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DIVISION TWO

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STATE OF WASHINGTON

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No. 39573-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY D. JONES,

Appellant.

APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS
(RAP 10.10)

On Appeal From The Superior Court of Washington
Pierce County Cause No. 08-1-00445-9
The Honorable James R. Orlando, Judge

Anthony D. Jones, #837537
Appellant
McNiel Island Corr. Ctr.
P.O. Box 881000 - B125
Steilacoom, WA 98388

On March 10, 2010, Russell Selk, the Attorney representing Anthony D. Jones, the Appellant in this appeal, filed an Opening Brief of Appellant in this Court. The State has not filed a response. Mr. Jones now files this Statement of Additional Grounds (SAG) pursuant to RAP 10.10.

I. STATEMENT OF GROUNDS PRESENTED
BY APPELLATE COUNSEL

In the Opening Brief of Appellant, Appellate Counsel raised and argued that reversal is required because the prosecutor committed multiple acts of misconduct and counsel was ineffective.

Under Duncan v. Henry, 513 U.S. 364, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995), the United States Supreme Court have said that "[i]f state courts are to be given the opportunity to correct alleged violations of prisoner's federal rights they must surely be alerted to the facts that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment he must say so, not only in federal court, but in state court." Id., at 365-66.

For purposes of federal habeas corpus review, Mr. Jones wishes to alert this Court to the facts that the issues raised and argued by Appellate Counsel in her Opening Brief, incorporated herein by reference as though

fully set forth, also violates his federal constitutional rights:

1. Mr. Jones was denied his right to due process of law and his right to a fair trial by the prosecutor's multiple acts of misconduct, which were constitutionally offensive, flagrant, and prejudicial, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and article I, sections 3, 7, and 22.

See Opening Brief of Appellant.

2. Mr. Jones received the ineffective assistance of trial counsel in violation of the Sixth Amendment to the United States Constitution and article I, section 22.

See Opening Brief of Appellant.

II. STATEMENT OF ADDITIONAL GROUNDS PRESENTED BY APPELLANT

1. Officer Smith's conduct in establishing probable cause to arrest Mr. Jones and the search of Mr. Jones' vehicle were in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Washington Constitution Article I, Sections 3, 7, 9, and 22.

2. The denial of Mr. Jones' request for a continuance of his trial to retain the assistance of private, effective counsel, amounted to a denial of his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Const. art. I, sec. 22.

3. Mr. Jones was denied his right to compulsory process in violation of the Sixth Amendment to the United States Constitution, and Const. art. I, sec. 22.

4. The State was relieved of it's burden to prove beyond a reasonable doubt every element of the crimes with which Mr. Jones was charged, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Const. art. I, sec. 3.

5. Mr. Jones' counsel was ineffective in the litigation of his Fourth Amendment claim, under the Sixth Amendment to the United States Constitution and Const. art. I, sec. 22(amend 10).

6. Mr. Jones was denied his right to due process and his right to a fair trial by the State's amendment of the Information on the day of trial to add a school zone enhancement, in violation of the Fourteenth Amendment to the United States Constitution and Const. art. I, secs. 3 and 22.

III. STATEMENT OF RELEVANT FACTS

a. Procedural Facts. On January 25, 2008, the Pierce County Prosecuting Attorney filed an Information in the Pierce County Superior Court, under Cause No. 08-1-00445-9, which charged Mr. Jones with Unlawful Possession of a Controlled Substance with Intent to Deliver (Count I), Unlawful Possession of a Controlled Substance (Count II), and Unlawful Possession of a Controlled Substance (Count III), for crimes he allegedly committed on November 21, 2007. See Appendicies A and B.

On February 8, 2008, the Pierce County Prosecuting Attorney filed a motion and Affidavit for bench warrant for the arrest of Mr. Jones, which was issued on February 20, 2008. Several months later, on June 19, 2008, Mr.

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Appendicies A through L are attached and are true copies of relevant Clerk's Papers from the Pierce County Superior Court in State v. Jones, Cause No. 08-1-00445-9. Mr. Jones files the attached Supplemental Designation Of Clerk's Papers to include these records on appeal.

*The Verbatim Report of Proceedings contains two Volumes which has been transmitted to this Court.

Jones was arrested. The case dragged on for several more months and on April 22, 2009, Defense Counsel, Curtis Huff, filed a Knapstad motion to dismiss. See Appendix C. Then on April 30, 2009, Mr. Huff filed a motion to suppress the evidence as the result of an unlawful search and seizure, and fruit of the poisonous tree, inter alia. See Appendix D. On June 12, 2009, the State filed a response, responding to both the motion to dismiss and the suppression motion. See Appendix E.

After several long delays, the case finally proceeded to trial, and on July 7, 2009, a jury was empanelled. On July 8, 2009, the State filed an Amended Information to add a school zone enhancement to Count I. See Appendix K. That same day, July 8, 2009, the trial court issued instructions to the jury, see Appendix F, which omitted material facts the State was required to prove from what it charged in the Information. The State was required to prove that Mr. Jones "did unlawfully, feloniously, and knowingly" possess the drugs.

That same day, July 8, the jury returned verdicts of guilty on all counts, including the special verdict. See Appendices G, H, I, and J. Then on July 17, 2009, the trial court entered Findings of Facts and Conclusions of Law on Mr. Jones' motion to dismiss and motion to suppress. See Appendix L. Mr. Jones filed an appeal

to this Court, appellate counsel filed an opening brief, and Mr. Jones files this statement of additional grounds.

b. Substantive Facts. On November 21, 2007, Tacoma Police Officers Smith and Betts were assigned to the "gang unit" looking for gang activity when they ensued an encounter with Mr. Jones. IRP 105-06. According to Officer Smith, at about 3:30 pm, they were traveling eastbound on East 40th Street towards Portland Avenue and observed Mr. Jones going westbound on East 40th Street, approaching McKinley Avenue. IRP 107.

From "about 50 feet away" Officer Smith observed a brand new, 2007 Dodge Charger, with a young black male inside, and "noticed that he was not wearing a safety seatbelt." IRP 108. With a preconceived conception that this young black male may be involved in gang activity, Officer Smith "continued to the next intersection and made a U-Turn to catch up to" Mr. Jones, the young black male, "as he was going through the intersection of 40th and McKinley to turn into 7-Eleven." IRP 109.

Officer Smith initiated a traffic stop and claimed that Mr. Jones "opened his car door" as "he walked up to" him. IRP 110. Officer Smith said "hi" and told Mr. Jones that "he stopped him because he weren't wearing his seatbelt," then asked Mr. Jones "for his driver's license, registration, and proof of insurance." IRP 111. Mr. Jones stated that he "did not know it was

the law to wear a seatbelt." IRP 111.

According to Officer Smith, "while looking around the vehicle, he observed the driver's side door compartment had a large pill bottle," and in plain view, was able to see a "512 number imprinted on a pill." IRP 112. However, Officer Smith was never asked at trial whether he had 20/20 vision in order to have seen a "512 on a pill" that was "about even with [his] ankle." IRP 112.

Officer Smith testified that, based on his "training and experience, the pill with the imprint 512 is specific for schedule II controlled substance which is oxycodone, 5 milligrams." IRP 113.

Officer Smith testified and told the jury that "it's not a crime if you have a prescription for a drug" but "if you are carrying someone else's prescription drug, then it would be a crime." IRP 113. However, Officer Smith never made this statement to Mr. Jones prior to questioning him about the pills. IRP 113-114. Instead, Officer Smith used entrapment to elicit an incriminating confession from Mr. Jones to gain probable cause to arrest him.

- A. I asked Mr. Jones about the pill bottle.
- Q. And what did you ask him about?
- A. I asked him whose pills they were.
- Q. Okay. And how did the defendant respond to that question?
- A. He stated they were his wife's pills.
- Q. And did you follow that up with any other questions?
- A. Yeah. I asked his if there was a label on the pill bottle.

- Q. Okay. And what was his response to that?
- A. No, there wasn't.
- Q. Did you ask him at any point during this conversation what the pills were?
- A. Yes. He stated they were percocet.
- Q. And in your training and experience, Percocet is a generic name for oxycodone?
- A. Correct.
- Q. At that -- at that point, now that the defendant's indicated that he has these pills and they're a controlled substance and they're not his and he doesn't have a prescription--
- Q. What did you do at that point?
- A. Well, based on him not having the pills in a proper container, no label on the container, his admission that it was percocet, and that it was not his prescription, I advised him he was under arrest for unlawful possession of a controlled substance, had him step out of the the vehicle and I placed him in handcuffs.

IRP 114-115.

If Officer Smith knew, from his training and experience, that the pills were in fact oxycodone, a schedule II controlled substance as he claimed, then he should not have been questioning Mr. Jones to elicit an incriminating response to gain probable cause to arrest him. The State had the burden to prove that Officer Smith had probable cause to arrest Mr. Jones, and failed to do so.

Did Officer Smith gain probable cause to arrest when (1) he saw a pill with the number 512 imprinted on it, and based on his training and experience, knew it to be oxycodone, a schedule II controlled substance, or (2) when his questions, which were designed to elicit an incriminating response from Mr. Jones, compelled a confession that the pills were "percocets"?

Mr. Jones did not know that it was a crime to have

his wife's prescription drugs in their car, and reasonable jurists would find that debatable, even Officer Smith testified that it could be innocent, and courts have been especially cautious when the evidence that is alleged to establish probable cause is entirely consistent with innocent behavior.

Moreover, after extracting a confession from Mr. Jones, Officer Smith placed him under arrest and claimed that he then read him his Miranda rights. IRP at 116. Specifically, Officer Smith stated:

"Yes. I advised Mr. Jones: You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish."

IRP 116.

Officer Smith claimed that he then searched Mr. Jones and when he reached in his left front pant pocket, Mr. Jones stated that "this is not good; that I am fucked. I got some stuff that I should not be having." IRP 119-120. Officer Smith claimed that he then opened Mr. Jones' pocket, looked inside, and observed a clear plastic baggie with 19 individually packaged blue baggies inside. IRP 120. Reasonable jurists would disagree with Officer Smith's statement and no rational trier of fact would find beyond a reasonable doubt, that by simply opening someone's pant pocket, even with 20/20 vision, "observe a clear plastic baggie with 19

individually packaged blue baggies inside." IRP 120.

According to Officer Smith, he placed Mr. Jones in the back of his patrol car and then conducted a search of Mr. Jones' car. Officer Smith found a second pill bottle with a lid to it, opened it up, and found ten white oval pills with M57/71 which he claimed was methadone, a Schedule II controlled substance. IRP 126. Officer Smith never field tested any of the drugs at the scene to determine their true identity. Instead, Officer Smith called poison control and used a drug bible. IRP 126-127.

Officer Smith claimed that Mr. Jones told him "that he was selling the pills and the crack and that he had planned to meet someone at the 7-Eleven and sell the drugs before [h]e contacted him", IRP 131, a claim Mr. Jones adamantly denied.

Officer Smith's partner, Betts, who was also "assigned to the Tacoma Police gang unit" IRP 161, testified, but never filed a police report. IRP 178. Police officers routinely use their police reports to refresh their memories when testifying at trial. Officer Betts must be an extraordinary officer because ordinary officers would not remember the specifics of an incident "that's off [their] recollection" IRP 178, almost three years later.

Officer Betts' testimony at trial was based entirely on Officer Smith's report, rather than his own

independent recollection of the events. It is clear that his testimony was used to bolster Officer Smith's testimony at trial. Officer Betts' opinion testimony was unfairly prejudicial to Mr. Jones because when a law enforcement officer gives opinion testimony, the jury is especially likely to be influenced by that testimony which carries an aura of special reliability and trustworthiness.

At trial, the State called "Maude Kelleher, the lead router for Tacoma School District" 2RP 194, to testify regarding the school-zone enhancement that it filed against Mr. Jones on the day of trial.

The prosecutor handed Ms. Kelleher State's Exhibit 3, which she created for this case. 2RP 195. According to Ms. Kelleher, the one thousand-foot radius is determined by computer and when she type in the school zones or bus stops the computer brings up which bus stops are within that radius. 2RP 196. Ms. Kelleher testified that, although "[t]he map, the 1000-foot radius, the stops, the boundaries, [are] all computer generated," she "personally" typed in her own information, and in doing so, "mistyped" the correct information. 2RP 198.

Ms. Kelleher's map that she "personally" prepared with her "mistyped" information was unfairly prejudicial to Mr. Jones because it lacks sufficient indicia of reliability.

Q. And the thousand-foot parameter you put in, do you type that in or is there an option for a thousand feet? How does that work?

A. I type it in. It defaults to 800 feet.

Q. Defaults?

A. So I type in the 1,000.

Q. So 800 feet would be a smaller circle?

A. Correct.

Q. So as you are testifying today, that East Spokane and 40th triangle, that is actual -- the actual bus stop?

A. Yes, it is.

Q. And these words should be ignored because it has an error up in the corner that you typed in.

A. That's -- yeah.

2RP 199.

The defense called Kelley Jones, Mr. Jones' wife, as a witness. She testified that Mr. Jones used drugs to support his addiction, and until recently, they were without insurance to help him with his problem. 2RP 204-07. Ms. Jones testified that her recent job provided "a good insurance program" and Mr. Jones took advantage of that and checked into Crossroads Rehabilitation Center, an outpatient drug treatment program, which Mr. Jones attended for over a year. 2RP 207.

Mr. Jones then testified on his behalf and admitted that he had a "very severe" drug problem which started when he was "about 15 years old." 2RP 223-224. As to the incident, Mr. Jones had "a difference of opinion to alot of what the police testified to in trial."

2 RP 229.

Mr. Jones testified that he was driving up 40th to the intersection of 40th and McKinley where the officers' were sitting at the red light. Mr. Jones

pulled up to the red light beside the officers as they seen each other. 2RP 231. Because it's a two lane road, as the light turned green, the officers turned right and he kept going straight to turn into 7-Eleven. The officers turned right, then turned into 7-Eleven. There are two entrances into 7-Eleven, one from the south side and one from the east side. 2RP 232.

Mr. Jones testified that he was out of his vehicle when Officer pulled up behind him and he returned to his car to get his driver's license, registration, and proof of insurance. Mr. Jones asked Officer Smith why was he getting pulled over and he responded because Mr. Jones was not wearing a seatbelt.

Mr. Jones testified that Officer Smith did not read him his Miranda rights until he was placed in the back of his patrol car. Mr. Jones contends that Officer Smith primarily pulled him over because he was profiled as a young black male, driving a brand new 2007 Dodge Charger, and believed to be a gang member. Officer Smith used a pretextual stop to investigate Mr. Jones for gang activity and warrants.

Mr. Jones never told Officer Smith that he was at 7-Eleven to meet somebody to sell the drugs and Officer Smith never produced any witness that corroborated his testimony.

The cumulative effect of all these errors, coupled with the fact that Mr. Jones' trial counsel did not

call a key defense witness from the 7-Eleven store who witnessed the incident, and prosecutorial misconduct, denied him a fair trial and a jury verdict worthy of confidence.

In addition, the trial court erred in entering Findings of Facts and Conclusions of Law nine days after the Jury's verdict. 2RP 323. Counsel's motions to dismiss and to suppress under CrR 3.5/3.6 were filed months before trial had begun and the trial court was required to decide these motions in pretrial. Mr. Jones is entitled to the relief requested herein.

IV. ARGUMENT

Mr. Jones was denied his fundamental constitutional rights in violation of both the state and federal constitutions. When fundamental constitutional rights are in issue, the reviewing courts are compelled to make their own independent examination of the testimony, the findings, and the record for the purpose of determining whether there has been a denial of due process of law. See McNear Jr. v. Rhay, 65 Wn.2d 530, 535-36, 398 P.2d 732 (1965)(citing Haynes v. Washington, 373 U.S. 503, 10 L.Ed.2d 513, 83 S.Ct. 1336 (1963); Ker v. California, 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623 (1963); State v. Rutherford, 63 Wn.2d 949, 389 P.2d 895 (1964)).

1. OFFICER SMITH'S CONDUCT IN ESTABLISHING PROBABLE CAUSE TO ARREST MR. JONES AND THE SUBSEQUENT SEARCH OF MR. JONES' VEHICLE WERE IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND CONST. ART. I, SECTIONS 3, 7, 9, and 22.

The Fourth Amendment of the United States Constitution governs all searches and seizures conducted by government agents. The Fourth Amendment provides:

"The right of the people to be secure in the 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 Fourth Amendment proscribing unreasonable searches and seizures is obligatory upon the states through the Fourteenth Amendment to the United States Constitution. McNear Jr. v. Rhay, 65 Wn.2d at 536 (citing Mapp v. Ohio, 367 U.S. 643, 654-55, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961)).

The Fifth Amendment of the United States Constitution protects a person against being incriminated by his own compelled testimonial communications. The Fifth Amendment provides:

"No person ... shall be compelled in any criminal case to be a witness against himself"

U.S. Const. amend V. And, the proscription against self-incrimination contained in the Fifth Amendment has, through the Fourteenth Amendment, likewise become obligatory upon the states. McNear Jr. V. Rhay, 65

Wn.2d at 536 (citing Malloy v. Hogan, 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1964)).

The Sixth Amendment of the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right ... be have the Assistance of Counsel for his defense."

U.S. Const. amend VI. The Sixth Amendment is obligatory upon the states through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 342, ___ L.Ed.2d ___, ___ S.Ct. ___ (1963).

The federal court use a rule to exclude illegally obtained evidence. Under the exclusionary rule, evidence obtained in violation of the Fourth, Fifth, or Sixth Amendments may not be introduced at trial for the purpose of proving the defendant's guilt. When a court improperly admits evidence in violation of the exclusionary rule, reversal is required unless the error was harmless. The exclusionary rule is not a personal constitutional right, but rather a judicially created remedy designed to deter constitutional violations.

The exclusionary rule applies in state court to evidence obtained through a Fourth Amendment violation, see Mapp v. Ohio, 367 U.S. at 654-55, and also to evidence obtained through a Fifth Amendment violation. See Blackburn v. Alabama, 361 U.S. 199, 205, ___ L.Ed.2d ___, ___ S.Ct. ___ (1960). Likewise, statements that were deliberately elicited in violation of a defendant's

Sixth Amendment right to counsel must be excluded.

Similarly, Washington State Constitution guarantees the same result. Article I, Section 3 provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Article I, Section 7 provides that "[n]o person shall be disturbed in his private affairs, ... without authority in law." Article I, Section 9 provides that "[n]o person shall be compelled in any criminal case to give evidence against himself," and Article I, Section 22 provides that "[i]n criminal prosecutions the accused shall have the right to the assistance of counsel for his defense, ... to demand the nature and cause of the accusation against him, to have a copy thereof, ... to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial."

And our courts have said that when an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. See State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (citing State v. Kenedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)).

a. The traffic stop performed by Officer Smith was unlawful as it was a pretext for unrelated criminal investigation. Our Supreme Court has held that pretextual traffic stops violate the Washington

Constitution. See State v. Ladson, supra. "The essence of a pretextual traffic stop is that the police stop a citizen, not to enforce the traffic code, but to investigate suspicions unrelated to driving." See State v. DeSantiago, 97 Wn.App. 446, 451, ___ P.2d ___ (1999). In evaluating whether a particular stop is pretextual, "the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." Ladson, 138 Wn.2d at 358-59.

In this case, Officer Smith initiated a traffic stop solely to investigate for gang activity and fish for evidence of a crime.

b. Mr. Jones was unlawfully seized. Mr. Jones was seized because his freedom of movement was restrained by Officer Smith. Once pulled over, Mr. Jones was not free to leave or free to terminate the encounter with Officer Smith. See State v. O'Neil, 148 Wn.2d 564, 574, 62 P.3d 489 (2008)(citing United States v. Mendenhall, 449 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); Florida v. Bostick, 501 U.S. 429, 436, 111 S.Ct. 2332, 115 L.Ed.2d 389 (1991)).

c. Officer Smith conducted a search of Mr. Jones' vehicle without his consent and without a search warrant. Both the state and federal constitutions require police to obtain a search warrant or have consent to conduct

a search, otherwise it is unlawful. Second or repetitive searches and seizures, even when conducted incident to a valid arrest, have long and uniformly been characterized as unreasonable. McNear v. Rhay, 65 Wn.2d at 540 (citing cases).

In this case, because Officer Smith did not have neither consent to search or a search warrant, the evidence he gathered must be suppressed.

d. It is obvious that Officer Smith lacked probable cause to believe that the pills, in plain view, were contraband, otherwise he would not have elicited a confession from Mr. Jones in order to gain probable cause to arrest. If however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object, i.e., if "its incriminating character [is not] immediately apparent", the plain view doctrine cannot justify its seizure. See Minnesota v. Dickerson, 508 U.S. 366, 375, 124 L.Ed.2d 334, 113 S.Ct. 2130 (1993). See also, Arizona v. Hicks, 480 U.S. 321, 325, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987).

Regardless of whether the officer detects the contraband by sight or by touch, however, the fourth amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures. Id., at 376.

In this case, under the plain view doctrine, since Officer Smith did not possess the requisite immediate knowledge upon which he could reasonably conclude that he had incriminating evidence before him, the evidence should have been suppressed. If it was immediately apparant to Officer Smith that the pills that he saw in plain view were illegal drugs, then he would not have interrogated Mr. Jones without Miranda warnings as a deliberate tactic to elicit a confession. After Mr. Jones made an unwarned confession that the pills were pococets, Officer Smith arrested him and then read him his Miranda rights. The statements should have been suppressed because Mr. Jones was not advised that he can choose whether or not to give a statement regardless of what he said prior to the warning.

e. Mr. Jones was not advised that his uncounseled admissions could be used against him in a subsequent criminal proceeding. Officer Smith had a duty to advise Mr. Jones of his Miranda rights under the Fifth Amendment before questioning him about the pills that he claimed Mr. Jones confessed to being "percocets". Mr. Jones could have then waived his right to remain silent or his right to counsel with "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." See Moran v. Burbine, 475 U.S. 412, 421, 89 L.Ed.2d 410, 106 S.Ct. 1135 (1986).

In this case, the State should not have been allowed to use the statements made by Mr. Jones unless Officer Smith had informed him of his constitutional right to counsel and the right to remain silent. See Miranda v. Arizona, 384 U.S. 436, 467, 16 L.Ed.2d 694, 85 S.Ct. 1602 (1966).

f. Mr. Jones did not know that "percocets" were illegal. Courts must be especially cautious when the evidence that is alleged to establish probable cause is entirely consistent with innocent behavior. See Reid v. Georgia, 443 U.S. 438, 65 L.Ed.2d 390, 100 S.Ct. 2752 (1980).

g. The trial court erred in denying Mr. Jones' motion to dismiss and motion to suppress. An issue involving an unlawful search is one of manifest constitutional error which this court can address for the first time on appeal. State v. Littlefair, 129 Wn.App. 336, 338, 119 P.3d 359 (2005). This court reviews the denial of a suppression motion to determine whether substantial evidence supports the trial court's findings of facts and whether those findings support the conclusions of law. State v. Dempsey, 38 Wn.App. 913, 921, 947 P.2d 265 (1997); State v. Hill, 123 Wn.2d 641, 644, 370 P.2d 313 (1994).

In this case the trial court should have granted Mr. Jones' motions in pretrial, rather than post conviction. Washington courts have not determined

whether "findings of facts" made by a trial Judge should first be determined by a jury before entering "conclusions of law" and whether, by allowing Judges to make findings of facts conflicts with *Blakely* and its progeny. In any event, Mr. Jones did not receive a fair trial.

In this case, Officer Smith extracted a confession from Mr. Jones through coercion which violated due process. See *Brown v. Mississippi*, 297 U.S. 278, 286-87, ___ L.Ed.2d ___, ___ S.Ct. ___ (1936)(Confession extracted through coercion violated Due Process Clause of the Fourteenth Amendment). Mr. Jones was entitled to due process before his right to counsel attached. See *Kirby v. Illinois*, 406 U.S. 682, 691, ___ L.Ed.2d ___, ___ S.Ct. ___ (1972)(Due Process Clauses of the Fifth and Fourteenth Amendments protect a defendant from prejudicial procedures before right to counsel attaches). Mr. Jones' statements were made in violation of his constitutional rights and should have been suppressed. See *Michigan v. Harvey*, 494 U.S. 344, 348-49, ___ L.Ed.2d ___, ___ S.Ct. ___ (1980)(Any statements obtained in violation of a defendant's right to counsel are inadmissible as evidence in the prosecution's case-in-chief).

1. Mr. Jones' Fifth Amendment rights were ignored by the trial court. Both the Fifth Amendment and Const. art. I, sec. 9, protect the right against

self-incrimination, and our courts "interpret the two provisions equivalently." State v. Earls, 116 Wn.2d 364, 375, 805 P.2d 211 (1991).

The Washington Supreme Court has explained the purpose of these amendments to mean "[t]he right against self-incrimination ... is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt" State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

Furthermore, the State must obtain incriminating evidence on its own. The Fifth Amendment right against self-incrimination "spare[s] the accused from having to reveal, directly or indirectly, his knowledge of the facts relating him to the offense or from having to share his thoughts and beliefs with the Government." Easter, 130 Wn.2d at 241 (quoting Doe v. United States, 487 U.S. 201, 213, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988)).

ii. Mr. Jones' constitutional rights were violated by opinion testimony. There are some areas which are clearly inappropriate for opinion testimony in criminal trials. Among these opinions, particularly expressions of personal belief, as to the guilt of the defendant. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Lay and expert witnesses may not testify as to the guilt of the defendant, either directly or by

inference. State v. Olmedo, 112 Wn.App. 525, 530, 49 P.3d 960 (2002), review denied, 148 Wn.2d 1019, 64 P.3d 650 (2003). Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury. State v. Demerey, 144 Wn.2d at 759. The role of the jury is to be held "inviolable" under Washington's constitution. Wash. Const. art. I, sec. 21. When a law enforcement officer gives opinion testimony, the jury is especially likely to be influenced by that testimony. Demerey, 144 Wn.2d at 763. An officer's testimony carries an "aura of special reliability and trustworthiness." Id. (citing United States v. Espinosa, 827 F.2d 604, 613 (9th Cir. 1987)).

In this case the opinion testimony of Officer Smith regarding the "pretext" stop, the opinion testimony of Officer Betts, who did not file a police report, and Ms. Kelleher, who "'personally' mistyped" information material to this case, denied Mr. Jones his constitutional rights to a fair trial by and impartial jury.

2. THE DENIAL OF MR. JONES' REQUEST FOR A CONTINUANCE OF HIS TRIAL TO RETAIN THE ASSISTANCE OF PRIVATE, EFFECTIVE COUNSEL, AMOUNTED TO A DENIAL OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CONST. ART. I, SEC. 22.

A court is entitled to balance the right to retain or to substitute counsel of choice against the interest of judicial integrity and efficiency. See Wheat v.

United States, 486 U.S. 153, 159, ___ S.Ct. ___, ___ L.Ed.2d ___ (1988)(the "essential aim of the [6th] Amendment is to guarantee an effective advocate.").

In this case Mr. Jones advised the trial Judge of a potential conflict of interest with his counsel and the total breakdown in communication. Mr. Jones had retained another private attorney who was ready to "effectively" defend his best interest. The trial Judge denied his request based upon the Prosecutor's objection, who failed to show any prejudice. Mr. Jones' best interest would have been to allow his retained private counsel. See United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001)(right to counsel violated by denial of defendant's motion to substitute counsel because court's open-ended questions failed to adequately ascertain extent of breakdown in communication with client).

3. MR. JONES WAS DENIED HIS RIGHT TO COMPULSORY PROCESS IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND CONST. ART. I, SEC. 22.

While the Confrontation Clause of the Sixth Amendment protects a criminal defendant's right to cross-examine adverse witnesses, the Compulsory Process Clause grants a defendant the right to offer the testimony of favorable witnesses and to compel their attendance at trial.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in

his favor." U.S. Const. amend. VI. This right was held applicable to the states through the Fourteenth Amendment in Washington v. Texas, 388 U.S. 14, 19, ___ S.Ct. ___, ___ L.Ed.2d ___ (1967).

Mr. Jones requested a material witness, a clerk from the 7-Eleven Store, who witnessed the entire incident on November 21, 2007, with Officers Smith and Betts, and everything that transpired thereafter. Mr. Jones was denied his constitutional right to have this material witness for his defense.

4. THE STATE WAS RELIEVED OF IT'S BURDEN TO PROVE BEYOND A REASONABLE DOUBT EVERY ELEMENT OF THE CRIMES WITH WHICH MR. JONES WAS CHARGED, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND CONST. ART. I, SEC. 3.

Due process requires that the state prove every essential element of a charged crime beyond a reasonable doubt. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)(citing In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). It is reversible error to instruct the Jury in a manner that would relieve the state of this burden, failure to instruct the Jury as to every element of the crime charged is constitutional error that can be raised initially on appeal. State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995).

Consistent with these fundamentals, Mr. Jones contends that the State was required to prove that he "knowingly, feloniously, and unlawfully" possessed the

drugs with intent to deliver. This information was charged, but not instructed in the "to-convict" Jury Instructions. See Appendix L. This error requires reversal.

5. MR. JONES'S COUNSEL WAS INEFFECTIVE IN THE LITIGATION OF HIS FOURTH AMENDMENT CLAIM, UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND CONST. ART. I, SEC. 22.

In Strickland v. Washington, the Supreme Court established a two-prong test to evaluate ineffective assistance claims. 466 U.S. 668, 687, ___ S.Ct. ___, ___ L.Ed.2d ___ (1984). To obtain reversal of a conviction under the Strickland standard, the defendant must prove that counsel's performance fell below an objective standard of reasonableness, id., at 687-88, and that counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome in the proceeding. See id., at 687.

In this case, had trial counsel investigated the case, interview witnesses prior to trial, and tested the State's case to the crucible of truth, there is a reasonable probability that the trial court would have granted counsel's motion to dismiss and suppress, and the outcome of the proceedings would have been different.

MR. JONES WAS DENIED HIS RIGHT TO DUE PROCESS AND HIS RIGHT TO A FAIR TRIAL BY THE STATE'S AMENDMENT OF THE INFORMATION ON THE DAY OF TRIAL TO ADD A SCHOOL ZONE ENHANCEMENT.

Due process requires a statute to provide fair notice, measured by common practice and understanding, of that conduct which is prohibited, so that persons of reasonable understanding are not required to guess at the meaning of the enactment ... and ... contain ascertainable standards for adjudication so that police, judges, and juries are not free to decide what is prohibited and what is not. See State v. Brayman, 110 Wn.2d 183, 196, 751 P.2d 294 (1988).

Mr. Jones have a right to know the nature of the behavior which will subject him to the enhancement prior to the day of trial. It was important to his defense for an adequate investigation into the location of the school bus stop routes and it's actual distance. Because the location of the bus stop route was not reasonable ascertainable, until well after Ms. Kelleher testified at trial, Mr. Jones was denied due process and his right to a fair trial.

V. RELIEF REQUESTED

For the foregoing reasons, Mr. Jones asks this Court to:

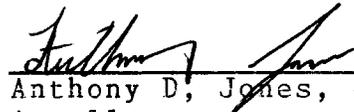
1. Reverse his convictions, vacate his sentence, and remand to the trial court for a new trial;
and,
2. Reverse the trial court's Order denying his CrR 3.5/3.6 motions to dismiss and suppress evidence,

and remand to the trial court for suppression of the evidence;

or,

3. Grant any other relief the Court deems just.

DATED this 22 day of April, 2010.


Anthony D, Jones, #837537
Appellant
McNeil Island Corr. Ctr.
P.O. Box 881000 - B125
Steilacoom, WA 98388