

66726-2

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No. 66726-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ABDI HILOW,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

THE COURT'S RESTRICTIONS ON HILOW'S  
CROSS-EXAMINATION, AND ITS PROHIBITIONS  
ON HILOW'S ABILITY TO MAKE A PROFFER OF  
THE PERTINENT IMPEACHMENT EVIDENCE,  
DENIED HILOW A FAIR TRIAL

1. The State knew or should have known about the police officer's pending criminal investigation. At Hilow's trial, the prosecutor disavowed any obligation to determine whether its central witness, police officer James Lee, was in the middle of a criminal investigation that might taint his credibility and expose a bias in his testimony. On appeal, the prosecution again tries to bury its head, putting the burden on Hilow to prove that there was a criminal investigation against Lee that was pending at the time of Hilow's trial. But the prosecution's contentions about the state of the evidence are contrary to the record.

Hilow cited several news reports in his Opening Brief and, without objection from the prosecution, the Court agreed to supplement the record with those reports. Those articles demonstrate the nature of the information that was known to the police and should have been available to the prosecution but which the State refused to disclose.

In an article published on November 10, 2010, more than three months before Hilow's trial, the Seattle Times reported that Lee had been "placed on administrative assignment to home," and the police department was looking into the possibility of a criminal investigation against him.<sup>1</sup>

A few weeks later, the Seattle Times reported that Seattle Police Chief John Diaz had arranged for the Washington State Patrol "to conduct a criminal investigation" of Lee.<sup>2</sup> The police department would put its own internal investigation on hold until the criminal investigation was complete. Id. Although the prosecution did not publicly announce it had filed criminal charges against Lee until after Hilow's trial, the police department had announced that it was criminally investigating Lee's conduct before Hilow's trial. Id.

In fact, at the very same time as Hilow's trial, Lee was testifying in the same courthouse in another case being prosecuted by the same office.<sup>3</sup> 2RP 93 (noting Lee is required to testify in

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<sup>1</sup> Steve Miletich, et al, Seattle Times, "Seattle officer's kicking of suspect prompts call for federal civil rights review," ( Nov. 18, 2010), available at: [http://seattletimes.nwsourc.com/html/localnews/2013465458\\_copkick19m.html](http://seattletimes.nwsourc.com/html/localnews/2013465458_copkick19m.html)

<sup>2</sup> Steve Miletich, Seattle Times, "State Patrol to launch criminal probe of SPD officer who kicked suspect," (Dec. 7, 2010), available at: [http://seattletimes.nwsourc.com/html/localnews/2013619553\\_copkick08m.html](http://seattletimes.nwsourc.com/html/localnews/2013619553_copkick08m.html)

<sup>3</sup> Steve Miletich, Seattle Times, "Seattle officer admits in court he wrongly described kicking teen in store," (Feb. 15, 2011), available at [http://seattletimes.nwsourc.com/html/localnews/2014234642\\_coprkick16m.html](http://seattletimes.nwsourc.com/html/localnews/2014234642_coprkick16m.html).

another case in the courthouse); 2RP 202 (noting Lee in middle of testifying in Judge Hayden's courtroom about undisclosed matter). At that other trial, Lee admitted he was currently being criminally investigated. Miletich, *supra*, n.3. The newspaper reported that, "Lee told jurors the State Patrol is conducting an investigation of his actions in the convenience store. The criminal investigation was initiated in December at the request of Seattle Police Chief John Diaz." *Id.*

Consequently, the prosecution's claims that it knew nothing and could not have known anything about Lee's pending criminal investigation fall flat. The prosecution essentially asks that it may turn a blind eye to information pertinent to the credibility of police officers, and disavows its obligation to discover an officer's self-interest in the outcome of a case. The available evidence shows that the State, either the police department or the prosecution, knew about Lee's pending criminal investigation. See Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). The prosecution must disclose impeachment evidence related to the credibility of parties

who testify against the accused at trial—here, the officer charged with investigating a crime. State v. Benn, 120 Wn.2d 631, 650, 845 P.2d 289 (1993)<sup>4</sup> (“[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the Brady rule” (alterations in original) (quoting United States v. Bagley, 473 U.S. 667, 676, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985))). This includes evidence of discipline for misconduct or untruthfulness related to any officer who is a witness. See United States v. Bland, 517 F.3d 930, 934 (7<sup>th</sup> Cir. 2008) (internal investigation of police officer for misconduct should be disclosed).

Information about Lee’s pending criminal investigation was never disclosed to Hilow, who had to try to figure out what was going on with Lee on his own, in the middle of trial. The prosecution never explained to Hilow or the court that Lee was testifying in the very case that prompted the kicking incident in that same courthouse. See Miletich, supra, at 2 n.3. It never disclosed that Lee admitted his pending criminal investigation when testifying

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<sup>4</sup> The Ninth Circuit ruled that the Brady violation in Benn was sufficiently material to the credibility of an important prosecution witness to require reversal, thus overruling the Supreme Court’s assessment of the materiality of the impeachment evidence. Benn v. Lambert, 283 F.3d 1040, 1053-54 (9<sup>th</sup> Cir. 2002), cert. denied, 537 U.S. 942 (2002).

in that case – testimony that was directly contrary to his claims in Hilow’s case, where he disavowed knowing about any criminal investigation -- and the prosecution never tried to correct Lee’s misrepresentation. 2RP 106.

2. The trial court limited Hilow’s ability to inquire into the basis for questioning Lee’s credibility and bias. The prosecution’s insistence that Hilow prove Lee harbored a bias against Hilow to be able to cross-examine Lee about the pending investigation against him also neglects the restrictions the court placed on Hilow at the preliminary stage. The court narrowed the inquiry when Hilow was trying to learn whether there was impeachment information available, as well as the disadvantage under which Hilow operated when he was not given information or advance notice of Lee’s pending predicament. The court granted only a limited hearing regarding Lee’s potential credibility issues. 2RP 103.

The court ruled that Hilow would have to show a “nexus to this case,” showing Lee had been untruthful or had “provided false testimony in another proceeding” in order to be entitled to any further cross-examination of Lee. 2RP 103. The court’s express requirement on a prior finding of untruthfulness curtailed Hilow’s ability to delve into Lee’s current predicament and how it could be

relevant to the jury's assessment of Lee's self-interest in the case, as did Lee's failure to answer questions forthrightly and the State's refusal to correct any of Lee's mistaken testimony. After questioning Lee, Hilow's attorney informed the court he felt hampered by the officer's answers that appeared less than forthright but he had not been given further information to test Lee's claims. 2RP 113. He asked for more information from the prosecution. 2RP 113. But the State again insisted Hilow needed to prove the possibility of Lee's bias or motive to lie without assistance from the State or disclosure by the State of information known to the police department. 2RP 114.

The State further portrays Hilow as having objected to Lee's testimony based only on his bias against African-American men as opposed to his self-interest in aiding the prosecution to improve his own chances against criminal prosecution and protecting his jeopardized police career. This claim relating to waiver should be disregarded. Hilow explained that he wanted to cross-examine Lee about his "bias where it may influence his willingness to give testimony that is not accurate." 2RP 201. He tried mightily to obtain what information he could about Lee but the State insisted it knew nothing and required Hilow to get a court subpoena for police

records. 2RP 98, 102, 115, 201-02. Hilow's lawyer explained he did not know what discipline Lee faced or might face. 2RP 101. Hilow was not in the position to figure out Lee's legal predicament in the middle of trial, which is why the burden rightly rests on the State to disclose all evidence in its possession that it knows, should know, or is known to the police that might be favorable to the defense -- including impeachment evidence. Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

3. The materiality of Lee's pending personal interest in his reputation as a police officer and his hidden motive to curry favor with the prosecution is demonstrated by the prosecutor's closing argument. The Response Brief neglects in context in which the prosecution set the case up as a credibility contest between Hilow and Lee and then told the jury that Lee was simply an experienced officer who had no interest in the outcome of this case, unlike Hilow's "very personal interest" in the outcome. RP 262.

The prosecutor's closing argument was flagrant misconduct because it misled the jury about facts known to the State. It is misconduct to vouch for the credibility of a police officer. State v. Ramos, \_\_Wn.App. \_\_, 2011 WL 4912836, \*7 n.4 (2011). It is misconduct to misstate the facts of the case. Id. at \*7. A

prosecutor may not “deliberately misrepresent” facts known to him.

Miller v. Pate, 386 U.S. 1, 6-7, 87 S.Ct. 785, 17 L.Ed.2d 690

(1967). The prosecutor did all three when he assured the jury that Lee had no “bias or prejudice” and no personal interest in the case.

The jury had no reason to guess that Lee had any personal stake in the outcome of the case because the jurors did not know he was being investigated, that his actions had prompted the FBI to review the Seattle Police Department’s practices, and that he faced potential criminal prosecution. The jurors would understand that Hilow had a reason to want the jury to find him not guilty, but the same would not be true of the police officer. The prosecution assured the jury that Lee was just “doing his job” and had no “interest” in what happened in the case. 2RP 262. He had no “bias or prejudice,” the prosecutor argued to the jury, when the jury knew of no reason to think otherwise. 2RP 262.

The State claims that the fact that Lee testified consistently with his police report shows his honesty, but it could also show the opposite. If Lee had admitted there was an error in his police report, he could be subject to discipline at a precarious time in his police career, as is demonstrated by the discipline he faced when he disclosed an error in his police report in another case. RP 108.

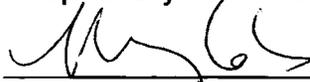
The prosecution took advantage of the lack of information before the jury to insist that Lee's credibility outweighed Hilow's but never gave the jury full and fair information for which it could make this assessment. The prosecution insisted that Lee was "clear and unequivocal" in his testimony and this testimony was based on his many years of experience. 2RP 262, 273, 274. Implicit in this argument was that Lee had no reason to shade his testimony, and Lee's lack of bias was explicitly argued to the jury, but in fact, Lee had made choices in the course of his work that were being criminal investigated. The jury should have been told of Lee's bias and personal motives, and the prosecution should not have argued to the jury that there was no reason to question Lee's testimony. These errors denied Hilow a fair trial and an a meaningful opportunity to confront his accuser.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Hilow respectfully requests this Court reverse his conviction.

DATED this 17th day of November 2011.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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	)	
ABDI HILOW,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF NOVEMBER, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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