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NO. 71532-1-1

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

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STATE OF WASHINGTON

Respondent,

v.

MOHAMED IBRAHIM

Appellant.

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COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON

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

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BRIEF OF APPELLANT

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## **1. INTRODUCTION**

Mohamed Ibrahim was denied his right to have his first jury determine the verdict. When the trial judge declared a mistrial over the defendant's objections, he violated Mr. Ibrahim's constitutional right to be free from Double Jeopardy. At the first trial, in which the State alleged that Mr. Ibrahim had assaulted Mardillo Barnes and Vincent Williams with a firearm, the evidence had come in favorably for the defense. The State struggled to prove that Mr. Ibrahim was the shooter. The primary victim in the shooting, Mardillo Barnes, could not identify anyone in court as the shooter. Two other eyewitnesses to the shooting, Vincent Williams and Berket Kabede, split on their opinions. Williams said he believed that Ibrahim was the shooter. Berket Kabede was prepared to testify that Ibrahim was not the assailant.

At the first trial, the State also struggled to prove that Mr. Ibrahim acted with the intent to inflict great bodily harm as required for a conviction for Assault 1. Vincent Williams testified that Ibrahim had a gun, but had not pointed it at either Mr. Williams or Mr. Barnes, the alleged victims. Without testimony that Ibrahim aimed a weapon at the victims, the State struggled to prove that Ibrahim intended to inflict great bodily harm.

Other parts of the trial had also been difficult for the prosecution. The trial judge noted that the State's witnesses lacked credibility and were not being truthful. In addition, when the defense moved to suppress the testimony of the emergency room physician because of discovery violations, that motion was granted.

Altogether, the case had gone as well as possible for the defense. Mr. Ibrahim wanted to finish the first trial. He wanted to proceed with the jury he had chosen to decide his case.

Shortly before the State rested its case, the defense announced that it had found Berket Kabede and that he was prepared to testify for the defense. Both the State and defense had been looking for him, but neither side had located him before trial. When the prosecutors learned that Mr. Kabede was prepared to testify that neither Mr. Ibrahim nor the co-defendant, Mr. Shire, had been the shooters, they moved to exclude his testimony. When that motion was denied, the judge recessed the trial to allow the prosecutors to interview Berket Kabede before he testified. After the recess, the prosecutors told the judge they would need a lengthy continuance to prepare for his testimony. In fact, the State took the position that the continuance would need to be extraordinarily long, nearly 28 days, because one prosecutor wanted to go on her long-scheduled vacation. She asked the court to poll the jury to see if it would create a

hardship for any of the jurors to return in mid-January to finish the trial.

The judge denied the prosecutor's request.

Instead, the judge declared a mistrial on his own motion, over Mr. Ibrahim's objection. Mr. Ibrahim's counsel objected strenuously, saying among other things, that there was no reason why the case could not be concluded in the next few days. Nevertheless, the judge declared a mistrial.

At the second trial, the prosecutor's case improved substantially. Witness Williams changed his testimony. He was certain that Ibrahim shot straight at the three victims. The prosecutor brought in the medical experts that had earlier been excluded. Over the defense objection, the prosecutor was permitted to amend the information adding another charge of Assault 1 related to Berket Kabede.

At the first trial, Mr. Kabede was at the courthouse prepared to testify. At the second trial, however, Mr. Kabede did not respond to the subpoena issued by the defense lawyers. When defense counsel moved for a material witness warrant to compel Mr. Kabede's testimony, that motion was denied. As a result, Mr. Kabede never testified.

## **2. ASSIGNMENTS OF ERROR**

1. The trial court erred in declaring a mistrial over the defendant's objection.
2. The trial court erred in denying a defense motion for a material witness warrant for Mr. Kabede, a defense witness who would have given exculpatory testimony.
3. The trial court erred when it permitted the prosecutor to amend the information to add a third count of Assault 1 after the mistrial.
4. The evidence was insufficient to convict Mr. Ibrahim of Assault 1, Count 3, of the Fourth Amended Information relating to Berket Kabede.
5. The trial court erred in imposing consecutive sentences on Counts 1,2, and 3.
6. The Fourth Amended Information failed to notify Mr. Ibrahim of the nature and cause of the accusations against him when the prosecutor argued a "transferred intent" theory.

### **3. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Once a jury is impaneled and trial has begun in a criminal case, the Double Jeopardy Clause precludes retrial by a different jury, unless the defendant freely consented to a mistrial or there was a "manifest

necessity” to discharge the jury which was already chosen. Was it an abuse of discretion for the trial court to order a mistrial, where Mr. Ibrahim did not consent, and the court's apparent reason---the prosecutor's request for a long vacation---did not constitute “manifest necessity”?

2. Was it an abuse of discretion for the trial judge to deny a motion for a material witness warrant for Berket Kabede?

3. Did the trial court err when it permitted the prosecutor to amend the information, charging an additional count of Assault 1 relating to Berket Kabede, after the first trial ended in a mistrial?

4. Was there sufficient evidence to convict Mr. Ibrahim of Count 3 of the Fourth Amended Information charging the crime of Assault 1, given that Berket Kabede did not testify?

5. When the court failed to make a finding that the offenses involved separate and distinct criminal conduct, was it improper to impose consecutive sentences in Counts 1,2, and 3?

6. When the prosecutor introduces alternative theories that contain new elements at trial – both an “aiding and abetting” theory and a “transferred intent” theory - does the charging document adequately notify the defendant of the nature and cause of the accusation against him?

#### **4. STATEMENT OF THE CASE**

This case was tried twice. The first trial was in King County Superior Court in November and December of 2013. On December 17, on his own motion and over the defendant's objection, Judge Jeffrey Ramsdell declared a mistrial. (CP 49) The deputy prosecutor, Julie Kline, told the judge that a new witness, Berket Kabede, had surfaced and was prepared to testify for the defense. Mr. Kabede would testify that he was an eyewitness to the shooting and that neither Mr. Shire nor Mr. Ibrahim were the shooters. RP (12/17/13) at 44. Ms. Kline told the judge that it would be impossible to cross examine Mr. Kabede without more investigation, which would require a continuance. Ms. Kline told the court that she wanted to go on her vacation, so if a continuance were to be granted, it would need to be about 28 days in length. She would return from vacation on January 13 and would be prepared to go ahead with the trial on January 14, 2014. RP (12/17/13) at 36. She offered no other solution to the problem. Without fully considering the many options to proceed without declaring a mistrial, the judge, on his own motion, declared a mistrial. The defendant objected strenuously. RP (12/17/13) at 64.

The case was tried a second time in September, 2014 before Judge William Downing. The defendant moved to dismiss the trial on double jeopardy grounds, but that motion was denied. CP 50-64. RP (9/3/2014) at 36–39. Before proceeding with a second trial, the prosecutor, over the defendant’s objection, added an additional count of Assault 1 while armed with a deadly weapon, with Berket Kabede the named victim. RP (9/3/14) at 39, 42. 44. For the second trial, the defendants subpoenaed Mr. Kabede. RP (9/17/14) at 4. Defense counsel talked with Kabede on the day before he was scheduled to testify. RP (9/17/14) at 4. However, the next morning he did not appear in court. The defense counsel asked the court to issue a material witness warrant for Mr. Kabede, but the court denied the motion. RP (9/17/14) at 11. The defendants had Mr. Kabede ready, willing and able to testify at the first trial, but he failed to show up for the second trial. His testimony would have been material and very helpful to Mr. Ibrahim. He would have testified that Mr. Ibrahim was not one of the shooters. RP (12/17/13) at 44

At the end of the second trial, Mr. Ibrahim was found guilty of three counts of Assault 1 while armed with a deadly weapon, and one count of Illegal Possession of a Firearm. CP 268. He was sentenced to prison for a term of 486 months. CP 292-296.

This case began on May 21, 2013 when Yusuf Shire and Mohamed

Ibrahim were each charged with two counts of Assault in the First Degree as well as one count of Unlawful Possession of a Firearm in the First Degree. The State alleged that the two defendants walked up to Mardillo Barnes and Vincent Williams at about 1:00 AM near the corner of 85<sup>th</sup> Street and Fremont Avenue in Seattle, and without provocation started firing shots at them. CP 72 One bullet hit Mardillo Barnes in the hand. Also present at the scene was Berket Kebede (AKA “Kip” and “Barquet”), a friend of Mr. Barnes and Mr. Williams. (CP 72)

At the first trial, the three eyewitnesses to the shooting were prepared to testify. Each had a different story. Mardillo Barnes, the man who was shot in the hand, testified that he could not identify either of the defendants as the shooter. RP (12/10/13) at 151.

Vincent Williams testified at the first trial that he was with Mardillo Barnes and Berket Kabede on the night of the shooting. RP (12/5/13) at 41. Two men approached him. In the courtroom he identified the co-defendant, Mr. Shire and referred to him by his street name Lewy. Mr. Shire pulled out a gun and shot a round into the air. RP (12/5/13) at 49. Mr. Shire pointed and started firing toward Mr. Williams and his friends. RP (12/5/13) at 50. Mr Williams testified that Mr. Shire “brought the gun down and points directly at us and begins to shoot towards us.” RP (12/5/13) at 53. Just before firing the gun Mr. Shire said:

“I do this”. RP (12/5/13) at 55. The other man, Mr. Ibrahim, was retreating when he fired his gun. RP (12/5/13) at 56. Mr. Ibrahim was firing in Mr. William’s general direction. RP (12/5/13) at 56. He was firing into the street. RP (12/5/13) at 56. Both Shire and Ibrahim turned and ran. RP (12/5/13) at 58. During cross-examination, Vincent Williams told the jury that Mr. Shire fired his weapon first, followed by Mr. Ibrahim, who was retreating. Regarding Ibrahim, he testified that “he wasn’t aiming at me.” RP (12/5/13) 161. Mr. Williams testified that when Ibrahim fired his gun, the shots could have been in his general direction, “but I don’t believe they were toward me, at me. I don’t believe they were directed at me.” RP (12/5/13) at 152. Mr. Williams, the only eyewitness to the shooting to identify Mr. Ibrahim, testified that Mr. Ibrahim did not aim the gun at him. Nor did he testify that Ibrahim aimed at Mr. Barnes. When asked if Ibrahim fired at Barnes, Mr. Williams stated: “Nah. I’m not saying he fired at Barnes”. RP (12/5/13) at 152. By contrast, at the second trial, Vincent Willams testimony was much more favorable to the prosecution. In the second trial, he claimed that Mr. Ibrahim fired at all three “victims”. RP (9/11/14) at 50.

Berket Kebede was the third eyewitness to the shooting. By contrast to Mr. Williams testimony, Berket Kebede was prepared to testify that he was also present at the shooting, observed the two shooters, and

neither Mr. Shire nor Mr. Ibrahim did the shooting. RP (12/17/13) at 22.

Although the State and defense had communicated about “Ket Barquet” being called as a witness as early as October 21, 2013 (CP 220), when the prosecutors realized that he was present and prepared to testify for the defense, they claimed surprise and moved to exclude his testimony. RP (11/27/13) 12.; RP (11/27/13) 60 The State claimed surprise even though the detective had been told on the day of the shooting that “Kip” was at the scene of the shooting and had been chased across the street. RP (12/11/13) 186. The judge ruled that he would not exclude Berket Kabede’s testimony because it was material and potentially helpful to the defense. RP (12/17/13) at 46. Julie Kline told the court that although they knew that “Barquet” had been at the scene of the crime when the shooting occurred, neither she nor the detectives were certain of his identity before trial. Consequently, she had not been able to prepare for cross examination. RP (12/17/13) at 26. Judge Ramsdell then recessed the trial to allow the prosecutor and detectives to interview Berket Kabede. RP (12/17/13) at 40. The detectives, with prosecutors present, spent nearly an hour and a half intensely questioning Berket Kabede before returning to Judge Ramsdell’s courtroom. CP 108 – 189. When the prosecutor returned she asked the judge for a 28 day continuance of the trial. RP (12/17/13) at 46. Mr. Kabede was prepared to testify that day, but the trial

was terminated before he had the opportunity to take the witness stand.

After three weeks of trial, the presentation of nearly 20 witnesses and nearly 50 exhibits, on December 17, 2013, the prosecutor, Julie Kline, moved for a continuance of the trial to January 14, 2014 to accommodate her vacation. She told the judge that she could not be prepared to cross examine Berket Kabede without a recess to January 14<sup>th</sup>. The judge denied the motion, but then, on his own motion, declared a mistrial terminating the trial without a verdict. CP 49. RP (12/17/13) 75, 76.

The judge's declaration of a mistrial benefitted the prosecutors. Before declaring the mistrial, Judge Ramsdell made it clear that the State's witnesses had credibility problems. He said: "Well, I've got an awful lot of people saying they don't know anything about things that I'm sure they know a lot about, and the jury can consider credibility issues and so forth." RP (12/16/13) 196. Judge Ramsdell went on to talk about the weaknesses in the testimony of the State's witnesses: "This is not quote, unquote a straightforward case. Everybody's hemming and hawing and telling a little bit about what they know, and I don't think they're telling the entire truth for the most part, and I don't know that anybody disagrees with me on that." RP (12/17/13) 76 He also noted that if he declared a mistrial, there would be an advantage for the prosecutor in that the prosecutor would be able to amend the information to charge an additional count of

Assault 1 related to Mr. Kebede. Judge Ramsdell said to the prosecutor: “So now that you know who this guy is and where to locate him, you could actually add a count.” RP (12/17/13) 55).

At the first trial, in addition to the three eyewitnesses to the shooting - Mr. Williams, Mr. Barnes and Mr. Kebede - other lay witnesses testified including Mr. English and Mr. Bentler. Neither Mr. English nor Mr. Bentler saw the shooting. Mr. English testified that he heard gunshots and saw two men run between apartment buildings. Though he wanted to help the police, he told the detective that he could not identify faces, only clothing. (RP 12/5/13 at 21.) In the courtroom, Mr. English could not identify either Mr. Shire, nor Mr. Ibrahim. RP (12/5/13) at 127. Another witness, David Bentler, saw a Toyota Camry drive from the scene after he heard gunshots. RP (12/4/13) 158. The police stopped a Toyota Camry about ten blocks from the scene and found five individuals inside the car, all of Somali descent, including Mr. Shire and Mr. Ibrahim. RP (12/6/13) at 124.

Two guns were found in the Toyota Camry under the front seats of the car. Mr. Ibrahim was seated in the back seat of the car. RP (12/6/13) at 125,135. One gun, a revolver, had Mr. Shire’s fingerprints. Another gun, a 9mm automatic, was identified by a State expert witness as matching a bullet found at the scene. That gun, the 9 mm, did not have

fingerprints. RP (12/16/13) at 106 - 139

Although the prosecutor, Julie Kline, told the court that the trial was pressing against her vacation schedule, the prosecutors themselves created the time squeeze. The prosecutors repeatedly asked for continuances before the trial started and were unprepared with witnesses, causing delays, once the trial began.

On August 23, 2013 the court set a trial date of October 28, 2013. Two deputy prosecuting attorneys were assigned to try the case, Julie Kline and Paul Sewell. Although the case was set for trial on October 28, the prosecutors asked for repeated continuances because they were in trial on other matters. From October 28 to November 20, 2013, the prosecutors asked for a continuance of the trial date on nine occasions. CP (Supplemental) \_\_\_\_\_; Appendix A. Ms. Kline had scheduled a month-long vacation to begin on December 18. Had the trial begun on October 28, the parties would have had an ample opportunity to complete the presentation of the evidence before Ms. Kline's scheduled vacation. But because of the repeated requests by the State for continuances, the case was not assigned to Judge Ramsdell for trial until November 26, 2013. With the Thanksgiving Day break and a delay in jury selection, opening statements did not occur until December 4. RP (12/4/13) at 6. In the dialogue between the court and the prosecutor, Ms. Kline said that the case

would definitely be finished on December 17 because she would be going on vacation starting on December 18. RP (12/2/13) at 27

Before the jury was impaneled and evidence was presented, the Court asked Ms. Kline: “Are you still confident that we are not going to get ourselves messed up with time constraints, Ms. Kline?” She said: “I think we still may be fine.” RP (12/3/13) at 6,7.

There was good reason to be concerned about whether this trial would be finished before Ms. Kline’s scheduled vacation. The prosecutors had listed 38 witnesses for trial. RP (11/27/13) at 56. From December 4<sup>th</sup>, through December 17<sup>th</sup>, there would be only 8 trial days to fit in the testimony of all the State’s witnesses. If the defense chose to put on a case, the likelihood of going past Ms. Kline’s December 17<sup>th</sup> cutoff date, would be that much greater. The judge announced that he had several separate matters that would need to be heard during the course of the trial. For example, he told the lawyers he would not be available on Thursday, December 5 or Thursday December 12<sup>th</sup>. RP (12/2/13) at 26, 27. That gave the prosecutor a very short time to complete the trial once testimony began. It was, simply, poor management to start the trial on December 4<sup>th</sup> knowing that one of the prosecutors would not be available after December 17<sup>th</sup>.

An additional problem, causing delays, was that the prosecutor had

mismanaged witnesses before trial and during the trial. The defense had tried to set up witness interviews with the prosecution before trial, but the witnesses were not made available for interviews until after the case had been called for trial. As a result, the proceedings were recessed so that the defense lawyers could interview the witnesses before giving opening statements. RP (11/26/13) at 5. Counsel for Mr. Ibrahim noted that it would be difficult to give an opening statement, saying: “We are in somewhat of an awkward position because we have not been able to interview the primary witnesses in this case . . .” RP ( 11/27/13) at 10. On November 27, when the court asked if the state was ready to proceed with witnesses for the 3.5 hearing, the prosecutor said that the witnesses were not present, but would be available at 1:30. RP (11/27/13) at 5. At 1:30 when the court reconvened, the prosecutor was not ready with her witnesses. She told the court: “So we don’t actually have our officers here this afternoon as we anticipated.” RP (11/27/13) 86. On December 3<sup>rd</sup>, when it would have been time to do opening statements, the proceedings were delayed again because the prosecutor had not scheduled interviews with witness English until 4:00 PM that afternoon. Again, the trial was delayed. RP (12/3/13) at 4–7. The jury was excused for the afternoon. On December 16<sup>th</sup>, the prosecutors were not ready with witness Owens, so the jury was excused to go home. RP (12/16/13) 182.

Although the defense and the prosecution had been aware that Berket Kabede might be a witness at trial, the prosecutor had not prepared for that possibility. Berket Kebede was an eyewitness to the shooting. His street name was “Kip”. Some people called him “Barquet”. Witness Vincent Williams told Detective Janes on May 18, 2013 that Kip was present when the shooting occurred. The detective was aware that Kip had witnessed the shooting and was a potential witness at trial. RP (12/11/13) at 12. Kip was a close friend of both Vincent Williams and Mardillo Barnes. He lived just up the street from Mardillo Barnes’ house. RP (12/17/13) at 57. During a witness interview, Mardillo Barne’s mother told the prosecutor that Kip lived just up the street and often visited her house. RP (12/17/13) at 29. The prosecutor listed “Kip Barquet” as a witness on its witness list. RP (12/17/13) at 28. The prosecutor had considered amending the information to include Mr. Kebede as a victim in a third count of assault. RP (12/17/13) at 59.

Defense counsel explained to Judge Ramsdell that the prosecutor was aware of Berket Kabede’s involvement in the shooting and knew how to get in touch with him: “. . . Mr. and Mrs Barnes both talked about "Ket", Berket, where he lives, who he is, that he regularly is at their house, and at that point, I’ll tell you the State wasn’t interested in finding who he is for a number of reasons.” RP (12/17/13) at 59.

When Judge Downing heard the motion to dismiss on double jeopardy grounds he commented on the detectives lack of diligence in attempting to find witness Berket Kabede. Judge Downing noted: “Well I understand from what Ms. St. Clair said that the Barnes’ parents had informed the prosecutor that this third person (Kabede) lives in the neighborhood, lives just up the street. He’s a friend of our son. . . .” The judge went on to say: “. . . it does seem as if there was information here and . . . I’m a little shocked sometimes at the lack of diligence that the police department puts into locating witnesses in this type of case.” In denying the motion to dismiss on double jeopardy grounds, the judge stated: “I fault the police department in not making a more rigorous effort to locate this witness and, in fact, a potential victim in the case in the months between the offense and the trial date.” RP (9/3/2014) 36 – 39 The State had not been diligent in finding Berket Kabede and had not been diligent in preparing for cross examination of him.

At the second trial, Mr. Kabede’s testimony was even more important. He would have been a strong exculpatory witness for the defense and the prosecutor listed him as the “victim” in Count 3 of the Fourth Amended Information. RP (9/3/14) at 39,40. However, he did not honor the defense subpoena. When the defense moved for a material witness warrant for Kabede, that motion was denied by Judge Downing

even though the judge was aware of the significance of his testimony. RP (9/17/14) at 11. Kabede was prepared to testify that he was present when the shooting took place and when Mr. Barnes was shot, but that “neither of the defendants shot the victim”. CP 53, 74.

Judge Downing was concerned at the start of the second trial that the State had not secured all of the witnesses necessary to go forward with the trial. He asked the prosecutor: “But you’re intending to call as witnesses in this trial Mardillo Barnes, Vincent Williams, and Berket Kebede?” The prosecutor told the judge that he planned to call each of those witnesses. RP (9/3/2014) at 40. On September 3, 2014, Mr. Herschkowitz, the prosecutor, told the judge that if they had any problem securing the witnesses for trial he would ask the court to sign a material witness warrant. He said, specifically: “But I had Jodie prepare material witness warrants for the three individuals just to be on the safe side, which we will present to the Court if we are not able to ascertain their location in time.” RP (9/3/2014) at 41. Yet, the prosecutor never presented the material witness warrants for Mr. Kabede to the judge and did not call Mr. Kabede to the witness stand.

On September 17<sup>th</sup>, when the State failed to call Mr. Kabede as a witness, the defense subpoenaed him to testify. Unfortunately, Mr. Kabede did not honor the subpoena and did not appear in court. RP

(9/17/2014) at 4. Defense counsel moved the court for a material witness warrant, but that motion was denied. RP (9/17/2014) at 10. In denying the motion, Judge Downing said: “And I think I would, in light of the timing, be obliged to decline the invitation.” RP (9/17/2014) at 10,11. The judge gave no other reasons.

## 5. ARGUMENT

### A. DOUBLE JEOPARDY

1. **Once jeopardy attaches, an accused has a fundamental constitutional right to have his case decided by the jury he chooses, unless he freely consents to a mistrial, or a “manifest necessity” exists to justify a mistrial.**

“A basic tenet of our constitutional freedoms is the prohibition against a second trial for the same offense.” State v. Robinson, 146 Wn. App. 471, 477-78, 191 P.3d 906 (2008). The Double Jeopardy Clause of Fifth Amendment to the U.S. Constitution provides that no person shall be “twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. V. Similarly, article 1, section 9 of the Washington Constitution provides: “No person shall be twice put in jeopardy for the same offense.”

The constitutional prohibition against double jeopardy protects defendants from running the same “gauntlet” more than once. *Id.* at 478. It also prohibits the State from having more than one opportunity to convict a defendant for the same crime. *Id.*; Arizona v. Washington, 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed. 2d 717 (1978). The defendant’s constitutional “right to be tried by the jury first chosen and sworn to try his case is inviolable.” State v. Rich, 63 Wn. App. 743, 749, 821 P.2d 1269 (1992) A court considering a mistrial must engage in a "scrupulous exercise of judicial discretion" before foreclosing a defendant's "valued right to have his trial completed by a particular tribunal". State v. Melton, 97 Wn. App. 327, 331, 983 P.2d 699 (1999)

When an initial prosecution ends in mistrial, a subsequent retrial increases the emotional and financial burden imposed on the defendant, may give the State an unfair opportunity to tailor its case based on what it learned the first time around, and may increase the chances that an innocent person will be convicted. State v. Jones, 97 Wn.2d 159, 162 641 P.2d 708 (1982); Arizona v. Washington, 434 U.S. at 503-04 and n. 14. “Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.” Arizona v. Washington, 434 U.S. at 505.

At Mr. Ibrahim’s second trial, the prosecutor’s case improved

significantly. The prosecutor's witness, Mr. Williams, became certain that Mr. Ibrahim shot right at him and his two friends. RP (9/11/14) at 50. At the first trial Mr. Williams had testified that Mr. Ibrahim had not aimed at either Mr. Barnes or himself. (12/5/13) at 152, 161. At the first trial, the emergency room physician's testimony had been excluded. In the second trial Dr. Nicholas Vedder testified about the injuries to Mardillo Barnes. RP (9/10/14) at 9. In the first trial, the prosecutor had not joined a count of Assault 1 related to Berket Kabede. In the second trial, the prosecutor filed a Fourth Amended Information, over the defendant's objection, alleging that Mr. Ibrahim assaulted Berket Kabede. RP (9/3/14) at 39 – 42.

If a jury is discharged after jeopardy attaches but before the jury reaches a verdict, a defendant may be tried again for the same crime only if: (1) he freely consents to the mistrial or (2) the mistrial was required by a "manifest necessity". State v. Juarez, 115 Wn. App. 881, 836-87, 889, 64 P.3d 83(2003); United States v. Dinitz, 424 U.S. 600, 606-07, 96 S. Ct. 1075, 47 L.Ed. 2d 267 (1976). To discharge the jury without the defendant's consent is tantamount to an acquittal "unless such discharge was necessary in the interest of the proper administration of public justice." Jones, 97 Wn.2d at 162. This means that "extraordinary and striking" circumstances must be present which clearly indicate that

substantial justice cannot be obtained without discontinuing the trial. Id. at 163.

Jeopardy attaches after the jury is selected and sworn. Juarez, 115 Wn. App. at 887. In this case, the court discontinued the trial after the jury was selected and sworn and witnesses had already testified for the State. Therefore, jeopardy attached and the court was permitted to discharge the jury only upon Mr. Ibrahim's consent or if a "manifest necessity" clearly indicated that substantial justice would not be obtained without discontinuing the trial. Jones, 97 Wn.2d at 162; Juarez, 115 Wn. App. at 886-87; Dinitz, 424 U.S. at 606-07.

**2. Mr. Ibrahim did not consent to a mistrial and no "manifest necessity" existed; therefore, the court's declaration of a mistrial violated Mr. Ibrahim's constitutional right to have his case decided by the jury which he chose.**

Mr. Ibrahim's attorney strenuously objected to a mistrial. She told the court that Ms. Kline could take a couple of days away from her vacation to cross--examine Mr. Kabede. Ms. St. Clair argued the following:

Yes. For the record, the defense does object to a mistrial. We want to make that very, very clear. That there is no reason this trial cannot conclude this week. There is no reason. The State has plenty of opportunity for cross-examination, opportunity to bring in any rebuttal witness, and while it may be inconvenience melding into a month long vacation to take a couple of days, I think we can go forward.

RP (12/17/13) 74.

Even when judicial or prosecutorial error prejudices a defendant's chances of securing an acquittal, a defendant still has the right "to go to the first jury and, perhaps, end the dispute then and there with an acquittal." United States v. Jorn, 400 U.S. 470, 484, 91 S.Ct. 547, 27 L.Ed. 2d 543 (1971). "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." Dinitz, 424 U.S. at 608-09. In the absence of the defendant's consent, the "doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's options until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." Id. At 607-08.

Here, the prosecutor informed the court that the State would not be able to proceed with the trial without obtaining a month-long recess, due to the prosecutor's vacation schedule. The court then declared a mistrial

on his own motion.

**3. When the State creates the circumstances that make it difficult for it to proceed to trial without a lengthy recess, there is no “manifest necessity” for a mistrial.**

When the State creates circumstances making it difficult to proceed with a trial, thus causing the trial judge to declare a mistrial, the Double Jeopardy Clause bars a retrial. Juarez, 115 Wn. App. at 888-89. That is what happened here. The case was set for trial on October 28. The prosecutors requested, and were granted, a total of nine continuances because they were in trial on other matters. Due to those continuances, Mr. Ibrahim's trial did not start until November 26, 2013. When the trial did start, the State was not ready to proceed. It had not made witnesses available for defense interviews and failed to have witnesses ready to testify. It was the State that created the time squeeze between the start of the trial and the date set for the prosecutor's vacation.

When the State causes the circumstance that creates the difficulty in proceeding with a trial, those circumstances cannot be used to declare “manifest necessity” for a mistrial. In Juarez, the defense moved to dismiss the prosecution with prejudice, following the State's untimely

disclosure of evidence. The untimely disclosure of evidence made it difficult for the defense to proceed with the trial. When the defense moved for a continuance the trial judge, instead, declared a mistrial. Juarez, 115 Wn. App. at 886. On appeal, the appellate court concluded that the prosecutor had created the problem and that Mr. Juarez did not freely “consent” to the discharge of the jury. Id. at 890. Therefore, because there was no “manifest necessity” to discharge the jury, retrial was prohibited by the Double Jeopardy Clause

Similarly, in Rich, the trial judge declared a mistrial over the defendant’s objection. Rich, 63 Wn. App. at 746. The prosecutor had failed to prove the identity element of the offense, and defense counsel moved to dismiss. The prosecutor tried to re-open his case, but the trial judge denied that motion, and declared a mistrial. The defendant was subsequently tried and convicted. The Court of Appeals held:

“The State's failure to identify Rich was not, however, a problem that can be blamed on Rich. The State had earlier convinced the trial court to proceed with the trial in absentia. In so doing, the State made its burden of proving the identity of the perpetrator of the crime more difficult. In our judgment, an absence of proof caused by the State's determination to proceed to trial without the defendant's presence is not the kind of emergency or necessity which should afford the State another opportunity to prove its case.”

Rich, 63 Wn. App. at 748. In the present case, the prosecutor's plans for a 28-day vacation created a problem that could not be blamed on Mr.

Ibrahim. The prosecutor's scheduled vacation was not the kind of emergency or necessity which should have given the State another opportunity to prove its case.

**4. A “manifest necessity” does not exist if the court could have found alternative solutions to the problem which would have allowed the court to avoid a mistrial**

A “manifest necessity” arises only when there are “very extraordinary and striking circumstances,” Downum v. United States, 372 U.S. 734, 736, 83 S.Ct 1033, 10 L. Ed. 2d 100 (1963); State v. Jones, 97 Wn.2d 159, 164, 641 P.2d 708 (1982). When there exist reasonable options to a mistrial, like a continuance or a recess of the trial that would fairly cure a problem and allow the case to proceed to verdict, courts rarely conclude that a mistrial is appropriate. For example, a defendant is not entitled to a mistrial even when there are late disclosures of witnesses or other evidence. Discharge of the jury is an extreme remedy that is unwarranted even when the State violates the discovery rules by not disclosing evidence until after trial has begun. State v. Krenik, 156 Wn. App. 314, 320, 231, P.3d 252 (2010); State v. Brush, 32 Wn. App 445, 456, 648 P.2d 897 (1982).

The appropriate remedy, when the State discloses discoverable information after trial has begun, is usually to grant a continuance so that the defense may prepare a response to the new information. Krenik, 156 Wn. App. at 321; Brush, 32 Wn. App. at 456. In Krenik, the State did not disclose the existence of video surveillance of Ms. Krenik's home, until the first day of trial. Id. at 317. The trial court asked Krenik what remedy she sought. Krenik could have moved for a continuance to obtain access to the recording, if any existed, but the only remedy she requested was the granting of a mistrial, and didn't change her position when the trial court offered an opportunity to revisit the issue the next day. The Court held that Krenik did not establish actual prejudice sufficient to compel the choice of dismissal as a sanction for the prosecutor's noncompliance with the discovery rule. The appropriate remedy was to grant a continuance so that Krenik could access the recording. Id. at 321-322. Similarly, in Brush, the State violated the discovery rules by not disclosing a police officer's statement until after trial had begun. The appropriate remedy was to grant a continuance, not a mistrial. Brush, 32 Wn. App. at 456.

When the State seeks a mistrial over the defendant's objection, " 'extraordinary and striking circumstances' must exist before the judge's discretion can come into play." State v. Jones, 97 Wn.2d 159, 164, 641 P.2d 708 (1982); State v. Sheets, 128 Wn. App. 149, 154, 115 P.3d 1004.

In State v. Jones, the trial court granted the State's motion for a mistrial, over the defendant's objection, after the testimony by a witness for the state violated the rape shield statute. The Court of Appeals reversed the defendant's conviction and remanded for the entry of an order of dismissal with prejudice.

Courts consistently hold that, under such circumstances, the “manifest necessity” standard is not met and the Double Jeopardy Clause bars a retrial. For example, in Robinson, 146 Wn. App. 471 at 482-84, the Court of Appeals held that retrial was barred when the trial court had granted a mistrial following communication between jury and bailiff, but failed to consider a lesser remedy such as admonishing the jury or a providing curative instruction. In Sheets, 128 Wn. App. at 158, the Court of Appeals held that retrial was barred, where the trial court granted a mistrial after a witness testified that the complaining witness was “flirting” with him on the night of alleged attempted rape, and where the trial court could have cured any prejudice resulting from violation of the rape shield law by providing limiting instruction. In Browning, 38 Wn. App. at 776, retrial was barred where the trial court granted a mistrial after the prosecutor said multiple times during closing argument that jury instructions were “misleading,” and there was no showing that a less precipitous action would not have solved the problem.

**5. The trial court failed to consider logical alternatives to a mistrial, such as ordering a short continuance so that the prosecution could prepare its cross-examination of Mr. Kabede.**

In Downum v. United States, 372 U.S. 734. the prosecution inadvertently failed to secure the presence of its key witness at trial and was therefore granted a mistrial. The Court held that there was no manifest necessity for the mistrial because the prosecution could have asked for a continuance or taken steps to locate the witness before trial. A trial court must explore reasonable alternatives before declaring a mistrial.

In the present case, Judge Ramsdell never realistically considered the workable options to a mistrial even though both the prosecutor and defense counsel urged the court to do so. There were at least six possible options that the court could have considered, including: (1) recessing the case for a single day, two days, or three days to allow the State to explore the impeachment of Mr. Kabede and then finishing the trial; (2) declaring a longer recess and requiring Ms. Kline to interrupt her vacation whenever the prosecution was ready to proceed; (3) declaring a recess, releasing Ms. Kline to go on her vacation, but requiring that her co-counsel, Mr. Paul Sewell, complete the trial; (4) polling the jury to determine whether

a three or four-week continuance of the trial would work for their schedules and continuing the trial to January 14th; (5) ordering the case to proceed immediately without a recess, having the witness Kabede testify, allowing the prosecution to cross examine, and then entertaining a motion for a continuance if the prosecution still needed more time to investigate; or (6) ordering the exclusion of Berket Kabede's testimony from the trial.

Regarding option (1), the defense lawyer for Mr. Ibrahim objected to a lengthy continuance of the trial date, as follows:

Court: So you don't have any quarrel with a recess of some sort, but January 14 is what, too –

Def: No, I do have a quarrel.

The court: Tell me.

I think that there is no reason we cannot get through this witness. I, you know, apologize to Ms. Kline and her vacation... sometimes we have to bend, so if she has to give up a day of her vacation, I think that is sad, but it is, you know, the least of all issues here. We could conclude this trial by tomorrow. They have plenty of cross examination fodder, and they could bring any necessary rebuttal witnesses, and I think there is no reason we couldn't conclude this case tomorrow or if we have to the next day, but to have a two week break I think is a problem. So, yes, I do object. It's actually more than two weeks; it is more like a month. I think that is a problem.

RP (12/17/13) 63-64.

The court did not consider the first option, which was to order a one, two or a three-day continuance of the trial. It only considered two options: to recess the case for one day, or to recess the case for 28 days.

The court never brought Mr. Kabede into the courtroom to learn in detail the nature of his testimony. Although the prosecutor, along with two detectives, had interviewed Mr. Kabede, the court never inquired why a lengthy continuance was necessary. It was not clear from the hearing why a two or three day continuance would not have provided sufficient time to prepare for cross-examination of Mr. Kabede.

The court also did not consider the second option, which was to order Ms. Kline to complete the trial, and to continue the case for the necessary time. The court did not seriously explore the possibility that Ms. Kline could return in a week to finish the trial. Even though Ms. Kline was scheduled to start her vacation on December 18, she was not scheduled to leave Seattle during the two-week period prior to January 1. CP 59. Ms. Kline was scheduled to be in Seattle during her vacation during the period from December 17 to December 31. She was going to enjoy a visit with her sisters during that period. RP (9/3/2014) 30. In fact, Ms Kline told Judge Ramsdell: "I'm not going anywhere." RP (9/3/2014) 34.

Regarding the third option, the court never inquired whether Mr. Sewell, the second prosecutor on the case, could complete the trial for the State. Mr. Sewell had presented much of the State's case up to that point. He certainly appeared to be competent to try the case. In fact, had the

issue with Mr. Kabede not arisen, but instead the defendants decided to testify or call other witnesses, Mr. Sewel would have been left alone to finish the trial. He would have been required to cross-examine the defendants and other witnesses and would have given closing arguments. There was no apparent reason why Mr. Sewell could not have completed the case in Ms. Kline's absence.

Regarding the fourth option, the court declined to poll the jury to determine whether they could accommodate a lengthy continuance to January 14th even though both the State and defense urged the court to do so. The court's view was that it would be too much of an imposition to ask the jurors to return after a long recess, and that they would conclude that the defense was to blame for the recess. RP (12/17/13) 75-76. Each of those issues could have been cured with an appropriate instruction to the jury.

Judge Ramsdell gave Ms. Kline time to consult with the appellate division of the prosecutor's office to "make sure that a mistrial is not going to screw things up." After consultation, Ms. Kline said to Judge Ramsdell:

We have talked to people and we still feel that before the court grants a mistrial, we should be asking the jury if they are available to come back on the 14<sup>th</sup> to finish the trial and if there are issues with them coming back, then you know I think the court is in a better position for granting it at that point.

Judge Ramsdell responded in part: “I’m not going to poll the jury on this. I just don’t feel comfortable doing that. . . . So with all due respect to your appellate unit, counsel, I’m going to decline the invitation to poll the jurors and assess whether or not they’re ready, willing and able to come back on January 14.” RP (12/17/13) 75-76.

Regarding the fifth option, the conservative approach would have been to continue with the trial, allow the defense to call Kabede, have him testify, allow the prosecution to conduct some cross examination, and then entertain a motion for a continuance if the prosecutor believed it was still necessary. The prosecutor had substantial fodder for cross-examination following their pre-testimony interview of Mr. Kabede on December 17th. The interview of Mr. Kabede showed that the detectives were well aware of Mr. Kabede’s background, including his involvement in other criminal cases. CP 108. The most reasonable course for the trial judge would have been to proceed with the trial, , have Mr. Kabede testify, and then determine whether the prosecutor needed additional time.

Regarding the sixth option, excluding Berket Kabede’s testimony from the trial, Judge Downing noted that Judge Ramsdell could have excluded the witness. He said: “The Court had the option of excluding the witness. That would have been an option for the court at that time.”

RP (9/3/14) at 38. Superior Court Criminal Rule 4.7, paragraph 7, permits the court to enter such other orders as it deems just under the circumstances if there has been a violation of discovery rules. If the court believed that the defense had not given fair notice of Berket Kabede's testimony, it could have excluded that witness.

All of the options suggested above would have been preferable to declaring a mistrial over the objections of Mr. Ibrahim and the prosecutor. Each option provided a reasonable alternative to declaring a mistrial.

**6. The record does not reflect "manifest necessity" or such extraordinary and striking circumstances that a mistrial was required in the interest of the proper administration of justice.**

The record must reflect the basis upon which the court relied in making the discretionary determination to declare a mistrial. State v. Dykstra, 33 Wash. App. 648, 651, 656 P.2d 1137 (1983). Neither the trial record nor the court's order showed an adequate factual basis for the court's order granting a mistrial. The order set forth no reasons at all for granting a mistrial. It stated, in its entirety:

The Court, without motion from the parties, finds, for all the reasons set forth orally in the record, that a mistrial is justified in this case by manifest necessity and hereby orders a mistrial.

CP 49.

The trial record also does not disclose an adequate basis for the court's decision to discharge the jury. The transcript does show that the court was concerned that, if it granted a 28-day recess so that the prosecutor could take her planned vacation, the jury would conclude that the defense was to blame. RP (12/17/13) at 72. However, both parties asked the court to poll the jury. Ms. Kline suggested that the court either ask the jury whether a longer trial would pose a hardship, or give a cautionary instruction that they were not to infer anything from a recess. RP (12/17/13) at 73.

Mr. Ibrahim's counsel argued that the State could cross-examine Mr. Kabede and be given an opportunity to bring in any rebuttal witnesses, and the trial still could be concluded within the week. RP (12/17/13) 74.

"Although the trial court was not required to expressly find 'manifest necessity,' it is clear that the record must adequately disclose some basis upon which the court determines that the jury necessarily must be discharged." State ex rel. Charles v. Bellingham Mun. Court, 26 Wn. App. 144, 149, 612 P.2d 427 (1980), *citing* Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824 (1978). In Charles v. Bellingham Mun. Court, Ms. Charles was tried on charges of negligent driving and hit-and-run. She was

found not guilty of negligent driving, but the foreman told the court that the jury was unable to reach a verdict on the hit-and-run charge. The city refiled that charge, and Ms. Charles moved to dismiss on the grounds of double jeopardy. The court denied the motion.

The Court of Appeals reversed. It noted that the findings of fact and conclusions of law reflected that the trial court considered only the length of deliberation. The record showed no basis for the court's decision to discharge the jury, so the discharge of the jury operated as an acquittal. Charles v. Bellingham Mun. Court, 26 Wn. App. at 149.

In State v. Browning, 38 Wn. App. 772, 689 P.2d 1108 (1984), the district court declared a mistrial because the prosecutor told the jury that he was dissatisfied with the jury instructions, and explained the instructions to the jury. On appeal, the superior court dismissed the charges. The Court of Appeals affirmed the dismissal. It held that jeopardy had attached in Mr. Browning's trial, and that the record failed to demonstrate the existence of "manifest necessity" or such extraordinary and striking circumstances that a mistrial was required in the interest of the proper administration of justice.

In this case, the record fails to show the existence of "manifest necessity," or such extraordinary and striking circumstances that a mistrial was required in the interest of the proper administration of justice.

A defendant's claim of a violation of double jeopardy raises questions of law and is reviewed de novo. State v. Strine 176 Wn 2d 742, 293 P.3d 1177 (2013)

**B. MATERIAL WITNESS WARRANT AND THE RIGHT TO COMPULSORY PROCESS.**

**1. In the second trial, Judge Downing erred in failing to issue a material witness warrant for Barket Kabede.**

The prosecutor, Mr. Herschkowitz, told Judge Downing that he would call Mr. Kabede as a witness at trial. RP (9/3/14) at 40. He told the judge that he had prepared a material witness warrant for Mr. Kabede. RP (9/3/14) at 40,41. Finally, he told the judge that if he anticipated any problems in securing his testimony, he would present the material witness warrant to the court for signature. RP (9/3/14) at 41. However, the prosecutor neither called Mr. Kabede to testify, as promised, nor did he move the court for a material witness warrant as promised. The prosecutor's failure created a timing problem for the defense. When Mr. Kabede was not called as a State's witness, defense counsel subpoenaed him to appear on September 17th. He failed to honor the subpoena and did not voluntarily appear to testify at trial. When defense counsel moved

for a material witness warrant, the judge said it was too late and denied the motion. RP (9/17/14) at 10. Judge Downing stated: “And I think I would, in light of the timing, be obliged to deny the motion”. RP (9/17/14) at 10, 11. The judge gave no other reasons.

Mr. Kabede was a critical witness for the defense and the listed “victim” in the third count of the Information. Both the defense lawyers and the prosecutor had told Judge Downing the importance of Mr. Kabede’s testimony. He would testify that shooters were not the two charged defendants. CP 53, 74.

In Washington v. Texas , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed 2d 1019 (1967) the court found that the right of compulsory process is a fundamental right that is applicable to the States. It stated:

“The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States. . . . The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury, so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”

Article 1, Section 22 of the Washington State Constitution makes the rights of the accused explicit: “In criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face, to

have compulsory process to compel the attendance of witnesses in his own behalf . . .”

The criminal rules give courts the authority to arrest those individuals who fail to show up to testify in court. CrR 4.10 provides on motion of the defendant the court may issue a warrant for the arrest of a material witness. The warrant shall be issued upon a showing that the testimony of the witness is material and that the witness has refused to obey a lawfully issued subpoena.

In City of Bellevue v. Vigil, 66 Wash App 891, 833 P.2d 445 (1992) the court found that the trial court’s decision to grant or deny a motion for the issuance of a material witness warrant is reviewed for a manifest abuse of discretion. An abuse of discretion exists when the exercise of discretion is “manifestly unreasonable or based on untenable grounds or reasons”. State v. Darden, 145 Wash 2d 612, 41 P.3d 1189 (2001) A material witness warrant is issued when testimony is material and could affect the outcome of the trial. State v. Hartley, 51 Wash App 442, 754 P.2d 131 (1988).

Here, although the prosecutor had promised to call Mr. Kabede as a witness, and had promised to move for a material witness warrant if he had trouble securing Mr. Kabede’s presence at trial, he did neither. Although Mr. Kabede was listed as a “victim” in the Information, he

would have testified that the defendant, Mr. Ibrahim, did not commit the crimes. Mr. Kabede was a critical witness. It was an abuse of discretion for the trial court to deny the motion for a material witness warrant.

C. IT WAS IMPROPER FOR THE STATE TO ADD A THIRD  
COUNT OF ASSAULT 1 AFTER A MISTRIAL.

At the second trial, the State moved to amend the charges to include a third count of Assault 1, related to Berket Kabede and the defense objected. RP (9/3/14) at 39, 42. 44. After a mistrial, the State may not amend the charge to add a count that should have been joined for the first trial. State v. Russell, 101 Wn 2d 349, 678 P.2d 332(1984) Here, the State failed to join the related offense of Assault 1 with Berket Kabede listed as the victim in the first trial. Therefore the State should have been prohibited from amending the information and adding another Assault 1 count in the second trial. It was an abuse of discretion for the court to permit the amendment.

D. SUFFICIENCY OF THE EVIDENCE FOR COUNT 3

**1. The prosecutor failed to call Mr. Kabede as a witness and**

**failed to prove the element of assault that the victim was injured or put in fear of injury.**

Count 3 alleged that Mohamed Ibrahim assaulted Mr. Kabede. Mr. Kabede was not called as a witness by the State. There was no proof that he was actually injured. Nor was there proof that he was placed in fear. The evidence at trial was insufficient to sustain a conviction. The standard for appellate review in determining whether there was sufficient evidence at trial is whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Jefferies, 105 Wn.2d 398, 407, 717 P.2d 722 (1986)

E. THE TRIAL COURT ERRED IN SENTENCING MR. IBRAHIM TO CONSECUTIVE SENTENCES.

**1. The trial judge failed to make findings that the offenses arose from “separate and distinct conduct” and, thus, failed to justify consecutive sentences.**

RCW 9.94A.589(1)(b) provides that a defendant shall be sentenced to consecutive sentences if convicted of two or more serious violent offenses “arising from separate and distinct criminal conduct”. In Judge Madsen’s concurring opinion in State v. Cubias 155 Wn.2d 549, 558, 120 P.3d 929 (2005) she stated: “If this finding is made the

trial court must impose sentences for “serious violent offenses” consecutively. Conversely, absent a finding of separate and distinct conduct the court must impose concurrent sentences unless the court finds other facts that justify an exceptional sentence.” The case law contemplates a finding by the court or jury. Here, Judge Downing made no finding, nor did the jury make a finding, regarding whether the offenses represented separate and distinct conduct.

The failure of either the judge or jury to make a finding is significant because of the prosecutor’s closing argument that Mr. Ibrahim could be convicted using an aiding and abetting theory and a transferred intent theory. Under the prosecutor’s theory, one shot by co-defendant Shire toward Mr. Barnes, was sufficient for Mr. Ibrahim to be convicted of three counts of Assault 1.

It was an abuse of discretion for the trial court to sentence Mr. Ibrahim to consecutive sentences on Counts 1,2, and 3 without making a finding regarding whether the offenses represented separate and distinct conduct. See State v. Price, 103 Wash. App. 845 (2000)

#### F. NOTICE OF THE ELEMENTS OF THE OFFENSE

**1. The defendant’s right to be notified of the nature and cause of the accusation against him was violated when the Fourth**

**Amended Information failed to allege the elements of “aiding and abetting” and “transferred intent”.**

Count 1 of the Fourth Amended Information alleged that Mohamed Ibrahim “with the intent to inflict great bodily harm, did assault Mardillo Barnes with a firearm and force and means likely to produce great bodily harm or death.” Count 2 alleged that Mohamed Ibrahim, with the intent to inflict great bodily harm, did assault Vincent Williams Jr. with a firearm and force and means likely to produce great bodily harm or death. Count 3 alleged that Mohamed Ibrahim with the intent to inflict great bodily harm, did assault Berket Kabede with a firearm.

The charges said nothing about Mr. Ibrahim acting as an accomplice. The Fourth Amended Information did not inform him that he could be found guilty if, with knowledge that it will promote or facilitate the commission of the crime, he either, solicits, commands, encourages or requests the other person to commit the crime, or aids or agrees to aid the other person in planning or committing the crime. None of those elements are contained in the information.

In addition, the charges said nothing about “transferred intent”. The Fourth Amended Information failed to inform the Mr.

Ibrahim that if his intent was to harm a third person, for example, whose name was not mentioned in the Information, the defendant could still be convicted of Counts 1, 2, or 3. CP 246.

Nor did the charging document inform Mr. Ibrahim that he could be convicted of aiding and abetting an Assault 1 even though the person he intended to aid and abet (the principal) did not intend to commit an Assault 1 because the principal did not intend to inflict great bodily harm.

The charges could have alleged that Mr. Ibrahim aided and abetted Mr. Shire in assaulting the three victims, but it didn't. The Fourth Amended Information could have alleged that if Mr. Ibrahim intended to assault another person other than the person listed as the victim in the charge, he could still be convicted based on a "transferred intent" theory, but it didn't. Instead, the information was silent on those "elements" of the offense. It failed to tell Mr. Ibrahim, before trial, that the State intended to prove the case with an "aiding and abetting" theory and a "transferred intent" theory. The Fourth Amended Information did not state facts that would have put the defendant on notice that those theories would be used at trial.

The United States Constitution provides that "in all criminal prosecutions, the accused shall . . . be informed of the nature

and cause of the accusation.” U.S. Const. amend. VI. The Washington State Constitution contains a similar provision: “In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him (and) to have a copy thereof.” Const. art. I, Section 22. A charging document must include all essential elements of a crime. State v. Taylor, 140 Wn. 2d 229, 996 P.2d 571 (2000) This “essential elements rule” is grounded in the federal and State constitutional requirements that criminal defendants be informed of the accusations against them. In Washington, a charging document must allege facts which support every element of the offense and must adequately identify the crime charged. State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007); State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989)

On September 17<sup>th</sup>, 2014, at the second trial, the prosecutor gave a closing argument presenting a new theory of the case, the “transferred intent” theory. The prosecutor told the jury: “When the defendant acted with the intent to assault one person, another person is assaulted as a result, the defendant is also deemed to have acted with the intent to assault that person. . . . So what does that mean, more detailed. It doesn’t matter which three, which of the three you believe the defendant was intending to harm. It doesn’t

matter.” RP (9/17/14) at 54. The prosecutor also argued that the defendant could be convicted even though he did not actually physically assault Mr. Barnes, Mr. Williams, or Mr. Kabede. RP (September 17, 2014) 51.

The manner of committing a crime is an element and the defendant must be informed of this element in the information in order to prepare a proper defense. State v. Carothers, 84 Wn.2d 256, 263, 525 P.2d 731 (1974) The legislature spelled out in RCW 9A.08.020 the specific elements that must be proved for one to be criminally liable as an accomplice. Those elements include that the defendant “with knowledge that it will promote or facilitate the commission of the crime, he solicits, commands, encourages, or requests such other person to commit it”. In this case, the court instructed the jury on both accomplice liability and transferred intent, CP 246, 247, yet the Amended Information mentioned neither.

When the legislature determines that “transferred intent” can be the basis of a conviction, it spells that out as an element of the offense. See, for example, RCW 9A.32.030, the Murder in the First Degree statute. (A person is guilty of Murder 1 when: “With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person . . .”) There,

transferred intent becomes an element of the crime which the State must plead and prove.

Although there are lines of cases stating that the charging document does not need to contain notice of an aiding and abetting theory, (see State v. Rodriguez 78 Wn App 269, 899 P.2d 871 (1995), nor of a “transferred intent” theory (see State v. Clinton, 25 Wash. App. 400, 606 P.2d 1240 (1980) those decisions gloss over the constitutional requirement of notice. Providing notice is required by both the federal and State constitutions.

This case should be distinguished from both Rodriguez and Clinton, supra. Here, the instructions given to the jury and the argument made by the prosecutor, created such complexity that the defendant was not fairly notified in the charging document of what the State could prove and still obtain a conviction. When the instructions and arguments are so convoluted, the defendant does not have the notice of the nature and cause of the accusation that the constitution requires.

Mr. Shire, the co-defendant, was found “not guilty” of each of the Assault 1 charges in counts 1,2, and 3. RP (9/18/14) 4. By contrast, Mr. Ibrahim was found guilty of those same counts, counts 1,2, and 3. Instruction number 8, the “to convict” instruction (CP 248)

permitted Mr. Ibrahim to be convicted even though it was Mr. Shire who assaulted Mardillo Barnes and even though Mr. Shire did not have the intent to inflict great bodily harm. If Mr. Ibrahim had the intent to inflict great bodily harm, but did not actually harm Mr. Barnes, he could still be convicted even though Mr. Shire's intent was only to scare and not hurt Barnes. Further, pursuant to a "transferred intent" theory, Mr. Ibrahim could be convicted even though neither Mr. Shire nor Mr. Ibrahim intended any harm to Mr. Barnes or any other named "victim". (See Instruction number 6, paragraph 1, the transferred intent instruction) CP 246. The permutations of elements and facts that could be used to obtain a conviction are so numerous that the Fourth Amended Information failed to give real notice to Mr. Ibrahim of the nature and cause of the accusations.

Failure of the Fourth Amended Information to notify the defendant, before trial, of the State's reliance on an "aiding and abetting" theory and a "transferred intent" theory, violated his right to be informed of the nature and cause of the accusation against him.

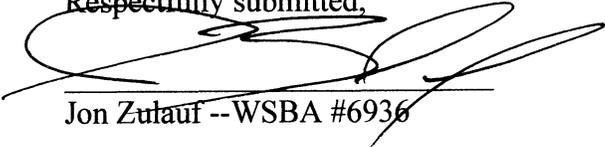
A challenge to the sufficiency of a charging document is reviewed de novo. State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007)

E. CONCLUSION

Mr. Ibrahim asks this court to reverse his conviction on all counts and dismiss the charges with prejudice because of a violation of his double jeopardy rights. If the case is not dismissed, Mr. Ibrahim asks the court to reverse his conviction and remand for a new trial because of the trial court's violation of his right to compulsory process. Mr. Ibrahim asks this court to reverse his conviction on Count 3 because of the improper amendment of the information following the mistrial. Mr. Ibrahim asks this court to reverse his conviction on Count 3 because of the insufficiency of the evidence on that count. Mr. Ibrahim asks this court to remand for a new sentencing with direction to the trial court to impose sentences on Counts 1, 2 and 3 to run concurrently. Finally, Mr. Ibrahim asks this court to reverse his conviction on Counts 1, 2, and 3 and remand for a new trial because of the State's failure to adequately notify him in the charging document of the elements of the crime.

DATED this 19 day of Nov., 2015.

Respectfully submitted,

  
Jon Zulauf --WSBA #6936

Zulauf and Chambliss  
Attorney for Mohamed Ibrahim

**APPENDIX**

**A**

**COURT ORDERS CONTINUING THE TRIAL DATE**

**CASE # 13-1-09790-3 SEA**

**SUB NUMBERS**

**30, 32, 34, 37, 40, 43, 44, 48**

**FILED**  
KING COUNTY, WASHINGTON  
OCT 28 2013  
SUPERIOR COURT CLERK

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
KING COUNTY**

STATE OF WASHINGTON  
Plaintiff/Petitioner

vs

IBRAHIM, MOHAMED  
Defendant/Respondent  
CCN:1864303

NO. 13-1-09790-3 SEA

**ORDER CONTINUING TRIAL**

(ORCTD)  
(Clerk's Action Required)

This matter came before the court for consideration of a motion for continuance brought by

Plaintiff  Defendant  The Court

It is hereby ORDERED that the trial, currently set for 10/28/2013 is continued to 10/29/2013.

Upon agreement of the parties [CrR 3.3(f)(1)]  Required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

Plaintiff's counsel in trial;  No judicial availability;  Defense counsel in trial;

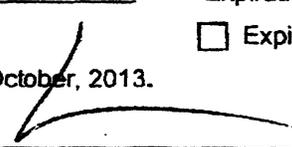
Other: \_\_\_\_\_

It is further ORDERED:

Omnibus hearing date is: \_\_\_\_\_ Expiration date is: 11/28/2013

Expiration date remains the same

DONE IN OPEN COURT this 28 day of October, 2013.

  
\_\_\_\_\_  
Judge Ronald Kessler

Approved for entry:

\_\_\_\_\_  
Deputy Prosecuting Attorney WSBA No. \_\_\_\_\_  
I agree to the continuance:

\_\_\_\_\_  
Attorney for Defendant WSBA No. \_\_\_\_\_

\_\_\_\_\_  
Defendant (signature required only for agreed continuance)

I am fluent in the \_\_\_\_\_ language and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

\_\_\_\_\_  
King County, Washington  
Interpreter

**FILED**  
KING COUNTY, WASHINGTON

OCT 29 2013

**SUPERIOR COURT CLERK**

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
KING COUNTY**

STATE OF WASHINGTON  
Plaintiff/Petitioner

vs

IBRAHIM, MOHAMED  
Defendant/Respondent  
CCN:1864303

NO. 13-1-09790-3 SEA

**ORDER CONTINUING TRIAL**

(ORCTD)  
(Clerk's Action Required)

This matter came before the court for consideration of a motion for continuance brought by

Plaintiff  Defendant  The Court

It is hereby ORDERED that the trial, currently set for 10/29/2013 is continued to 10/30/2013.

Upon agreement of the parties [CrR 3.3(f)(1)]  Required in the administration of justice  
[CrR 3.3(f)(2)] for the following reason:

Plaintiff's counsel in trial;  No judicial availability;  Defense counsel in trial;

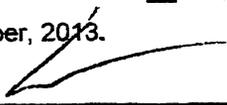
Other: \_\_\_\_\_

It is further ORDERED:

Omnibus hearing date is: \_\_\_\_\_ Expiration date is: 11/29/2013

Expiration date remains the same

DONE IN OPEN COURT this 28 day of October, 2013.

  
\_\_\_\_\_  
Judge Ronald Kessler

Approved for entry:

\_\_\_\_\_  
Deputy Prosecuting Attorney WSBA No.

\_\_\_\_\_  
Attorney for Defendant WSBA No.

I agree to the continuance:

\_\_\_\_\_  
Defendant (signature required only for agreed continuance)

I am fluent in the \_\_\_\_\_ language and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

\_\_\_\_\_  
King County, Washington  
Interpreter

FILED  
KING COUNTY, WASHINGTON

OCT 30 2013

SUPERIOR COURT CLERK

SUPERIOR COURT OF THE STATE OF WASHINGTON  
KING COUNTY

STATE OF WASHINGTON  
Plaintiff/Petitioner

vs

IBRAHIM, MOHAMED  
Defendant/Respondent  
CCN:1864303

NO. 13-1-09790-3 SEA

ORDER CONTINUING TRIAL

(ORCTD)  
(Clerk's Action Required)

This matter came before the court for consideration of a motion for continuance brought by

Plaintiff  Defendant  The Court

It is hereby ORDERED that the trial, currently set for 10/30/2013 is continued to 10/31/2013.

Upon agreement of the parties [CrR 3.3(f)(1)]  Required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

Plaintiff's counsel in trial;  No judicial availability;  Defense counsel in trial;

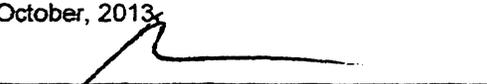
Other: \_\_\_\_\_

It is further ORDERED:

Omnibus hearing date is: \_\_\_\_\_ Expiration date is: 11/30/2013

Expiration date remains the same

DONE IN OPEN COURT this 29 day of October, 2013.

  
\_\_\_\_\_  
Judge Ronald Kessler

Approved for entry:

\_\_\_\_\_  
Deputy Prosecuting Attorney WSBA No.

\_\_\_\_\_  
Attorney for Defendant WSBA No.

I agree to the continuance:

\_\_\_\_\_  
Defendant (signature required only for agreed continuance)

I am fluent in the \_\_\_\_\_ language and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

\_\_\_\_\_  
Interpreter King County, Washington

**FILED**  
KING COUNTY, WASHINGTON  
OCT 31 2013  
SUPERIOR COURT CLERK

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
KING COUNTY**

STATE OF WASHINGTON  
Plaintiff/Petitioner

vs

IBRAHIM, MOHAMED  
Defendant/Respondent  
CCN:1864303

NO. 13-1-09790-3 SEA

**ORDER CONTINUING TRIAL**

(ORCTD)  
(Clerk's Action Required)

This matter came before the court for consideration of a motion for continuance brought by

- Plaintiff     Defendant     The Court

It is hereby ORDERED that the trial, currently set for 10/31/2013 is continued to 11/04/2013.

- Upon agreement of the parties [CrR 3.3(f)(1)]     Required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

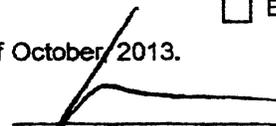
- Plaintiff's counsel in trial;     No judicial availability;     Defense counsel in trial;

Other: \_\_\_\_\_

It is further ORDERED:

- Omnibus hearing date is: \_\_\_\_\_    Expiration date is: 12/04/2013  
 Expiration date remains the same

DONE IN OPEN COURT this 30 day of October, 2013.

  
\_\_\_\_\_  
Judge Ronald Kessler

Approved for entry:

\_\_\_\_\_  
Deputy Prosecuting Attorney WSBA No.  
I agree to the continuance:

\_\_\_\_\_  
Attorney for Defendant WSBA No

\_\_\_\_\_  
Defendant (signature required only for agreed continuance)

I am fluent in the \_\_\_\_\_ language and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

\_\_\_\_\_  
King County, Washington  
Interpreter

**FILED**  
KING COUNTY, WASHINGTON  
NOV 04 2013  
SEA  
SUPERIOR COURT CLERK

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
KING COUNTY**

STATE OF WASHINGTON  
Plaintiff/Petitioner

vs

IBRAHIM, MOHAMED  
Defendant/Respondent  
CCN:1864303

NO. 13-1-09790-3 SEA

**ORDER CONTINUING TRIAL**

(ORCTD)  
(Clerk's Action Required)

This matter came before the court for consideration of a motion for continuance brought by

Plaintiff  Defendant  The Court

It is hereby ORDERED that the trial, currently set for 11/04/2013 is continued to 11/05/2013.

Upon agreement of the parties [CrR 3.3(f)(1)]  Required in the administration of justice  
[CrR 3.3(f)(2)] for the following reason:

Plaintiff's counsel in trial;  No judicial availability;  Defense counsel in trial;

Other: \_\_\_\_\_

It is further ORDERED:

Omnibus hearing date is: \_\_\_\_\_ Expiration date is: 12/05/2013  
 Expiration date remains the same

DONE IN OPEN COURT this 1 day of November, 2013.

\_\_\_\_\_  
Judge Ronald Kessler

Approved for entry:

\_\_\_\_\_  
Deputy Prosecuting Attorney WSBA No. \_\_\_\_\_  
I agree to the continuance:

\_\_\_\_\_  
Attorney for Defendant WSBA No. \_\_\_\_\_

\_\_\_\_\_  
Defendant (signature required only for agreed continuance)

I am fluent in the \_\_\_\_\_ language and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

\_\_\_\_\_  
Interpreter King County, Washington

**FILED**  
KING COUNTY, WASHINGTON

NOV 07 2013

SUPERIOR COURT CLERK

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
KING COUNTY**

STATE OF WASHINGTON  
Plaintiff/Petitioner

vs

IBRAHIM, MOHAMED  
Defendant/Respondent  
CCN:1864303

NO. 13-1-09790-3 SEA

**ORDER CONTINUING TRIAL**

(ORCTD)  
(Clerk's Action Required)

This matter came before the court for consideration of a motion for continuance brought by

Plaintiff  Defendant  The Court

It is hereby ORDERED that the trial, currently set for 11/06/2013 is continued to 11/07/2013.

Upon agreement of the parties [CrR 3.3(f)(1)]  Required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

Plaintiff's counsel in trial;  No judicial availability;  Defense counsel in trial;

Other: \_\_\_\_\_

It is further ORDERED:

Omnibus hearing date is: \_\_\_\_\_ Expiration date is: 12/07/2013

Expiration date remains the same

DONE IN OPEN COURT this 6 day of November, 2013.

\_\_\_\_\_  
Judge Ronald Kessler

Approved for entry:

\_\_\_\_\_  
Deputy Prosecuting Attorney WSBA No.

\_\_\_\_\_  
Attorney for Defendant WSBA No.

I agree to the continuance:

\_\_\_\_\_  
Defendant (signature required only for agreed continuance)

I am fluent in the \_\_\_\_\_ language and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

\_\_\_\_\_  
King County, Washington  
Interpreter

**FILED**  
KING COUNTY, WASHINGTON

NOV 14 2013

SEA  
SUPERIOR COURT CLERK

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
KING COUNTY**

STATE OF WASHINGTON  
Plaintiff/Petitioner

vs

IBRAHIM, MOHAMED  
Defendant/Respondent  
CCN:1864303

NO. 13-1-09790-3 SEA

**ORDER CONTINUING TRIAL**

(ORCTD)  
(Clerk's Action Required)

This matter came before the court for consideration of a motion for continuance brought by

Plaintiff     Defendant     The Court

It is hereby ORDERED that the trial, currently set for 11/12/2013 is continued to 11/13/2013.

Upon agreement of the parties [CrR 3.3(f)(1)]     Required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

Plaintiff's counsel in trial;     No judicial availability;     Defense counsel in trial;

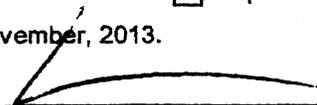
Other: \_\_\_\_\_

It is further ORDERED:

Omnibus hearing date is: \_\_\_\_\_    Expiration date is: 12/13/2013

Expiration date remains the same

DONE IN OPEN COURT this 13 day of November, 2013.

  
\_\_\_\_\_  
Judge Ronald Kessler

Approved for entry:

\_\_\_\_\_  
Deputy Prosecuting Attorney WSBA No.

\_\_\_\_\_  
Attorney for Defendant WSBA No

I agree to the continuance:

\_\_\_\_\_  
Defendant (signature required only for agreed continuance)

I am fluent in the \_\_\_\_\_ language and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

\_\_\_\_\_  
King County, Washington  
Interpreter

**FILED**  
KING COUNTY, WASHINGTON  
NOV 14 2013  
SEA  
SUPERIOR COURT CLERK

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
KING COUNTY**

STATE OF WASHINGTON  
Plaintiff/Petitioner

vs

IBRAHIM, MOHAMED  
Defendant/Respondent  
CCN:1864303

NO. 13-1-09790-3 SEA

**ORDER CONTINUING TRIAL**

(ORCTD)  
(Clerk's Action Required)

This matter came before the court for consideration of a motion for continuance brought by

Plaintiff  Defendant  The Court

It is hereby ORDERED that the trial, currently set for 11/13/2013 is continued to 11/18/2013.

Upon agreement of the parties [CrR 3.3(f)(1)]  Required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

Plaintiff's counsel in trial;  No judicial availability;  Defense counsel in trial;

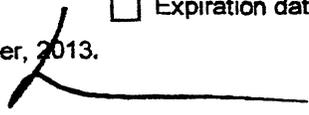
Other: \_\_\_\_\_

It is further ORDERED:

Omnibus hearing date is: \_\_\_\_\_ Expiration date is: 12/18/2013

Expiration date remains the same

DONE IN OPEN COURT this 14 day of November, 2013.

  
\_\_\_\_\_  
Judge Ronald Kessler

Approved for entry:

\_\_\_\_\_  
Deputy Prosecuting Attorney WSBA No. \_\_\_\_\_  
I agree to the continuance:

\_\_\_\_\_  
Attorney for Defendant WSBA No. \_\_\_\_\_

\_\_\_\_\_  
Defendant (signature required only for agreed continuance)

I am fluent in the \_\_\_\_\_ language and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

\_\_\_\_\_  
Interpreter King County, Washington

**FILED**  
KING COUNTY, WASHINGTON

NOV 20 2013

SUPERIOR COURT CLERK

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
KING COUNTY**

STATE OF WASHINGTON  
Plaintiff/Petitioner

vs

IBRAHIM, MOHAMED  
Defendant/Respondent  
CCN:1864303

NO. 13-1-09790-3 SEA

**ORDER CONTINUING TRIAL**

(ORCTD)  
(Clerk's Action Required)

This matter came before the court for consideration of a motion for continuance brought by

Plaintiff  Defendant  The Court

It is hereby ORDERED that the trial, currently set for 11/19/2013 is continued to 11/20/2013.

Upon agreement of the parties [CrR 3.3(f)(1)]  Required in the administration of justice  
[CrR 3.3(f)(2)] for the following reason:

Plaintiff's counsel in trial;  No judicial availability;  Defense counsel in trial;

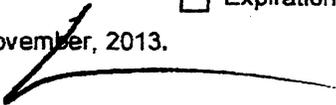
Other: DRA on medical leave

It is further ORDERED:

Omnibus hearing date is: \_\_\_\_\_ Expiration date is: 12/20/2013

Expiration date remains the same

DONE IN OPEN COURT this 20 day of November, 2013.

  
\_\_\_\_\_  
Judge Ronald Kessler

Approved for entry:

\_\_\_\_\_  
Deputy Prosecuting Attorney WSBA No.

\_\_\_\_\_  
Attorney for Defendant WSBA No.

I agree to the continuance:

\_\_\_\_\_  
Defendant (signature required only for agreed continuance)

I am fluent in the \_\_\_\_\_ language and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

\_\_\_\_\_  
King County, Washington  
Interpreter

**# 71532-1-I**

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the Appellant's (Mohamed Ibrahim's) brief, was filed in the Court of Appeals, Division 1, under cause number 72753-2-1, and a true copy was delivered to the Respondent King County Prosecuting Attorney and mailed with first class postage prepaid to the Appellant, Mohamed Ibrahim.

Dated November 19, 2015

A handwritten signature in black ink, appearing to read 'Jon Zulauf', is written over a horizontal line.

**Jon Zulauf #6936  
Attorney for Appellant**