

NO. 36505-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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In re The Personal Restraint of:

ERIC ROBERT LEONARD,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

FILED  
COURT OF APPEALS  
DIVISION II  
08 MAR 21 PM 12:38  
STATE OF WASHINGTON  
BY DEPUTY

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OPENING BRIEF OF PETITIONER

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1403-19-08

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. Petitioner is entitled to relief from personal restraint because the prosecutor's misconduct at trial eliciting and arguing from key testimony the prosecutor knew to be false denied petitioner his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

2. Petitioner is entitled to relief from personal restraint because trial and appellate counsel's failure to argue that the state had denied the defendant a fair trial by eliciting and arguing from key evidence that the state and counsel knew to be false denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

*Issues Pertaining to Assignment of Error*

1. Is a Petitioner entitled to relief from personal restraint when the prosecutor's misconduct at trial eliciting and arguing from key testimony the prosecutor knew to be false denied petitioner his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, and caused prejudice in that absent the false evidence, the jury would have returned a verdict of acquittal?

2. Is a Petitioner entitled to relief from personal restraint when trial and appellate counsel's failure to argue that the state had denied the defendant a fair trial by eliciting and arguing from key evidence that the state and counsel knew to be false denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment?

## STATEMENT OF THE CASE

### *Factual History*

On February 1, 2005, Dawn Mills was working the closing shift at a Subway Sandwich Shop in downtown Vancouver. RP 58-59<sup>1</sup>. At the 9:00 p.m. closing time, she locked the front door and began her closing routine. RP 59-60, 63-64, 69. About an hour later, at 10:00 pm, she heard a scraping sound at the back employee door that leads onto an alley. *Id.* She also heard the doorknob shake. RP 60. After calling out, "Is anyone there?" and receiving no reply, she called "911". *Id.*

Vancouver police officer Timothy Huycke responded to the front of the Subway Shop about two minutes after the "911" call. RP 69. As he drove up, he saw the defendant Eric Leonard walking on the sidewalk in front of the store. RP 71-72. The defendant was wearing dark clothes and gloves. RP 72, 80. Suspicious, Officer Huycke approached the defendant and asked if he had any weapons. RP 73. The defendant responded that he did, and he produced a knife from the small of his back. RP 74. Officer Huycke then arrested the defendant for carrying a concealed weapon, and searched him incident to that arrest. RP 75. That search uncovered a pistol from the

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<sup>1</sup>The record in this case includes the verbatim reports of the *Knapstad* motion, designated herein as "RPK" and the jury trial, designated herein as "RP."

defendant's waistband, and a speed loader, bullets, two screwdrivers, and a small flashlight from the defendant's pockets. RP 75-81. A subsequent check through police records determined that the pistol the defendant had in his waistband had been reported stolen and the defendant was a convicted felon who could not legally possess firearms. RP 97.

After taking the defendant into custody, Officer Huycke went to the alley behind the Subway Shop to inspect the back door. RP 83-86. He saw recent pry marks in the green paint of the door, and matching green paint chips on the ground near the door. RP 86. According to Officer Huycke, the smaller of the two screwdrivers he found in the defendant's pockets had paint chips on it the same color as the paint chips on the ground at the back door to the Subway Shop. *Id.* Officer Huycke put the paint chips from the ground below the door in one glassine evidence bag, and the small screwdriver with the paint chips he said he saw on it in another glassine evidence bag. RP 86-87, 90. He sealed them and later sent them to the crime lab for analysis. RP 86-87, 90.

#### ***Procedural History***

By information filed February 4, 2005, the Clark County Prosecutor charged the defendant with first degree unlawful possession of a firearm, attempted first degree burglary, possession of a stolen firearm, and possession of burglary tools. CP 1-2. The court later allowed the state to file an

amended information adding a firearms enhancement to the attempted burglary charge. CP 911-92.

Prior to trial, the state provided the defense with discovery materials in this case, including the crime laboratory report on the two baggies that Officer Huycke sent to the lab for analysis. CP 20. The body of this report states as follows:

**EVIDENCE**

- Item 6     One sealed zip-lock bag containing one “Vermont American” brand screwdriver.
  
- Item 8     One sealed zip-lock bag containing tiny gray-green paint flakes.

**PROCEDURES**

Stereomicroscopy was used to examine Item 6 for the presence of paint flakes on the tip, particularly green colored paint flakes.

**RESULTS**

No paint chips, particularly green colored paint chips, were found in Item 6.

CP 20.

Following receipt of this report and other discovery materials, the defendant’s attorney filed a *Knapstad* Motion, arguing *inter alia* that the charge of attempted first degree burglary should be dismissed because the lab report revealed that the officer had been wrong in his claim that the screwdriver had green paint chips on it. CP 16-71. The lab report was

attached to the motion along with a number of other documents. *Id.*

On July 8, 2005, the parties appeared before the Honorable Robert Harris to argue the *Knapstad* Motion. RPK. During this hearing, the defense specifically argued that the state did not have sufficient evidence to prove the burglary charge because the lab report had disproved Officer Huycke's claim that the screwdriver the defendant had in his possession had any paint chips on it at all, let alone paint chips consistent with the paint from the back door of the Subway shop. RPK 4-5. In the colloquy at the end of the motion, the court clarified that lab did not find any paint chips on the screwdriver or in the baggie in which the officer placed the screwdriver, and that the other baggie contained paint chips the officer found on the ground below the back door of the Subway Shop. RPK 22-23.

At the end of the *Knapstad* motion, the court requested further evidence in the form of photographs of the Subway store and the surrounding area. RPK 22-25. One week later, the state filed a Supplemental Affidavit with the requested photographs attached. CP 79-88. The court later entered a written order on the *Knapstad* motion. CP 39-40. As concerned the screwdriver and the paint chips, the court found:

The officer believed he observed paint chips on the screwdriver, but testing failed to disclose anything to be supportive of that conclusion.

CP 39.

However, given (1) the defendant's proximity to the Subway Shop within a few minutes of the police receiving the report of the attempted burglary, and (2) the fact that the police did not find anyone else in the general area, the court denied the motion, finding that this evidence was sufficient to allow the jury to hear the charge. CP 39-40.

On August 15, 2005, this case was called for trial before a jury, with Judge Harris presiding. RP i. During this trial, the state called four witnesses, including Officer Huycke. RP 68-91. During his direct examination, the following questioning occurred, in spite of the fact that the state knew that the crime lab had returned a report finding that neither the screwdriver nor the bag the officer placed it in had any paint chips on or in it.

Q. Now, did you also notice paint chips any other place?

A. Besides on the ground beneath the door handle and the missing paint from the door, it -- on one of the screwdrivers, the smaller of the two screwdrivers is how I described it, on the tip of it or on the end of it there appeared to be a very small green paint chip that matched the color of the door.

Q. And what did you do with that paint chip?

A. I put that -- *I left the paint chip on the screwdriver, placed it in a bag, a separate bag*, and later placed it in evidence, requesting a crime lab examination of that chip and also a chip that I took off -- one off the door and one off the bottom on the ground beneath the door, to -- for --

Q. So --

A. -- comparison purposes.

Q. -- the paint chips on the bottom of the door, did you place those -- or, I mean, that you saw on the ground, did you place those into evidence?

A. Yes.

RP 86-87 (emphasis added).

At the end of cross-examination in this case, the following colloquy occurred:

Q. And you submitted the paint chips and the screwdrivers to the crime lab for comparison, didn't you?

A. Yes.

Q. And you did not receive any positive confirmation that they matched; correct?

A. I don't think I received anything back from the crime lab.

RP 90.

In spite of the fact that (1) the crime lab had returned a report on the screwdriver and the sample paint chips the officer had submitted, and (2) the report showed that the screwdriver did not have any paint chips on it, defense counsel failed to have the report marked as an exhibit, failed to confront the officer with it to rebut his testimony, and failed to move that it be admitted into evidence. RP 68-91. Neither did the state take any steps to present this report to the jury. *Id.*

During rebuttal, the state specifically argued that there was no crime

lab report on the screwdriver or the sample paint chips. RP 154. The state claimed as follows:

Finally, the paint chip. Clearly there is no crime lab report, but you'll see Exhibit 18. It appears to be an empty plastic bag. And the reason that that plastic bag appears to be empty is because there's tiny paint chips in there (indicating).

RP 154.

Following deliberation in this case, the jury returned verdicts of guilty on all counts, along with a special verdict that the defendant was armed with a firearm during the commission of the attempted burglary. CP 101-105. After sentencing in this case, petitioner filed timely notice of appeal. CP 121. On direct review, counsel for the defendant argued sentencing issues only. RP 121-129. Counsel did not argue that the state had committed misconduct when it elicited testimony it knew was incorrect and when it argued for conviction from that evidence. *Id.* The mandate on the direct appeal issued on October 20, 2006. CP 121.

On April 24, 2007, the defendant filed a CrR 7.8(b) motion, arguing that (1) he had recently obtained a copy of the lab report, and (2) that based upon this report his conviction for attempted first degree burglary should be vacated and the charges dismissed. RP 130-146. By order filed May 8, 2007, Judge Harris of the Clark County Superior Court transferred the case to the Court of Appeals as a personal restraint petition. CP 160. On December 12,

2007, this court entered an order appointing counsel to represent the defendant and referring the case to a panel of judges for determination on the merits. *See* Order Referring Petition.

## ARGUMENT

### **I. PETITIONER IS ENTITLED TO RELIEF FROM PERSONAL RESTRAINT BECAUSE THE PROSECUTOR'S MISCONDUCT AT TRIAL ELICITING AND ARGUING FROM KEY TESTIMONY THE PROSECUTOR KNEW TO BE FALSE DENIED PETITIONER HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.**

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). The due process right to a fair trial is violated when the prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice the defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

For example in *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the defendant appealed his death sentence arguing in part that the prosecutor had committed misconduct by (1) obtaining an order in limine precluding the admission of any evidence concerning evidence of the conditions in prison of a person serving a sentence of life without release, and

(2) then arguing that the jury should consider such conditions in determining whether or not to impose the death penalty. The defendant appealed his sentence, arguing that this argument by the state constituted misconduct. The Supreme Court agreed with this argument and reversed the death sentence.

The court held:

Three factors weigh in favor of a finding of prosecutorial misconduct here. First, the violation of the trial court's order is blatant and the original motion in limine was targeted at preventing the defense from effectively responding to the prosecutor's argument. Second, although defense counsel attempted to paint a contrary picture of prison life, he was unable to introduce evidence to support his argument and his argument simply was not as compelling as the prosecutor's (perhaps because he did not expect to be allowed to make such an argument). Third, the images of Gregory watching television and lifting weights, when juxtaposed against the images of the crime scene, would be very difficult to overcome with an instruction. Again, these images would be central to the question of whether life without parole or death was the more appropriate sentence. Although this presents a close question, we conclude that the prosecutor's argument characterizing prison life amounted to prosecutorial misconduct that could not have been cured by an instruction. The prosecutor's misconduct independently requires reversal of the death sentence.

*State v. Gregory*, 158 Wn.2d at 866-867.

Under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, a prosecutor's elicitation or use of perjured or false testimony or evidence constitutes misconduct. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). In addition, under RPC 3.3(a)(4), if evidence has been presented to the jury or court, and the prosecutor later "comes to know of its falsity, [he] shall

promptly disclose this fact to the [court.]" RPC 3.3(c). Similarly, under the Fourteenth Amendment it is also misconduct "when the state, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 31 L.Ed.2d 1217 (1959). A conviction based on false testimony must be set aside if there is any reasonable likelihood that the false testimony affected the decision of the jury. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1976).

In the case at bar, the state presented what it knew to be false evidence when it elicited the following statement from Officer Huycke.

Q. Now, did you also notice paint chips any other place?

A. Besides on the ground beneath the door handle and the missing paint from the door, it -- on one of the screwdrivers, the smaller of the two screwdrivers is how I described it, on the tip of it or on the end of it there appeared to be a very small green paint chip that matched the color of the door.

Q. And what did you do with that paint chip?

A. I put that -- *I left the paint chip on the screwdriver, placed it in a bag, a separate bag*, and later placed it in evidence, requesting a crime lab examination of that chip and also a chip that I took off -- one off the door and one off the bottom on the ground beneath the door, to -- for --

Q. So --

A. -- comparison purposes.

Q. -- the paint chips on the bottom of the door, did you place

those -- or, I mean, that you saw on the ground, did you place those into evidence?

A. Yes.

RP 86-87 (emphasis added).

Not only was the state in possession of the lab report that showed that this evidence was incorrect, but the state also knew that the court in its ruling on the Defendant's *Knapstad* motion had entered a written finding that was incorrect. In addition, this misconduct was compounded when the state heard the officer give an answer under cross-examination that the state knew to be false. This question and answer went as follows:

Q. And you submitted the paint chips and the screwdrivers to the crime lab for comparison, didn't you?

A. Yes.

Q. And you did not receive any positive confirmation that they matched; correct?

A. I don't think I received anything back from the crime lab.

RP 90.

Not only did the state fail to inform the court that this evidence was incorrect, but the state then argued what it knew to be false to the jury.

During rebuttal argument, the prosecutor claimed as follows:

Finally, the paint chip. Clearly *there is no crime lab report*, but you'll see Exhibit 18. It appears to be an empty plastic bag. And the reason that that plastic bag appears to be empty is because there's tiny paint chips in there (indicating).

RP 154 (emphasis added).

In fact, there was a lab report, the prosecutor knew there was a lab report, and the prosecutor knew that the lab report stated that there were no paint chips on the screw driver. Thus, in the case, the prosecutor committed misconduct when he elicited false evidence, when he failed to alert the court when the officer presented further false evidence on cross-examination, and when he actively argued from this false evidence. This misconduct denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

As was previously stated, in order to prevail on a claim of prosecutorial misconduct, the defense bears the burden of proving “prejudice.” In other words, the defense must show that there is a “substantial likelihood” that the misconduct affected the jury’s verdict. *State v. Evans, supra*. This is the same burden that the defendant must meet in this case in order to prevail upon this petition for post-conviction relief, since relief may only be granted on a constitutional error if the petitioner demonstrates prejudice by a preponderance of the evidence. *In re Pers. Restraint of Crabtree*, 141 Wn.2d 577, 587, 9 P.3d 814 (2000). As the following explains, in this case petition can meet this burden.

In the case at bar, the state presented fairly compelling evidence that someone had attempted to enter the Subway shop without permission. This

evidence came in two forms: (1) the testimony of the store clerk who heard a scraping noise at the door and either saw or heard the doorknob turn, and (2) the testimony of the police officer that there were fresh scrapes in the paint to the door consistent with someone having very recently attempted to force the door open. However, the evidence that the defendant was that person was far from compelling. In fact, the only evidence that the state had on this issue (other than the claim of consistent paint on the screwdriver) was the fact that the defendant was in the vicinity of the store and the officer didn't see anyone around. However, this evidence must be seen in the light of the fact that the clerk scared the would-be burglar away by calling out. Thus, even though the officer arrived quickly (in as few as two minutes), this was still enough time for a person to run much farther away than the defendant was when the officer saw him.

Under these circumstances, the false evidence of consistent paint on the screwdriver in the defendant's possession was undoubtedly the one strong fact that compelled the jury to convict. Absent this evidence, the jury would have been left with the very real possibility that the true burglar had run away, while the defendant just happened to be walking down the street returning to his mother's house, which was only a few blocks away. Thus, it is more likely than not that the jury would have acquitted on the attempted burglary charge had the false evidence not been presented to the jury, and had

at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant argues that he is entitled to relief from personal restraint based upon trial counsel’s failure to effectively cross-examine Officer Huycke with the lab report, and based upon appellate counsel’s failure to raise this issue as part of his direct appeal. As concerns this second claim, the United States Supreme Court has recognized that a criminal defendant has a right to have effective assistance of counsel on his first appeal of right. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). When this right is denied, a defendant’s first opportunity to raise it as regards appellate counsel is usually on collateral review. *See, e.g., In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 344, 945 P.2d 196 (1997). This court has held that:

[i]n order to prevail on an appellate ineffective assistance of counsel claim, petitioners must show that the legal issue which appellate counsel failed to raise had merit and that they were actually prejudiced by the failure to raise or adequately raise the issue.

*In re Maxfield*, 133 Wn.2d at 344.

It is true that the failure to raise all possible non-frivolous issues on appeal is not ineffective assistance. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). Indeed, the exercise of discretion in deciding what issues may best lead to success is the heart of the appellate attorney's role. *Id.* However, if a petitioner can show that his appellate counsel failed to raise an issue with underlying merit, then the first prong of the ineffective assistance test is satisfied. *Maxfield*, 133 Wn.2d at 344. In addition, if petitioner can show that the court would have been compelled to grant a new trial had appellate counsel raised a particular issue, then the first prong would necessarily be met with the prove of the second. *Id.*

In the case at bar, as was set out at the end of the first argument, it is more likely than not that the jury would have acquitted the defendant on the attempted burglary charge had it found out that the lab had tested the screwdriver and found no paint chips on it. In fact, as concerned the attempted burglary charge, this was the most effective and compelling piece of evidence that the defense had. There is no possible tactical reason for the defense to have failed to mark the report as an exhibit and then confront the

officer with the crime lab's analysis that proved (1) that the screw driver had no paint on it at all, and (2) that, contrary to his claim, the lab had done the analysis and given the officer the report. Thus, the failure to cross-examine the officer with this evidence fell below the standard of a reasonable prudent attorney, and it caused prejudice. As a result, trial counsel's failure to introduce the report into evidence and trial counsel's failure to cross-examine the officer with it denied the defendant effective assistance of counsel.

In addition, in this case, appellate counsel's failure to argue prosecutorial misconduct as was presented in Argument I in this petition also fell below the standard of a reasonable prudent attorney. The support for this conclusion is found in the fact that all of the evidence necessary to make this claim was found in the record on appeal. The lab report was in the court's file attached to the *Knapstad* Motion and it was mentioned in the argument on the *Knapstad* Motion. Appellate counsel designated the *Knapstad* Motion with the attached report as part of Clerk's Papers on appeal, and the verbatim report of the *Knapstad* motion was part of the record on appeal. In addition, the verbatim report of the trial with the offending testimony as set out in Argument I herein was found in that trial transcript. Thus, appellate counsel had the ability to present this argument.

Finally, as has been argued herein, the use of this lab report in evidence would more likely than not have resulted in a verdict of acquittal in

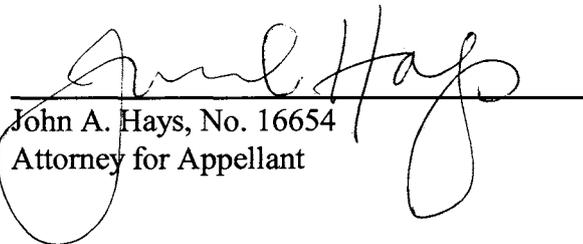
this case because the report would have destroyed the state's only strong piece of evidence that the defendant was the person who had committed the attempted burglary. Thus, had counsel on appeal presented the argument of prosecutorial misconduct and ineffective assistance, it is more likely than not that the court on the direct appeal would have reversed and remanded for a new trial. Consequently, appellate counsel's failure to make this argument also caused prejudice on appeal and denied the defendant effective assistance of counsel on appeal. As a result, the defendant is entitled to relief from personal restraint.

**CONCLUSION**

The defendant is entitled to relief from personal restraint based upon prosecutorial misconduct and based upon ineffective assistance of counsel at both the trial and appellate levels.

DATED this 19<sup>th</sup> day of March, 2008.

Respectfully submitted,

  
\_\_\_\_\_  
John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

### **RPC 3.3**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

