

No. 47368-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Fauzi Zain,

Appellant.

Cowlitz County Superior Court Cause No. 14-1-00596-0

The Honorable Judge Marilyn Haan

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Zain's failure to register conviction violated his Fourteenth Amendment right to substantive due process.
2. The registration statute is invalid on its face because it burdens the fundamental rights to travel and to freedom of movement, but is not narrowly tailored to achieve a compelling state interest.
3. The registration statute is invalid on its face because there is no "evidentiary nexus" between its method and results.
4. The registration statute is invalid on its face because it is imprecise and fails to consider "plainly relevant considerations."

ISSUE 1: A statute is facially invalid if it impedes a fundamental right without being narrowly tailored to meet a compelling state interest. Washington's failure to register statute burdens the fundamental rights to travel and to freedom of movement, but treats dangerous and non-dangerous offenders alike and lacks an "evidentiary nexus" between its method and results. Does the failure to register statute violate the substantive component of the Fourteenth Amendment right to due process?

5. Mr. Zain's failure to register conviction violated his Fourteenth Amendment right to due process because it was based on insufficient evidence.
6. The state failed to prove that Mr. Zain knowingly failed to comply with the registration requirements.
7. The state failed to prove that Mr. Zain knew he'd been evicted from the Hudson Hotel Annex, triggering his duty to register.
8. The state failed to prove that Mr. Zain lacked a fixed residence.

ISSUE 2: A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found all of the elements beyond a reasonable doubt. Here, there was no evidence that Mr. Zain knew he'd been evicted from the Hudson Hotel Annex, and thus knowingly failed to comply with his duty to register. Did the court violate Mr. Zain's

Fourteenth Amendment right to due process by entering a conviction for failure to register?

ISSUE 3: A fixed residence means a building that a person lawfully and habitually uses as living quarters a majority of the week. Here, the state failed to prove that Mr. Zain lacked a fixed residence. Was the evidence insufficient to sustain the judge's decision that Mr. Zain failed to comply with registration duties imposed on those who lack a fixed residence?

9. The trial court erred by failing to hold a hearing prior to requiring that Mr. Zain be restrained during his trial.
10. The trial court erred by imposing restraints on Mr. Zain without adequate cause.
11. The trial court erred by imposing restraints on Mr. Zain without considering less restrictive alternatives.
12. Mr. Zain was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
13. Defense counsel was ineffective for failing to object to the imposition of restraints on Mr. Zain, in the absence of an impelling necessity.

ISSUE 4: Prior to requiring an accused person to attend trial in restraints, a trial judge must hold a hearing to determine the necessity of shackling the person during trial. Here, the judge did not hold a hearing to determine the need for restraints, and Mr. Zain was required to attend trial in restraints. Was Mr. Zain's conviction entered in violation of his Fourteenth Amendment right to due process?

ISSUE 5: The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, defense counsel unreasonably failed to object to the needless imposition of physical restraints. Was Mr. Zain denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

People who commit sex offenses as juveniles have very low recidivism rates.¹ When he was 17, Fauzi Zain pled guilty to three counts of second-degree rape of a child, all committed in March of 2000. CP 9; Ex. 3, Supp. CP. Since that time, he has not committed another sex offense, but has been convicted four times of failure to register.² CP 9.

On January 16th, Mr. Zain was released from prison after serving his most recent sentence for failing to register. RP 11, 51; Ex. 7, Supp. CP. The Department of Corrections provided him a voucher to enable him to obtain housing. RP 16, 51, 52. He moved into the Hudson Hotel Annex, a facility in Cowlitz County that accepts registered sex offenders and others released from DOC custody.³ RP 16, 24, 51. Mr. Zain lived at the hotel with a roommate named Ben Held. RP 18. He properly registered his address with the Cowlitz County Sheriff's Department. Ex. 1, RP 10-12.

¹ See e.g. Amy E. Halbrook, *Juvenile Pariahs*, 65 *Hastings L.J.* 1, 13 (2013); L. Chrysanthi, et al, *Net-Widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses*, 17 *Widener L. Rev.* 127, 149 (2011); Richard A. Paladino, *The Adam Walsh Act As Applied to Juveniles: One Size Does Not Fit All*, 40 *Hofstra L. Rev.* 269, 290-92 (2011).

² The present conviction is his fifth. He has also been convicted of possession of a controlled substance and bail jumping. CP 9.

³ Although the property is referred to as a hotel, the manager and the judge also used the word "apartment" to describe the unit where Mr. Zain stayed. RP 16, 17, 67.

The DOC voucher was for three months' rent. RP 16, 51, 54. Mr. Zain believed he had until the end of April to find alternate housing (or to start paying rent at the Hudson Hotel Annex). RP 52. This was what he had been told upon his release from prison in January. RP 52.

In fact, the hotel manager expected him to start paying rent on April 16th, three months from the date he moved in. RP 17. There is no indication that anyone notified Mr. Zain of this expectation, or explained what would happen if he didn't pay his rent by this date. *See RP, CP generally.*

When Mr. Zain didn't make a payment on April 16th, the manager, Brian Weathers, tried to contact him. RP 17. Weathers went to Mr. Zain's apartment twice, and tried to call him once. RP 18. When he called, the person who answered the phone didn't speak English, and Weathers didn't leave a message.⁴ RP 18.

On April 21st, Weathers went to the apartment to evict Mr. Zain. RP 18-21. He did not serve Mr. Zain with any paperwork. RP 25. According to Weathers, an eviction can be effectuated at the Hudson Annex simply by removing a person's property and changing the locks; no formal eviction notice or process is required. RP 15.

⁴ The prosecution did not ask Weathers what number he'd used to try and reach Mr. Zain. RP 17-18, 25. Mr. Zain provided his number, and testified that it had remained unchanged since his release from prison. RP 54.

Weathers and another person removed Mr. Zain's property from the apartment and placed it in storage. RP 18-19. Mr. Zain's property filled two bags and a tub. RP 18-19. It consisted of clothing (10-12 outfits and three pairs of shoes) and tools Mr. Zain used in his job doing construction.⁵ RP 53.

Weathers and his helper were able to move all the property in one truckload rather than in multiple trips. RP 19. After removing the property, Weathers checked Mr. Zain out on his computer, and changed the locks on the apartment. RP 18, 19-20. He did not ever notify Mr. Zain that he could no longer reside in the apartment. RP 25-26.

Ben Held continued to live in the apartment. At some point, he began paying increased rent so he could occupy it alone, without a roommate. RP 21-23. The record does not indicate when this occurred.

Mr. Zain had been on DOC supervision since his release in January. His probation officer, Terry Mathers, went to visit him on April 17. Mr. Zain was not there. RP 29. Mathers also left a phone message asking Mr. Zain to report by 4pm on the same day (April 17th). RP 31-32. Mathers visited again on April 21st at 7:30 a.m., but no one answered the

⁵ Weathers recalled a duffel bag, another bag, and a tub. He knew that some of the items were clothing, but did not recall whether or not he and his helper moved tools or other belongings. RP 24.

door. RP 32, 36. He called a few more times, and had some difficulty leaving a message. RP 33.

Mr. Zain called back and left two messages on April 23rd. In his first message, he asked about entering treatment.⁶ RP 55. Mathers then called him and left a message telling him he had a warrant for his arrest. RP 33. Mr. Zain called back and left a second message, asking about the warrant.⁷ RP 33. Mathers did not notify Mr. Zain he'd been evicted from the Hudson Hotel Annex. RP 27-36.

A civilian investigator visited the apartment on April 24th. She did not find Mr. Zain home at that time. RP 37-40.

On April 28th, Mr. Zain went to Lewis County for the day. He was arrested on the DOC warrant. RP 35, 52. He was released from custody on May 16th, and immediately went to the sheriff's department registration office. RP 56.

The state charged Mr. Zain with failure to register. CP 1. Mr. Zain waived his right to a jury, and stipulated that he'd previously been convicted of a sex offense and two prior failures to register. CP 4-5.

At the start of trial, the following took place:

⁶ The probation officer did not testify about this first message; however, the state did not dispute Mr. Zain's account of the call. RP 33, 59-60.

⁷ Mr. Zain denied calling to ask about a warrant, and indicated he'd never received any messages from DOC. RP 54, 55.

[DEFENSE COUNSEL]: My only request would -- and I talked to the jailer about this and I think she requested this of her sergeant -- I would -- and I think the response was negative from the jail so I'm asking that the Court -- um -- since we're going to be here for a couple hours, if he could have his hands free or one hand free so he can take notes, if he needs to tell me anything. Typically, I have clients tell -- take notes so they're not whispering in my ear if they need to let me know anything.

JUDGE HAAN: Can we have one hand?

CORRECTION OFFICER: I was just told no.

JUDGE HAAN: I'm sorry?

CORRECTION OFFICER: I was told no.

JUDGE HAAN: Okay. A security issue -- what -- I need to know more because it does assist in the trial.

(Correction officer confers on radio.)

CORRECTION OFFICER: Copy that. One.

JUDGE HAAN: Okay.

[DEFENSE COUNSEL]: Right-handed? Okay. Thanks.

RP 5-6.

Mr. Zain testified at trial that he believed his voucher covered rent at the Hudson Hotel Annex through the end of April. RP 51-52. He kept all of his property there, and did not "start up" another residence elsewhere during the month of April.⁸ RP 53. He testified that no one ever told him that rent became due on April 16th, or that he'd been evicted from the annex.⁹ RP 53.

⁸ At the time of trial, he had lost all of his property because Weathers had disposed of it. RP 19, 53.

⁹ The state did not introduce a rental agreement or other document showing the terms of Mr. Zain's occupancy. *See* RP, CP *generally*.

The prosecutor did not ask him whether he'd returned to the apartment after April 21st.¹⁰ RP 50-56. Nothing in the record established where Mr. Zain had spent the night the majority of the week between April 21st and the 28th (when he was arrested). *See RP, CP generally.*

The prosecution did not present the testimony of Mr. Zain's roommate, Ben Held. Nor did the state present any evidence showing that Held ordinarily kept the door to the apartment locked, or that he'd excluded Mr. Zain from the apartment. Nothing in the record established whether or not hotel rules permitted Held to have overnight guests, or what restrictions might apply. *See RP generally.*

In closing, defense counsel argued that the state had failed to prove that Mr. Zain knowingly violated his registration requirements. RP 62-63. Counsel pointed to the lack of evidence that Mr. Zain knew he'd been evicted from the apartment at any time prior to the end of April. RP 62-63.

The court found Mr. Zain guilty of failure to register. RP 66. Although the state had charged Mr. Zain with violating his registration requirements in several different ways, the judge specifically based her

¹⁰ On direct examination, Mr. Zain did testify that he'd "been by" the annex between April 10th and April 28th. RP 52.

verdict on his failure to comply with the procedures for those who lack a fixed residence. CP 1; RP 66-68.

The judge reasoned that Mr. Zain bore the burden of knowing whether or not he had a fixed residence, and that he lost his residence when the manager changed the locks. RP 66-68. She sentenced Mr. Zain to 50 months in prison, and he timely appealed. CP 7-20, 21.

ARGUMENT

I. THE FAILURE TO REGISTER STATUTE VIOLATES DUE PROCESS BECAUSE IT BURDENS THE FUNDAMENTAL RIGHTS TO TRAVEL AND TO FREEDOM OF MOVEMENT AND IS NOT NARROWLY TAILORED TO MEET A COMPELLING STATE INTEREST.

A. Standard of Review.

Constitutional violations are reviewed *de novo*. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 66, 331 P.3d 1147 (2014). A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

B. Due process guarantees the fundamental rights to travel and to freedom of movement.

The Fourteenth Amendment right to due process includes a substantive component. *Lawrence v. Texas*, 539 U.S. 558, 565, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). This component has “fundamental

significance in defining the rights of the person.” *Lawrence* 539 U.S. at 565. Substantive due process goes beyond mere procedural protections to actually limit the government’s ability to operate in certain realms. *Lawrence*, 539 U.S. at 578; *Troxel*, 530 U.S. at 65.

Due process guarantees the fundamental right to travel. *Aptheker v. Sec’y of State*, 378 U.S. 500, 505, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964); *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 901, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986); U.S. Const. Amends. V, XIV; Wash. Const art. I, § 3. The right to travel includes the right to travel within a state. *State v. Enquist*, 163 Wn. App. 41, 50, 256 P.3d 1277 (2011). The constitution also guarantees a fundamental right to freedom of movement. *State v. J.D.*, 86 Wn. App. 501, 506, 937 P.2d 630 (1997). That right is rooted in due process and the First Amendment freedom of association. *Id.*

A statute that burdens the fundamental rights to travel and to freedom of movement is subject to strict scrutiny. *Macias v. Dep’t of Labor & Indus. of State of Wash.*, 100 Wn.2d 263, 273, 668 P.2d 1278 (1983); *J.D.*, 86 Wn. App. at 508. A state law implicates the right to travel if it indirectly burdens exercise of that right by creating “any classification which serves to penalize the exercise of the right.” *Soto-Lopez*, 476 U.S. at 903 (internal citations omitted). A statute burdening a

fundamental right cannot survive strict scrutiny unless it is narrowly tailored to meet a compelling state interest. *Lawrence* 539 U.S. at 593; *J.D.*, 86 Wn. App. at 508.

C. The failure to register statute is unconstitutionally overbroad on its face.

The right to travel is one of the few rights so fundamental that statutes burdening it are subject to facial overbreadth challenges. *Sabri v. United States*, 541 U.S. 600, 610, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (citing *Aptheker* 378 U.S. 500).

Governmental intrusions into fundamental rights may not sweep unnecessarily broadly: “precision must be the touchstone of legislation affecting freedoms.” *Aptheker*, 378 U.S. at 508, 514 (internal citation omitted). A statute is not narrowly tailored if there are reasonable alternatives that would achieve the state’s purpose and place a lesser burden on constitutionally protected activity. *Soto-Lopez*, 476 U.S. at 909-10.

The sex offender registration requirements place a burden on the fundamental rights to travel and to freedom of movement. The statute requires that a person who is subject to the registration requirement

register as a transient or at a particular fixed residence.¹¹ RCW 9A.44.130(1), (4), (5). A registered sex offender with a fixed address cannot travel away from home for more than three nights. By leaving home for more than three days, the person would likely be at risk of criminal prosecution.¹² RCW 9A.44.132. Similarly, a transient sex offender must report weekly. RCW 9A.44.130(5). Additional requirements apply when a sex offender attends or works at a school or institution of higher learning. RCW 9A.44.130(1)(b).

The purpose of the registration scheme “is to assist law enforcement agencies’ efforts to protect their communities against reoffense by convicted sex offenders.” *State v. Pray*, 96 Wn. App. 25, 28, 980 P.2d 240 (1999), *review denied*, 139 Wn.2d 1010 (1999). Assuming this is a compelling interest, the statute nonetheless violates substantive due process because it is not narrowly tailored to meet that aim. *Aptheker*, 378 U.S. at 508.

¹¹ A person without a fixed residence must register as a transient and check in with the county sheriff once a week. RCW 9A.44.128(9); RCW 9A.44.130(5).

¹² It is unclear from the statute whether a person with a fixed address would be permitted to re-register temporarily at a place where s/he was staying while traveling. The statutory scheme does not anticipate re-registration unless the person has changed his/her fixed residence or come to lack a fixed residence. *See* RCW 9A.44.130(4)-(5). Even if temporary re-registration were permitted by the statute, the requirement would still place a burden on the rights to travel and to freedom of movement. Accordingly, the statute would need to be narrowly tailored to meet a compelling state interest.

1. The failure to register statute is not narrowly tailored because it burdens fundamental rights without considering a person's "relevant characteristics."

Legislative discrimination affecting fundamental rights must be correlated to a person's "*relevant characteristics*." *Soto-Lopez*, 476 U.S. at 911 (italics in original). A statute is not narrowly tailored if it "excludes plainly relevant considerations" in its burden of a fundamental right. *Aptheker*, 378 U.S. at 514.

The failure to register statute is not narrowly tailored because it reaches people who are neither dangerous nor likely to reoffend. For example, the statutory scheme requires registration by people who have been convicted of nonviolent crimes. A high school junior who has *de minimis* consensual sexual contact with a freshman can be convicted of third-degree child molestation. RCW 9A.44.089. Such a person would be required to register as a sex offender and could be criminally prosecuted for failing to do so. RCW 9A.44.130; RCW 9A.44.132.

The failure to register scheme rests on the assumption that any person convicted of a sex offense is dangerous to society. But The Bureau of Justice Statistics has found that sex offenders are less likely to reoffend than people who commit other types of crimes:

In comparison to the rearrest rate for drug offenders (41.2%), larceny-theft offenders (33.9%), and those who commit nonsexual

assault (22%), sex offenders are relatively unlikely to be rearrested for another sex crime.

...

Moreover, it appears that an individual is more likely to be the victim of a sex crime at the hands of a convict whose original crime was not a sex crime.

Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 La. L. Rev. 509, 521 (2013) (citing Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, U.S. Dep't of Justice, *Recidivism of Prisoners Released in 1994* (2002)).

Studies have shown that people who commit sex offenses as juveniles, in particular, have very low recidivism rates. *See e.g.* Halbrook, 65 Hastings L.J. at 13; Chrysanthi, et al, 17 Widener L. Rev. at 149; Paladino, 40 Hofstra L. Rev. at 290-92. Nonetheless, Washington juveniles adjudicated for most sex offenses are required to register and face criminal prosecution if they do not.¹³ RCW 9A.44.130(a)(1); RCW 9A.44.132.

In short, the legislative assumption that all people convicted of sex offenses pose a danger to society is not supported by empirical evidence. A prior sex conviction is not a proxy for dangerousness. Nonetheless, the registration scheme criminalizes failure to register even by people who are

¹³ Some people adjudicated guilty for sex offenses as juveniles may later move for relief from the registration requirements after a period of time has passed. RCW 9A.44.143. This fact does not alter the analysis regarding whether the sex offender registration scheme is narrowly tailored during the period when they are required to register.

not dangerous or at risk of reoffending. The statute is not precise enough to justify the burden it places on the fundamental rights to travel and freedom of movement.¹⁴ *Aptheker*, 378 U.S. at 514.

The sex offender registration scheme is not narrowly tailored because it fails to consider the “plainly relevant consideration” of whether a person is actually dangerous or likely to commit future sex offenses. *Soto-Lopez*, 476 U.S. at 911; *Aptheker*, 378 U.S. at 514.

2. The failure to register statute is not narrowly tailored because there is no “evidentiary nexus” between its purpose and effect.

To qualify as narrowly tailored, “there must be an evidentiary nexus between a law's purpose and effect.” *J.D.*, 86 Wn. App. at 508. The Washington sex offender registration scheme is not narrowly tailored because it lacks an evidentiary nexus: evidence shows that it does not serve its stated goal of protecting the public. *Id.*

A Washington-specific study has found that the sex offender registration requirements have no statistically significant effect on recidivism. Nor do registration requirements increase public safety. Walker Wilson, 73 La. L. Rev. at 523 (*citing* Donna D. Schram & Cheryl

¹⁴ The statute could be made more precise. For example, the legislature could require registration only of those at risk to reoffend. In another context, the government uses actuarial instruments and other predictive tools to justify indefinite civil confinement. *See* RCW 71.09; *In re Det. of Kistenmacher*, 163 Wn.2d 166, 169 n. 2, 178 P.3d 949 (2008).

Darling Milloy, Wash. State Inst. for Pub. Pol'y, *Community Notification: A Study of Offender Characteristics and Recidivism* (1995)). Numerous other studies have reached the same conclusion. *Id.* at 523-24; *see also* J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161 (2011) (finding that sex offender registration may actually increase recidivism); Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & Econ. 207 (2011).

The Washington system of sex offender registration is not narrowly tailored. There is no “evidentiary nexus between [its] purpose and effect.” *J.D.*, 86 Wn. App. at 508.

The failure to register statute violates substantive due process on its face because it impedes the rights to travel and freedom of movement without being narrowly tailored to meet a compelling state interest. *Aptheker*, 378 U.S. at 508, 514; *Soto-Lopez*, 476 U.S. at 909-10. Mr. Zain’s failure to register conviction rests on a statute that is unconstitutionally overbroad. The conviction must be reversed and the charge dismissed with prejudice. *Id.*

II. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. ZAIN.

A. Standard of Review.

A claim of insufficient evidence admits the truth of the state's evidence and all reasonable inferences therefrom. *State v. Caton*, 174 Wn.2d 239, 241, 273 P.3d 980 (2012). A conviction must be overturned for insufficient evidence if no rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *State v. Drake*, 149 Wn. App. 88, 93, 201 P.3d 1093 (2009).

B. No rational trier of fact could have found that Mr. Zain knowingly failed to register as a person lacking a fixed residence.

The failure to register statute criminalizes knowing failure to comply with the registration requirements of RCW 9A.44.130. RCW 9A.44.132. A registered sex offender "who lacks a fixed residence" must notify the sheriff within three business days "after ceasing to have a fixed residence," and must also "report weekly, in person, to the sheriff." RCW 9A.44.130(5). A fixed residence is "a building that a person lawfully and habitually uses as living quarters a majority of the week." RCW 9A.44.128(5).

Here, the trial judge found Mr. Zain guilty of knowingly violating these provisions by failing to register or report after ceasing to have a fixed residence. RP 66-68; CP 7. However, the state failed to present

evidence that Mr. Zain lacked a fixed residence or that he knew he lacked a fixed residence.

First, Mr. Zain believed that he lived at the annex, and that his rent was paid through the end of April. RP 51-52. Nothing in the record suggests that he was notified that he'd been evicted.¹⁵ *See* RP, CP *generally*. Furthermore, absent testimony from Ben Held, the state failed to prove that Mr. Zain stopped using the apartment as his fixed residence, even after the manager removed his belongings and changed the locks.¹⁶

Second, if Mr. Zain *did* cease to occupy the annex apartment, the state didn't prove that he "lacked" or "ceased to have" a fixed residence because the prosecutor didn't ask Mr. Zain where he stayed after April 21st. RP 50-56. Under the state's theory, Mr. Zain left the annex; however, he may well have "lawfully and habitually" used another building "as living quarters a majority of the week," and thus had a fixed residence within the meaning of the statute.¹⁷ RCW 9A.44.128.

¹⁵ Indeed, the record does not establish that he understood he was at risk of being evicted, that the eviction could take place without notice, or that the eviction could transpire as quickly as it did. *See* RP, CP *generally*.

¹⁶ Nor did the state prove that Ben Held lacked authority to sublet a portion of the apartment, or to allow Mr. Zain to stay until the end of the month for free. *See* RP, CP *generally*. Thus the state could not prove that Mr. Zain resided there unlawfully. *See* RCW 9A.44.128(5) (defining fixed residence to require lawful use of a building.)

¹⁷ Of course, this would also trigger a duty to register under RCW 9A.44.130. However, the court did not find that Mr. Zain changed his residence address. RP 66-68. The judge's verdict rested on her finding that he ceased to have a fixed residence. RP 66-68.

Under the evidence presented, no rational trier of fact could have found beyond a reasonable doubt that Mr. Zain lacked or ceased to have a fixed residence. Nor could a rational factfinder conclude that he knew he lacked or ceased to have a fixed residence. Accordingly, the state presented insufficient evidence to sustain the judge's verdict. *Drake*, 149 Wn. App. at 93. Mr. Zain's conviction must be reversed. *Id.*

III. THE TRIAL COURT VIOLATED MR. ZAIN'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND ART. I, § 3 BY ALLOWING HIM TO BE RESTRAINED AT TRIAL IN THE ABSENCE OF AN "IMPELLING NECESSITY."

A. Standard of Review

Constitutional issues are reviewed *de novo*. *LK Operating*, 181 Wn.2d at 66.

B. Mr. Zain was entitled to attend trial free of shackles absent some "impelling necessity" for physical restraint.

A defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. *State v. Damon*, 144 Wn.2d 686, 691, 25 P.3d 418 (2001); *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). Restraints may not be used "unless some *impelling necessity* demands the restraint of a prisoner to secure the safety of others and his own custody." *Finch*, 137 Wn.2d at 842 (quoting *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981))

(emphasis in original)). The accused has the right to be brought before the court “with the appearance, dignity, and self-respect of a free and innocent man.” *Finch*, 137 Wn.2d at 844.

Restraints are disfavored because they undermine the presumption of innocence, restrict the defendant’s ability to assist in the defense of his case, interfere with the right to testify, and offend the dignity of the judicial process. *Finch*, 137 Wn.2d at 845; *Hartzog*, 96 Wn.2d at 399. Close judicial scrutiny is required to ensure that the inherent prejudice of restraint is necessary to further an essential state interest. *Finch*, 137 Wn.2d at 846.

The trial court must base its decision to physically restrain an accused person on evidence that s/he poses an imminent risk of escape, intends to injure someone in the courtroom, or cannot behave in an orderly manner while in the courtroom. *Finch*, 137 Wn.2d at 850. Concern that a person is “potentially dangerous” is not sufficient. *Finch*, 137 Wn.2d at 852. Restraints may only be imposed based on information specific to a particular person; a general concern or a blanket policy will not pass constitutional muster. *Hartzog*, 96 Wn.2d 383. Finally, restraints should be used only as a last resort, and the court *must* consider less restrictive alternatives before imposing physical restraints. *Finch*, 137 Wn.2d at 850.

A trial court electing to impose restraints must make findings of fact and conclusions of law that are sufficient to justify the use of the restraints. *Damon*, 144 Wn.2d at 691-692. On direct appeal, improper use of restraints is presumed to be prejudicial. *In re Davis*, 152 Wn.2d 647, 698-699, 101 P.3d 1 (2004).

- C. The judge failed to hold a hearing or to consider less restrictive alternatives prior to requiring Mr. Zain to appear in restraints with only one hand free.

Mr. Zain appeared for his bench trial wearing restraints imposed by the jail. RP 5-6. No mention was made of the reason for restraints. The court did not hold a hearing, hear evidence, or enter findings. Nothing in the record suggests that Mr. Zain posed an imminent risk of escape, that he intended to injure someone in the courtroom, or that he could not behave in an orderly manner. *Finch*, 137 Wn.2d at 850. Nor is there any indication that the court considered less restrictive alternatives. *Finch*, 137 Wn.2d at 850.

The restraints were improper, and their imposition requires reversal. This is so even though Mr. Zain's case was tried to the bench, because the improper imposition of restraints is presumed prejudicial. *Davis*, 152 Wn.2d at 698-699.

Although a major concern with the improper use of restraints involves the negative effect on a jury, the *Finch* court identified several

other reasons why restraints may not be imposed absent impelling necessity. These include practical consequences, such as restriction of ability to assist in the defense and interference with the right to testify. In addition, imposition of restraints without adequate cause “offend[s] the dignity of the judicial process.” *Finch*, 137 Wn.2d at 845. The illegal imposition of restraints violated Mr. Zain’s due process rights. *Id.*

Because the issue is raised on direct appeal, the court’s improper use of restraints is presumed to be prejudicial. *Davis*, 152 Wn.2d at 698-699. His conviction must be reversed¹⁸ and the case remanded with instructions to permit Mr. Zain to appear in court without restraint, absent some impelling necessity. *Id.*

IV. MR. ZAIN WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

¹⁸ Even if the conviction is not reversed, the Cowlitz County Superior Court should be reminded of the law regarding restraints. It appears from this record that restraints are routinely imposed, at least during bench trials.

- B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision applies to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, art. I, § 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. art. I, § 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The strong presumption of adequate performance is only overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, 153 Wn.2d at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, “[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

C. Defense counsel provided ineffective assistance by failing to object to the unnecessary imposition of restraints during trial.

The Sixth Amendment right to the effective assistance of counsel exists in order to protect an accused person’s fundamental right to a fair trial. *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). This includes the right to appear in court free from restraint. *Wrinkles v. Buss*, 537 F.3d 804, 813-815 (2008). In light of the wealth of case law prohibiting imposition of restraints without individualized justification, a failure to object “cannot be an objectively reasonable tack

under prevailing norms of professional behavior.” *Wrinkles*, 537 F.3d at 815; *see also Roche v. Davis*, 291 F.3d 473, 483 (2002).

As noted above, Mr. Zain appeared in court in restraints. RP 5-6. Nothing in the record suggests any reason why restraints were required, and the court failed to hold a *Finch* hearing. Despite this, defense counsel made no objection when the court submitted to the jail’s request to have Mr. Zain partially restrained. Counsel’s failure to object and demand a *Finch* hearing was objectively unreasonable. *Wrinkles*; 537 F.3d 804; *Roche*, 291 F.3d 473.

Mr. Zain was prejudiced by his attorney’s deficient performance. Had counsel objected to the restraints, Mr. Zain would have received the *Finch* hearing to which he was entitled.¹⁹ Furthermore, because nothing in the record supports imposition of restraints, he would have been able to appear at trial “with the appearance, dignity, and self-respect of a free and innocent man.” *Finch*, 137 Wn.2d at 844.

A reasonable attorney would have acted to protect his client’s constitutional right to appear in court free from restraint. Because defense counsel failed to object, Mr. Zain was deprived of the effective assistance

¹⁹ Of course, the obligation to hold a hearing rests with the court; it is not up to counsel to demand a hearing. *State v. Gonzalez*, 129 Wn. App. 895, 901, 120 P.3d 645 (2005).

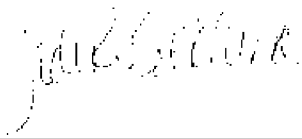
of counsel. *Wrinkles*; 537 F.3d 804; *Roche*, 291 F.3d 473. His conviction must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Zain's failure to register conviction must be reversed and the charge dismissed with prejudice. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on January 7, 2015,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Fauzi Zain, DOC #857246
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

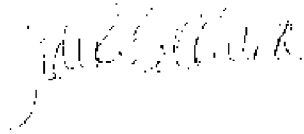
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
bours@co.cowlitz.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 7, 2015.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

January 07, 2015 - 3:38 PM

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