

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

COURT OF APPEALS
DIVISION II

12 FEB 16 PM 1:04

STATE OF WASHINGTON
BY [Signature]
DEPUTY

STATE OF WASHINGTON

RESPONDENT

V.

WALKER SR., DOIES D

APPELLANT

ORIGINAL CASE No.

09-1-02784-8

APPEAL CASE No.

41970-0-II

I, MR. DOIES D WALKER SR., HAVE RECEIVED 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 THIS MERITS.

ADDITIONAL GROUND 1

SEE ATTACHED PAPERWORK

ADDITIONAL GROUND 2

SEE ATTACHED PAPERWORK

IF THERE ARE ADDITIONAL GROUNDS, A BRIEF SUMMARY IS ATTACHED TO THIS STATEMENT

DATE: 09 FEBRUARY 2012

SIGNATURE: Mr. Doies D Walker Sr.

MR. DOIES D. WALKER SR.

ADDITIONAL GROUND #1

DURING THE DATE OF JUNE 2, 2009, A SEARCH WARRANT WAS EXECUTED IN MY PLACE OF RESIDENCE. THIS WARRANT [ATTACHED SECTION 7] STATES SPECIFICALLY WHAT & WHERE OFFICER(S) WERE ABLE TO SEARCH, THEREFORE ANY EVIDENCE FOUND OUTSIDE OF THESE AREAS IS INADMISSABLE IN TRIAL. WITH THAT SAID, I BELIEVE MY RIGHTS WERE VIOLATED WHEN POLICE SEARCHED MY SAFE (WHICH WAS PURCHASED SEPERATELY FROM THE HOUSE) PROCEEDED WITHOUT A WARRANT FOR SAID SAFE. AS SUCH, THIS SHOULD HAVE RENDERED ANY EVIDENCE TAKEN FROM SAID SAFE INADMISSABLE IN TRIAL.

SUPPORTING FACTS

WASHINGTON PRACTICE & PROCEDURE

CHAPTER 27 FORTH AMENDMENT OF UNITED STATES CONSTITUTION PROVIDER

SEARCH WARRANT

-3002- SEARCH WARRANT GENERAL

CrR 2.3 CrR LJ 2.3 PROVIDES THAT A SEARCH WARRANT WILL ISSUE UPON THE CONCURRENCE OF THREE REQUIREMENTS

- 1) AN AFFIDAVIT OR SWORN TESTIMONY SUBMITTED BY A PEACE OFFICER OR PROSECUTING ATTORNEY WHICH DEMONSTRATES PROBABLE CAUSE TO BELIEVE THAT A CRIMINAL OFFENSE HAS BEEN COMMITTED AND THAT EVIDENCE OF THAT OFFENSE IS LOCATED IN A PARTICULAR PLACE.

SUPPORTING FACTS (CONT 'D)

CrR 2.3 CrR LJ 2.3 PROVIDES THAT A SEARCH WARRANT WILL ISSUE UPON THE CONCURRENCE OF THREE [3] REQUIREMENTS (CONT 'D)

2) THE WARRANT MUST PARTICULARLY DESCRIBE THE AREA TO BE SEIZED.

3) THE WARRANT MUST BE ISSUED BY A NEUTRAL AND DETACHED MAGISTRATE.

EXCLUSIVELY MOTION 3 SEARCH WARRANTS

SEARCH WARRANT

- 3.003- SEARCH WARRANT GENERAL

ADDITIONALLY AN OFFICER EXECUTING A VALID SEARCH WARRANT MAY SEIZE ANY ITEMS NOT DESCRIBED IN THE WARRANT IF THEY ARE IN PLAIN VIEW AND THE OFFICER HAS PROBABLE CAUSE TO BELIEVE THE ITEMS ARE EVIDENCE OF A CRIME

CHAPTER 5 SEARCH WARRANT REQUIREMENTS

5.4] DESCRIPTION: THE WARRANT MUST DESCRIBE THE PLACE TO BE SEARCHED AND THE ITEMS TO BE SEIZED WITH PARTICULARITY

SUPPORTING FACTS
(CONT'D)

CONSTITUTIONAL & CASE SUPPORT

- I) A HOMEOWNER'S CONSENT TO A SEARCH OF THE HOME MAY NOT BE
EFFECTIVE CONSENT TO A SEARCH CLOSED OBJECT INSIDE THE HOME
IA) UNITED STATES v KARO 468 US 705, 725-26 104 S. CT. 3296, 82 L.
Ed. 2d. 530 (O, CONNER J., CONCURRING)

II) U.S. v WALLER 426 F.3d 845-2005

- ° IN THIS CASE, HOWARD'S CONSENT TO SEARCH HIS APARTMENT DOES NOT
NECESSARILY EXTEND TO WALLER'S CLOSED LOGGAGE. A VALID CONSENT
TO SEARCH THE CLOSED CONTAINER MUST COME FROM ONE WHO HAS COMMON
AUTHORITY OVER THE EFFECT SOUGHT TO BE INSPECTED, ONE WHO HAS
COMMON OR GENERALLY HAS JOINT ACCESS OR CONTROL MUST PROPOSE.

ADDITIONAL GROUND #2

MY TRIAL ATTORNEY, A MR. PHILIP E. THORNTON, FILED A 3.6 MOTION TO SUPPRESS EVIDENCE SEIZED FROM THE SAFE DURING TRIAL, DUE TO IT WAS AN ISSUE OF CONSTITUTIONAL MAGNITUDE, A FACT RAISED IN THE PREVIOUS AREA.

(ADDITIONAL GROUND #1)

THE COURTS DENIED THIS MOTION BECAUSE IT WAS NOT BROUGHT UP INTIME BEFORE TRIAL STARTED. [SEE ATTACHED SECTION II] THE JUDGE SIGNED AN ORDER SETTING A DEADLINE FOR ALL MOTIONS ON FEBRUARY 3, 2011. THE PROSECUTING ATTORNEY STATED THIS TO THE JUDGE, REMINDING HIS HONOR THAT THE DEADLINES FOR THE MOTIONS HAD PAST, AND THAT MY TRIAL ATTORNEY COULD NOT BRING THIS ISSUE UP DURING TRIAL.

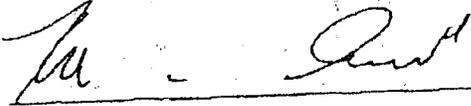
MY ISSUE WITH THIS IS SIMPLE. DUE TO THE CONSTITUTIONAL MAGNITUDE WITHIN THIS MOTION, SAID MOTION SHOULD BE ABLE TO BE RAISED AT ANYTIME.

All of which are evidence of a violation and/or attempt to commit a Murder 1st Degree, a violation of RCW 9A.32.030, Robbery 1st Degree, a violation of RCW 9A.56.200, and Assault 1st Degree, a violation of RCW 9A.36.011. THEREFORE, in the name of the State of Washington, you are commanded that within ten days from this date, with necessary and proper assistance, you enter into and/or search the said house, person, place or thing, to-wit:

- Motel 6, 5201 20th St. E, room #132, Fife, Pierce County, Washington, 98424, a motel with a clearly marked door with that address.
- 6110 Alameda Ave West, University Place, Pierce County, Washington, 98467 (alternately known/listed as 6110 59th Ave West, University Place, Pierce County, Washington, 98467), a single family residence, yellow in color, with an attached yellow garage, all vehicles including one Cadillac sedan and another unknown make sedan, and all storage areas and outbuildings.
- 680XYV, a 1990 Olds four door sedan, white in color, VIN#1G3HY54C7L1828462, registered to Jennifer Trevino, located at the Lakewood PD evidence processing bay

And then and there diligently search for said evidence, and any other, and if same, or evidence material to the investigation or prosecution of said felony or any part thereof, be found on such search, bring the same forthwith before me, to be disposed of according to law. A copy of this search warrant shall be served upon the person or persons found in or on said house or place and if a person is not found in or on said house or place, a copy of this warrant shall be posted upon any conspicuous place in or on said house, place, or thing, and a copy of this warrant and inventory shall be returned to the undersigned judge or his agent promptly after execution.

GIVEN UNDER MY HAND this _____ day of 6/3/09, 2009.
10:50 am



Judge

001266

SECTION I
(CONT'D)

IN COUNTY ^{FILED} ~~CLERK~~ ^{NOTICE} SUPERIOR COURT OF THE STATE OF WASHINGTON

A.M. JUN 09 2009 P.M.

IN AND FOR THE COUNTY OF PIERCE

PIERCE COUNTY WASHINGTON
KEVIN STOCK, COUNTY CLERK
BY _____ DEPUTY

COMPLAINT FOR SEARCH WARRANT

09-1-50589-8

STATE OF WASHINGTON)

) ss

No.

COUNTY OF PIERCE)

COMES NOW DETECTIVE JEFF PAYNTER of the Lakewood Police Department, who being first duly sworn on oath complains, deposes, and says:

That for a period of time up to and including 6/2/09, in Lakewood, Washington, felonies to-wit: Murder 1st Degree, a violation of RCW 9A.32.030, Robbery 1st Degree, a violation of RCW 9A.56.200, and Assault 1st Degree, a violation of RCW 9A.36.011, were committed by the act, procurement or omission of another, and that the following evidence is material to the investigation;

- Any trace evidence to include but not limited to, blood, bodily fluids, hair, and fibers.
- Any clothing determined to be of evidentiary value.
- Any paperwork, documents, electronic files or devices, or photographs indicating dominion and control of locations to be searched or identity or information related to the victims or victim's associates.
- Any weapons, firearms, bullets, bullet casings or parts thereof.
- Holsters, cleaning kits, manuals, or other firearm related paraphernalia.
- Any evidence related to the crimes of Robbery 1st Degree, Assault 1st Degree, or Murder 1st Degree, or identity of the perpetrators.
- Any contraband or items criminally possessed.
- One chrome or stainless semi-automatic pistol.
- One black handgun.
- One dark colored flat-brimmed ball cap.
- One light-colored wide-brim floppy hat.
- One button down short sleeved dark shirt with insignia on the left pocket.
- One light-colored t-shirt.
- Two pairs dark pants or jeans.
- One light colored long-sleeved sweatshirt.
- Loomis brand cash bags.
- Checks, receipts, or other paperwork related to Wal Mart stores.

All of which are evidence of a violation and/or attempt to commit a Murder 1st Degree, a violation of RCW 9A.32.030, Robbery 1st Degree, a violation of RCW 9A.56.200, and Assault 1st Degree, a violation of RCW 9A.36.011.

The affiant verily believes that the above evidence is concealed in or about a particular house or place to wit:

- Motel 6, 5201 20th St. E, room #132, Fife, Pierce County, Washington, 98424, a motel with a clearly marked door with that address.
- 6110 Alameda Ave West, University Place, Pierce County, Washington, 98467 (alternately known/listed as 6110 59th Ave West, University Place, Pierce County, Washington, 98467), a single family residence, yellow in color, with an attached yellow garage, all vehicles including one Cadillac sedan and another unknown make sedan, and all storage areas and outbuildings.
- 680XYV, a 1990 Olds four door sedan, white in color, VIN#1G3HY54C7L1828462, registered to Jennifer Trevino, located at the Lakewood PD evidence processing bay.

The affiant's belief is based upon the following facts and circumstances:

On 6/2/09 at 1323 hrs, Lakewood PD officers responded to Wal Mart, 7001 Bridgeport Way SW, Lakewood, Pierce County Washington, following 911 calls reporting that an armored car guard had been shot during a robbery. Officers and detectives responded to that location and discovered victims Kurt Husted, a Loomis Armored Car guard, and Wilbert Pena down in the north lobby of the store. Husted sustained a gunshot wound to the head and was pronounced dead at the scene. Pena sustained a non-fatal gunshot wound and was transported to a hospital for treatment.

I interviewed witness Tito E. Brown. Brown advised that he heard shots fired inside the store and saw one of the victims lying on the floor. He said that he ran outside and saw a white Buick sedan driving away and saw a partial license plate of 352M.

Detective Punzalan and Detective Bunton reviewed security video from Wal Mart. The video depicted two male suspects waiting for Husted to enter the store. The detectives viewed Husted make a cash pickup from the store office, then return to a cart with bags of cash. The detectives viewed suspect #1 approach Husted, aim a chrome or stainless semi-automatic pistol at him, and shoot Husted in the head. Husted and Pena then fall to the ground. Detectives Punzalan and Bunton then viewed the suspects exit the store with the cash bags and run to a white sedan, license WA 352RMD. That vehicle then left the area at a rapid rate. Further review of the security video revealed that the occupants of 352RMD appeared to contact a second vehicle, a light colored sedan, prior to the robbery.

I interviewed witness Kim Nicholson, an employee of Wal Mart's accounting department. She advised that she gave Husted approximately \$55,000 in cash and checks for deposit immediately prior to the robbery and shooting.

Follow up investigation revealed that 352RMD was reported stolen on 4/20/09 reference Tacoma PD case # 091100792. The vehicle was recovered by Tacoma PD at 6613 South Monroe, Tacoma, Washington, following a 911 call from witness Ryan Wells at 6613 South Monroe. Wells advised that three individuals dumped the vehicle in the alley behind his apartment. Officers responded to that location a short time later and impounded 352RMD to the LPD evidence processing bay for search warrant service.

Ofc. Catlett conducted follow up investigation and contacted witness Natalie Brechbiel at 6611 South Monroe St. in Tacoma. Brechbiel advised that "Cal" was driving 352RMD when it was dumped in the alley behind 6613 South Monroe St. nearby. Brechbiel advised that after leaving 352RMD, "Cal" came to her apartment with two other individuals and asked for new pants. Brechbiel became concerned that "Cal" was involved in a serious crime and told him and the others to leave. Brechbiel stated that she had been to Cal's house before and offered to show Ofc. Catlett where the house was. Brechbiel then directed Ofc. Catlett to 3710 South Tyler Street, Tacoma, one unit of a tan duplex with dark tan trim.

Follow up investigation on that address revealed that 3710 South Tyler Street, Tacoma, WA was the DOC address of Calvin Finley. Ofc. Catlett relayed this information to Sgt. Estes and I at the station. A comparison of Finley's booking photo with the surveillance video of the suspect depicted shooting Husted indicated that Finley was nearly identical in appearance to the suspect that shot Husted.

Officers and detectives established surveillance on 3710 South Tyler Street, Tacoma, Pierce County Washington a short time after receiving the information from Brechbiel. Officer Catlett established a concealed position east of 3710 and began relaying information to myself and other officers. Ofc. Catlett observed adult male and female subjects entering and exiting 3710 South Tyler and 3712 South Tyler. These individuals came out of 3710 and entered 3712 and vice versa. At 1810 hrs, Ofc. Catlett advised that a male came out of 3710 South Tyler and entered 602PZP, a white Beretta. With other units I followed that vehicle to Center and Tyler, where the driver bought food at the convenience store, then followed it back to the residence. The male driver then exited the vehicle and stood in the driveway watching traffic on the road in an apparent attempt to spot surveillance.

At 1828 hrs, Ofc. Catlett observed 712SQZ, a green Chevrolet Suburban with custom rims, VIN #1GNEK13R1WJ341739, registered to Odies D. Walker, 6110 Alameda Ave W, University Place, WA 98467 pull up at 3710 South Tyler St. Ofc. Catlett advised that a black male driver exited the vehicle and contacted individuals at the duplex. Ofc. Catlett then advised that the vehicle was driving away southbound. Surveillance units were able to follow the vehicle away from that location and to confirm the license plate.

As this surveillance operation was unfolding, a confidential and reliable informant (hereafter referred to as "The CI") contacted members of the Tacoma FBI Violent Crimes Task Force. The CI advised that he/she was in contact with Jordan Lopez and Jesse Lewis. The CI advised that Lopez and Lewis had information about this robbery and homicide, and provided a north Tacoma address where Lopez and Lewis could be located. Lakewood PD and Task Force detectives and agents followed up on the CI's information and detained Lopez and Lewis via a traffic stop. Lopez and Lewis agreed to accompany detectives to Lakewood PD.

An interview of Jordan Lopez, finance of Jesse Lewis was conducted at the Lakewood Police Department by Detective R. Punzalan and Officer J. Martin. Prior to the interview LOPEZ was advised of her constitutional rights/waiver, to which she stated she understood and voluntarily waived.

JORDAN stated approximately 2-3 weeks ago LEWIS was approached by a subject known as "Odie" and "Smoke" who invited LEWIS to partake in an armored vehicle robbery at the Walmart in Lakewood. ODIE asked LEWIS directly if he was willing to be the shooter, to which he declined.

LOPEZ went on to say even though LEWIS declined the offer, ODIE and his cousin kept him informed of the plan and how the operation was to be carried out. LEWIS went to describe ODIE as a "hardcore Black Gangster Disciples" from Chicago approximately 40-42 years old who has been previously shot several times.

LOPEZ further stated she learned about the incident today and saw the suspect photos released to the media, which showed a B/M wearing a baseball hat, blue button down shirt with white undershirt emerging from the front doors of Walmart. In the background the photo shows a second B/M running from the interior threshold holding what appears to be bags. LOPEZ stated she immediately recognized the first subject as ODIE'S cousin and could identify him if shown a picture. In reviewing the surveillance film of the shooting this would have been immediately after the victim/guard was fatally shot.

LOPEZ was read the Lakewood Police Photographic Line-Up Admonishment Form to which LOPEZ stated she understood. LOPEZ was shown a series of 6 subjects, one of which was Calvin Finley. LOPEZ immediately and without any hesitation selected FINLEY as ODIE'S cousin and the subject emerging out of the Walmart in the surveillance photos. Additionally, LOPEZ stated FINLEY was a part of the planning and was described as "hardcore and very dangerous."

A search of ODIE revealed his identity to be Odies D. Walker, DOB/10-1/1967 with a listed address of 6110 Alameda Ave W, University Place Wa., in addition to 1446 W. Marquette Rd FL, #2 in Chicago, Ill.

Officer Martin contacted Detective J. Mendoza from area 1 Homicide Unit in Chicago, Illinois. Det. Mendoza confirmed ODIE'S gang status, located a mug shot photo which was send via email.

At approximately 2000 hrs, I was directed to return to the station to assist with interviews of Lopez and Lewis. I began observation of Det. Bunton's interview with Lewis, already in progress. Lewis advised that he had been in contact with a male known to him as "Smoke" who was married to a female named Tonie. Lewis advised that Smoke and Tonie had begun talking to him in the recent past about doing an armed robbery at Wal Mart, where Tonie worked. Lewis advised that Smoke had been doing surveillance of the armored truck deliveries and pickups at the Lakewood Wal Mart. He also advised that he had been over to Smoke's house and had seen a white Buick sedan parked in the back yard. Lewis advised that he leaned on the white Buick and Smoke told him not to touch it, because it was stolen. ✕

Lewis went on to say that Smoke asked him to participate in a robbery of Wal Mart in which the armored truck guard was to be shot. Lewis stated that he told Smoke he wasn't interested in participating in the robbery. Lewis stated that on 6/2/09 he heard about the robbery and murder at Wal Mart and knew that Smoke and Tonie had been involved.

It should be noted that 6110 Alameda Ave West, University Place, Washington, 98467, is the listed DOL address of Odies Walker. However, this address appears to also addressed as 6110 59th Ave West, University Place, WA 98467. A check of 6110 Alameda Ave W. in the Pierce County Assessor's office database did not show a listing; however there was a listed address of 6110 59th Avenue West. Surveillance of that location by

Ofc. Hamilton showed the physical address to be 6110 Alameda Ave West, University Place, WA 98467.

Odie Walker, his wife Tonie Irby, and their children were observed by Ofc. Hamilton and other officers driving 712SQZ, as Walker and Irby arrived at 6110 Alameda Ave. Odies Walker and Tonie Irby were taken into custody and transported to the station for interviews, as were several of their children. 712SQZ was impounded and transported to the Lakewood PD evidence processing bay.

At approximately 0400 hrs on 6/3/09, Sgt. Estes received information from a confidential source indicating that Calvin Finley was hiding at the Motel 6, 5201 20th St. E, Fife, Pierce County, Washington, 98424, a motel with a clearly marked door with that address. Multiple officers and detectives established surveillance on the motel shortly thereafter. At approximately 0800, Ofc. Catlett saw a male matching the description of Calvin Finley leave room #132. A vehicle, 680XYV, a 1990 Olds four door sedan, white in color, VIN#1G3HY54C7L1828462, registered to Jennifer Trevino, pulled up in the area of room #132, driven by a white female. Finley walked directly to this vehicle, walked to the open trunk, and placed a light colored bag in the trunk. Finley then got into the passenger seat and slouched down, and the vehicle then drove away from the scene.

Metro SWAT then stopped the vehicle and arrested Calvin Finley and detained and interviewed the female, later identified as Jennifer Trevino. Tacoma PD SWAT officers then obtained a key and cleared room 132 before securing it for detectives. Finley was transported to the station for interviews.

At 0833 hrs, Sgt. Lawler, Det. Johnson and other officers and detectives arrived at 6110 Alameda Ave W. University Place, Pierce County, Washington, 98467. While preparing to serve the warrant they found that there was a detached shed on the property that was not visible by officers during surveillance that may contain evidence of the above listed crimes. The shed was not listed on the original warrant.

Your affiant, Detective Jeff Paynter, has been a commissioned police officer in Washington State since 1994. Your affiant attended the Basic Law Enforcement Academy at Spokane, Washington and received 440 hours of entry level training, followed by four months of field training. Your affiant has attended specialized training in criminal investigations, auto theft investigations, informant development and management, surveillance, homicide investigations, and SWAT tactics. He is a Master Defensive Tactics Instructor. Your affiant served 8 months in the Spokane Police Department Street Crimes Unit, where he participated in narcotics and vice investigations including controlled buys, prostitution stings, buy-bust operations and search warrant service. Your affiant has made numerous narcotics arrests and has seized illegal narcotics during a variety of investigations including powder cocaine, crack cocaine, methamphetamine, marijuana, and black tar heroin. Your affiant served as a detective with the City of Federal Way, Washington for six years. During that assignment your affiant investigated cases involving burglary, forgery, auto theft, rape, assault, unlawful possession of firearms, child abuse, robbery, possession of stolen property, trafficking in stolen property, narcotics investigations, and homicide. Your affiant is a detective with the City of Lakewood assigned to the Criminal Investigations Unit.

* Lewis further stated that he had seen "smoke" store rifles and JC pistols in the shed, specifically a 30-06 rifle, ~~which Lewis~~ Lewis' statement was corroborated by Jordan Lopez, see original warrant.  Det. Jeff Paynter LK50

IT IS THE AFFIANT'S BELIEF that due to the afore mentioned circumstances; that Calvin Finley, Odies Walker, Tonie Irby, and others as yet unidentified are or have been engaged in the commission of Murder 1st Degree, a violation of RCW 9A.32.030, Robbery 1st Degree, a violation of RCW 9A.56.200, and Assault 1st Degree, a violation of RCW 9A.36.011, And your affiant hereby requests that a search warrant be signed for the search of the listed location and vehicles for further evidence in the-listed crimes.


Detective Jeff Paynter LK50

SUBSCRIBED AND SWORN TO BEFORE ME this _____ day of 6/8/09, 2009.


JUDGE

1 else would have it to be able to second guess me should
2 that became necessary. When she gets back, someone
3 remind me, and -- I will try to do it myself without
4 being prompted, but it does take a village to raise me
5 around here. If you think about it, remind me, and we
6 will try to get Mrs. Winnie to draft one of our
7 standard orders sealing.

8 Any other loose ends?

9 MR. THORNTON: The defense filed a brief motion to
10 suppress on Friday, and we would ask that that be heard
11 prior to opening statements. In the alternative, I
12 guess the subject matter of the finding of the safe,
13 the contents of the safe, any evidence derived from the
14 items on the safe or in the safe will not be mentioned
15 by the State in opening. We can address it sometime
16 after the opening, but I would prefer to know where we
17 stand going into the opening statements.

18 THE COURT: This is, basically, a 3.6 motion to
19 suppress evidence seized from the safe? Is that it?

20 MR. THORNTON: Correct.

21 Mr. Costello has handed me a scheduling order as
22 well as an omnibus order, which set forth a briefing
23 schedule.

24 The Court does not know this, but at the time that
25 this order was entered, I was in trial on the Wal*Mart

1 matter and tried to do the best that I could --

2 THE COURT: On which matter?

3 MR. THORNTON: Not the Wal*Mart matter, the
4 Clemmons matter. I tried to do the best that I can.

5 I stumbled across this issue in speaking with some
6 colleagues late last week and tried to brief it as best
7 that I can.

8 It is an issue of constitutional magnitude, which
9 my understanding is, it can be raised at any time.) (I)
10 did not purposely delay for any tactical reasons. I'm
11 just a slow-thinker as to whether or not this was an
12 issue or not. I don't think that Mr. Walker should be
13 denied the opportunity to address this issue because a
14 scheduling order wasn't filled out and I didn't think
15 fast enough.

16 (THE COURT:) Actually, I'm trying to -- it's my
17 fault here -- I think that I did see that, but I had
18 not, for whatever reason, put it in a place --

19 MR. THORNTON: The brief or the scheduling orders?

20 THE COURT: The scheduling order has just been
21 handed up with the briefs, but your motion and brief
22 with respect to that. I know that I saw it. I know
23 that you turned it in. I'm just trying to find it here
24 in my stack of things.

25 Mr. Costello, you are standing. I don't want to

1 leave you there for a while. Feel free to talk.

2 MR. COSTELLO: Thank you, Your Honor.

3 I've handed forward the scheduling order up to
4 remind the Court that the defense agreed last fall in
5 an omnibus order that the briefs by a moving party need
6 to be filed. I believe that it was two weeks prior to
7 the motion date. We have a scheduling order -- that is
8 on top here that Your Honor signed -- setting motion
9 dates here in this department for February 3rd and --
10 all pretrial motions.

11 ~~THE COURT:~~ Yes. It looks like that addition was
12 in my handwriting even. *

13 MR. COSTELLO: I want to emphasize to the Court,
14 because this is, by my calculation, roughly seven weeks
15 late. Importantly, Your Honor, Mr. Thornton tells the
16 Court that it just didn't come to him. I accept what
17 he is saying at face value; but under the law, it seems
18 to the State that he needs to make a greater showing
19 than that.

20 In State v. Duckett, which is at 73 Wn. 2d, 692,
21 the State Supreme Court dealt with a suppression motion
22 that was filed on the day of trial. I submit to
23 Your Honor that this is the functional equivalent of
24 it, Friday afternoon, on the eve of trial. In Duckett,
25 the trial judge refused to hear the suppression motion.

1 The State Supreme Court upheld it. The court said that
2 it was not timely filed. I will, quote here, as a
3 general rule, a defendant must "within a reasonable
4 time before the case is called for trial, move for
5 . . . suppression and give the court an opportunity to
6 try out the disputed question of fact," unless the
7 defendant offers to prove, by the exercise of
8 reasonable diligence, he could not have learned earlier
9 of the unlawful seizure.

10 Well, in this case, the defense has known from the
11 inception of this case that a safe was taken from the
12 defendant's bedroom closet. They have known from the
13 beginning of this case that the safe was locked, and,
14 in fact, they have known that the State has clear
15 evidence to show that the defendant purchased that safe
16 earlier in the day at a Federal Way Wal*Mart.

17 Counsel suggests that it's an issue of
18 constitutional magnitude. Well, it is, but the
19 Supreme Court has said in Duckett and other cases,
20 State v. Robbins, 37 Wn. 2d, 431, the court has made
21 clear that a constitutional right comes with it a
22 privilege to ask the court to consider a violation of
23 that right, but the privilege can be waived. That's
24 what has happened here from the State's perspective,
25 Your Honor. He has waived his privilege, his