

FILED
COURT OF APPEALS

10 JUN 26 AM 11:31

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BY *[Signature]*

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

39420-1

No. 06-1-03531-5

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

Aquarius Tyree Walker
(your name)

Appellant.

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

Additional Ground 1

See attached Appendix A. Judicial Misconduct

PH 11 178 1710

Statement of Additional Grounds

Additional Ground 2

See Attached Appendix B. Failure to preserve Potentially Exculpatory Evidence.

Additional Ground 3

See Attached Appendix C. Emergency Stay for Interlocutory Discretionary Review.

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

Date: 7-26-10

Signature: Aquarius Walker

CERTIFICATION OF SERVICE

I certify that 1 copy of _____ emailed to
to A. Grannis
& B. Ulsan
7/30/10 KAC
Date Signed

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Additional Ground 4

Hostility from the Judge and Prosecutors toward my defense Counsel Prejudiced my right to a fair trial. The record shows the judge actually yelling very loudly (Shut up) to my lawyer. It also shows my lawyer and the prosecutor arguing time and time again over a personal lawsuit between the two of them. My trial should never had anything about that lawsuit at all. It brought hostility throughout my whole trial. My lawyer even cursed at the judge during an argument with her and the judge. If my lawyer shows no respect for the judge to the point she decides to curse at the judge. The hostility is way to high between the two. The result is prejudice to me. In re Garrett #37293-9-I (1997).

Additional Ground 5

Ineffective Assistance of Counsel - Lawyer failed to ask for self defense against Multiple Attackers. The record shows by testimony from multiple witnesses that there were multiple upon multiple Samoan pursuers of myself and my friends. Bad faith by the Lakewood Police officers losing the contact information list of 75 to 100 people prejudiced me do to the fact that if they kept that list these missing Samoan pursuers were on that list, And if I recieved an exceptional low sentence for one Samoan that was on the list. It would have showed the size

1 and also how many there were that were in pursuit and
2 engaged in this scene. It shows the reason for my actions
3 were justified if these summons could have been contacted
4 and their involvement was actually investigated by the
5 Lakewood Police Department.

6 ② My Lawyer Engaged in Questioning possible jurors
7 during Voir Dire with questions about the actual events
8 in the case, Against my wishes. She informed me that the
9 prosecutor was not doing Voir Dire correctly by Asking
10 the potential jurors questions about my case. I told
11 her that if that was true then why would she do the
12 same thing as him, because I did not want my trial
13 done wrong. I wanted a fair trial, she should not
14 do that. She said if the judge was gonna let the prosecutor
15 do that she could do it. If Voir Dire was not supposed
16 to be done like that she should not have been done like that.
17 Two wrongs do not make it right. At the end of Voir Dire
18 The prosecutor asked the jurors. How many of you know
19 what this case is about, all the jurors raised their hands.
20 Their minds were somewhat made up just from Voir Dire. Very
21 Prejudicial. 80 to the first impression makes up 90%
22 of ones Decision.

23 ③ Lawyer failed to object to the prosecutors Continuous
24 Content that I admitted to shooting my friend in
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1 the head.

2 ④ During toward the end of trial my lawyer started trying
3 to argue issues about obtaining a confession from me during
4 interrogations by officers at the police station. The judge had
5 to stop my lawyer and tell her she was supposed to argue
6 those issues during pretrial motions and arguments. I was
7 prejudiced, because that cannot be considered one of her
8 tactical strategies. A confession is a very important issue in
9 a murder case. So if my confession was never argued at the
10 proper time which was pre trial arguments it became
11 meritless and pretty much canceled out.

12 Additional Ground 6

13
14 Conflict of Interest - There was a lawsuit between my
15 lawyer and my prosecutor. This lawsuit involved actually the
16 prosecutor's office. My prosecutor was a main issue of this
17 lawsuit though which is why it became very personal for
18 the both of them. The conflict was very obvious prior to
19 trial between the two in news paper articles as well as
20 the judge pulling the two attorneys being brought into
21 the judge's chambers asking the two attorneys could they
22 be professional during the trial. I was insured by my attorney
23 that the lawsuit would not come up at all during my trial.
24 As soon as the trial started the lawsuit and hostility

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2 started and never stopped. The conflict was so severe
3 that my lawyer focused on her differences with the prosecutor
4 and lost focus on being an effective counsel for me. It was
5 definitely a focus of the judge because she had to keep
6 repeatedly telling the two about the noticable dislike for one
7 another through the actions and behavior throughout trial. The
8 lawsuit definitely prejudiced my trial. It kept my attorney
9 from performing to her usual adequate and competent level.

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25 Date 7-26-10

Signature. Aquarius Walker
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6 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY**

7 STATE OF WASHINGTON,

8 Plaintiff,

9 vs

10 AQUARIUS WALKER,

11 Defendant.

NO. 06-1-03531-5

DEFENDANT'S MOTION TO
DISMISS – JUDICIAL
MISCONDUCT

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14 FACTS RELATED TO MOTION

15 This matter was assigned to this court for trial on March 16, 2009. After assignment,
16 the court invited the prosecutor and defense counsel into chambers. The court informed the
17 parties of its awareness that the attorneys had clashed in the past. The court stated its opinion
18 that the attorneys did not like each other and then queried if the attorneys could be civil during
19 the trial. The attorneys assured the court that they could do so.

20 Throughout the trial, the court sua sponte repeatedly has raised the issue of the
21 attorney's conduct. This is so even when the attorneys have not raised issues about opposing
22 counsel's conduct.

23
24 On a recent day in court, defense counsel attempted to raise an objection regarding the
25 prosecutor's disparagement of defense counsel in front of the jury. This occurred after the

DEFENDANT'S MOTION
TO DISMISS -- JUDICIAL
CONDUCT

COPY
Page 1 of 13

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1 prosecutor objected to a question that defense counsel asked on cross-examination. The
2 prosecutor made an objection which informed the jury of the prosecutor's opinion that defense
3 counsel had violated an order in limine. The jury was excused. When defense counsel
4 attempted to make the objection, the court interrupted her and yelled at her to "shut up." The
5 court then proceeded to berate counsel for her objection and referred again to the court's
6 perception that the attorneys appear to her to not like each other. Defense counsel attempted to
7 explain her objection based on the legal rule that the prosecutor may not disparage defense
8 counsel before the jury. The trial court refused to respond to the merits of the objection and
9 instead informed defense counsel that perhaps she would be found ineffective on appeal. When
10 defense counsel queried whether the court believed she had been ineffective, the court stated
11 that perhaps appellate counsel would argue and the court of appeals might so find.
12

13 Defense counsel asserted that she had not said anything derogatory about the prosecutor
14 in open court. The court could not point to any comments but, as has been true throughout the
15 case, instead alluded to nuances and innuendo in questions, etc.

16 The court also stated that it did not want to hear any more comments about opposing
17 counsel.

18 The court never considered the merits of defense counsel's objection or even required
19 the prosecutor to respond.

20 On April 22, 2009, an individual named Velma Stewart contacted defense counsel to
21 inform her that the court had made comments about the attorneys while in the 11th floor lunch
22 room. The court reportedly stated to an attorney that "Neeb and Corey should not be allowed
23 on the same planet." Other statements also were made about the court's opinion regarding the
24 attorneys. Jurors sometimes eat on the 11th floor lunchroom and it is likely that some of them
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1 were present in the lunchroom at the time of the court's statements and heard them. According
2 to the witness, the comments were not made in a whisper and were clearly audible to other
3 people in the lunchroom.

4 On another occasion defense counsel objected to the police officer witness's repeated
5 use of the term "crime scene." Defense made this objection in good faith and for the reason
6 that the use of the term "crime scene" is prejudicial to the defendant. This is especially so
7 because this is a self-defense case where the defendant contends that no crime occurred. The
8 repeated use of the term "crime scene" reinforces to the jury that the police viewed the location
9 as a place where a crime occurred. Instead of simply overruling the objection, the trial court
10 commented on the evidence by telling the jury and counsel that the jury would not determine
11 whether this was a "crime scene" and therefore that the use of the term "crime scene" was
12 perfectly proper.
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16 LAW AND ARGUMENT

17 Trial before a fair and impartial judge is a fundamental right guaranteed by the Due
18 Process Clause. * Ward v. Village of Monroeville, 409 U.S. 57, 34 L.Ed.2d 267, 93 S.Ct. 80
19 (1972). The Washington Supreme Court likewise has stated:

20 The principle of impartiality, disinterestedness, and fairness on
21 the part of the judge is as old as history of courts; in fact, the
22 administration of justice through the courts is based upon this principle.

23 Milwaukee Railroad v. Human Rights Commission, 87 Wn.2d 802, 808, 557 P.2d 307 (1976).
24
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1 Moreover the Washington Supreme Court has held: "The fundamental nature of this
2 right is demonstrated by the fact that not even the appearance of bias is tolerated." Daye v.
3 Attorney General of the State of New York, 696 F.2d 182, 196-97 (2d Cir. 1982) (en banc).

4 Fairness, of course, requires an absence of actual bias in the trial of cases. But our
5 system of law has always endeavored to prevent even the probability of unfairness . . . [J]ustice
6 must satisfy the appearance of justice." In re Murchison, 349 U.S. 133, 136, 99 L.Ed.2d 942,
7 75 S.Ct. 523 (1955) (quoting Offcutt v. United States, 348 U.S. 11, 14, 99 L.Ed.11, 75 S.Ct. 11
8 (1954).

9
10 When the issue is raised on appeal, a new trial *must* be granted whenever there is cause
11 for suspicion that the trial judge was unfair or the judge's impartiality might reasonably be
12 questioned. Diimmel v. Campbell, 68 Wn.2d 697, 414 P.2d 1022 (1966); Brister v. Tacoma
13 City Council, 27 Wn.App. 474, 486, 617 P.2d 1156 (1976); Canon 3(D)(1)(a).

14 Where the judge's impartiality is hostility defense counsel, Due Process may be
15 violated even if the judge's bias is not communicated to the jury, Walberg v. Israel, 766 f.2d
16 1071, 1076 (7th Cir. 1985); United States v. Holland, 655 F.2d 44, 47 (5th Cir. 1981); Bell v.
17 Chandler, 569 F.2d 557 (10th Cir. 1978). Such hostility may in fact prevent the defendant from
18 receiving effective assistance of counsel. Walberg v. Israel, *supra*.

19
20 A judge's conduct justifies a new trial "only if the record shows actual bias or leaves an
21 abiding impression that the jury perceived an appearance of advocacy or partiality." U.S. v.
22 Laurins, 857 F.2d 529, 537, (9th Cir. 1988). Litigants are entitled to a trial before a judge who
23 is detached, fair and impartial. Ward v. Westland Plastics, Inc., 651 F.2d 1266, 1271 (9th Cir.
24 1980). A trial court commits reversible error when it expresses its opinion on an ultimate issue
25 of fact in front of the jury *or it argues for one of the parties*. Handgards, Inc. v. Ethicon, Inc.,

DEFENDANT'S MOTION
TO DISMISS -- JUDICIAL
CONDUCT

1 743 F.2d 1282, 1289 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190, 105 S. Ct. 963, 83 L. Ed. 2d
2 968 (1985); see Maheu v. Hughes Tool Co., 569 F.2d 459, 471-72 (9th Cir. 1978).

3 In the instant case, for the reasons set forth below, the defendant asks this court to
4 dismiss this case at this time or in the alternative to order a mistrial.

5
6 1. THIS COURT SHOULD DISMISS THIS CASE WHERE JUDICIAL CONDUCT
HAS COMPROMISED DEFENSE COUNSEL'S ABILITY TO REPRESENT HER CLIENT.

7 The defendant's right to counsel is guaranteed the right to counsel. This right springs
8 from the Sixth Amendment to the federal constitution ("The accused shall enjoy the right to . . .
9 the assistance of counsel for his defense" and from article I, section 22 of the Washington
10 Constitution ("The accused shall have the right to appear and defend in person, or by counsel . .
11 .").

12
13 In this case, defense counsel was attempting to argue the impropriety (outside the
14 presence of the jury) of the content of the prosecutor's objection in front of the jury to the effect
15 that the evidence which defense counsel sought to admit had been covered by a motion in
16 limine and that he therefore was surprised that counsel would go into that area. The prosecutor
17 instead of making a simple objection instead wanted to convey to the jury his opinion that
18 defense counsel is incompetent at best and deceitful and unethical at worst. When defense
19 counsel tried to make the her argument, she was interrupted by the judge who in fact yelled at
20 her to "shut up." The trial court then berated counsel for attacking the prosecutor, went into a
21 litany about how the court knew that the attorneys held animosity toward each other, and how
22 defense counsel might be found to be effective. When defense counsel informed the court that
23 she needed to withdraw if the court believe she was ineffective, the court informed her that an
24 appellate attorney might raise that issue on appeal. This outburst was entirely unrelated to the
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DEFENDANT'S MOTION
TO DISMISS -- JUDICIAL
CONDUCT

1 merits of the argument that defense counsel was attempting to raise. Although defense counsel
2 eventually succeeded in making brief argument on the record, the trial court did not even ask
3 the state to respond to it. The trial court did not ever consider the merits of the argument.

4 The trial court thus has prevented defense counsel from making at least one legitimate
5 substantive argument regarding prosecutorial misconduct. By failing to even require a
6 response from the state, the trial court has created the appearance of favor to the prosecutor and
7 contempt for defense counsel.

8 The trial court's action, coupled with the trial court's other comments about the
9 attorneys, have undermined the attorney client relationship. These comments have raised
10 issues that counsel must deal with and that counsel cannot deal with adequately during the flow
11 of trial. Nevertheless, the court's comments have left the defendant at time upset, distraught
12 and unable to assist in his own defense. For example, the trial court's speculation that an issue
13 on appeal would be whether defense counsel had been ineffective raises a major issue for the
14 attorney - client relationship. The relationship of attorney-client, especially in a murder
15 prosecution where the stakes are high, requires that the attorney and client work together and
16 that they trust each other. The client must have confidence in the attorney's ability and
17 judgment to make objections and to make other tactical decisions. The trial court's comments
18 have naturally created the impression that either the trial court does not think much of defense
19 counsel's representation in this case or else that the trial court has some bias against defense
20 counsel. The trial court's outburst ("shut up") and other statements have adversely affected the
21 attorney - client relationship in this case.
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1 2. THIS COURT'S OTHER COMMENTS AND ALLEGATIONS OF
2 MISCONDUCT ALSO HAVE COMPROMISED DEFENSE COUNSEL'S ABILITY TO
3 REPRESENT HER CLIENT.

4 As noted in the statement of facts, the trial court has accused counsel of improper
5 conduct for matters that reportedly occurred when the court was in chambers. The trial court 's
6 general comments about matters apparently reported to the court by an unidentified party
7 concern defense counsel because defense counsel cannot respond to the merits without
8 knowing exactly what was reported to the court and by whom.

9 In addition, although defense counsel believes that she has not made a single derogatory
10 comment about the prosecutor in front of the jury, the trial court repeatedly has made
11 comments to the effect that her animosity toward the prosecutor has been apparent through
12 nuances and innuendo. Defense counsel has not ever intended to disparage the prosecutor in
13 any way before the jury. Defense counsel cannot recall a single such comment. Likewise
14 defense counsel has not made personal attacks on the prosecutor during any court proceedings.
15 There is a substantive distinction between making legitimate arguments regarding prosecutorial
16 misconduct and making unwarranted purely personal attacks on the deputy prosecutor.
17

18 In this case, defense counsel submits that the trial court's extraordinary and repeated
19 comments regarding the court's opinions on how the parties are getting along coupled with the
20 trial court's allegations of misconduct when the court is not in session are depriving the
21 defendant of his Due Process rights as well as undermining his right to counsel.

22 It is clear that the court believes whatever it hears from the unknown source about the
23 out of court conduct of counsel. The court's comments on the record regarding such matters
24 compromise the attorney-client relationship. Obviously a defendant has expectations that the
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1 trial court will dispassionately and impartially preside over his case. When the trial court
2 focuses on the issues noted above then the defendant perceives that the trial court is more
3 focused on personalities than on his case. The defendant perceives that the trial court has
4 concluded that his counsel has engaged in misconduct and perhaps has even been ineffective in
5 her representation of him. The trial court's actions thus undermine the defendant's confidence
6 in counsel's judgment and action.

7
8 3. THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE
EVIDENCE WHEN RULING ON AN OBJECTION.

9 Article 4, section 16 of the Washington Constitution provides: "Judges shall not charge
10 juries with respect to matters of fact, nor comment thereon, but shall declare the law." The
11 purpose of prohibiting judicial comments on the evidence is to prevent the jury from being
12 influenced by the trial judge's opinion of the evidence submitted. State v. Hansen, 46 Wn.App.
13 292, 300, 730 P.2d 706, 737 P.2d 670 (1986).

14 An alleged comment on the evidence is shown if the court's attitude toward the merits
15 of the case or its evaluation of a disputed issue is inferable from the statement. Id. The
16 touchstone of error with a judicial comment on the evidence is whether the feeling of the court
17 as to the truth value of the testimony of a witness has been communicated to the jury. State v.
18 Trickel, 16 Wn.App. 18, 25, 553 P.2d 139 (1976). When this issue is raised successfully on
19 appeal the remedy is reversal of the judgment. State v. Surry, 23 Wash. 655, 63 P. 557 (1900).
20 When such error occurs at trial, the result should be dismissal.

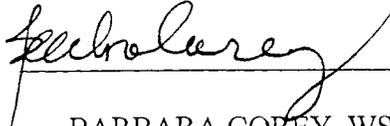
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22 In this case, the trial court's comments in the presence of the jury regarding the reasons
23 for overruling defense counsel's objection reinforced to the jury the trial court's view that the
24 Brickyard parking lot was a **crime** scene. Defense counsel's objection was proper. The use of
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1 the term "crime scene" conveys the opinion that a crime occurred there. The trial court
2 instructed the parties that the jury would not have to determine whether the location was a
3 crime scene, but only whether the defendant had committed any crimes there. The trial court
4 missed the point of the objection and in fact reinforced the state's testimony that this was a
5 "crime scene." This was an unconstitutional comment on the evidence.
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8 CONCLUSION

9 For the foregoing reasons, the defendant respectfully asks this court to grant his
10 motion for dismissal.
11

12 APRIL 29, 2009.
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16 BARBARA COREY, WSB#11778
17 ATTORNEY FOR MR. WALKER
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DECLARATION OF BARBARA COREY

1. That I am the attorney for Aquarius Walker and am competent to make this declaration.

2. After this case was assigned to this department, the court invited counsel into chambers for a conversation prior to the arrival of my client at the courtroom. The court informed the attorneys that it was aware that there might be some personal animosity between the attorneys. I have never tried a case before this court nor have I had a trial in any case where Mr. Neeb was the prosecutor. I have never discussed my opinions regarding Mr. Neeb with this court and I am not aware whether he has discussed his opinions about me with this court. I do know that the News Tribune has made mention of possible disharmony between counsel. However, I am a professional as is Mr. Neeb. We both know how to conduct ourselves in the courtroom.

3. During the chambers conversation, the court asked whether the attorneys could set aside their apparent dislike of each other when trying the case. I know that I told the court that I could do that. I do not recall what Mr. Neeb exactly what Mr. Neeb said but I believe that he stated that he could do so, too.

4. Almost from the beginning of the trial, the court has engaged in a running commentary regarding the court's perceptions of how we appear to the court to be getting along. The court even has commented on conversations and/or events that reportedly have occurred outside the court's presence. I do not know the source of the court's information but I believe that the court has been influenced by what it has heard from that source. In my opinion, unless one of the attorneys raises an issue about an alleged conversation or event through a motion, the matter is not before the court.

1 I know that if I have an objection or an issue regarding the conduct of the case I will
2 bring it to the court's attention. I have known Mr. Neeb for many years and I do not doubt that
3 he will do the same.

4 5. I was accused of discussing the case in front of a juror after court. I never did that.
5 Whoever gave that information to the court was incorrect. One of the state's witnesses
6 approached me after court and initiated a conversation. I terminated the conversation
7 immediately when I saw a juror in the hallway.

8 If someone has information that a juror or jurors heard such a conversation, I would like
9 to know about it. I may want to have the court inquire as to what the juror heard and whether
10 the juror can continue to be a fair juror.

11 6. Throughout the trial, the court sua sponte repeatedly has raised the issue of the
12 attorney's conduct. This is so even when the attorneys have not raised issues about opposing
13 counsel's conduct.

14 7. On a recent day in court, I attempted to raise an objection regarding the prosecutor's
15 disparagement of defense counsel in front of the jury. The prosecutor made an objection which
16 informed the jury of the prosecutor's opinion that defense counsel had violated an order in
17 limine. When I attempted to make the argument (outside the presence of the jury), the court
18 interrupted me before I could do so. The court *yelled* at me to "shut up." The court's voice
19 volume was extremely loud and I have no doubt that it could be heard in the jury room. The
20 court then proceeded to berate me for my objection and reiterated the court's perception that
21 the attorneys appear not to like each other. I attempted explain my objection based on the legal
22 rule that the prosecutor may not disparage defense counsel before the jury. The trial court
23 refused to respond to the merits of the objection and instead informed me that perhaps I would
24 be found ineffective on appeal. When I queried whether the court believed I had been
25 ineffective, the court stated that perhaps appellate counsel would argue and the court of appeals

1 might so find. I then stated that if the court had concerns that I was not effectively representing
2 Mr. Walker, I would leave the case at that moment.

3 I find it very difficult to communicate with my client when he becomes upset by the
4 court's yelling and also by the content of comments made by the court.

5 There are times when I believe that the court is more concerned with making a record of
6 its perceptions of the two attorneys conduct toward each other than with addressing the merits
7 of objections and other issues in the case.

8 Defense counsel asserted that she had not said anything derogatory about the prosecutor
9 in open court. The court could not point to any comments but, as has been true throughout the
10 case, instead alluded to nuances and innuendo in questions, etc.

11 The court also stated that it did not want to hear any more comments about opposing
12 counsel. The court's comments raise serious concerns in my mind as to whether the court will
13 be able to impartially consider my motion to dismiss based on the state's failure to preserve
14 potentially exculpatory evidence.

15 8. A trial spectator informed me that last week the court made a derogatory comment
16 about the attorneys in the 11th floor lunchroom. She was able to hear it. She avers that the
17 court spoke at its usual volume and that the comment would have been heard by any one in that
18 area of the lunchroom. Some jurors eat in the lunchroom and may well have heard it. This
19 greatly concerns counsel and raises issues about the court's ability to continue to preside over
20 this case.

21
22 9. I have been gone from the prosecutor's office for more than 5 years. I have had
23 trials with individuals who were witnesses in my civil case against Pierce County. I have never
24 experienced anything like the current case where the court so intensely focused on the
25 relationship with the attorneys.

DEFENDANT'S MOTION
TO DISMISS -- JUDICIAL
CONDUCT

1 10. As a result of the court's comments, I have observed my client become distracted,
2 distraught, and defeated in his emotions during this case.

3 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
4 STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRENT.
5 SIGNED IN TACOMA ON APRIL 29, 2009.

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9 Barbara Corey.

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7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
8 **IN AND FOR PIERCE COUNTY**

9 STATE OF WASHINGTON,

10 Plaintiff,

NO. 06-1-03531-5

11 vs

12 AQUARIUS WALKER,

13 Defendant.

MOTION TO DISMISS
FOR FAILURE TO PRESERVE
POTENTIALLY EXCEULPATORY
EVIDENCE

14
15 A. ISSUE FOR TRIAL COURT DECISION:

16 1. Should this court grant defendant's motion for dismissal where the state failed to
17 preserve potentially exculpatory evidence and this has prejudiced the defendant?
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19 B. LAW AND ARGUMENT:

20 The State's obligation to disclose favorable evidence to the defendant, under the
21 Fourteenth Amendment of the United States Constitution, carries with it a correlative duty to also
22 preserve material evidence in its possession. Courts hold that a prosecutor's duty under In Brady
23 v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court held that a
24 prosecutor's duty to disclose exculpatory evidence includes the obligation to preserve such
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DEFENDANT'S MOTION
FOR DISMISSAL

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1 evidence from loss or destruction. Following Brady, the Court decided a number of cases
2 clarifying the prosecutor's duty. In California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81
3 L.Ed.2d 413 (1984), the court held that the duty to preserve evidence is limited to evidence "that
4 *might* be expected to play a significant role in the suspect's defense." To meet this standard, the
5 evidence must possess an exculpatory quality that was apparent before the evidence was destroyed
6 and by of such a nature that the defendant would be unable to obtain comparable evidence. If the
7 State fails to preserve evidence that meets this standard, it must dismiss the criminal charges
8 against the defendant; the State's good or bad faith is irrelevant to the analysis. Arizona v.
9 Youngblood, 488 U.S. 51, 58, 109 S.Ct. 133, 102 L.Ed.2d 281 (1988); State v. Copeland, 130
10 Wn.2d 244, 279-80, 922 P.2d 1304 (1996). Where evidence does not rise to the level of being
11 materially exculpable but is only potentially useful, a failure to preserve evidence does not
12 constitute a due process denial unless a defendant can demonstrate the State's bad faith.
13 Youngblood, 488 U.S. at 58. Police Bad Faith

15 In this case, the police clearly knew the importance of identifying and obtaining contact
16 information for all of the individuals who were present at scene. For this reason, Officers
17 Gildehaus and Olson were directed to obtain such information. In addition, it appears that
18 other uniformed offices also were tasked with obtaining such information.

19 This information is vital information for the defendant. See attached declaration of
20 Gerald Robert Crow.

21 Notwithstanding the police recognition that this would be important
22 information/evidence, the State, through its police officers, thereafter failed to preserve the
23 field notes of Lakewood Police Department officers Darcy Olson and Andrew Gildenhaus.
24 These reports contained the names of numerous potential witnesses to the shooting. These
25

DEFENDANT'S MOTION
FOR DISMISSAL

1 reports were given to Det, Bunton. One officer handed the notes to Det. Bunton and the other
2 officer either handed the notes to Det. Bunton or put them an in-box for him. The notes were then
3 lost or destroyed. Mario Moss testified that there were approximately 100 individuals watching the
4 fight which was on-going at the time of the shooting. Other witnesses have given different
5 accounts of the fight and the shooting.

6 By 10 a.m . on July 29, 2006, the police knew that the defendant told Det. Estes and
7 Officer Crommes that he fired his gun to protect Scoot Moss from the Samoans who were
8 attacking him.

9
10 Officer Gildehaus wrote his report on July 29, 2006, at approximately 10 a.m. In that
11 report, he noted that he identified several subjects in the parking lot and took notes as to whether
12 they had seen anything or not. Officer Olson likewise took down the names of all of the
13 individuals who left the parking lot by car. She checked the ID's of all of the people she
14 contacted. Neither Gildehaus not Olson made photocopies of the lists of names they took down in
15 the early morning hours of 7/29/06.

16 In addition, Kabili Silver testified that a police officer took down the names of Brickyard
17 patrons as well as contact information prior to their departure from the club. No officer has ever
18 acknowledged doing this. No such information has ever been provided to the defense.

19 As the court knows, this is a self-defense case. The defense would have contacted each
20 and every one of the witnesses in the parking lot had names and contact information been
21 available. It is highly probable that the lists would have enabled the defense to contact
22 eyewitnesses who would corroborate testimony that a large Samoan was beating Scoot and
23 slamming him into cars, that there were other Samoans who were pursuing Mr. Walker, that Mr.
24 Walker fired warning shots up into the air prior to trying to shoot the Samoan who appeared to be
25

DEFENDANT'S MOTION
FOR DISMISSAL

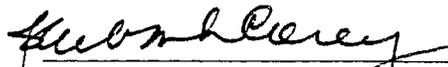
1 killing Scoot, etc. It is highly likely that the defense would have been able to discover
2 eyewitnesses who would corroborate that the warning shots did nothing to stop the brutal attack on
3 Scoot. In addition, it is highly likely that the defense would have been able to locate witnesses
4 who, like Mario Moss heard a shot being fired while he exited the Brickyard (note: this was before
5 he allegedly intervened in the argument between a Samoan and Kim Miller – “the tomboy”). In
6 addition, both Tim Nole and Kimberly Miller saw a Samoan with a handgun. Tim Nole is
7 expected to testify that he saw the Samoan crouched down near the Goodwill store and pointing
8 the gun.
9

10 Because the state failed to preserve this obviously significant information, this court should
11 dismiss this case. The evidence that was lost was important enough that police officers were
12 tasked with obtaining it. It is readily apparent that eyewitnesses may provide either exculpatory or
13 inculpatory evidence. However, the defense can never contact these important eyewitnesses
14 because of the state’s failure to preserve the information/evidence.
15
16
17

18 C. CONCLUSION:

19 For the foregoing reasons, the defendant respectfully asks this court to dismiss this case.

20 DATED: April 29, 2009.

21 
22 BARBARA COREY, WSPA #11778
23 Attorney for Defendant
24
25

DEFENDANT’S MOTION
FOR DISMISSAL

BARBARA COREY, ATTORNEY, PLLC
901 South “I” St, #201
Tacoma, WA 98405
253.779.0844

DECLARATION OF G. ROBERT CROW

1
2 1. That I am the investigator in this assigned case. Prior to opening my private
3 investigation business, I was a sergeant in the Pierce County Sheriff's Department, where I
4 worked for 23 years.

5 2. During my work with the sheriff's department, I responded to and assisted in the
6 investigation of hundreds of major crime incidents. I know that it is imperative to identify all
7 potential witnesses and obtain contact information for them.

8 3. As a private investigator, I need to contact all of the witnesses in a case to complete a
9 thorough defense investigation. Because the defense is not present at the scene investigation, I
10 must rely on what is contained in the police reports.

11 4. In a self defense case, it is imperative to contact anyone who may have been present
12 at the location and time of the incident.

13 5. I need to contact even those witnesses whom the police and prosecutors might
14 discount. This is so because the defense has its own theory of the case and may well learn
15 valuable information from such witnesses. As a defense investigator, I often ask very different
16 questions than the police ask.

17 6. I have been the investigator on this case since mid-2007. I have read all of the police
18 reports and attempted to obtain all of the field notes of the investigating officers and detectives.
19 I learned that information regarding 75-100 possible witnesses and their contact information
20 collected by Gildehaus, Olson and other officers is missing. I also interviewed Tim Nole, an
21 employee at Bourbon Street, who told me that he spoke to a uniformed police officer and told
22 him that he had seen a Samoan with a gun and that he heard more than one gun being fired at
23 the time of the incident. Nole told me that the uniformed officer wrote this information down
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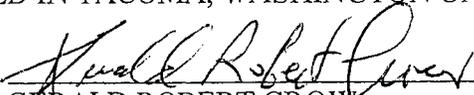
DEFENDANT'S MOTION
FOR DISMISSAL

1 into a note pad. Kabili Silver told me that he detained 70-75 individuals inside the Brickyard
2 Bar. These individuals were not allowed to leave until they had provided names and contact
3 information to police and also had been briefly interviewed. None of this information exists. It
4 is impossible to ascertain the identities of the police officers who performed these tasks.
5 Gildehas and Olson informed me that they gave the names and contact information to Det.
6 Bunton, who stated that he did not have them.

7
8 7. Without these names and contact information, I am unable to complete the ~~inv~~^{AR}
9 investigation. It is impossible to get all of the facts of the case without being able to contact
10 these people. There is no doubt in my mind that some of these individuals would have seen
11 what happened in the parking lot and therefore likely would have assisted Mr. Walker at trial.

12 8. Further, I have learned on many occasions that some individuals are reluctant to say
13 much to police at the scene because they are eager to leave. For this reason, police re-contact
14 these individuals at a later date to obtain their statements. Individuals generally are far more
15 cooperative at a later time. If the names and contact information are destroyed then no one can
16 interview any of the individuals who might have valuable information about this case.

17
18 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
19 STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.
20 SIGNED IN TACOMA, WASHINGTON ON APRIL 29, 2009.

21 
22 _____
23 GERALD ROBERT CROW

FILED
IN COUNTY CLERK'S OFFICE

A.M. MAY 11 2009 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

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

AQUARIUS TYREE WALKER,
Petitioner,

vs

STATE OF WASHINGTON,
Respondent.

NO.

PIERCE COUNTY SUPERIOR
COURT NO. 06-1-03531-5

PETITION FOR EMERGENCY STAY
AND FOR INTERLOCUTORY
DISCRETIONARY REVIEW

I. IDENTITY OF PETITIONER:

AQUARIUS TYREE WALKER, petitioner, and defendant below, represented by his attorney Barbara Corey asks this court to grant the requested relief.

II. STATEMENT OF RELIEF SOUGHT:

Petitioner asks this court to grant his emergency motion for stay as well as his motion for interlocutory discretionary review of the trial decisions made noted herein.

III. DECISIONS BELOW:

1. Should this court accept emergency interlocutory review where the trial court has refused to rule on the merits of many motions made by defense counsel and where instead of ruling on the motions, the trial court instead has verbally attacked defense counsel?

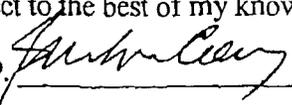
WALKER - PETITION FOR
STAY AND EMERGENCY
DISCRETIONARY
REVIEW

BARBARA COREY, ATTORNEY, PLLC
901 South "I" St, #201
Tacoma, WA 98405
253.779.0844

1 2. Should this court accept emergency interlocutory discretionary review where the trial
2 court has refused to permit the defense to present a case by granting the deputy prosecutor's
3 motion to prohibit defense witnesses from making detailed diagrams of the parking lot where the
4 shooting occurred because they are "cumulative" to the generalized diagrams made in the state's
5 case?

6 3. Should this court grant emergency interlocutory review where the trial court failed to
7 dismiss for prosecutorial misconduct where the prosecutor informed the court that he had been
8 "lip-reading" comments made by the defendant to his attorney?

9 III. STATEMENT OF THE CASE:

10 Declaration of Barbara Corey: I swear under penalty of perjury that the following
11 statement of the case is true and correct to the best of my knowledge and recollection. Signed in
12 Tacoma, Washington on May 8, 2009. 

13 AQUARIUS TYREE WALKER, hereinafter petitioner, is charged with murder in the first
14 degree (charged victim – Tavarrus Moss); murder in the second degree (charged victim – Tavarrus
15 Moss); assault in the first degree (charged victim – Henri Moss); assault in the first degree
16 (charged victim – Rooney Key); unlawful possession of a firearm in the second degree. The state
17 also seeks the firearm sentencing enhancement on Counts 1 – 4.

18 Petitioner was determined to be indigent early on in the trial court proceedings. Petitioner
19 has been incarcerated since July 29, 2006 and continues to have no assets. (Appendix A)

20 Trial commenced before Department 2, Judge Katherine Stolz., on March 17, 2009.
21 Prior to going on the record, the court summoned counsel into her chambers. Inside chambers, the
22 court told counsel that she "knew" there had been substantial animosity between the attorneys.
23 The attorneys informed her that they would be professional during the trial of the case.

24
25 WALKER – PETITION FOR
STAY AND EMERGENCY
DISCRETIONARY
REVIEW

1 Defense counsel was ill the week of March 30-April 3, 2009, and complied with the court
2 order to provide physician verification of her illness. Defense has a severe medical condition that
3 is protected under Americans with Disabilities Act.

4 Opening statements were made on April 6, 2009.

5 Almost from the moment when the first witness was called, the court commented in
6 response to objections that the attorneys were displaying their animosity to each other. The court
7 frequently did not rule on the merits of the objections.

8 On May 4, 2009, the petitioner argued his motion to dismiss for judicial misconduct.
9 (Appendix B). After petitioner's argument, the court did not rule on the motion except to state
10 that the court had not commented on the evidence. To the contrary, the court responded by
11 attacking petitioner's counsel. The court referred to comments allegedly made outside the court's
12 presence (and reported to the court by some unnamed source), called petitioner's counsel
13 "insolent" and "worse than Mr. Neeb", observed that petitioner's counsel would "trot around with
14 your book on prosecutorial misconduct", and commented that one did not have to be "a rocket
15 scientist" to tell that the two attorneys do not like each other.

16 On May 4, 2009, the prosecutor began making motions to limit the defense case.
17 Throughout the week of May 4-7, the trial court granted many of the prosecutor's motions to
18 prohibit the petitioner from putting on various witnesses and even witnesses make illustrative
19 charts. The trial court accepted the prosecutor's argument that the petitioner had no right to present
20 evidence that might be deemed cumulative after the state's case. Although the prosecutor's
21 objection to the charts was that they were cumulative, the trial court then sua sponte added that the
22 floor plan chart of a tavern could not be used because some witnesses said that floor plan appeared
23 inaccurate whereas the employee of the establishment testified otherwise.

1 Starting on May 4, 2009, defense counsel observed that petitioner was having problems
2 focusing on the trial and processing testimony presented in court. On May 5, 2009, defense
3 counsel asked the court to order a competency evaluation of the petitioner. The court declined to
4 do so and observed that she watched the petitioner and that he was taking notes of the trial
5 testimony. The prosecutor also watched the petitioner and eavesdropped and "lip-read" when the
6 petitioner spoke to his attorney. The prosecutor informed the court that he had been lip-reading
7 statements made by the petitioner to his attorney. The prosecutor related to the court the content of
8 one of those statements.

9 On May 6, 2009, defense counsel made a motion to dismiss or alternatively for a mistrial
10 based on prosecutorial misconduct. Defense counsel argued that the prosecutor's conduct violated
11 the petitioner's right to counsel and also undermined the attorney-client relationship because it
12 hindered free communications between petitioner and his counsel during trial. The prosecutor
13 responded that he thought that he was being accused of having eavesdropped or lip-reading every
14 day of the trial. Petitioner argued that was not the allegation and that the petitioner's motion was
15 based on the prosecutor's admission that he had been doing so on May 5, 2009.

16 The trial court's response was to reference "many times" that she had been able to hear
17 petitioner and counsel whispering together at counsel table. Rather than rule on the merits of the
18 motion regarding the prosecutor's misconduct, the trial court once again berated petitioner's
19 counsel.

20 On May 7, 2009, the trial court granted the prosecutor's motion to require the petitioner to
21 provide an offer of proof in advance of any witness testimony and to further disclose whatever
22 "new testimony" is proposed to be offered by witnesses who have already testified for the state.
23 Appendix C. The trial court thus has ordered the petitioner to disclose his trial tactics and strategy
24
25

1 to the state and the court prior to putting on his case. This is an unconstitutional intrusion into the
 2 attorney-client relationship and an impermissible attempt to discover trial strategy and case theory.

3 IV. GROUNDS FOR REVIEW AND ARGUMENT:

4 A. THIS COURT SHOULD ACCEPT INTERLOCUTORY DISCRETIONARY
 5 REVIEW WHERE THE PETITIONER HAS SATISFIED RAP 2.3(b)(1),(2),(3).

6 RAP 2.3(b) permits a party to seek discretionary review in limited circumstances, in
 7 pertinent part:

- 8 (1) The superior court has committed an obvious error which would render
 9 further proceedings useless;
 10 (2) The superior court has committed probable error and the decision of the
 11 superior court substantially alters the status quo or substantially limits the
 12 freedom of a party to act;
 13 (3) The superior court has so far departed from the accepted and usual course
 14 of judicial proceeding . . . as to call for review by the appellate court.

15 In this case, this court should grant petitioner's motion for all three reasons, which will be
 16 discussed in reverse order.

17 In Folise v. Folise, 113 Wn.App. 609 (2002), the court held that interlocutory discretionary
 18 review was warranted because the trial court's departure from the accepted and usual course of
 19 judicial proceedings by ignoring unambiguous language in the statutory scheme and case law
 20 satisfied RAP 2.3(b)(3).

21 In this case, the trial court has refused to rule on motions, ignored unambiguous language in
 22 caselaw, and departed from the court's requirements under the Code of Judicial Canons.

23 The nature and number of the trial court's errors in RAP 2.3(b)(3) also encompasses and
 24 satisfies the criteria of RAP 2.3(b)(1), (2).

1 B. THE TRIAL COURT'S REFUSAL TO COMPLY WITH UNAMBIGUOUS
 2 CONSTITUTIONAL PROVISIONS, CASE LAW, AND COURT RULES HAS DENIED THE
 3 DEFENDANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

4 The Fifth Amendment to the United States Constitution, in pertinent part provides: "No
 5 person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived
 6 of life, liberty, . . . without due process of law."

7 The Sixth Amendment to the United States Constitution, in pertinent part provides: "In all
 8 criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his Defense."

9 The Fourteenth Amendment, article 1, section 1, to the United States Constitution, in
 10 pertinent part, provides that no state shall " . . . deprive any person of life, liberty, . . . , without due
 11 process of law.

12 Likewise, Wash. Const. Art. I, § 22 , in pertinent part provides: " In criminal
 13 *prosecutions the accused shall have the right to appear and defend in person, or by counsel, to*
 14 *demand the nature and cause of the accusation against him, to have a copy thereof, to testify in*
 15 *his own behalf, to meet the witnesses against him face to face, to have compulsory process to*
 16 *compel the attendance of witnesses in his own behalf . . . "*

17 Wash. Const. Art. I, § 9 in pertinent part provides: "No person shall be compelled in
 18 any criminal case to give evidence against himself . . ."

19 Wash. Const.. Art. I, § 3 provides: " No person shall be deprived of life, liberty, or property,
 20 without due process of law."

21 In Washington v. Texas, 388 U.S. 14 (1967), the Court held that the right to offer evidence
 22 in one's own behalf is a fundamental component of due process of law.

23
 24 The right to offer the testimony of witnesses, and to compel their attendance, if
 25 necessary, is in plain terms the right to present a defense, the right to present the

1 defendant's version of the facts as well as the prosecution's to the jury so that it may
2 decide where the truth lies . . . This right is a fundamental element of due process of
law.

3 Washington v. Texas, 388 U.S. at 19; see also United States v. Nixon, 418 U.S. 683, 709 (1974).

4 "Whether rooted directly in the Due Process Clause of the Fourteen Amendment, or
5 in Compulsory Process of Confrontation clauses of the Sixth Amendment, the
6 Constitution guarantees criminal defendants 'a meaningful opportunity to present a
complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690, 90 L. Ed. 2d 636, 106
S.

7 Ct. 2142 (1986)(citations omitted) (quoting California v. Trometta, 467 U.S. 479, 485, 81
8 L. Ed. 2d 413, 104 S. Ct. 2528 (1984). . . . "[W]here constitutional rights directly
9 affecting the ascertainment of guilt are implicated, [evidentiary rules] may not be applied
mechanistically to defeat the ends of justice." Chambers, 410 U.S. [284,] 302 [1973]).

10 Greene v. Lambert, 288 F.3d 1081, 1090-1091 (9th Cir. 2002).

11 The Supreme Court has consistently held in a number of contexts that state procedural and
12 evidentiary rules must give way to a criminal defendant's rights under the Fifth, Sixth and
13 Fourteenth Amendments to appear, testify and defend at trial, and to present witnesses in his or
14 her own behalf. See, e.g., Washington v. Texas, supra (a statute preventing defendants from
15 testifying if tried jointly with others unconstitutionally denied those defendants their right to testify
16 at trial); Chambers v. Mississippi, 410 U.S. 284 (1973) (a state hearsay rule prohibiting a party
17 from impeaching his or her own witness precluded the defendant from examining a witness who
18 had confessed to the crime and unconstitutionally denied the defendant his right to present
19 witnesses and evidence negating the elements of the charged crime); Rock v. Arkansas, 483 U.S.
20 44 (1987) (an Arkansas evidentiary rule excluding all post-hypnosis testimony unconstitutionally
21 burdened the defendant's right to testify at trial).

22 Most recently in Holmes v. South Carolina, 126 S. Ct. 1727 (2006), the Supreme Court
23 held that the state's rule excluding evidence of third-party guilt if the prosecution's case against the
24

1 defendant was strong violated a defendant's constitutional rights to present a complete defense
2 grounded in the due process, confrontation, and compulsory process clauses.

3 Even when evidence is not otherwise admissible, a defendant has a due process right to
4 rebut arguments presented by the state. Simmons v. South Carolina, 512 U.S. 154, 164-165
5 (1994); Skipper v. South Carolina, 476 U.S. 1 (1986); Gardner v. Florida, 430 U.S. 349 (1977);
6 Ake v. Oklahoma, 470 U.S. 68, 83-87 (1985).

7 Trial is an adversarial process. The general rule is that "[i]t is the duty of counsel to call
8 to the court's attention, either during the trial or in a motion for new trial, any error upon which
9 appellate review may be predicated, in order to afford the court an opportunity to correct it."
10 City of Seattle v. Harlaon, 56 Wn.2d 596, 597, 354 P.2d 928 (1960). Furthermore, when the
11 alleged error is such that its prejudicial effect may not be corrected by an appropriate jury
12 instruction, the proper remedy is to call the matter to the trial court's attention and claim a
13 mistrial. State v. Beard, 74 Wn.2d 335, 339-40, 444 P.2d 651 (1968). In the course of calling
14 matters to the court's attention by way of motion, the moving party legitimately expects the trial
15 court to consider the merits and make a ruling on the merits.

17 Example 1

18 In this case, the trial court has repeatedly and consistently foreclosed the petitioner's
19 constitutional right to present his defense. For example, in its case in chief, the prosecutor had
20 various witnesses write on diagrams to show where they were at certain moments relevant to the
21 charged offenses. All of these diagrams were admitted as exhibits. (Appendix D) In stunning
22 contrast, the petitioner has been denied the right to have witnesses make far more detailed
23 diagrams regarding their whereabouts and the whereabouts of others at certain moments relevant to
24

1 the charged offenses. The court has accepted the prosecutor's argument that the petitioner's
2 exhibits would be "cumulative." The court turned a deaf ear to the petitioner's arguments that he
3 has the right to present his defense. There perhaps is nothing more basic to the presentation of the
4 defense than the presentation of witnesses' detailed and illustrated testimony. There is no authority
5 for prohibiting the petitioner from adducing such testimony and exhibits. The trial court's oft-
6 stated concern, egged on by the deputy prosecutor, is to finish the case by a certain date. The trial
7 court's rulings have been motivated by time factors rather than by ensuring that the defendant
8 receives the full panoply of his constitutional and procedural rights.

9
10 Further, the trial court has granted the prosecutor's motion that the defendant cannot
11 produce any testimony or other evidence unless it is "new". The prosecutor has succeeded in
12 persuading the court that the petitioner cannot present his case as he wishes to do. The court will
13 not let the defense witnesses prepare diagrams. The court will not let the petitioner present
14 witnesses who have not yet testified regarding their personal observation at a homicide scene
15 because the presentation of such evidence would be "cumulative". The evidence is "cumulative"
16 because the prosecutor has the evidence out in the manner which he prefers. Apparently because
17 the prosecutor has adduced all the evidence, the petitioner may not present more detailed evidence.

18 In addition, the petitioner has filed motions that the trial court has failed to consider on the
19 merits. Instead, the trial court has made derisive and hostile comments, which accompanied by a
20 refusal to rule on the merits of the motions, has denied the petitioner important and fundamental
21 constitutional rights, including his right to effective assistance of counsel.

22
23 In addition, the prosecutor has persuaded the court to require him to preview his case to the
24 state. This is so the trial court can determine in advance which witnesses the petitioner may call

1 and the limits of their testimony. This is customarily accomplished during the testimony of the
 2 witnesses and the interposition of objections which the court will rule upon. There is no legal
 3 authority for denying the petitioner his right to present a defense. The oft-stated reason is that the
 4 court and the prosecutor want to rush the case through, regardless of the constitutional rights of the
 5 defendant.

6 Example 2

7
 8 It is well-established that a prosecutor may not "... act in a manner that
 9 circumvents and thereby dilutes the protection afforded by the right to counsel." Maine v.
 10 Moulton, 474 U.S. 159, 171 (1985). Although prosecutors are expected to prosecute their
 11 cases with considerable vigor and dispatch, they "may strike hard blows, but are not at liberty to
 12 strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935). In the instant case, the
 13 prosecutor made a knowing and calculated decision to eavesdrop and "lip read" privileged
 14 communications between the petitioner and counsel.

15 Nevertheless, as noted in the statement of the case, the deputy prosecutor stated on the
 16 record in open court that he had been paying close attention to the petitioner's communications
 17 with counsel during trial proceedings. The prosecutor stated on the record that he was ""reading
 18 lips." He then proceeded to relate a portion of a conversation that had occurred between petitioner
 19 and counsel! It is unknown what else the prosecutor learned from his illegal intrusion into this
 20 confidential communication.

21
 22 When petitioner made a motion for mistrial/dismissal based on serious prosecutorial
 23 misconduct, the trial court never even addressed the impropriety of the prosecutor's conduct.
 24 Rather than addressing the troubling constitutional violations presented by a prosecutor's

1 admission that he was eavesdropping and lip-reading a confidential conversation between
2 petitioner and counsel, the trial court berated petitioner and counsel. The trial court purported to
3 reference prior occasions when the court itself claimed to have heard such discussions. There is
4 little, if any at all, record of these alleged occurrences. Further, whether or not the trial court heard
5 any prior communications between petitioner and counsel is wholly irrelevant to the prosecutor's
6 deliberate intrusion into constitutionally protected confidential communications. In the face of a
7 damning admission of a deputy prosecutor that he intentionally invaded the attorney-client
8 relationship, the trial court somehow put the blame on petitioner and counsel. The trial court
9 glossed over the fundamental constitutional issue and instead attacked petitioner and his attorney.
10

11 The trial court's refusal to consider the merits of this motion satisfies the requirements of
12 RAP 2.3(b)(1),(2), (3).

13 Example 4

14 On another occasion, the trial court refused to rule on the merits of a motion wherein
15 petitioner moved for a mistrial because the prosecutor made remarks before the jury that
16 denigrated his counsel. A defendant's constitutional right to the assistance of counsel can be
17 infringed by a prosecutor's comments that denigrate his attorney. Prosecutorial attacks on defense
18 counsel usually takes three forms: remarks about counsel's reasons for interposing objections;
19 insinuations that defense counsel believes his client is guilty; and attacks on counsel's ethics and
20 integrity. Since these remarks offend a specific constitutional guarantee, courts may invoke a more
21 stringent standard of review when examining the harm therefrom. Sizemore v. Fletcher, 921 F.2d
22 567 (6th Cir. 1990); Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983).
23
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25

1 In the instant case, the deputy prosecutor in the presence of the jury has suggested that
2 petitioner's counsel lacks ethics and integrity by his objection that he is "surprised" that counsel
3 had violated an order in limine. Further, the prosecutor has impugned petitioner's counsel before
4 the court by mocking counsel's medical conditions, including a medical condition known by the
5 prosecutor to be protected by the Americans with Disabilities Act. The prosecutor repeatedly has
6 made clear his opinion that petitioner's counsel intends to drag out the trial.

7
8 Instead of ruling on petitioner's motions related thereto, the trial court again has ignored the
9 merits of the motions. While ignoring the motions on prosecutorial misconduct, the trial court
10 instead turned its focus to petitioner's counsel. The trial court informed petitioner that his counsel
11 might be found ineffective on appeal. The trial court provided no basis for this statement which
12 was wholly unrelated to the merits and appears to have been calculated to deride petitioner for
13 making motions and to drive a wedge into the attorney-client relationship.

14 Example 5

15 On yet another occasion, the trial court refused to rule on the petitioner's motion for
16 dismissal/mistrial based on judicial misconduct. Instead, the trial court launched a tirade against
17 defense counsel. The trial court called petitioner's counsel names such as "insolent", "abrasive",
18 "worse than Mr. Neeb" and then inexplicably assailed her for "toting around" a book on
19 prosecutorial misconduct. Counsel has the right and duty to interpose objections on behalf of her
20 client and may "tote" to trial any book she wishes. The trial court yet again refused to rule on the
21 merits of the motion and instead used the occasion of petitioner's motion to personally attack
22 petitioner's counsel.
23

24 C. THIS COURT SHOULD GRANT AN EMERGENCY STAY OF THIS TRIAL IN
25 ORDER TO ENSURE EFFECTIVE REVIEW AND TO ENSURE THAT PETITIONER

WALKER - PETITION FOR
STAY AND EMERGENCY
DISCRETIONARY
REVIEW

1 RECEIVES HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WITH EFFECTIVE
2 ASSISTANCE OF COUNSEL.

3 RAP 8.3 provides pertinent part:

4 Except when provided by statute, the appellate court has the authority to issue orders,
5 before or after acceptance of review, to ensure effective and equitable review, including the
6 authority to grant injunctive or other relief to a party.

7 In Purser v. Rahm, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985), this court held that "whether a stay
8 pending appeal should be granted depends on (1) whether the issue presented by the appeal is
9 debatable, and (2) whether a stay is necessary to preserve the fruits of a successful appeal,
10 considering the equities of the situation."

11 In this case, there can be no dispute that the issues presented by the appeal are debatable.
12 The specific grounds are set forth above establish a troubling mix of calculated prosecutorial
13 intrusion into confidential communications between petitioner and counsel and a trial court that is
14 not functioning as a trial court. The trial court's outbursts against counsel and refusal to rule on the
15 merits of motions and objections deprives the petitioner of any meaningful trial.

16 Although this court generally declines to interrupt a trial because the issues may be raised
17 on a later appeal. this court should depart from that rule in the instant case. An appellate court
18 reviews the trial court's decisions under the abuse of discretion standard. If the petitioner does
19 not receive a fair hearing below, then his ability to obtain meaningful review of the trial court's
20 decisions is substantially compromised. Further, under the current posture of the case, Petitioner is
21 denied the right to present his defense. Therefore, a stay is essential to preserve the fruits of a
22 successful appeal, considering the equities of the situation.

Further, petitioner has been in custody for nearly three years. His case is fraught with reversible error. Although courts generally do not consider the liberty interest when ruling on a stay, this court should weigh this factor under the singular case history herein.

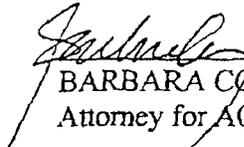
The Framers of the Constitutions did not ever envision that a trial court and prosecuting authority would act with such blatant disregard for petitioner's fundamental rights. When the trial court is more consumed with personalities and calendars than with honoring the trial process and the criminal defendant's rights, then there has been no trial.

Justice delayed may be justice denied. However, justice hurried is no justice at all.

V. CONCLUSION:

For the foregoing reasons, the petitioner respectfully asks this court to grant his motion for emergency stay and for interlocutory discretionary review.

DATED this 8th day of May, 2009.


BARBARA COREY, WSBA #11778
Attorney for AQUARIUS TYREE WALKER

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I faxed and delivered via ABC-LMI or U.S. Mail, postage pre-paid, a copy of the Petition for Emergency Stay and for Interlocutory Discretionary Review to: Kathleen Proctor, Sr. Appellate Deputy, Pierce County Prosecutor's Office, Room 946 County-City Building, Tacoma, WA, and personally delivered a copy to the Petitioner.

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Date


Signature

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