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STATE OF WASHINGTON
BY [Signature]
DEPUTY

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

STATE OF WASHINGTON)
)
 Respondent,)
)
 v.)
)
 ISMAEL ROWN LES)
 (your name))
 Appellant)

No. 36589-8-II

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, ISMAEL R. LES, 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 1

- 1) DEFENSE COUNCIL WAS INEFFECTIVE FOR ALLOWING THE JURY TO HEAR AND WEIGH AS EVIDENCE AN UNMIRANDARIZED STATEMENT SUBMITTED TO PROSECUATION
- 2) TRIAL COURT ERRORED BY NOT DISMISSING THE CHARGES BASED UPON THE CORPUS DELICTI DOCTRINE.

Additional Ground 2

- 3) ISSUES MAY BE RAISED FOR THE FIRST TIME ON APPEAL IF IT IS MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT.
- 4) PROSECUTOR ENGAGED IN MISCONDUCT BY ARGUMENT IN CLOSING THAT RESULTED IN IMPERMISSABLE COMMENT ON DEFENDANTS RIGHT TO REMAIN SILENT.

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

Date: October 13th 2008

Signature: [Signature]

NO. 36589-8-II

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

In Re the Direct Appeal of:

ISHMEAL LES,
Petitioner.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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PRO SE SUPPLEMENTAL GROUNDS FOR REVIEW

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TABLE OF AUTHORITIES

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STATE V. SARGENT; 40 Wa. App. 340, 347, 698 P. 2d 598 (1985)
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STATE V. FIALLO-LOPEZ; 78 Wa. App. 717 (1995)
STATE V. MARTIN; 41 Wa. App. 133, 139, 703 P.2d 309 (1985)
STATE V. GRAHAM; 59 Wa. App. 418, 798 P.2d 341
STATE V. SMITH; 104 Wn. 2d 497, 707 P. 2d 1306 (1985)
GRIFFIN V. CALIFORNIA; 380, US. 609 6-4-15 (1965)
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LINCOLN V. SUNN; 807 F.2d at 809
UNITED STATES V. KENNEDY; 714 F.2d 968, 976 (9th Cir. 1983)

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

ISMEAL LES,)
Appellant,)
vs.)
STATE OF WASHINGTON,)
Respondent.)

No. #36589-8-II
Statement Of Additional
Grounds For Review

I. ISSUES PRESENTED FOR REVIEW

1. Defense counsel was ineffective for allowing the jury to hear and weigh as evidence an un-mirandized statement submitted by the prosecution.
2. The trial court erred by not dismissing the charges based upon the corpus delicti doctrine.
3. Issues may be raised for the first time on appeal if it is a manifest error affecting a constitutional right.

4. THE PROSECUTOR ENGAGED IN MISCONDUCT BY ARGUMENT
IN CLOSING THAT RESULTED IN IMPREMISSIBLE COMMENT
ON THE DEFENDANTS RIGHT TO REMAIN SILENT.

1. Defense counsel was ineffective

The Sixth and Fourteenth Amendments give the petitioner the right to receive effective assistance of counsel. One method of determining whether counsel has rendered reasonably effective assistance is to ask whether the proceedings were a farce or a mockery. Williams v. Bonto, 354 F.2d 689, 704 (5th Cir. 1965) The Farce-mockery test is but one criterion for determining if an accused has received minimum representation. (Reasonably effective assistance). See Bendelow v. United States, 418 F.2d 42, 50 cert. denied 400 U.S. 976, 91 S.Ct 379, 27 387, but one may also receive ineffective assistance of counsel even though the proceedings have not been a farce or mockery. United States v. Edwards, 488 F.2d 1154 at pg. 1164 1165 (5th Cir 1974).

It is defense counsels job to provide the accused with an "understanding of the law in relation to the facts". Walker v. Cadwell, supra, 476 F.2d at 224. The advise he gives need not be perfect but it must be reasonably competent. Geloson v. Smith, 438 F.2d 1075 at 1081 N.5 (1970). A lawyer who is not familiar with the facts and the law revelent to his clients case cannot meet

required minimal level. see Herring v. Estelle, 491 F.2d 125 at 128, U.S. v. Scott, 625 F.2d 625 (1980); Thomas v Lockhart, 738 F.2d 304 at 309 (1984). In this case before the bar petitioners counsel has fallen well short of the required minimal level of effectiveness by allowing the prosecution to enter testimony that can only be considered hearsay, and this erroneous action through failure to research the facts of the case and or the relevant law amounts to ineffective assistance of counsel. Burgess v. Griffin, 585 F.2d 1564 (9th Cir. 1978) quoting Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979). The petitioners counsel should of been aware of the fact that at no time during any conversations with police officials was he mirandized.

Thurston county deputy Nathan Knosch testified during trial that he was called out to meet with Colvard at the Pleasant Blade Elementary school on March 1st, 2007, because Colvard believed that Mr. Les may have stolen his guns. RP at 15 He further testified that he also spoke to Mr. Les about the alleged theft, and that Les 'confessed' to taking the firearms. RP at 18, 19, 21, 41-42. At no point during the alleged confession was Mr. Les mirandized by Officer Knosch.

Defense counsel should have challenged the use of the 'confession' statement to the law enforcement officials. Not only was the statement made under duress and prior to any mirandization but the law enforcement officials allowed Mr. Les to help investigate into the retrieval of the firearms because of the assumed

knowledge that Mr. Les led police to believe that he had by means of the 'confession'.

Defense counsel never challenged the use of the statements and testimony from law enforcement officials during the trial that resulted from Les' un-mirandized statements of 'confession'. The officers testimony clearly exhibits that Les should have been immediately detained and informed of his right to remain silent and not incriminate himself the moment he told police officials anything pertaining to the missing guns. Les was prejudiced by the use of the un-mirandized statements that were heard by the jury during the trial, and defense counsel failed in its duty to uphold Article I, sec. 22 of the Washington State Constitution, and the Sixth and Fourteenth Amendments to the U.S. Constitution. See Strickland v. Washington, 446 U.S. 668, 104 S.ct 2052 80 L.ed 2d 674 (1984).

During the closing arguments the prosecution solidifies the use of the un-mirandized statements of Mr. Les' and actually goes so far as to encourage the jury to consider them by stating, "You have an independent law enforcement officer who came in here and and took the stand and confirmed pretty much confirmed everything that Mr. Colvard told you about his meeting with Mr. Les on March 1st. Mr. Les admitted to a uniformed police officer that he took those guns." RP at 175 Defense counsels failure to object to this and all other references to the alleged knowledge confession that was not made pre mirandization prejudiced Mr. Les and can not be deemed a trial tactic or strategy by counsel

Where there has been a violation to the Sixth amendment of the Constitution courts must suppress any evidence discovered as a result of the unconstitutional statement, as well as any fruit of the poisonous tree. Wong Sun v. U.S. 288 F.2d 366 9th Cir (1961).

In this case before the bar this court must remand for a new trial. Clearly the use of the statements made to law enforcement officials made in violation of Miranda v. Arizona, prejudiced Les and were the result of ineffective counsel.

2. The trial court erred.

The rule of Corpus Delicti means that the body of the crime must be proved by evidence sufficient to support an inference that there has been a criminal act. A defendant's incriminating statement alone is not sufficient enough to establish that a crime took place. State v. Wright, 76 Wa.App. 811 (1995).

In this case the State never presented other independent evidence to corroborate his incriminating statements. Some of the statements were in violation of Miranda v. Arizona.

The instructions of this case involved the element of possession, dominion and control, and in this case there is absolutely no evidence that proved Mr. Les Possessed the alleged weapons or indication he had any control over them other.

For these reasons the lower court erred by not dismissing the charges against Mr. Les

3. Issues may be raised for the first time on appeal.

Whether RAP 2.5(a)(3) applies to this case is based upon a two part test. (1) Whether the alleged error is truly constitutional and (2) Whether the alleged error is manifest.

An error is manifest when it has practical consequence in the trial of the cause. State v. Kronich, 160 Wn.2d 873, 899, 161 P.3d 982 (2007)(quoting State v. Kirkpatrick, 160 Wn.2d 873, 880, 161 P.3d 990 (2007)). These errors in Mr. Les' case are not harmless.

4. The prosecution engaged in misconduct

The law in Washington are clear; prosecutors are held to the highest professional standards. A prosecuting attorney is a quasi judicial officer. See State v. Huson & 3 Wn.2d 660, 663, 440 P.2d 192 (1968). The State Supreme Court has characterized the duties and responsibilities of the prosecuting attorney as follows: "He represents the State, and in the interest of justice he must act impartially. His trial behavior must be worthy of the office for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. State v. Case 49 Wn.2d 66 298 P.2d 500 (1956); State v. Coles, 28 Wa.App. 563,573, 625 P.2d 713 (1981).

A defendant in a criminal case has a constitutional right not to testify at trial, and thus not be subjected to any cross-

examination. See U.S. Constitution Amendment 5 and Washington Constitution Article 1 Sec. §9. Drawing attention to the defendants failure to testify is a constitutional error. State v. Sargent, 40 Wa.APP. 340, 347, 698 P.2d 598 (1985).

Prosecutorial comment on the accused's exercise of his constitutional right to remain silent is forbidden. The state can't be permitted to put forward an inference of guilt, which necessarily flows from an imputation that the accused has suppressed or is withholding evidence., when as a matter of constitutional law he is not required to testify. To hold otherwise would render this constitutional privilege meaningless for its exercise would result in a costly penalty to the accused. Judicial intolerance for prejudicial prosecutorial tactics is another important consideration underscoring the scrupulous regard which the law has this right. State v. Reed, 25 Wa.App. 46, 48, 604 P.2d 1330 (1979) State v. Torres, 16 Wa.App. 254, 554 P.2d 1069 (1976): State v. Fiallo-Lopez, 78 Wa.App. 717 (1995).

The test to determine if a defendants 5th Amendment right has been violated is whether the prosecutors statement was of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify. State v. Sargent, 40 Wa. App. at 346. Reversal is required only if there is a substantial likelihood the comment affected the jury's decision. State v. Martin, 41 Wa. App. 133, 139, 703 P.2d 309 (1985) State v. Reed, supra, State v. Graham, 59 Wa. App. 418, 798 P.2d 341; State v. Smith, 104 Wn.2d 497, 707 P.2d 1306 (1985).

In Mr. Les' case, during the course of the closing argument the state improperly drew attention to the fact that Les failed to testify. Because Les was the only one that could provide answers to the improper argument in concerns to the firearms, Les was again prejudiced by this. There was no cross-examination and therefore the prosecution didn't have the answers, but nonetheless put to the jury the following..."I think you can see from the other evidence well, of course, there were some firearms stolen. I mean why would the defendant be talking about firearms if nothing was taken, if they didn't exist in the first place." RP 173 "There's no mention by this defendant of that. In fact, the defendant admits that he took the firearms RP 174

This seeded argument presented by the prosecution is improper because law enforcement presented incriminating statements made by Mr. Les that were made without him being mirandized and the fruit of this poisonous tree resulted in Les' conviction. There was no other evidence presented in this case other than his own alleged 'confession' which never should of been heard...because Les never took the stand.

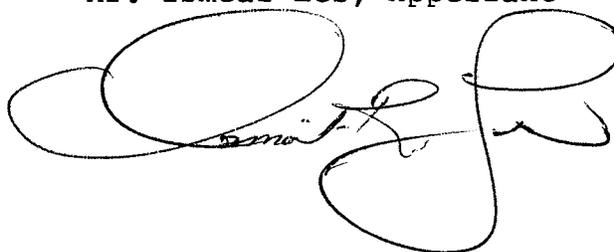
A criminal defendant has an absolute right to remain silent and not testify. Griffin v. California, 380 U.S. 609, 6-4-15 (1965) Doyle v. Ohio, 426 U.S. 610, 619 (1976); Wainright v. Greenfields, 474 U.S. 284, 289-91 (1986). Courts will not when the prosecutors comment is made a single time, an isolated incident, does not stress on the inference of guilt from silence as a basis of convi-

ction and is followed by curative instructions, but that isn't the case here. Several different times during closing the prosecution made comments about Mr. Les' silence, or said things that couldn't be refuted without cross-examination of Mr. Les, and these things prejudiced him to the jury. See Lincoln v. Sunn, 807 F.2d at 809 quoting United States v. Kennedy, 714 F.2d 968, 976 (9th Cir 1983).

For the reasons stated within the petitioner respectfully requests that this court grant this petition and remand this case back to the superior court for further proceedings.

Dated this 13 day of October, 2008.

Mr. Ismeal Les, Appellant

A handwritten signature in black ink, appearing to be "Ismeal Les", written in a cursive style. The signature is positioned below the typed name "Mr. Ismeal Les, Appellant".

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STATE OF WASHINGTON
DEPUTY

AFFIDAVIT

STATE OF WASHINGTON)

) SS: 36589-8-84

COUNTY OF WALLA WALLA

I, Ismael R. Lee, declare under penalty of perjury that the following statements within this affidavit are true and correct to the best of my knowledge and has been executed on this 13th day of October, 2008, at

Washington State Penitentiary
in the County of Walla Walla, Washington:

sent out my (SAG) statements of Additional Grounds to the individuals as follows:

• Richard A. Woodrow
3732 Pacific Ave SE
Olympia WA 98501

• Carol L. La Verne
Thurston County Prosecutor's Office
2000 Lakeridge Dr. SW Bldg. #2
Olympia WA 98502-6045

• David C. Penzance (Clerk/Administrator)
Washington Court of Appeals Div. II
950 Broadway, Suite 300
Tacoma WA 98402-4454

Ismael R. Lee
(Affiant's Name)

Subscribed and Sworn to before me this 13th day of October, 2008.

Alan J. Walter

Notary Public in and for the State of Washington.

Residing in Walla Walla, WA

My commission expires 7-12-11

