

STATE OF WASHINGTON

Respondent,

No. 40548-2-II

v.

STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

MARK ANTHONY LEE

Appellant,

CLERK OF COURT  
JANUARY 10 2011 10:52  
STATE COURT FOR  
BY                       
DEPUTY

I, MARK ANTHONY LEE, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional ground 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

Prosecutor Misconduct

\_\_\_\_\_  
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Additional Ground 2

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

Date: 12/8/10

Signature: Mark A Lee

COURT OF APPEALS NO.40548-2-II

CLALLAM COUNTY CLERK  
10/26/10 11:52  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

MARK ANTHONY LEE,

Defendant/Appellant.

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Pierce County Superior Court Cause No. 09-1-05281-8

The Honorable Stephanie A. Arend,  
Presiding Judge at the Trial Court

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STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

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Mark Anthony Lee #921932  
Defendant/Appellant

Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, Wa 98326

TABLE OF CONTENTS

I. ARGUMENT..... 1-3

    1. Prosecutor Misconduct..... 1-3

        A. The prosecutor made an false in the  
           Declaration OF Probable cause.....1

        B. The prosecutor suborned perjury of  
           Officer Barry's testimony.....2-3

II. CONCLUSION.....4

TABLE OF AUTHORITIES

Washington Cases

State v. Finnegan, 6 Wn. App. 612, 616, 495 P.2d  
674 (1972)..... 2-3

Federal Cases

Alorta v. Texas, 355 U.S. 28, L. Ed. 2d 9,  
78 S. Ct. 1173 (1959).....2

Kaline v. Flechter, 93 F. 2d 653 (9th Cir. 1996) ..1

Mooney v. Holohan, 294, U.S. 103, 79 L. Ed.  
791 55 S. Ct. 340 98 A.L.R. 406 (1935).....2

Napue v. Illinos, 360, U.S. 264 3 L. Ed.  
1217 79 S. Ct. 1173 (1959).....2-3

Exhibit A.....1-2

## 1. PROSECUTOR MISCONDUCT

A. The Prosecutor made an false statement in the Declaration of Probable Cause.

Jason Pruyf, a deputy prosecutor, prepared an information charging Mark Anthony Lee with Residential Burglary and Making A False Or Misleading Material Statement To A Public Servant. The information was accompanied by a " Certification for Determination of Probable Cause," a sworn declaration, describing the results of the police investigation. Based upon this document, which Pruyf signed, Lee *was* charged, convicted by jury, and sentenced to 63 months for residential burglary and making a false or misleading statement to a public servant.

The false statement in the declaration reads as follows: " When asked if he had been inside the residence Defendant Lee initially stated that he had not been." Exhibit A pg 2.

Appellant still maintains that he was not asked by Officer Barry if he was in the house, and that is why Barry did not have an direct quote of denial in his report. RP 198.

Officer Barry testified that he asked appellant if he was in the house and the appellant stated, " I don't know what you're talking about." RP 192,196-199. But the prosecutor's false statement, made under oath, gives a direct quote of denial by the appellant that is not in Officer Barry's report. RP 198.

Appellant contends that because of the inaccuracies in the certification his conviction should be reversed and dismissed. *Kalina v. Flether*, 93 F. 3d 653 (9th Cir. 1996).

B. The Prosecutor suborned perjury of  
Officer Barry's testimony.

State v. Finnegan, 6 Wn App. 612, 495, P. 2d 674 (1972). The prosecutor's duty to disclose evidence favorable to a defendant began with Mooney v Holohan 294, U.S. 103, 79 L. Ed. 791, 55 S. Ct. 340 98 A.L.R. 406 (1935) wherein the Supreme Court held it was reversible error for the prosecutor to suborn perjury to seek a conviction. Alorta v. Texas, 355, U.S. 28, 2 L. Ed. 2d 9, 78 S. Ct. 103 (1957) extended the Mooney doctrine to the prosecutor's use of evidence known to be false. The prosecutor's duty not to suborn perjury or to use evidence known to be false was further enlarged to place upon the prosecutor an affirmative duty to correct state witnesses who testify falsely. Napue v Illinois, 360, U.S. 264 3 L. Ed 1217 79 S, Ct. 1173 (1959).

According the Declaration of Probable Cause submitted by the prosecutor to the Court, under oath, ( exhibit A pg 3), when Officer Barry asked Defendant Lee how he got into the residence, Lee stated, " man I don't know, I wasn't paying attention to how she got into the door. Then stated that Turley lived at the residence. ( Id. 2).

The following colloquy took place between the prosecutor and Officer Barry. RP 195.

Q. Did you ever ask the Defendant how it was that he got into the house in the first place?

A. I did.

Q. And what was his response to you?

A. He didn't know.

Q. Did he elaborate on that at all?

A. Well, I asked him how he got into the house, he said that he didn't know and that the girl lived there, and I said how did the girl get in the house and he said, " I don't know."

Officer Barry's answer was false, misleading, and in direct contradiction to the quote in the probable cause. Had Barry stated what was quoted in the probable cause; " I don't know, I wasn't paying attention to how she got into the door," in answer to

the question, RP 195, it would have clearly told the jury that appellant understood Officer Barry's question to be asking him how did Turley get into the residence, and not how did appellant get into the residence. Furthermore, the quote, " I don't know, I wasn't paying attention to how she got into the door," could have inferred to the jury, and/or defense counsel could have possibly drawn from Barry that appellant was asked how did Turley get into the house without a key, and that appellant stated that he did not know because he wasn't present to pay attention to how she got in the door.

Instead, Barry lied and omitted that quote to mislead the jury into thinking that appellant deliberately told him that he did not know how he (appellant) got into the house. Also, appellant was not asked how he (appellant) got into the house, and then asked how did Turley get into the house. RP 195. That was another lie in which the prosecutor was aware of and did not correct Officer Barry, but instead used Barry's false , misleading, contradictory testimony during closing arguments to get an conviction. RP 327.

Moreover, during questioning Barry omitted the quote, " I don't know, I wasn't paying attention to how she got into the door," yet the prosecutor uses the quote in his closing arguments, ( RP 327), which clearly shows that the prosecutor knew Barry did not answer truthfully when he was questioned. RP 195.

It is never permissible to encourage or suggest to a witness that he testify falsely, or even to allow false or misleading testimony to stand uncorrected. *Napue v. Illinois*, 360 U.S. 264, 3 L. Ed. 2d 1217 79 S. Ct. 1173 (1959); *State v. Finnegan*, 6 Wn App. 612,616, 495 P. 2d 674 (1972). Reversal is required.

**2. CONCLUSION**

For all of the foregoing reasons and conclusions Mark Anthony Lee respectfully requests that this Court reverse and dismiss his convictions of Residential Burglary and Making a False of Misleading Statement to a Public Servant.

DATED this 8th day of December, 2010.

Respectfully Submitted,

  
Mark Anthony Lee  
Defendant/Appellant

1 SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

2 STATE OF WASHINGTON,

3 Plaintiff,

CAUSE NO. 09-1-05281-8

4 vs.

5 MARK ANTHONY LEE,

DECLARATION FOR DETERMINATION OF  
PROBABLE CAUSE

6 Defendant.

7 JASON P RUYF, declares under penalty of perjury:

8 That I am a deputy prosecuting attorney for Pierce County and I am familiar with the police  
9 report and/or investigation conducted by the TACOMA POLICE DEPARTMENT, incident number  
093271312;

10 That the police report and/or investigation provided me the following information;

11 That in Pierce County, Washington, on or about the 23rd day of November, 2009, the defendants,  
12 MARK ANTHONY LEE(did commit the crimes of Residential Burglary and False Statement to a Public  
13 Servant), TRACEY CORNEL HOLMES(did commit the crime of Residential Burglary), KELLY JAY  
LOCOCO(did commit the crimes of Residential Burglary and two counts of False Statement to a Public  
14 Servant), and ALAINE JOY TURLEY(did commit the crime of Residential Burglary).

15 **INITIAL OBSERVATIONS:** According to the Tacoma Police Department, on or about 11/23/09 at  
16 21:39 hours, Officer Spangler and other officers were dispatched to 868 South 34<sup>th</sup> Street in response to a  
17 burglary in progress. According to dispatch, the reporting party, Richard Olson, was watching several  
18 individuals take items from his friend's house and load them into a green Ford Explorer type vehicle;  
19 according to the reporting party the homeowner was away on vacation.

20 When Officer Spangler arrived he observed a green Ford Excursion parked in the driveway of the listed  
21 residence with a woman, later identified as Defendant Lococ, sitting in the front passenger side. As  
22 Officer Spangler moved closer he could see three individuals, later identified as Defendants Turley,  
23 Holmes, and Lee, walk out to the vehicle from inside the residence. At that time Defendant Holmes  
24 was holding something in his hands which he placed into the open back of the vehicle. Defendants Turley and  
Lee then moved back towards the inside of the listed residence.

Soon thereafter, when Officer Spangler announced his presence, Defendants Turley and Lee went into the  
residence and closed the door behind them. Within moments Defendants Turley and Lee returned  
outside.

**CONTACT WITH DEFENDANT HOLMES:** After being read his Miranda rights Defendant Holmes  
provided the following information in response to police questioning: Mr. Holmes told police that nothing  
was going on at the house. He informed Officer Barry that a dude named Lee called him to come over so  
he did. Defendant Holmes further stated that he had not been to the residence before. Defendant Holmes  
stated that he didn't ask why he was asked over to the residence. At this time a television remote was  
observed sticking out of Defendant Holmes pocket. When asked about the remote, Defendant Holmes

DECLARATION FOR DETERMINATION  
OF PROBABLE CAUSE -I

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Tacoma, WA 98402-2171  
Main Office (253) 798-7400

Exhibit A

1 stated "oh, that's not for the TV inside, that's to my TV; at this time Officer Barry had yet to inquire  
2 about a TV inside the residence. When asked why he would carry his home television remote with him,  
3 Defendant Holmes asked Officer Barry why he was asking so many questions.

4 **CONTACT WITH DEFENDANT LEE:** Officer Barry then contacted Defendant Lee. After being read  
5 his Miranda rights Defendant Lee provided the following information in response to police questioning:  
6 Defendant Lee first stated that there wasn't anything funny going on at the residence. When asked if he  
7 had been inside the residence Defendant Lee initially stated that he had not been. When reminded of the  
8 fact that he was standing at the front entrance when Officer Barry contacted him, Defendant Lee stated  
9 "alright dude I was inside. Me and the girl were having sex on the couch because she said she lived here."

10 When Officer Barry asked if Defendant Lee was sure he had accounted for all of his activity inside the  
11 residence, Defendant Lee stated "okay man while we were having sex she looked at the TV in here. She  
12 asked me if [I] knew someone who would want to buy it. I told her I did so I called my boy to come here  
13 and look at it and when he got here he said he'd buy it." When asked how he had gotten into the  
14 residence, Defendant Lee stated "man I don't know, I wasn't paying attention how she got into the door."  
15 Defendant Lee then stated that Defendant Turley lived at the residence.

16 **CONTACT WITH DEFENDANT TURLEY:** Upon contact Defendant Turley stated that she lived in  
17 the house and informed Officer Spangler she was moving out and her friends were helping her. Defendant  
18 Turley stated that she had keys to the house and received mail there. Officer Spangler allowed Defendant  
19 Turley to enter the house to locate proof of her residence and observed a flat screen television off of its  
20 stand leaning against the wall. After a couple of minutes of searching Defendant Turley was unable to  
21 find any mail with her name on it. Defendant Turley then attempted to use every one of the keys on her  
22 key chain on the front door but none of her keys worked. Defendant Turley then stated that she must have  
23 left her key to the front door at home after already claiming that the listed residence was her home.  
24 Defendant Turley admitted to being jobless heroine addict without money. Defendant Turley initially  
stated that the flat screen TV was hers alone, later she stated that it belonged to her and the homeowner,  
Richard Hamilton.

15 **DISCOVERY IN VICTIM'S BEDROOM:**

16 Soon thereafter Officer Martin entered the residence to assist in the investigation. When Officer Martin  
17 asked Defendant Turley which bedroom was hers, Defendant Turley indicated the bedroom on the left but  
18 stated "I don't want you to go back there," and stood in Officer Martin's path blocking him from walking  
19 toward the bedroom. When Officer Martin entered the room he immediately observed a battery powered  
20 hand saw and hand tools lying on the floor in front of an open closet which contained a mounted wall  
21 safe. There were fresh pry marks and broken plastic pieces on the safe consistent with an attempt at  
22 forced entry.

23 Officer Johnson later noted that there were handprints on the outside of the bedroom window which  
24 appeared as if someone was pushing up on the window when they were deposited. There was a black  
sweater with yard debris on top of a portable heater just inside the same window.

25 **CONTACT WITH DEFENDANT LOCOCO:** Officer Barry contacted Defendant Lococo and asked  
26 her for her name and date of birth. Defendant Lococo provided the name "Amanda Lee Bernazani" date  
27 of birth 7-19-78. After being advised of her Miranda rights Defendant Lococo was asked for her  
28 identification; she stated that she didn't have any identification on her but did have I.D. out of Maryland  
29 and Florida. A LESA records check returned a negative status for the identity provided. When informed  
30 that she could be arrested for obstruction for providing false information, Defendant Lococo stated "okay,  
31 okay, my real name is Kelly J. Lococo, 10-29-79, and I think I have a warrant for my arrest." A LESA  
32 records check confirmed a DOC arrest warrant (#321666).

DECLARATION FOR DETERMINATION  
OF PROBABLE CAUSE -2

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Exhibit A

1  
2 Following the burglary investigation Defendant Lococo was transported to the Pierce County Jail with  
3 Defendant Turley. En-route to the jail Defendant Turley spontaneously stated "she has a crack pipe in her  
4 hands and is trying to put it on my side of the seat." Defendant Lococo responded by calling Defendant  
5 Turley a liar. When the Defendants were removed from the patrol car, Officer Johnson observed that  
6 Defendant Lococo was holding a crack pipe in her right hand. Officer Johnson then informed Defendant  
7 Lococo that she would be searched at the jail and charged with introducing contraband if anything was  
8 found on her person; Defendant Lococo twice asserted that she did not have anything else on her person.  
9 During the booking process booking personnel located a crack pipe, razor blade, and lighter in Defendant  
10 Lococo's shoe; in response, Defendant Lococo stated: "I forgot that stuff was there."

11  
12 **CONTACT WITH THE REPORTING PARTY:** The reporting party, Richard Olson, stated that he  
13 was a friend of the homeowner, Richard Hamilton. Mr. Olson further stated that Mr. Hamilton was away  
14 on vacation to Florida visiting his son. Mr. Olson was checking on the residence while Mr. Hamilton was  
15 away.

16  
17 **CONTACT WITH THE HOMEOWNER:** Mr. Olson then put Officer Spangler in touch with Mr.  
18 Hamilton via telephone. Mr. Hamilton identified himself and provided identifying information to Officer  
19 Spangler which Officer Spangler independently identified by comparing it with items located in the  
20 residence. Mr. Hamilton admitted to knowing Defendant Turley but stated that she had moved out with  
21 all of her property 6 months ago. Mr. Hamilton stated that the television belonged to him and that the  
22 closet safe had not been broken into before he left. Mr. Hamilton also stated that he did not own any tools  
23 and that if there were tools in the house they didn't belong to him.

24  
25 **CONTACT WITH WITNESS RICHARD HAEHN:** Mr. Haehn stated that he had been at the residence  
26 at 08:30 that morning to fix a bed in the spare room and stated that the television was on the entertainment  
27 stand when he was there. He further stated that nothing was in disarray and that the safe had not been  
28 tampered with. According to Mr. Haehn all the doors were locked when he left.

29  
30 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF  
31 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

32 DATED: November 24, 2009

33 PLACE: TACOMA, WA

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JASON P RUYF, WSB# 38725

DECLARATION FOR DETERMINATION  
OF PROBABLE CAUSE -3

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Exhibit A