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OF THE STATE OF WASHINGTON

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No. 36217-1-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jeffery S. Cook,

Appellant.

Clallam County Superior Court

Cause No. 05-1-00036-7

The Honorable Judge George Wood

Appellant's Opening Brief

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: (866) 499-7475

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR vii

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR viii

1. Did the trial court err by denying Mr. Cook’s motion to dismiss for violation of his constitutional right to religious freedom? Assignments of Error Nos. 1, 2, 3.... viii

2. Was Mr. Cook’s conviction based on evidence unlawfully seized in violation of the Fourth Amendment? Assignments of Error Nos. 4-8. ix

3. Was Mr. Cook’s conviction based on evidence unlawfully seized in violation of Wash. Const. Article I, Section 7? Assignments of Error Nos. 4-8..... ix

4. Did the officers unlawfully detain Mr. Cook without a reasonable suspicion that he was engaged in criminal activity? Assignments of Error Nos.4-8..... ix

5. Did the officers unlawfully search Mr. Cook’s van incident to his arrest when he was not in the van at the time the arrest was initiated? Assignments of Error Nos. 6-10. ix

6. Was Mr. Cook denied the effective assistance of counsel when his attorney failed to seek suppression of the illegally seized evidence? Assignments of Error Nos. 6-10.

ix

- 7. Was Mr. Cook denied the assistance of counsel when he was forced to choose between ineffective counsel and self-representation? Assignments of Error Nos. 6-11..... ix
- 8. Did the trial court erroneously grant Mr. Cook's request to represent himself? Assignments of Error Nos. 6-11. ix
- 9. Is the trial court's finding of criminal history based on insufficient evidence? Assignments of Error Nos. 12-16. . x
- 10. Did the trial court err by sentencing Mr. Cook with an offender score of 2? Assignments of Error Nos. 12-16. x

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1

ARGUMENT..... 2

- I. Mr. Cook's conviction was obtained in violation of Article I, Section 11 of the Washington State Constitution. 2**
- II. The admission of unlawfully seized evidence violated Mr. Cook's constitutional rights under the Fourth Amendment and Wash. Const. Article I, Section 7. 9**
- III. The trial court violated Mr. Cook's constitutional right to counsel by forcing him to choose between ineffective counsel or proceeding *pro se*. 14**
- IV. The trial court failed to properly determine Mr. Mendoza's criminal history and offender score..... 20**

CONCLUSION 22

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Chapman v. California</i> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)	15
<i>Chimel v. California</i> , 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)	12
<i>Daniels v. Woodford</i> , 428 F.3d 1181 (9 th Cir., 2005)	16
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	14
<i>Holloway v. Arkansas</i> , 435 U.S. 475, 98 S.Ct. 1173 (1978)	15, 20
<i>Johnson v. Zerbst</i> , 304 U.S. 458, 58 S.Ct. 1019 (1938)	15
<i>McMann v. Richardson</i> , 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).....	17
<i>Nardone v. United States</i> , 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939)	12
<i>Pazden v. Maurer</i> , 424 F.3d 303 (3 rd Cir., 2005).....	15, 16
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	17
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)	13
<i>U.S. v. Salemo</i> , 61 F.3d 214 (3 rd Cir., 1995).....	15, 16
<i>U.S. v. Taylor</i> , 113 F.3d 1136 (10 th Cir., 1997)	15, 16
<i>United States v. Brignoni-Ponce</i> , 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d (1975).....	13
<i>Wilks v. Israel</i> , 627 F.2d 32 (7 th Cir.,1980)	15, 16

WASHINGTON CASES

Backlund v. Board of Comm'rs, 106 Wn.2d 632, 724 P.2d 981 (1986) 6

City of Tacoma v. Bishop, 82 Wn.App. 850, 920 P.2d 214 (1996) 15

First Covenant Church v. Seattle, 120 Wn.2d 203, 840 P.2d 174 (1992).. 3

In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001)..... 17

In re Marriage of Jensen-Branch, 78 Wn. App. 482, 899 P.2d 803 (1995)3

Rogers Potato v. Countrywide Potato, 152 Wn.2d 387, 97 P.3d 745 (2004)
..... 21

State ex rel. Holcomb, 39 Wn.2d 860, 239 P.2d 545 (1952) 6

State v. Balzer, 91 Wn. App. 44, 954 P.2d 931, *review denied at* 136
Wn.2d 1022, 969 P.2d 1063 (1998)..... 4, 5, 6, 7, 8, 9

State v. Bradley, 105 Wn. App. 30, 18 P.3d 602 (2001)..... 14

State v. Brown, 154 Wn.2d 787, 117 P.3d 336 (2005) 13, 14

State v. Clifford, 57 Wn. App. 127, 787 P.2d 571, *review denied*, 114
Wn.2d 1025, 792 P.2d 535 (1990)..... 6

State v. Contreras, 92 Wn. App. 307, 966 P.2d 915 (1998)..... 10

State v. Crane, 105 Wn. App. 301, 19 P.3d 1100 (2001) 13

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999)..... 21

State v. Glossbrener, 146 Wn.2d 670, 49 P.3d 128 (2002) 12

State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) 3, 11

State v. Holmes, 135 Wn. App. 588, 145 P.3d 1241 (2006)..... 10

State v. Horton, 136 Wn. App. 29, 146 P.3d 1227 (2006)..... 17

State v. Johnston 107 Wn.App. 280, 28 P.3d 775 (2001)..... 12, 19

State v. Littlefair, 129 Wn. App. 330, 119 P.3d 359 (2005)..... 10

<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	10
<i>State v. Meacham</i> , 93 Wn.2d 735, 612 P.2d 795 (1980)	6
<i>State v. Mendoza</i> , 139 Wn. App. 693, 162 P.3d 439 (2007).....	20, 21
<i>State v. Nordstrom</i> , 89 Wn.App. 737, 950 P.2d 946 (1997).....	15
<i>State v. Norman</i> , 61 Wn. App. 16, 808 P.2d 1159, <i>review denied</i> , 117 Wn.2d 1018, 818 P.2d 1099 (1991).....	6
<i>State v. O'Cain</i> , 108 Wn. App. 542, 31 P.3d 733 (2001).....	13, 14, 19
<i>State v. O'Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	12
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	11, 12
<i>State v. Pittman</i> , 134 Wn. App. 376 , ___ P.3d ___ (2007).....	17
<i>State v. Porter</i> , 102 Wn. App. 327, 6 P.3d 1245 (2000).....	14
<i>State v. Rathbun</i> , 124 Wn. App. 372, 101 P.3d 119 (2004).....	12, 14, 19
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	17, 18, 19
<i>State v. Saunders</i> , 91 Wn. App. 575, 958 P.2d 364 (1998)	18
<i>State v. Thompson</i> , 93 Wn.2d 838, 613 P.2d 525 (1980)	13
<i>State v. Turner</i> , 114 Wn. App. 653, 59 P.3d 711 (2002)	14, 19
<i>State v. Waters</i> , 89 Wn. App. 921, 951 P.2d 317 (1998).....	3
<i>State v. Wheless</i> , 103 Wn.App. 749, 14 P.3d 184 (2000)	11, 12
<i>State v. White</i> , 135 Wn.2d 761, 958 P.2d 962 (1998).....	3, 11

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV	viii, 9, 10, 11
U.S. Const. Amend. VI	12, 14

U.S. Const. Amend. XIV	14
Wash. Const. Article I, Section 11	vi, 2, 3, 4, 8
Wash. Const. Article I, Section 22.....	14, 15
Wash. Const. Article I, Section 7.....	vi, viii, 9, 10, 11, 12, 14

STATUTES

<i>former</i> RCW 69.50.201.....	7
RCW 69.50.4013	vi, 4, 5, 7, 9
RCW 69.51A.....	8
RCW 9.94A.030(13).....	20
RCW 9.94A.500(1).....	20
RCW 9.94A.530(2).....	21
U.S. Const. Amend. I.....	3

OTHER AUTHORITIES

RAP 2.5.....	10, 11
--------------	--------

ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Cook's motion to dismiss under Wash. Const. Article I, Section 11.
2. The trial court erred by finding Mr. Cook guilty of violating RCW 69.50.4013 despite his sincerely held religious beliefs.
3. The trial court erred by upholding RCW 69.50.4013 in the absence of a compelling state interest or proof that the statute is the least restrictive means of achieving that interest.
4. The admission of evidence unlawfully seized in violation of the Fourth Amendment violated Mr. Cook's right to be free from unreasonable searches and seizures.
5. The admission of evidence unlawfully seized in violation of Wash. Const. Article I, Section 7 disturbed Mr. Cook in his private affairs without authority of law.
6. The police unlawfully detained Mr. Cook without a reasonable suspicion that he was engaged in criminal activity.
7. Officers unlawfully searched Mr. Cook's van incident to his arrest, since he was not in the van when the arrest was initiated.
8. Mr. Cook was denied the effective assistance of counsel.
9. Defense counsel was ineffective for failing to seek suppression of the evidence unlawfully seized from the van.
10. Mr. Cook was denied the assistance of counsel when he was forced to choose between ineffective counsel and self-representation.
11. The trial court erred by granting Mr. Cook's request to represent himself.
12. The trial court erred by failing to properly determine Mr. Cook's criminal history.
13. The trial court erred by failing to properly determine Mr. Cook's offender score.

14. The trial court erred by adopting Finding No. 2.2, which purported to list Mr. Cook's criminal history as follows:

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	<u>A</u> or <u>J</u>	TYPE OF CRIME
Child Molestation 1	9/18/1991	Clallam, WA	04/01-06/30-1990	J	S
FTRSO		"	03-26-2001	A	NV

CP 7.

15. The trial court erred by adopting Finding of Fact No. 2.3, which reads (in part) as follows:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE	PLUS ENHANCEMENTS	MAXIMUM TERM
1	2	I	0-6 mos	N/A	5 years

CP 6.

16. The trial court erred by sentencing Mr. Cook with an offender score of 2.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Jeffery S. Cook was accused of felony possession of marijuana. He told officers that he used marijuana for religious purposes, and prior to trial, he moved for dismissal because the prosecution violated his constitutional right to the free exercise of religion. The trial court denied his motion. Mr. Cook testified at a bench trial to his religious beliefs regarding use of marijuana.

1. Did the trial court err by denying Mr. Cook's motion to dismiss for violation of his constitutional right to religious freedom?
Assignments of Error Nos. 1, 2, 3.

Mr. Cook was driving his van when he was stopped by a police officer. The officer stopped him because he was near a church where an alarm had been triggered. After the stop, police smelled burnt marijuana and observed a marijuana pipe. They arrested Mr. Cook, searched his van, and seized marijuana.

Mr. Cook was represented for 11 months by an attorney. He asked defense counsel to move to suppress the marijuana, but defense counsel did not do so. Eventually, based (in part) on counsel's failure to move for suppression, Mr. Cook sought and received permission to represent himself.

2. Was Mr. Cook's conviction based on evidence unlawfully seized in violation of the Fourth Amendment? Assignments of Error Nos. 4-8.

3. Was Mr. Cook's conviction based on evidence unlawfully seized in violation of Wash. Const. Article I, Section 7? Assignments of Error Nos. 4-8.

4. Did the officers unlawfully detain Mr. Cook without a reasonable suspicion that he was engaged in criminal activity? Assignments of Error Nos. 4-8.

5. Did the officers unlawfully search Mr. Cook's van incident to his arrest when he was not in the van at the time the arrest was initiated? Assignments of Error Nos. 6-10.

6. Was Mr. Cook denied the effective assistance of counsel when his attorney failed to seek suppression of the illegally seized evidence? Assignments of Error Nos. 6-10.

7. Was Mr. Cook denied the assistance of counsel when he was forced to choose between ineffective counsel and self-representation? Assignments of Error Nos. 6-11.

8. Did the trial court erroneously grant Mr. Cook's request to represent himself? Assignments of Error Nos. 6-11.

No evidence was presented during the trial or at sentencing to establish that Mr. Cook had any criminal history. Nor did Mr. Cook admit or acknowledge any specific prior convictions. Despite this, the trial court found that Mr. Cook had two prior felonies. Mr. Cook was sentenced with an offender score of 2. The record does not indicate how the court arrived at this result.

9. Is the trial court's finding of criminal history based on insufficient evidence? Assignments of Error Nos. 12-16.

10. Did the trial court err by sentencing Mr. Cook with an offender score of 2? Assignments of Error Nos. 12-16.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jeffrey Cook had parked his van by a church in Port Angeles. As officers drove by, they heard the church alarm going off. They saw Mr. Cook standing between his van and the church door, then walking into a nearby house. The officers did not have a description of any alleged trespasser, and they contacted another party driving through the alley. When Mr. Cook got back into his van and drove roughly 20 feet, an officer stopped him. The officer smelled marijuana, saw a pipe, and arrested Mr. Cook. Police found marijuana in his van. Supp. CP, Trial Exhibit 1.

The court appointed an attorney to represent Mr. Cook regarding his charge of Possession of Marijuana, over 40 grams. CP 20; RP (1/24/05) 7. Mr. Cook had asked his attorney to bring a motion to suppress the evidence, which his attorney did not do. RP (12/1/06) 8. After bringing the issue of his representation to the court's attention twice, Mr. Cook decided to represent himself, stating that he felt he had no choice and wanted the courts to decide what was constitutional and not his attorney. RP (4/1/05) 7-8; RP (10/14/05) 5-12; RP (12/1/05) 5-15. The court allowed him to waive his right to an attorney and proceed *pro se*. RP (12/1/05) 5-15.

Mr. Cook challenged his charge on multiple bases, including that it violated his right to the free exercise of religion. Supp. CP. He testified that he uses marijuana as a holy sacrament, quoted references to it from the Bible, and indicated that its use brings him closer to the Holy Father. RP (3/19/06) 34-36. Mr. Cook submitted documentation of his sacramental use of marijuana for religious practice. Supp. CP. The court denied the motion, as well as all of his other motions to dismiss, and he was convicted after a bench trial. Supp. CP; CP 6.

At sentencing, the state alleged that Mr. Cook had been convicted of Child Molestation in the First Degree and Failure to Register as a Sex Offender. RP (4/20/07) 5, 6. The state did not offer any proof of the convictions, and Mr. Cook did not stipulate to them. RP (4/20/07) 5-15. Despite this, the court sentenced him with two criminal history points. CP 8. This timely appeal followed. CP 5.

ARGUMENT

I. MR. COOK'S CONVICTION WAS OBTAINED IN VIOLATION OF ARTICLE I, SECTION 11 OF THE WASHINGTON STATE CONSTITUTION.

The Washington State Constitution's guarantee of religious freedom protects an individual's right to possess and use marijuana.

Wash. Const. Article I, Section 11. In this case, the state's prosecution and conviction of Mr. Cook for felony possession of marijuana infringed his state constitutional right to religious freedom. His conviction must be reversed and the case dismissed with prejudice.

Article I, Section 11 of the Washington State Constitution is entitled "Religious freedom," and reads (in part) as follows:

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state...

The state constitutional right to religious freedom under Article I, Section 11 is broader than the corresponding federal right under the First Amendment to the U.S. Constitution.¹ *First Covenant Church v. Seattle*, 120 Wn.2d 203, 226, 840 P.2d 174 (1992); also *State v. Waters*, 89 Wn. App. 921, 951 P.2d 317 (1998); *In re Marriage of Jensen-Branch*, 78 Wn. App. 482, 491, 899 P.2d 803 (1995). As a fundamental right of vital importance, religious freedom may not be burdened unless the state can

¹ Washington's State Constitutional provisions are generally analyzed with reference to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). However, no *Gunwall* analysis is necessary where established principles of state constitutional jurisprudence apply. *State v. White*, 135 Wn.2d 761 at 769, 958 P.2d 962 (1998).

establish that “the restrictions serve a compelling state interest and are the least restrictive means for achieving that interest.”² *State v. Balzer*, 91 Wn. App. 44 at 53-54, 954 P.2d 931, *review denied at* 136 Wn.2d 1022, 969 P.2d 1063 (1998).

To challenge a criminal statute under Article I, Section 11, an accused need only demonstrate (1) “that his or her religious convictions are sincerely held and central to the practice of his or her religion,” and (2) that the statute has some coercive effect against a religious practice.³ *Balzer*, at 54 (1998).

In this case, Mr. Cook established that use of marijuana was central to his sincerely held religious beliefs (and the lower court did not find otherwise). Supp. CP; Rp (3/19/06) 34-36. Furthermore, this Court has determined that RCW 69.50.4013 (the statute which Mr. Cook was accused of violating) necessarily burdens the exercise of sincerely held religious beliefs involving use of marijuana. *Balzer*, at 55. RCW 69.50.4013 is therefore unconstitutional unless it is the least restrictive means for achieving a compelling state interest.

² This is the well-known “strict scrutiny” test. *Balzer, supra*, at 53.

³ To avoid putting courts in the position of determining the validity of religious beliefs, any arguably religious belief is sufficient to trigger constitutional protections.

The state did not present any evidence establishing a compelling interest served by RCW 69.50.4013; nor did the state show that a complete ban on possession of marijuana was the only means by which such compelling interest could be achieved. In light of this, the trial court should have granted Mr. Cook's motion. This Court should reverse Mr. Cook's conviction and dismiss the case with prejudice.

In the alternative, this Court should remand the case for a hearing at which the state may present evidence of a compelling interest, and demonstrate that the statute is the least restrictive means for achieving that interest. *Balzer, supra*.

If the Court is inclined to overlook the deficiency in the state's evidence and examine the issue on its merits, reversal and dismissal with prejudice are nonetheless required. Assuming the state's interest is that advanced by this Court in *Balzer, supra*, this Court should reconsider *Balzer* and find RCW 69.50.4013 unconstitutional when applied to those possessing marijuana pursuant to a sincerely held religious belief.⁴

The *Balzer* court's decision finding a compelling state interest suffered from two major flaws. First, the *Balzer* Court erroneously held

⁴ The record in *Balzer* did not contain sufficient evidence of a compelling state interest. However, this Court, *sua sponte*, took judicial notice of various "legislative facts" that it found sufficient to establish a compelling state interest. *Balzer*, at 58-64.

regulation of marijuana to be similar to five other regulations burdening religious beliefs. The Court cited five cases where compelling state interests justified regulations burdening religious beliefs. *Balzer*, at 57-58, citing *Backlund v. Board of Comm'rs*, 106 Wn.2d 632, 724 P.2d 981 (1986) (state may require hospital staff to purchase professional liability insurance); *State v. Norman*, 61 Wn. App. 16, 808 P.2d 1159, review denied, 117 Wn.2d 1018, 818 P.2d 1099 (1991) (state may require parents to provide medical treatment to their children); *State v. Meacham*, 93 Wn.2d 735, 612 P.2d 795 (1980) (state may require putative fathers to submit to blood tests under the Uniform Parentage Act); *State ex rel. Holcomb*, 39 Wn.2d 860, 239 P.2d 545 (1952) (state university may require X-ray screening of incoming students for tuberculosis); *State v. Clifford*, 57 Wn. App. 127, 787 P.2d 571, review denied, 114 Wn.2d 1025, 792 P.2d 535 (1990) (state may impose licensing requirements on drivers). But in each case, the interest found compelling related to protection of third parties other than the actors whose religious beliefs were infringed—the patients in *Backlund*, the children in *Norman* and *Meacham*, the student population in *Holcomb*, and the driving public in *Clifford*. In none of the examples were religious freedoms infringed for the benefit of the very person seeking to act on a sincerely held religious belief. These cases do not support regulations imposed to protect the health or safety of

people such as Mr. Cook, whose religious beliefs are burdened by RCW 69.50.4013.

Second, the Court improperly relied on the legislature's classification of marijuana as a Schedule I controlled substance. The Court noted that the classification was based on a finding (made at the time of the classification) that marijuana was considered to have high potential for abuse, was not accepted for medical use in treatment in the U.S., and was considered unsafe for use in treatment under medical supervision. *Balzer*, at 59, citing former RCW 69.50.201. The Court outlined decisions approving this classification under a rational basis test (giving great deference to the legislature). *Balzer*, at 60-61. The Court also reviewed federal cases upholding the classification under the less stringent federal free exercise standard. *Balzer*, at 61-64. Inexplicably, the *Balzer* Court then relied on these admittedly inapplicable authorities to conclude that the state has a compelling interest in the regulation of marijuana. *Balzer*, at 64.

Balzer's finding of a compelling state interest should be reconsidered, and this Court should independently determine whether or

not the state's interest in the regulation of marijuana is truly compelling.⁵ In doing so, this Court should not grant special deference to the legislature's pronouncements. Failure to make an independent determination by granting deference to the legislature vests that branch of government with nearly untrammelled authority to determine what religious practices are to be permitted. If religious freedom under Article I, Section 11 is to be afforded the respect it deserves, it may not be abrogated by a legislative finding that a particular practice is harmful.

The *Balzer* Court's determination that the statute is the least restrictive means of achieving a compelling state interest is likewise erroneous. According to the Court, permitting religious use of marijuana would allow other religions to seek constitutional protection for their sincere religious beliefs involving use of prohibited drugs. *Balzer*, at 64-65. But this cannot be a basis for denying Mr. Cook's claim; otherwise any violation of a constitutional right would be upheld on the basis that recognizing the violation would encourage others to assert their constitutional rights. This freezes the constitutional landscape, stripping

⁵ This is particularly true in light of the movement toward legalizing marijuana use for medical purposes (*see* RCW 69.51A), and ordinances such as Seattle's Initiative 75, requiring police to consider marijuana violations their lowest priority for enforcement.

Washington citizens of any constitutional protections not yet recognized by the courts.

The Court also expressed concern that recognizing a religious exception to the criminal statute would encourage “enlistment” by others who are not sincere in their religious beliefs. *Balzer*, at 65. But the trial court is charged with the task of determining whether or not a particular religious conviction is “sincerely held” and central to the accused’s religious practices. *Balzer*, at 54. While this determination might be difficult in some cases, such difficulty cannot be the basis for denying a constitutional right; otherwise, all constitutional rights would fail whenever a court is faced with a fact-specific determination involving discretion.

Because of his sincerely held religious beliefs, Mr. Cook should not have been convicted of violating RCW 69.50.4013. The conviction must be reversed and the case dismissed with prejudice.

II. THE ADMISSION OF UNLAWFULLY SEIZED EVIDENCE VIOLATED MR. COOK’S CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT AND WASH. CONST. ARTICLE I, SECTION 7.

Article I, Section 7 of the Washington Constitution provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7.

The Fourth Amendment to the Federal Constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

The unlawful seizure of evidence and subsequent admission of that evidence at trial violates U.S. Const. Amend. IV and Wash. Const. Article I, Section 7. When the trial record establishes a clear violation of these provisions, the issue may be raised for the first time on review as a manifest error affecting a constitutional right under RAP 2.5(a). *State v. McFarland*, 127 Wn.2d 322 at 334, 899 P.2d 1251 (1995); *State v. Holmes*, 135 Wn. App. 588 at 592, 145 P.3d 1241 (2006); *State v. Littlefair*, 129 Wn. App. 330 at 338, 119 P.3d 359 (2005); *State v. Contreras*, 92 Wn. App. 307 at 313-314, 966 P.2d 915 (1998). To meet this standard, “[t]he defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *McFarland*, at 334; *see also Contreras, supra*, at 313-314.

In this case, although no motion to suppress was made at trial, the record contains sufficient detail about the circumstances of Mr. Cook’s arrest and the subsequent search of the truck to enable this court to rule on

the issue. Supp. CP, Exhibit 1. Because of this, the erroneous admission of unlawfully seized evidence is a manifest error affecting a constitutional right. RAP 2.5(a).

The federal constitution provides the minimum protection against unreasonable searches; greater protection may be available under the Washington constitution. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Although differences are generally examined with reference to the six *Gunwall* factors, no *Gunwall* analysis is necessary where established principles of state constitutional jurisprudence apply. *State v. White*, 135 Wn.2d 761 at 769, 958 P.2d 962 (1998). The Supreme Court has stated that “it is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment.” *State v. Parker*, 139 Wn.2d 486 at 493, 987 P.2d 73 (1999).

Under both constitutional provisions, searches conducted without a search warrant are *per se* unreasonable and are presumed to be unconstitutional. *Parker*, at 494; *State v. Wheless*, 103 Wn.App. 749, 14 P.3d 184 (2000). Courts have outlined a small number of narrowly drawn and jealously guarded exceptions to the warrant requirement. *Parker*, *supra*; *Wheless*, *supra*. Where the state asserts an exception, it bears the

heavy burden of producing facts to support the exception. *Parker, supra*; *State v. Johnston* 107 Wn.App. 280 at 284, 28 P.3d 775 (2001).

One of the narrowly drawn exceptions to the warrant requirement is the search incident to arrest, which is justified by a concern for the arresting officer's safety and for the preservation of potentially destructible evidence within the arrestee's control. *Wheless, supra*; *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). The exception is narrower under Article I, Section 7 than it is under the Fourth Amendment. *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). Police may only search the passenger compartment of a vehicle incident to arrest if the vehicle was within the arrestee's immediate control at the time the police initiated the arrest. *State v. Rathbun*, 124 Wn. App. 372, 101 P.3d 119 (2004).

The legality of a search incident to arrest turns on the lawfulness of the arrest. Where the arrest is derived (directly or indirectly) from a violation of the Fourth Amendment or Article I, Section 7, the seized items must be suppressed as "fruits of the poisonous tree." *Nardone v. United States*, 308 U.S. 338 at 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939); *State v. Glossbrener*, 146 Wn.2d 670, 685, 49 P.3d 128 (2002).

The Fourth Amendment and Article I, Section 7 apply to brief detentions that fall short of formal arrest. *United States v. Brignoni-*

Ponce, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d (1975), *State v. Crane*, 105 Wn. App. 301, 311, 19 P.3d 1100 (2001). In order to justify a brief investigative detention, the police must have a well-founded suspicion of criminal activity based on specific and articulable facts; there must be a substantial possibility that criminal conduct has occurred or is about to occur.⁶ *State v. O'Cain*, 108 Wn. App. 542, 548, 31 P.3d 733 (2001); *see also State v. Brown*, 154 Wn.2d 787 at 798, 117 P.3d 336 (2005) (police illegally seized passenger by merely asking him to identify himself for a warrants check.) Furthermore, the facts must demonstrate that the individual detained is involved in the criminal conduct. *State v. Thompson*, 93 Wn.2d 838 at 840-841, 613 P.2d 525 (1980).

In this case, the police illegally seized Mr. Cook by stopping him while he was driving. At the time, the officers knew only that a church burglar alarm had been triggered. They did not know whether the alarm was triggered as a result of a crime, by accident, or due to malfunction. Nothing suggested that a felony (as opposed to misdemeanor trespass, malicious mischief, or some other minor crime) had been committed. Supp. CP, Exhibit 1. In the absence of a well-founded suspicion linking

⁶ The standard is based on the U.S. Supreme Court's holding in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Mr. Cook to criminal activity, the police lacked authority to detain Mr. Cook. *Brown, supra; O’Cain, supra.*

Furthermore, even if Mr. Cook were properly detained, his arrest cannot justify the search of his van: he was not arrested until after he had exited the van, and the van was not within his immediate control at the time of his arrest. *See State v. Rathbun, supra; State v. Turner*, 114 Wn. App. 653, 59 P.3d 711 (2002); *State v. Johnston supra*, at 285-286, citing *State v. Porter*, 102 Wn. App. 327 at 333, 6 P.3d 1245 (2000) and *State v. Bradley*, 105 Wn. App. 30, 38, 18 P.3d 602 (2001).

Because the evidence was unlawfully seized, its admission at Mr. Cook’s trial violated his constitutional rights under the Fourth Amendment and under Article I, Section 7. The conviction must be reversed and the evidence suppressed. *Rathbun, supra.*

III. THE TRIAL COURT VIOLATED MR. COOK’S CONSTITUTIONAL RIGHT TO COUNSEL BY FORCING HIM TO CHOOSE BETWEEN INEFFECTIVE COUNSEL OR PROCEEDING *PRO SE*.

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 is applicable 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, Article I, Section 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. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *U.S. v. Salemo*, 61 F.3d 214 at 221-222 (3rd Cir., 1995). Indeed, “the assistance of counsel is among those ‘constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.’” *Holloway v. Arkansas*, 435 U.S. 475 at 489, 98 S.Ct. 1173 (1978), quoting *Chapman v. California*, 386 U.S. 18 at 23 n. 8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The accused may waive her or his his Sixth Amendment right to counsel, but only if the waiver is made knowingly, intelligently, and voluntarily. *State v. Nordstrom*, 89 Wn.App. 737 at 740, 950 P.2d 946 (1997); *City of Tacoma v. Bishop*, 82 Wn.App. 850 at 855, 920 P.2d 214 (1996). A reviewing court must indulge every reasonable presumption against waiver. *U.S. v. Taylor*, 113 F.3d 1136 at 1140 (10th Cir., 1997); *Johnson v. Zerbst*, 304 U.S. 458 at 464, 58 S.Ct. 1019 (1938).

A clear choice between alternatives does not always permit a voluntary decision: if the choice presented is constitutionally offensive, the choice cannot be voluntary. *Pazden v. Maurer*, 424 F.3d 303 at 313 (3rd Cir., 2005), quoting from *Wilks v. Israel*, 627 F.2d 32 at 35 (7th Cir., 1980). A waiver of the right to counsel will not be found where the

accused reluctantly agreed to proceed *pro se* under circumstances that may have appeared to offer no real choice. *Salemo* at 221. For example, the accused ““may not be forced to proceed with incompetent counsel; a choice between proceeding with incompetent counsel or no counsel is in essence no choice at all.”” *Pazden v. Maurer, supra*, at 313, *quoting Wilks v. Israel* at 35. For this reason, a reviewing court must be confident that the accused was not forced to make a choice between incompetent counsel and appearing *pro se*. *Taylor, supra*, at 1140. The court must decide whether the accused waived the right to counsel voluntarily and affirmatively, or simply bowed to the inevitable. *Salemo, supra*, at 221-222.

The trial court bears the “weighty responsibility of conducting a sufficiently penetrating inquiry to satisfy itself that the defendant's waiver of counsel is... voluntary.” *Pazden v. Maurer*, at 314, *quotation marks and citations omitted*. A purported waiver is involuntary if the accused’s objections justify the appointment of new counsel. *Taylor*, at 1140. Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel. *Daniels v. Woodford*, 428 F.3d 1181 at 1198 (9th Cir., 2005).

The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 at 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853 at 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). To prevail on a claim of ineffective assistance, an appellant must show (1) that defense counsel's conduct was deficient, meaning that it fell 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 at 130, 101 P.3d 80 (2004); *see also State v. Pittman*, 134 Wn. App. 376 at 383, ___ P.3d ___ (2007). There is a strong presumption of adequate performance; however, this presumption is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130.

Where a claim of ineffective assistance is based on a failure to challenge the admission of evidence, the appellant must show (1) an absence of legitimate strategy for the failure to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of

the trial would have been different had the evidence not been admitted.
State v. Saunders, 91 Wn. App. 575 at 578, 958 P.2d 364 (1998).

In *Reichenbach, supra*, the defendant was charged with possession of methamphetamine. His trial counsel did not move to suppress the drugs, which the Supreme Court described as “the most important evidence the State offered” at trial. *Reichenbach*, at 130. Because an argument in favor of suppression was available to counsel, the Court ruled that “his failure to challenge the search...cannot be explained as a legitimate tactic, [and thus his] conduct was deficient.” *Reichenbach*, at 131. The Court then turned to the merits of the suppression argument, found that the methamphetamine was illegally seized, and reversed the conviction:

Because the methamphetamine was illegally seized and there was no tactical reason for failing to move to suppress, counsel's deficient performance was clearly prejudicial. *Reichenbach's* conviction for possession of methamphetamine was dependant on the baggie that was seized. Without that evidence, the State could not prove possession beyond a reasonable doubt. *Reichenbach's* right to the effective assistance of counsel was violated.
Reichenbach, at 137.

As in *Reichenbach*, Mr. Cook was charged with possession, and the drugs themselves were the most important piece of evidence offered by the State. There was no legitimate reason not to challenge the admission of the evidence, as suppression would have terminated the

prosecution. Mr. Cook was represented by an attorney from January 2005 to December 2005. During that time, Mr. Cook made it clear to the court and to his attorney that he wished to have the court consider a suppression motion. RP (12/1/05) 8. As outlined in the preceding section, the record suggests such a motion would have been successful. Despite this, his attorney failed to move to suppress the evidence. As in *Reichenbach*, defense counsel's performance (in failing to move to suppress the evidence) was deficient, because there was an argument available to challenge the seizure. This deficiency prejudiced Mr. Cook, because the evidence was illegally seized.

As noted above, the search was not properly incident to Mr. Cook's arrest. The police lacked a well-founded suspicion that Mr. Cook was involved in criminal activity, and thus had no basis to detain him. *O'Cain, supra*. Furthermore, the police did not initiate an arrest of Mr. Cook while he was still in the truck, thus his arrest could not justify the search. *Rathbun, supra; Turner, supra; Johnston, supra*.

Because Mr. Cook was faced with two unacceptable alternatives—going forward with an attorney who refused to move to suppress illegally seized evidence or proceeding on his own-- his waiver of counsel was not voluntary. The conviction must be reversed and the case remanded to the

trial court for the appointment of new counsel. *Holloway v.*

Arkansas, supra.

IV. THE TRIAL COURT FAILED TO PROPERLY DETERMINE MR. MENDOZA'S CRIMINAL HISTORY AND OFFENDER SCORE.

RCW 9.94A.500(1) requires that the court conduct a sentencing hearing “before imposing a sentence upon a defendant.” Furthermore, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record...

Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys.”

RCW 9.94A.500(1).

“Criminal history” means more than just a list of prior felonies (although it is often treated as such). Instead, “criminal history” is defined to include all prior convictions and juvenile adjudications, and “shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.” RCW 9.94A.030(13). To establish criminal history, “the trial court may rely on no more information than is admitted by the plea

agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530(2).

In this case, no evidence was presented that Mr. Cook had any criminal history; nor did he admit or acknowledge any specific prior convictions. RP (4/20/07) 5-15. The sentencing court did not determine his criminal history or calculate his offender score on the record. RP (4/20/07) 5-15. Despite the absence of any evidence of criminal history, the judgment and sentence reflected a finding that Mr. Cook had two prior felony convictions and an offender score of 2. CP 8. There is no indication in the record as to how this finding was made.

A trial court’s findings are reviewed for substantial evidence. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004). Because of the absence of any evidence of criminal history, the findings in this case are completely unsupported and must be vacated. *Rogers Potato, supra*. The sentence must also be vacated, and the case remanded for resentencing.⁷ See *State v. Mendoza*, 139 Wn. App. 693, 162 P.3d 439 (2007).

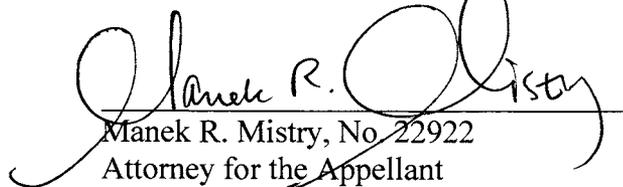
⁷ As the Supreme Court said in *State v. Ford*: “Even if informal, seemingly casual, sentencing determinations reach the same results that would have been reached in more formal and regular proceedings, the manner of such proceedings does not entitle them to the respect that ought to attend this exercise of a fundamental state power to impose criminal sanctions.” *State v. Ford*, 137 Wn.2d 472 at 484, 973 P.2d 452 (1999).

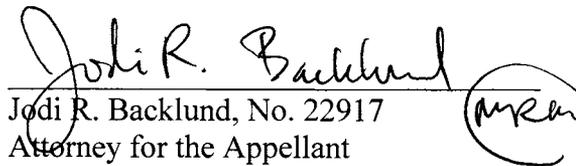
CONCLUSION

For the foregoing reasons, Mr. Cook's conviction must be reversed and his case dismissed. In the alternative, his case must be remanded for a new trial. If the conviction is not dismissed, the sentence must be vacated and the case remanded for a correct determination of Mr. Cook's criminal history and offender score.

Respectfully submitted on October 10, 2007.

BACKLUND AND MISTRY


Manek R. Mistry, No. 22922
Attorney for the Appellant


Jodi R. Backlund, No. 22917
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Jeffery S. Cook
151 Hooker Road
Sequim, WA 98382

and to:

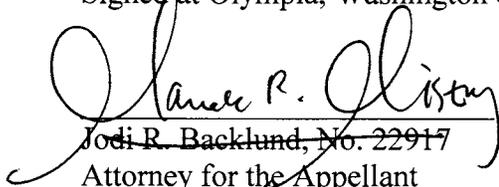
Clallam County Prosecuting Attorney
223 East 4th Street Suite 11
Port Angeles, WA 98368-3015

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on October 10, 2007.

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 October 10, 2007.


Jodi R. Backlund, No. 22917
Attorney for the Appellant #22922

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