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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 
DEPUTY

No. 42844-0-11

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

STATE OF WASHINGTON,
Respondent,

v.

TAWANA DAVIS,
Appellant.

STATEMENT OF ADDITIONAL GROUNDS

Tawana Davis, Pro se
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9601 Bujacich Rd. NW
Gig Harbor, WA 98332-8300

pm 9/5/12

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Issues Pertaining to the
Assignment of Errors

1. Ineffective Assistance of Counsel
2. Council failed to investigate or challenge the Affidavit for probable cause for the search warrant and they failed to investigate the unreliable and perjured statements made by law enforcement.
3. Did Special Operations Group Officers violate policies, procedures and RCW's, while conducting the investigation on the appellant?
4. The appellant was denied her Due Process to a Fair Trial through Cumulative Error.

Summary of Additional Grounds

The appellant, Tawana Davis, submits these additional grounds in supplement to the appellants opening brief. The appellant is challenging her convictions. She is also challenging the actions and truthfulness of the Bremerton Police Department in accordance with the Special Operations Group Manual. Had it not been for the abundance of cumulative error, the appellant would not have been convicted of all the charges.

The policies and procedures uphold the standards and safety of all involved, as well as, protect the defendants against substantial prejudice in order to secure a lawful conviction. Failure to abide by their own standards, policies, manuals, and procedures undermine any and all authority that would protect the police and the appellant's constitutional rights.

Once a manual such as this one is put in place and violated as this questions integrity of those involved against the appellant. In addition when procedures are not followed the credibility is lost, therefore; once again the appellant's constitutional rights to a fair trial have been violated.

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

THE STATE OF WASHINGTON)	
)	
Respondent,)	No. 42844-0-II
)	
v.)	STATEMENT OF
)	ADDITIONAL GROUNDS
<u>TAWANA LEA DAVIS</u>)	
)	
Appellant.)	

I, TAWANA DAVIS, 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 the merits.

ADDITIONAL GROUND ONE

In supplement to Appellant's opening Brief Ground 3. page13, of the appellants opening brief the appellant submits the following;the appellant was denied effective assistance of counsel guaranteed under the US Constitution, Amendment VI and article

1§ 22 of the Washington Constitution. Trial counsel failed to object, request a mistrial, or address in any way that juror #5 was repeatedly nodding off during trial. Page 300 Lines 13-24 RP. RCW 2.36.110 governs the removal of jurors where it says it shall be the duty of the judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by of indifference, inattention or any other physical or mental defect or any reason of conduct or practices incompatible with proper and effective jury service.

“The right of a trial by jury” means “a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct.” *State v. Tigano*, 63 Wn. App. 336, 341, 818 P. 2d 1369 (1991). In order to preserve a trial irregularity issue, in an appeal; counsel must request some relief at the time the irregularity occurs. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). It is the defenses duty to ask for a mistrial instead of waiting until an adverse verdict has been rendered to allege juror misconduct for the first time. Here the appellant’s trial lawyer did not request relief. *State Vs Soonalole*, 99 wn APP, 207, 215, 992, P2d 541(2000)

To prevail on the claim of ineffective assistance of counsel appellant must show both deficient performance and resulting

prejudice. *Strickland Vs Washington*, 466 US 668,687,104 S ct 2052, 80 L.ed 2d 674(1984) and *State Vs Thomas*, 109 Wn 2d 222, 225,-26, 743 P2d 816(1987). Defendants are entitled to relief under the sixth (6th) amendment when trial attorney fails to assert rights that may have altered the outcome of the trial. *Lafley V Cooper*, WL932019 at 9 citing *Kimmelman V Morrison*, 477 US 365, 1065 ct, 2574, 91 L.ed 305 (1986).

Appellant's trial lawyer failed to follow up on the juror that was nodding off frequently, which was an act of deficient performance. The appellant was denied a trial by twelve (12) attentive jurors and that is prejudice.

ADDITIONAL GROUND TWO

In supplement to appellants opening brief ground 3 the appellant submits the following. The appellant was again denied her right to effective assistance of counsel guaranteed under the US Constitution where the trial counsel failed to challenge the affidavit in support of the search warrant or the information provided by Detective Mathew Musslewhite lead officer of the Special Operations Group of the Bremerton Police Department. Had trial counsel done this, he would have realized that on page 9 line 30 and page 10, lines 1-4, of the Affidavit in support of the search

warrant Document #20110023, Officer Musslewhite did recklessly and intentionally falsify information to Judge Anna Laurie to obtain the search warrant. Detective Musslewhite stated that she had multiple arrests and police contact regarding controlled substance distribution, and that she and her son are both known methamphetamine distributors in Kitsap County area according to reliable sources. On page 163 lines 15-25, page 164, lines 1-25, and page 165, lines 1-11 RP, it is defined to us how Detective Musslewhite became aware of and familiarized himself with the appellant. He led us to believe that he used police data bases and his knowledge of the appellant's son to determine appellant's criminal background. It is unlawful and unconstitutional to use someone else's criminal record to establish the appellant's actions and alleged illegal activity. He also stated that the appellant has a long criminal history which spans multiple states. The appellant has a long criminal history which spans two states of which none of this criminal record involves any arrests, convictions, or incarcerations for distribution of any controlled substances, not even the current convictions the appellant is appealing. *State v. Horton*, 116 Wn. App. 909 (2003). *State v. Klinger*, 96 Wn. App. 619 (1999). *In RE Brown*, 96 Wn. 2d 431 (2001). *PR of Reichenbach*, 153 Wn. 2d 126

(2004). *Perjured Testimony. State v. Kirkman*, 126 Wn. App. 97

(2005). *Perry v. New Hampshire*, No. 10-8974 (January 11, 2012).

Perjury- RCW 5.28.060.

As in RCW 9.81.110, "misstatements are punishable as perjury. Every written statement made pursuant to this chapter by an applicant for appointment, employment, or by an employee, shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who willfully makes a material misstatement of fact

- 1) In any such written statement or
- 2) In any affidavit made pursuant to the provision of this chapter or
- 3) Under oath in any hearing conducted by any agency of the state or of any of its political subdivisions pursuant to this chapter or
- 4) In any written statement by an applicant for appointment, employment, or by any employee in state aid or private institution of learning in this state, intended to determine whether or not such applicant or employee is a subversive person as defined in this

chapter, which statement contains notice that it is subject to penalties of perjury, as prescribed in RCW chapter 9.41. "

ADDITIONAL GROUND THREE

Did the Special Operations Group Officers violate the policies, procedures, rules, and regulations of the Bremerton Police Department when handling the informants? At this time the appellant would like to submit the motion to supplement the record pursuant to RAP 9.11. I have provided a copy of the Bremerton Special Operations Group Manual pages 1, 13-18.

As per the Special Operations Group Manual page 1 (Introduction to the manual): This manual is an official publication of the Bremerton Police Department. It is issued with the authority of the chief of police and contains policies, procedures, rules and regulations for the Department members that are assigned to the Special Operations Group at the Bremerton Police Department.

It states that it will be the responsibility of every employee assigned to the unit to know and abide by all the policies, procedures, rules, and regulations contained in this manual. In addition to this manual all personnel assigned to the unit must be

fully aware of all employee stated responsibilities as outlined in the Bremerton Police Department Standard Operating Procedures Manual.

On page 16 § 7.7, utilization of Informants subsection E line (1), it states the informants shall not violate any criminal law to gather information or provide services for that unit. Laura Sutton Husted was utilized as a Defendant Informant, the definition for this is in the manual I have provided for the record under Motion RAP 9.11 and under page 13 § 7.2 Informant Definition subsection 7.2.1 and 7.2.2. On November 16, 2010, Ms. Sutton Husted contacted Detective Mathew Musslewhite and stated that she could buy meth from the appellant. Ms. Sutton was a Defendant Informant who had been charged with a Delivery of a Controlled Substance, RCW 69.50.401, and was working for law enforcement.

This being the reason creditability is substantially a question and why procedure should have been followed to the letter of the law. At the secure area, Ms. Sutton Husted was found in possession of .2 grams of methamphetamine, a syringe, and a mirror with residue, while supervising Officer Randy Plum was searching her car prior to the car being used during the controlled buy on the appellant. On page 471 lines 1-20 RP, Detective Plum

states that this was insignificant and allowed her to continue to be used, violating any and all police procedure, as well as, the appellant's 14th Amendment right. U.S. CONST. amend. XIV, cl. 4.

Due process provision of the Fourteenth Amendment was intended to guarantee procedural standards are adequate and appropriate, then and there after to protect at all times persons charged with or suspected of crimes by persons holding positions of power. *Chambers v. Florida*, 309 US 227, 84 L. Ed 716, 60 S ct. 472. In addition to this, Ms. Sutton Husted admitted to buying and selling methamphetamine the entire time she was under contract with law enforcement. Page 113 Lines 12-21 RP. Yet, her testimony was still allowed. On page 160 Lines 17-25 RP, Detective Musslewhite states, "obviously if there's a major violation, safety breach or major reliability problem that someone is trying to steal from us or something like that then were going to stop using that informant". However on page 161 Lines 1-15 RP, it explains that informants breaking their contracts or the law would violate their creditability and compromise the alleged buy.

It would seem, that Due Process would prevail, instead however, the Bremerton police officers chose to use their own rules

and make up their own polices, completely neglecting the 14th Amendment clause 4 under Due Process.

ADDITIONAL GROUND FOUR

Under the cumulative error doctrine, a defendant is entitled to a new trial where errors cumulatively produced a trial which was fundamentally unfair.

The doctrine applies to instances where there have been several trial errors that standing alone would not have been sufficient to justify reversal, but when combined deny a defendant a fair trial. *State v. Greiff*, 141 Wn. 2d 910 (2000).

1. Trial counsel failed to object, motion for a mistrial, or raise or preserve for appeal the issue of juror #5 nodding off frequently, Page 300 Lines 13-24 RP. *Strickland v. Washington*, 466 US 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). U.S. CONT. amend. VI. Criminal Law 641.13 (1).
2. Failure to challenge the search warrant was ineffective assistance of counsel, appellant's Brief #3 page 13.

3. Failure to challenge perjured testimony provided no affidavit of probable cause by Detective Musslewhite on appellant's arrest and conviction record. *State v. Kirkman*, 126 Wn. App. 97 (2005). RCW 9.81.110.

Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. *Mak v. Blodgett*, 970 F. 2d 614 (9th Cir. 1992). *Ewing v. Williams*, 596 F. 2d. 391, 395, (9th Cir.1979).

CONCLUSION

At this time for the reasons stated in my Appellants Brief, in my Statement of Additional Grounds, and as justice requires, I would respectfully ask the court to reverse and vacate my convictions with prejudices.

Dated: 9/5/12 Tawana Davis
Signature

Tawana Davis 904552
PRINT NAME & DOC
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9601 Bujacich Road Northwest
Gig Harbor, Washington 98332-8300

No. 42844-0-11

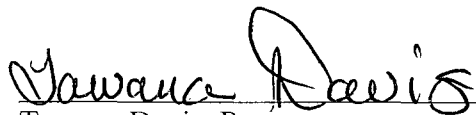
IN THE COURT OF APPEALS
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APPENDIX I-
BREMERTON POLICE SPECIAL OPERATIONS GOUNG MANUAL



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INTRODUCTION TO THE MANUAL

This manual is an official publication of the Bremerton Police Department. It is issued with the authority of the Chief of Police and contains policies, procedures, rules and regulations for department members that are assigned to the Special Operations Group of the Bremerton Police Department.

It will be the responsibility of every employee assigned to the unit to know and abide by all the policies, procedures, rules and regulations contained in this manual. In addition to this manual, all personnel assigned to the unit are to be fully aware of all employee stated responsibilities as outlined in the Bremerton Police Department Standard Operating Procedures Manual.

ASSIGNMENT OF THE MANUAL

All personnel assigned to the Special Operations Group will be provided with a copy of this manual.

- A. Each manual will be assigned a control number and, upon issuance, each recipient will provide certification, in a form determined by the Bremerton Police Department, that they have read and understand the policies and procedures set forth in this manual.
- B. Contents of the manual will not be disclosed to unauthorized personnel without direct permission from the Division Commander.
- C. Revisions, supplements and page changes will be disseminated to each person who possesses a manual.

CHAPTER 7:00:00

INFORMANT MANAGEMENT

7.1. INFORMANTS

7.1.1. Confidential Informants must be reliable and consistent. They must be capable of producing accurate information which furthers an investigation.

7.2. INFORMANT DEFINITIONS

7.2.1 Confidential Informant: A Confidential Informant is a person who provides information and/or services to members of the Unit with or without expectation of compensation in the form of money, or other considerations provided by the Unit, the prosecutor's office, or other branch of the criminal justice system.

7.2.2. Defendant/Informant: ~~As above, but subject to arrest and prosecution for a state offense, or a defendant in a pending federal or state case who expects compensation or judicial consideration.~~

7.2.3. Restricted-Use Informant: ~~An informant who meets any of the following criteria shall be considered a restricted-use informant.~~

- A. ~~Persons on probation or parole (federal or state) only with written consent of supervising agency.~~
- B. ~~Persons formerly dependent on drugs or currently participating in a drug treatment program with the approval of the Unit Supervisor.~~
- C. ~~Persons with two or more felony convictions with the approval of the Unit Supervisor.~~
- D. ~~Persons who have been convicted of a drug felony with the approval of the Unit Supervisor.~~

7.2.4. A Source of Information: A person or organization, not under the direction of a specific agent, who provides information without becoming party to the investigation itself (i.e. a business firm furnishing information from its records; an employee of an organization who, through routine activities, obtains information of value to the Unit; or a concerned citizen who witnesses an event of interest to the Unit). The title "informant" does not apply to a "source of information," unless the source seeks financial compensation or becomes a continuing active part of the investigative process.

7.3. DELETED

7.4. INFORMANT RESTRICTIONS

7.4.1 The following restrictions in the use of informants shall apply:

- A. No informant under the age of eighteen shall be used without the written consent of the informant's parents, and The Unit Supervisor.
- B. If an informant is arrested for a federal or state felony while under contract, his/her use shall be reviewed by Unit Supervisor for continued use.
- C. ~~Any informant who has been previously declared unreliable by any police agency shall not be used. (Special circumstances may apply but must be approved by the Unit Supervisor.)~~
- D. When using informants of the opposite sex, special caution must be taken to avoid the "police groupie" syndrome, or desire of the informant to develop more than a business relationship with the investigator(s).

7.5 NEW INFORMANTS (SIGN UP PROCEDURES)

7.5.1. There are four criteria that must be met to establish a person as an informant:

- A. The person is in a position to measurably assist the Unit in a present or future investigation.
- ~~B. The person shall not compromise Unit interests and activities.~~
- ~~C. The person shall accept direction necessary for effective use of their services.~~
- D. Approval of the Unit Supervisor.

7.5.2. The following procedures shall apply when signing up an informant:

A. Completely debrief the prospective informant:

- 1) Meet the informant with another sworn officer to exclude reserve officers.
- 2) At the first meeting, get as much information as possible from the prospective informant and complete a detailed report.
- 3) Get, don't give, information.
- 4) Ask the informant about all types of crimes. If possible obtain a taped statement reference the information he/she had just provided.

B. Conduct a thorough criminal background check:

- 1) Obtain WASIC, NCIC, III, DOL checks (to be included in the Informant File).
- 2) Obtain vehicle information to consist of all vehicles registered to the prospective informant.
- 3) Obtain the address and telephone number of the prospective informant and run a CAD history check on the address.
- 4) Determine if the prospective informant will testify. Do not promise that they won't have to testify.
- 5) Determine if the prospective informant is represented by an attorney and if they are aware of this.
- 6) Ascertain if the prospective informant is on probation or parole.

C. Complete Informant Contracts:

- 1) ~~Contracts for defendant/informants will be drawn up by the Prosecutor's office.~~
- 2) ~~Contracts will include recommendations to the court.~~
- 3) ~~Contracts should set time limits for the informant to perform specific acts.~~

D. Complete an Informant File for approval by the Unit Supervisor. The file shall contain the following items on the prospective informant:

- 1) Photograph
- 2) Triple I
- 3) WSIN check (if available)
- 4) Informant Identification Record, including biographical data

- 5) Special Consent Form
- ~~6) Contract from the prosecutors office (if this exists)~~
- 7) Payment records
- 8) Record of cases the informant is involved in
- 9) Initial debrief report (per 7.5 section A.2)

7.6 DEFENDANT/INFORMANTS

- 7.6.1 The use of defendant/informants shall be governed by the following:
 - A. A defendant may be advised that cooperation will be brought to the attention of the appropriate prosecutor. No further representations or assurances shall be given without approval of the prosecutor. The appropriate prosecutor shall have sole authority to decide whether or not to prosecute a case against a defendant/informant.
 - B. The appropriate prosecutor shall be advised of the nature and scope of the defendant/informant's cooperation.
 - C. Prior to formally seeking the dismissal of any criminal charge against a defendant/informant, the Unit Supervisor must obtain the approval of the Division Commander.
 - D. Use of defendant/informants shall be reviewed in the manner prescribed for other informants. Their use may be continued only if they are found to meet the standards set forth therein.
 - E. ~~A formal agreement shall be signed between the defendant/informant and the prosecutor.~~

7.7 UTILIZATION OF INFORMANTS

- 7.7.1. The following guidelines shall apply in the utilization of informants:
 - A. Detective/informant contacts shall be of a strictly professional nature. Social or business contacts are expressly prohibited.
 - B. Contacts with informants shall minimize their access to knowledge of Unit facilities, operations, activities, and personnel.
 - C. ~~Whenever practical, two Unit detectives shall be present at all contacts with the informant.~~
 - D. All significant contacts with the informant and all information obtained at these contacts shall be documented in debriefing reports.

E. Agents shall obtain a written or tape-recorded admonishment advising the informants of his/her responsibilities while working with the Unit. Informants (and sources of information) shall be advised at the outset that:

- 1) ~~They shall not violate any criminal law to gather information or provide services for the Unit.~~
- 2) ~~They shall not possess, sell, or deliver any narcotics or controlled substances, except as specifically directed to do so by a Unit detective.~~
- 3) They are not a police officer and they do not have any power of arrest or other legal authority.
- 4) The Unit will use all lawful means to protect their identity, but this cannot be guaranteed.

F. The prosecutor shall be advised of any assurances and/or compensation provided an informant or defendant/informants in advance of any judicial proceeding.

G. When informants participate in undercover purchases involving official funds, controlled drugs, or items of potential evidentiary value, the buy will require a minimum of two detectives for surveillance purposes. Each buy will be controlled in the following manner:

- 1) The informant will be thoroughly searched preceding the buy. If the informant's vehicle or residence is utilized in the investigation, a thorough search will also be documented of those areas to which the informant has access.
- 2) The informant will be given official funds, which have been recorded by serial number, for the purchase of any contraband. The informant shall not purchase any contraband with personal funds. To avoid any error, all personal funds should be taken from the informant prior to contact with the suspect. The personal funds shall be returned to the informant immediately upon completion of the transaction.
- 3) ~~When possible, constant surveillance will be conducted on the informant after the search and until he/she meets with surveying agents.~~
- 4) The informant shall then be thoroughly searched as in Step 1. All evidence and official funds will be retrieved from the informant. When possible, the entire process (Steps 1-5) should be accomplished by the same agent, with the same witness.
- 5) The informant shall be thoroughly debriefed and a statement shall be obtained from the informant. The statement shall include a complete description of the suspect, a detailed account of all circumstances and conversations involved in the transaction, and any other facts which may be of importance.

H. ~~All searches of informants shall be conducted by a unit member or other law enforcement member and when at all possible, of the same sex as the informant.~~

- I. ~~Information obtained from informants will be evaluated and tested (where possible) before police action is initiated.~~
- J. ~~Personal contact with informants of the opposite sex shall be accomplished with two officers present.~~
- K. Informants shall not be given agents' home addresses or home telephone numbers. A business telephone or pager number will be given to all informants where the agent can be reached.

7.8 PAYMENTS TO INFORMANTS

- 7.8.1. No money shall be paid to any informant unless the following conditions are satisfied:
 - A. A receipt for Payment for Information and Purchase of Evidence is signed in the informant's true name.
 - B. The detective making payment is required to have two detective signatures on the receipt.
 - C. Prior approval has been obtained from the Unit Supervisor.
 - D. The amount of payment must be commensurate with the value of services and/or information provided, and shall be based on the following factors:
 - 1) The nature and complexity of the investigation
 - 2) The impact of this investigation/arrest on the community.
 - 3) The significance of the contribution made by the informant to the desired objectives of the case.
 - 4) The past reliability and work record of the informant.
 - 5) The informant's willingness to testify in court.
 - E. All monies paid to an informant will be recorded on a payment log in the informant file and on the detective's Individual Investigator Ledger (See Chapter 11 – Confidential Funds) by the detective. Monies shall not be paid to an informant prior to the completion of his/her services unless other arrangements were made.

Refer to Chapter 11, Confidential Funds, for additional information.