, WA 98101, for Defendant.

Beth Carlson, Court Reporter
20480 Pond View Lane
Poulsbo, Washington 98370
(360) 697-3979

1 **MOTION CALENDAR IN PROGRESS**

2 WHEREUPON, the following proceedings were had and done to-
3 wit:

4 MR. MAYBROWN: Good morning, Your Honor.

5 MS. McELYEA: Good morning, Your Honor.

6 COURT: So we're here on City of Kirkland versus Stevens.
7 Preliminarily I'll grant the defense motion to strike the, uh,
8 amicus brief filed in this case. There's no provision for amicus
9 briefs in the Rules of Appeal from courts of limited jurisdiction.
10 And that's for the simple reason that the courts, uh, the
11 decisions of the Superior Court are not published so there's no
12 precedential value to them, and therefore no reason why anyone
13 would want to file an amicus brief in Superior Court.

14 The only reason why anyone is here this morning other than
15 me, the clerk and the lawyers is because of the notoriety of
16 Ms. Stevens. But defendant's notoriety doesn't ma-- give a case
17 precedential value. So that said, we're ready to get started with
18 the merits. And so Ms. McElyea, if you'd like to go ahead?

19 MS. McELYEA: Thank you, Your Honor. Good morning. Tammy
20 McElyea for the City of Kirkland. In this particular-- and do you
21 mind if I stay seated, or…?

22 COURT: That's fine. Whichever you prefer. You're welcome to
23 come up to the bar or stay, be seated there at the table.

24 MS. McELYEA: Okay. Perfect. Thank you so much. The question
25 that the City is asking this Court to answer is: How did the trial
26 court get to this extraordinary remedy of dismissing these matters
27 under 8.3 and 4.7 without even considering any less drastic

1 remedies, or allowing just this case to go to trial? We are asking
2 this Court today to find that the trial court abused its
3 discretion in the foll-- in the following manners.
4 We look at Court Rule 4.7. There is a provision in that rule
5 that states that the Court may at any dismiss an action if the
6 Court determines that the failure to comply with an applicable
7 discovery rule, or an order issued by the Court that is the result
8 of a willful violation or a, or of gross negligence. And that that
9 action prejudiced the ju-- prejudiced the defendant by such
10 failure.
11 This rule is extremely detailed as to what the obligations of
12 the prosecutor is. It goes through, um, every single step that the
13 prosecution has to meet. There are two specific subsections of
14 that rule that talk about investigations and how no party shall
15 interfere with the other party's ability to investigate or impede
16 their investigation.
17 There is also a second subsection on the ongoing duty to
18 disclose where a party discovers additional material and it's
19 their duty to continue throughout that process, including the
20 trial process, to make sure that that information is provided to
21 the other side. They even put in a provision: If discovered during
22 trial the Court shall be notified.
23 So the idea that this rule, there's an ongoing duty to
24 disclose things. There is no bright line, okay, on this particular
25 date everybody needs to stop giving everything. That's just not
26 how trial practice works. And in this particular case, the defense
27 claimed that filing a witness list twenty-two days prior to the

week of trial was a violation of 4.7.

Nowhere in the plain language of the rule or in any of the case law that's currently active is that the case, or would they find this as a violation.

The case law is very specific to what they found as unreasonable to the prosecutor. Providing discovery day of trial; failing to subpoena a victim for trial; failing to disclose names and addresses of witnesses unless one day-- oh, until one day before trial; not being prepared for trial the day of trial; failing to disclose exculpatory evidence until the middle of trial. These are what the Court, the Washington courts have consistently found as unreasonable.

Giving a witness list twenty-two days prior to trial week did not fall under that extreme case. The defense argues, he even argued during the trial court proceedings that he made attempts to contact these four individuals that were on our witness list, to no avail because they refused to talk to him.

And case law also shows us that witnesses, there isn't a duty for them to talk to the defense. It's the duty of the prosecutor not to interfere with those interactions, or prevent, or all the case law that we found in regards to this type of situation. The prosecutors would say, don't show up to these hearings, or these interviews, unless I'm there, or the prosecutor is there. Or that they've told them don't talk to them or your plea bargain will go away. That simply isn't the case here. And as long as the City does not interfere or engage in impeding on the defendant's process then no misconduct and no violation of 4.7 can be found.

If we go-- the only thing that the Court, there are two things that the Court ordered the City to do. One was to produce our interview witness, our witness interview notes. We did that very promptly. It was done by the end of business day on the day the Court ordered that. The other part was that they, he ordered depositions. We did, we went above and beyond doing our due diligence in order to make that happen. Make the, um, them available as best that we could at that point. But again it comes back to, this is around what the witnesses did.

And it's like, even though the trial court found the defendant had been prejudiced, the trial court did not find that it was the City's action that violated any discovery rule or order, and the trial court didn't find that the City acted willfully or in gross negligent, in a grossly negligent manner. Therefore the…

COURT: Yeah. It appeared to me that where things got confused here was that because we had this series of hearings. That the December 30th hearing was off. It clearly stated to the Court that the two things that the case law indicates you have to have in order to have a dismissal is a proof by the defense of arbitrary action or governmental misconduct and, secondly, prejudice affecting the, uh, the right of the defendant to a fair trial.

And that I think was discussed at the December 30th hearing. But then the Court, rather than deciding the motion at that point puts it over to January 6th and then to January 13th. And at those hearings all we do is revisit the issue of prejudice affecting the defendant, and there's no more discussion of whether there's any

1 actual, uh, arbitrary action or governmental misconduct.

2 MS. McELYEA: And that's correct, Your Honor. And from that,
3 from the case law if, if the trial court could not find that then
4 basically the prejudice is moot, because you have to have both.
5 And in the case law that we found it ba-- it truly states that if
6 the Court cannot find that there was arbitrary action then the
7 only, the only way that the, the next Court can rule is to remand
8 it back to the trial court.

9 And that's exactly what we're asking here. Because we don't
10 believe that the trial court made any findings whatsoever that the
11 City's, it was the City's behavior. That basically what the trial
12 court did was conflate the City's obligations and their actions
13 with what the vic-- or what the witnesses did or didn't do. For
14 example, answering questions about their medical information.
15 Their physician-patient privilege. Those subsequent depositions
16 were specific to that. It had nothing to do with what the City
17 did.

18 And, in order for this to be dismissed in this matter the
19 trial court has to find that it was the City's behavior that
20 impeded either the defense getting things done, or forcing, and
21 basically strong-arming the victims and the witnesses in these
22 cases to say exactly what the defense wanted them to say.

23 In, and, it's like in *State v. Clark*, the statement of yes,
24 the defense has a right to interview them. They don't have a right
25 to a successful interview. You just can't keep expecting the
26 witnesses to come back time and time and time again. Case law
27 doesn't allow it. The rules don't allow it. They don't allow for

this multiple thing. And you have to be able to find that the City did something wrong. And the trial court just simply didn't rule in that way. His rule was specifically and focused on what the victims did. What they did. What they wouldn't answer. What they wouldn't show up for specific things. There was no indication that the City did anything to impede that process.

COURT: Okay. So Mr. Maybrown?

MR. MAYBROWN: Thank you, Your Honor. This was an extraordinary set of circumstances and many things were happening side by side as the case moved towards trial. By the eve of trial you had six witnesses. Every fact witness in the case was refusing to comply with the discovery process. You have the two witnesses that were thumbing their nose at the Court and refusing to comply with Court orders, and the Court did find they were willful violations.

Secondly, you have the City endorsing right before the holiday, six months after the case was filed, less than two weeks before the readiness, four new lay witnesses. All of that is happening side by side. This deprived the defense of any fair opportunity to prepare the case for trial, and the Court so found. What I want to respond to is…

COURT: Well, I guess I'm, I'm not sure the Court so found. The Court certainly said that the defense was presented with enormous difficulties by this case. But obviously one of the problems we have here is there weren't actual written findings and conclusions entered. There are oral statements by the judge in making his decision. And certainly he substantially agrees with

1 you Mr. Maybrown that there were enormous difficulties presented
2 to the defense. I'm not sure that he actually made a finding that
3 it, that it prevented the defense from, from going forward.
4 MR. MAYBROWN: Well, first of all, under the RALJ rules,
5 because the courts of limited jurisdiction are somewhat less
6 formal than these provisions, there's a very specific rule, 9.1B
7 that says the Court must accept all findings, both explicitly made
8 and implicit in the Court's findings.
9 Here what the Court very clearly found is that endorsing
10 these witnesses six months after the trial had been set, less than
11 two weeks before readiness without any explanation or
12 justification was mismanagement.
13 If the Court-- let's, let me, um, get to the hearing, because
14 I asked whether the Court wanted to enter written findings or
15 conclusions and the Court said, you hear from the prosecutors, and
16 I can cite to the page. It's page 16 and 17 of that. And, and the
17 prosecutor did not want to be heard on this so the prosecutor did
18 not seek the entry of findings.
19 Now if the Court would say I, it would benefit this Court to
20 have more explicit findings we could go get more explicit
21 findings. But it's clear from this record what the Court was
22 saying, and the Court was saying two things. One, there's been
23 these very clear discovery violations where I've entered two
24 orders and under 4.7 these witnesses are willfully failing to
25 abide by these orders. And that's sufficient. The sec…
26 COURT: Well, but now wait a second. That's not sufficient.
27 That's willful behavior by the witnesses, but it's not by the, the

prosecuting agency.

MR. MAYBROWN: You have to look at 4.7, the second section which is different than the Superior Court rule. It does not say in that section anywhere that the willful violation of the order must be by the prosecutor. It doesn't say that.

COURT: I agree. It doesn't say that. But both you and I know it means that. Because it could not possibly mean anything else. It would be making a fool of the law for it to mean anything else. If you look at the history of the rule here, the, uh, local rule, or the, the rule for limited courts is patterned after the Superior Court.

And in the Superior Court rule both of those provisions are in, it's, it's, we're talking about subsection 7 and there's a little i's, one, two, three, etc. And in the Superior Court rule there's only a i and a ii. The ii in the Superior Court rule deals with lawyers and the iii in the, um, in the local court rule is the same.

What they've done in the local court rule, which was done after the Superior Court rule is break out the first one that has the more general discussion of discovery violations and possible remedies. And they separated the, the, out in the second part, those situations which rise to a level of considering dismissal.

Because in the Superior Court rule, unfortunately, it doesn't give you what the case law tells you, which is that you have to have the two elements of governmental misconduct or arbitrary action and prejudice affecting the defendant's rights. And that, the case law on that had developed by that time so I think they

1 felt it was necessary to break that out so you substated that
2 separately.
3 You're right. It doesn't say in a second, that the,
4 specifically say that it has to be the, the government that does
5 it. But it would just, well it just would destroy any action at
6 all if that were not true. All you'd have to do in any case is
7 defendant has, says at the time that, that the crime was
8 committed. I was at my buddy Al's. Al gives a statement to the
9 police saying, yeah he was there. Then the, they, you know, people
10 try to go interview him. He refuses to be interviewed. The Court
11 issues a subpoena or a material witness warrant. Al takes off and
12 disappears.
13 Defense moves to dismiss. We've got willful action. Clearly
14 Al is willfully refusing. That materially prejudices the defense.
15 If what Al said was true it would be an alibi. We'd be dismissing
16 cases right and left. But not on the basis of any government
17 action, but just because somebody else related to the case was
18 doing.
19 MR. MAYBROWN: Well, Your Honor, I think the problem-- we're
20 getting the two mixed. I think the Court certainly was authorized
21 to strike these witnesses given their refusal to cooperate. And…
22 COURT: Right. And I agree with you that that's, that's a
23 potential thing. But that's not, of course, what he did.
24 MR. MAYBROWN: Well, but there's a reason why he didn't do
25 that, and it's in the record. He said, the cost-- and this is at
26 page 26 of the hearing on Jan, January 6. Both parties have argued
27 and I believe testified that the police have acknowledged, there's

1 no other witnesses to this case. So it would have been, it would
2 have been the same essentially. If you're asking that it would
3 have been cleaner to say, oh I'm going to strike the witnesses.
4 And then, do you have a case? No, we don't have a case. We could
5 have that conversation but it had already been conceded that that
6 was the point.
7 So I think that, we could go back and the Court could make
8 more explicit and you could have beautiful detailed findings,
9 which would get us to exactly the same place. And even if this
10 Court was going to say the judge should have struck the witnesses
11 initially, there was no other alternative remedy that was
12 possible. They never suggested an alternative remedy at any time
13 during the hearings.
14 The Court moved along and gave chance after chance after
15 chance to rectify the situation. By the time they got to the day
16 before the readiness there was no proposal, give them one more
17 chance. We can help arrange the interviews with these four
18 witnesses who have been identified.
19 Once the Court strikes the six witnesses there's no case. It
20 was conceded. So it seems to me that if the Court's concern is
21 that there's not explicit findings saying, I find gross
22 mismanagement, or, I find gross negligence on the part of the
23 prosecutors, we'll go back and we'll just get that. I have no
24 doubt that the Court will enter such findings and clarify it's…
25 COURT: Well, but there wouldn't be any basis for entering
26 those findings. I mean, and that would…
27 MR. MAYBROWN: That's, that is untrue.

1 COURT: There, there clearly is not evidence of gross
2 mismanagement or arbitrary action, or willful violations by the
3 prosecuting agency. Now there is by the witnesses. But, but, but
4 you're conflating the witnesses with the prosecuting entity.
5 MR. MAYBROWN: Then what, what is the defense to do when the
6 State, six months after the trial, the case is filed, just two
7 weeks before trial readiness announces four witnesses. Two of them
8 are expert witnesses. There's no justification. We can't prepare
9 for them. What is the Court to do? Say, well, that's tough luck.
10 You've got to just hear what they have to say the first time on
11 the stand?
12 COURT: No.
13 MR. MAYBROWN: They gave us no time to get, they gave us…
14 COURT: No. There, there are other remedies Mr. …
15 MR. MAYBROWN: Well, the other remedy would have been to get a
16 deposition, but there was not sufficient time to get depositions
17 under the rules because they announced them so late in the day.
18 And the judge said, try to interview them and then we'll, um,
19 we'll reach that issue. But it seems to…
20 COURT: Well, well the next step for the judge would have been
21 to simply say, if you can't interview them by X date then they're
22 going to be stricken. Because-- now those witnesses are not
23 essential to the City's case. The City could go forward without
24 those witnesses. It might not like to do it that way, but those
25 witnesses are not essential to the case.
26 MR. MAYBROWN: So, well, so what the Court seems to be saying
27 is, the Court could have struck the two witnesses who failed to

1 comply with the orders based on 4.7, and the other four witnesses
2 based on their, um, being endorsed so late in the game. That would
3 have led to the same exact result.
4 COURT: Well, but I don't think, I think you're hurdling a
5 couple of steps Mr. Maybrown in terms of striking the, the two
6 witnesses, the alleged victim witnesses. Because what happened
7 was, of course, that you initially moved for dismissal on the
8 ground that they refused to be interviewed by you, and I
9 understand why you would do that.
10 And, but, of course, by the time we got the hearing on it
11 there actually had been a deposition. There had been an assertion
12 at the hearing of a refusal to answer certain questions on the
13 grounds of medical privilege. Now, ultimately the trial judge
14 determined that that medical privilege could not be asserted under
15 those circumstances, or at least not blanketly asserted.
16 One might have been able to, to say that they didn't have a
17 right to, to, I mean to, they didn't have to reveal all their
18 medical information but they certainly should have been willing to
19 answer any questions about medications that would relate to their
20 ability to perceive events or to be able to relate them
21 accurately, and so on, at trial.
22 But, the thing is, is that assertion is by the witnesses'
23 counsel. Now the witnesses' counsel it appears made that, that
24 claim of privilege in good faith. The judge ruled against her on
25 that, but, I think at that point then you need to go back and,
26 and, uh, and find out whether that you can get the answers or not.
27 Now, I realize that, that you were up against time pressures. But

1 I don't think that just because it's gotten that close it just
2 automatically means that we go to the nuclear option and, and
3 dismiss the case. Dismissal of the case requires willful or
4 arbitrary action on the part of the government, not on the basis
5 of the witnesses.
6 MR. MAYBROWN: Well, Your Honor, given the Court's, um, I
7 think the Court's lack of, um, appreciation or understanding of
8 exactly what was happening in the trial court, what I would ask
9 the Court to do is to remand us back to the trial court for entry
10 of findings and conclusions to protect this appeal. We offered
11 that opportunity. The prosecutor said it wasn't necessary. They
12 chose to appeal. The judge said he would, um, he'd ask the
13 prosecutors if they thought it was necessary.
14 I think that we would be in a much better position. The Court
15 could say, if Your Honor would appreciate it, that, I'm going to
16 strike the witnesses based on their willful violations. And then
17 we will see, I think, very clearly that we will ultimately be in
18 the same place. But, the real question, of course, is whether it
19 was an abuse of discretion for the judge to rule the way he did.
20 Having been told by the State-- or, the City, excuse me, that
21 they're the only witnesses and we won't have a case if they won't
22 testify. I understand why the trial judge said, I'm, we're going
23 to dismiss the case because there's no way that a case can proceed
24 given all that's happened.
25 And I think the judge will make a very explicit finding of
26 gross negligence in terms of them identifying the witnesses at the
27 time they did, for very specific reasons. But I think it's very

1 unfair to put the burden on us to try to show you why the hoops
2 were, um, set out the way they were. And more so…
3 COURT: Well but, now wait a second Mr. Maybrown. The burden
4 is on the defense when it makes a motion to dismiss under the rule
5 that requires the defense. It's an extraordinary remedy. I mean
6 obviously ordinarily in a criminal case there isn't, aren't any
7 burdens on the defense. But when the, but when the defense comes
8 forward and affirmatively says, you gotta get rid of this case
9 Court, because one, the government is engaged in arbitrary or, or,
10 is engaged in misconduct or arbitrary action; and, two, it
11 prejudicially affects the defense then, yes, the defense has the
12 burden on that.
13 MR. MAYBROWN: Well, I understand. But here we're, the
14 question is whether any reasonable judge in Washington, faced with
15 these circumstances, could have reached the decision it reached?
16 COURT: No, that's not the proper… I realize that there are
17 cases that articulate the standard that way but that, that's a
18 fundamental misstatement of what, what the, abusive discretion
19 means. It's a decision made for untenable grounds or for untenable
20 reasons. And the untenable grounds here is that there is no
21 finding by the trial court of a governmental misconduct or
22 arbitrary action.
23 MR. MAYBROWN: Then I think that the Court should allow us to
24 return to have findings entered, because I think that this Court's
25 not having a fair full record. I do think that in fairness to the
26 trial court and to the proceeding as a whole, rather than the
27 Court say, well, I don't see the findings here, or they're not

1 clear enough. Given that there's a very clear RALJ rule that says
2 this Court should infer. But for the sake of the record and for
3 the sake of this Court and its proceeding, I think the Court
4 should just remand us and let us enter findings.
5 COURT: Well, I'm certainly happy to infer Mr. Maybrown, if
6 you can point me to something in the record that, that would allow
7 me to infer that the Court actually found governmental misconduct
8 or arbitrary action on the basis of something, of, you know, but
9 there, it isn't there. What's there is an enormous litany of, of
10 concern about prejudice to the defense. And I grant you that
11 there, there is significant evidence of that. But it requires both
12 elements. It can't just be the one.
13 MR. MAYBROWN: Well, well I understand. But the Court did say
14 over and over again that the identification of these witnesses,
15 six months after the case had been filed, without justification,
16 two weeks before trial, and it was a holiday as the Court might be
17 aware.
18 COURT: Right. Right.
19 MR. MAYBROWN: Uh, and you, that, you confer he was saying
20 gross mismanagement. But if this Court wants to have the specific
21 finding of arbitrary action I think that we should go back and
22 make it more explicit. I don't think the Court should send it--
23 we're going to, we're going to get in a situation where I think
24 the Court is not, not making an inference because it doesn't have
25 a full enough record. But I, I do think that that would be the
26 appropriate way to handle this case.
27 I've been involved in appeals before, for example, in

suppression issues where the Court of Appeals says we need more clear findings so we can rule upon it. I, I don't think that that would be unwise in this case, if you want a more complete record. But I think it would be unfair to say this is untenable without giving the trial court a chance to be more explicit in why he was making those findings, and we can do that.

And in fact, I, I contemplated that at the time but the prosecutor said they didn't think it was necessary, or at least they didn't ask for that opportunity. It maybe lined the weeds a little bit. But whatever the intention was, I think that that would be the more appropriate course. Because either way we have to have the trial court have a chance to explicate.

COURT: Okay. Well, I don't think that's going to get us anywhere Mr. Maybrown. The problem is that this thing went off the rails when we had this series of hearings and we lost sight of what the original basis that the motion was. Because we kept coming back with new hearings and the only thing that was discussed was the prejudice for the defense.

Now, you may very well be able to accomplish the same result for your client upon remand. Because if what I think the trial judge is well within his rights to do is to say that okay, trial is on this date. If the defense does not have by this date ahead of trial the medical releases that are necessary to talk to the professional witnesses, the opportunity to interview people, then we're going to have a hearing on this date and which would be shortly thereafter, that deadline. And if, in fact, you don't have those then the Court goes through the process of determining okay,

1 this is material that's essential to the defense. It's unfair to
2 go forward. There isn't any lesser sanction that would, would
3 allow it, and exclude the witnesses.
4 Now, excluding the witnesses it may, it's different because
5 it's not finding misconduct on the part of the government, it's
6 finding these witnesses are prohibiting it. And it may accomplish
7 the same thing, but there is a significant procedural difference
8 between the one and the other.
9 MR. MAYBROWN: Well, well I have to say, the Court doesn't
10 have the full story. We filed actually after the original motion
11 to dismiss a document of renewed motion to dismiss, which was
12 actually what was ruled upon. Not the initial motion. So, I
13 actually think that, uh, we should have an opportunity to enter
14 findings and conclusions rather than start from ground zero.
15 Because basically what this Court has done is started the clock
16 all over again and gives the City another, uh, forces a
17 continuance is basically what, what's going to happen here.
18 So, rather than the former, I think that the latter is the
19 more fair remedy, given the situation when we offered the
20 opportunity to provide findings, rather than the Court saying,
21 well, I'll just give them-- let's start again and see what happens
22 now that they've, um, we've been through the process for months
23 and months and months.
24 So, um, I don't understand why the Court would put us in that
25 situation, where we have to start from ground zero, as if they
26 could re-file the case as if nothing happened.
27 COURT: Okay. Well, I appreciate your position Mr. Maybrown,

1 but I disagree with you. I think that it's fundamentally important
2 that the trial court keep in mind the basis of the motion that
3 it's ruling upon, and that it has to find the elements of that, of
4 what the defense has asserted as a basis for dismissal in order to
5 be able to dismiss.
6 And so I think that, that yes, that you need to go back to
7 the trial court and go through the process again. Now, obviously
8 you're pretty well along in the, in the process and I think you're
9 in a position to be able to ask the trial court to set some
10 deadlines for, by which you have to have stuff, or else we ought
11 to be looking at excluding witnesses. But I think we gotta go
12 through it properly rather than, you know, deciding after the
13 fact, well, it would accomplish the same thing so we'll just go
14 back and let the trial court enter some, some orders on that.
15 MR. MAYBROWN: Well, I actually think that the Court is
16 reading the record as narrowly as possible and not finding, uh,
17 not giving any credence to the motions that were filed. Because
18 there was a renewed motion specifically articulating what the
19 standard was. The judge cited the rule. He articulated the
20 standard. He noted that it was an extraordinary remedy and this
21 was an extraordinary situation.
22 So I, I can't disagree more strongly with the, this Court.
23 And it really is fundamentally unfair to put us into this
24 situation once again when we never had a fair chance to go to
25 trial the first time.
26 COURT: Okay. Well, I appreciate your position. So if you have
27 an order for me Ms. McElyea I'll sign it.

MS. McELYEA: Your Honor, unfortunately we don't have a copy of it. It's not with us. Do you want, is it all right (inaudible).

COURT: Okay. Yeah, if you want to, uh, prepare an order then.

MS. McELYEA: That would be fine. Okay.

COURT: Okay. So thank you counsel.

MOTION CALENDAR CONTINUES

CERTIFICATE OF COURT CLERK AND

ELECTRONIC COURT REPORTER

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, Beth Carlson, Official Electronic Court Reporter of the Superior Court of the State of Washington in and for King County, do hereby certify as follows:

That the foregoing Verbatim Report Of Proceedings, numbered from page 1 through 21, is a true and correct transcript of a Motion Hearing held October 2, 2015, heard in the matter of City of Kirkland, Plaintiff v. Hope Stevens, Defendant, King County Cause No. 15-1-01772-8 SEA, before Honorable Judge Douglass North sitting at the King County Courthouse, City of Seattle, State of Washington, on the date hereinbefore mentioned.

DATED at Poulsbo, Washington on this 11th day of October, 2015.

N. Beth Carlson

Court Reporter

CERTIFICATE