

FILED

JUL 16 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28756-4

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

YASIN AHMED IBRAHIM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable C. James Lust

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

RCW 9.41.170, *repealed by laws 2009, Ch. 216 § 8, eff. July 26, 2009*, provided that it was a felony for any person who was not a citizen of the United States to carry or possess any firearm, without first having obtained an alien firearm license from the director of licensing. This law violated Mr. Ibrahim's right as a lawfully admitted resident alien to keep and bear arms as guaranteed by the Second and Fourteenth Amendments to the U.S. Constitution.

Alternatively, the statute discriminated unlawfully against Mr. Ibrahim because of his status as a lawfully admitted resident alien and denied him the equal protection of the laws under the Fourteenth Amendment.

Furthermore, the continued prosecution of Mr. Ibrahim following repeal of RCW 9.41.170 denied him the equal protection of the laws under both the U.S. Constitution and the Washington Constitution.

When the trial court advised the State of the deficiencies of its case and then allowed the state to cure those defects, it violated Mr. Ibrahim's right to due process.

Finally, the failure to grant Mr. Ibrahim's motion to suppress evidence because of an illegal search and seizure violated his Fourth Amendment rights.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in its order of October 29, 2009 by denying Mr. Ibrahim's motion to dismiss pursuant to the Second and Fourteenth Amendments to the U.S. Constitution.

2. The trial court erred in its order of January 26, 2010 by denying Mr. Ibrahim's motion to hold RCW 9.41.170 facially unconstitutional.

3. The trial court erred in its order of January 26, 2010 by denying Mr. Ibrahim's motion to dismiss pursuant to CrR 8.3 or in the alternative, by failing to preclude testimony.

4. The trial court erred in its order of January 26, 2010 by denying Mr. Ibrahim's motion to suppress evidence.

Issues Pertaining to Assignments of Error

1. Is "strict scrutiny" the appropriate level of scrutiny for evaluating a Second Amendment restriction? (Assignment of Error 1.)

2. Does RCW 9.41.170 (*repealed*) violate the Second Amendment to the U.S. Constitution by infringing on an individual's right to possess and carry weapons in case of confrontation and should the charges against Mr. Ibrahim have been dismissed? (Assignment of Error 1.)

3. Did the continued prosecution of Mr. Ibrahim pursuant to a repealed criminal statute violate the equal protection clauses of the U.S. Constitution and the Washington Constitution? (Assignment of Error 1.)

4. Does RCW 9.41.170 (*repealed*) discriminate between U.S. citizens and lawful resident aliens and deny Mr. Ibrahim equal protection of the laws? (Assignment of Error 2.)

5. Did the court violate Mr. Ibrahim's right to due process of law by assisting the state in its prosecution of Mr. Ibrahim? (Assignment of Error 3.)

6. Was the pat down of Mr. Ibrahim by a Yakima police officer unjustified in the absence of any objectively reasonable rationale to spark a heightened sense of dangerousness or concern that a weapon might be present? (Assignment of Error 4.)

III. STATEMENT OF THE CASE

An Information was filed on April 28, 2009, charging Mr. Ibrahim with being an alien in possession of a firearm on April 22, 2009 in violation of RCW 9.41.170. Designation of Clerk's Papers "CP" 191.

An omnibus hearing was held on June 4, 2009 and an omnibus order was entered the same day. CP 182-185. The order stated that all witnesses had been disclosed by the state and that a witness list must be filed by "triage." Id.

The state filed its witness list on June 9, 2009, listing three witnesses, all with the Yakima Police Department: Officers Miller, Posada and Sanchez. CP 181.

A triage hearing was held on Friday, June 19, 2009. Verbatim Report of Proceedings "RP", June 19, 2008. During this hearing, the court made the following record:

Well, I've reviewed the file and I don't know how the State's going to prove his – his nationality because there's nobody from immigration listed on this witness list.

Id. at 8.

The following Monday, June 22, 2009, the state filed an

Amended Witness List, adding "I.C.E. representative" as a witness. CP 179.

Mr. Ibrahim filed his motion to dismiss pursuant to CrR 8.3; or in the alternative, Motion to Strike Untimely Amended Witness List and Preclude Testimony on June 26, 2009. CP 169-177. This motion was denied on January 11, 2010. RP of January 11, 2010, p. 27, l. 24.

On August 31, 2009, Mr. Ibrahim filed a motion to dismiss pursuant to the Second and Fourteenth Amendments. CP 167. This motion was denied on October 29, 2009. CP 145-146.

Mr. Ibrahim filed his motion to hold RCW 9.41.170 facially unconstitutional on January 11, 2010. CP 141. It was denied the same day, with the trial court indicating on the record that it felt the issue should be taken up to the court of appeals. RP of January 11, 2010, p. 10, ll. 1-2.

Mr. Ibrahim also filed a motion to suppress evidence on January 11, 2010, CP 97-99, but that motion had actually been heard on January 4, 2010, RP of January 4, 2010 and had been denied the same day. *Id.* at p. 42, l. 4.

IV. ARGUMENT

1. **RCW 9.41.170 (*repealed*) is facially unconstitutional and the firearm conviction against Mr. Ibrahim cannot stand.**
 - a. **The Second Amendment to the U.S. Constitution and Section 24 of the Washington Constitution guarantee the right to bear arms.**

The right to own and carry a firearm for personal protection is a fundamental right guaranteed by both the Second Amendment to the United States Constitution and Article 1, §24 of the Washington State Constitution, which provide, respectively:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const., Amend. II

The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

Wash. Const., Art. 1, § 24.

Section 24 expressly states that the right to bear arms, at least in part, relates directly to defense of self; and the Second

Amendment to the U.S. Constitution has been interpreted in a similar manner by the United States Supreme Court's in *District of Columbia v. Heller*, 554 U.S. ___, 128 S. Ct. 2783 (2008), which found, after an extensive textual and contextual review:

Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.

Id. at 2797.

b. The Second Amendment is made applicable to the states by the Fourteenth Amendment.

The Ninth Circuit Court of Appeals determined last year that the rights conferred by the Second Amendment are incorporated by the Due Process Clause of the Fourteenth Amendment and thereby made applicable to the states and local governments:

We therefore conclude that the right to keep and bear arms is “deeply rooted in this Nation’s history and tradition.” . . . It has long been regarded as the “true palladium of liberty.” . . . The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental, that it is necessary to the Anglo-American conception of ordered liberty that we have inherited. We are therefore persuaded that *the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment*

and applies it against the states and local governments.

Nordyke v. King, ___ F.3d ___, 4496 (9th Cir. 2009) (En Banc review pending) (Emphasis added). This reasoning has now been expressly validated by the United States Supreme Court in its recent decision, *McDonald v. Chicago*, 561 U.S. ___ (June 28, 2010)(slip op. at 44).

c. Lawful permanent resident aliens are protected by the Second Amendment.

Lawful resident aliens are among "the people" protected by the Second Amendment. As explained by the Supreme Court:

The Second Amendment protects "the right of the people to keep and bear Arms" While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

U.S. v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

More specifically, "aliens receive constitutional protections when they have come within the territory of the

United States and developed substantial connections with this country." *Id.* at 271. "[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." *Id.* (citation omitted).¹

In holding that the Second Amendment guarantees the individual right to possess firearms, *Heller*, 128 S. Ct. at 2796, recalled the above formulation that "the people" "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

Because Mr. Ibrahim is a lawfully admitted permanent legal resident of the United States, the denial of his right to bear arms under the Second Amendment may not be abridged. Since RCW 9.441.170 (repealed) does just that—abridges this fundamental right—it violates the Second Amendment, made applicable to the State of Washington by the Due Process Clause of the Fourteenth Amendment.

¹ "Aliens who are lawfully present in the United States are among those 'people' who are entitled to the protection of the Bill of Rights" *Id.* at 279 (Stevens, J., concurring).

2. RCW 9.41.170 (repealed) violates Mr. Ibrahim's constitutional right to equal protection of the laws.

The Fourteenth Amendment to the U.S. Constitution provides:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It has long been settled that the term "person" in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside. *Graham v. Richardson*, 403 U.S. 365, 371 (1971). "[C]lassifications based on alienage ... are inherently suspect and subject to close judicial scrutiny." *Id.* at 372. This is the case "whether or not a fundamental right is impaired." *Id.* at 373.

Similarly, *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 421 (1948), invalidated a state law excluding "aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so." "*Takahashi* and *Graham* stand for the broad principle that 'state regulation not congressionally sanctioned that

discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." *Toll v. Moreno*, 458 U.S. 1,12-13 (1982) (invalidating state law denying tuition benefits to nonimmigrant aliens).

In contrast to federal laws, "[s]tate alienage classifications create a 'suspect class' to which we apply strict scrutiny." *United States v. Lopez-Flores*, 63 F. 3d 1468, 1473 (9th Cir. 1995). Such "overriding national interests" as immigration and foreign relations "[j]ustify selective federal legislation that would be unacceptable for an individual State." *Id.*

A state law which discriminated against lawful resident aliens in issuance of firearm licenses was held violative of equal protection. *Say v. Adams*, 2008 WL 718163, 2008 U.S. Dist. LEXIS 20183 (W.D. Ky. 2008). State law authorized the state police to issue and renew licenses to carry a concealed deadly weapon ("CCDW license"), applications for which were obtained from the county sheriff of one's residence. Only U.S. citizens were eligible for a license. 2008 WL 718163 at *1. The citizenship requirement was passed to gain federal approval to

allow a CCDW license holder to purchase a firearm without a background check by the National Instant Criminal Background Check System ("NICS"). A NICS check for a non-citizen requires an "Illegal Alien Query" ("IAQ") through the U.S. Immigration and Customs Enforcement. The state police conducted a NICS check for a CCDW license, but not an IAQ check. When plaintiff Say, an alien with lawful permanent residence, attempted to apply for a CCDW license, the county sheriff told him that he was ineligible due to the citizenship requirement. Say then sued the head of the state police and the sheriff. *Id.* Federal law requires a NICS check for receipt of a firearm, but exempts purchasers who have certain state-issued permits, such as a CCDW license. 18 U.S.C. § 922(t)(1)(3). The citizenship requirement was imposed so that the state police could conduct their own non-NICS background check to issue such licenses, but in doing so they were unable to check the IAQ for lawful alien status. Say at *3.

The court held:

The Court cannot find that a state's interest in substituting a state background check for a federal background check is compelling enough to justify a

classification that discriminates against a suspect class. Furthermore, the citizenship provision is not narrowly tailored to achieve this governmental interest. A blanket prohibition discriminating against aliens is not precisely drawn to achieve the goal of facilitating firearms purchases when there exists a nondiscriminatory way to achieve the same goals. As discussed below, if the Kentucky State Police undertakes some administrative burden, it is possible to allow permanent resident aliens to obtain a CCDW license, and still meet the requirements necessary to allow CCDW holders to avoid the NICS inquiry at the time of purchase.

Id.

State v. Hernandez-Mercado, 124 Wash. 2d 368, 378, 879 P.2d 283 (1994), which interpreted the statute prior to the amendment in 1996 that extended its prohibition to all aliens-- not just those "who ha[ve] not declared [their] intention[s] to become a citizen of the United States"-- flatly stated that "RCW 9.41.170 is not necessary to safeguard the State's interest in keeping 'firearms out of dangerous hands.'" The court held that the state's public safety argument was "weak," but the record was too limited to find the statute facially violative of equal protection. *Id.* at 380.

By contrast, Mr. Ibrahim is a lawful permanent resident alien and the statute was amended in 1996 to extend the

prohibition to any non-U.S. citizen. As applied until its recent repeal, RCW § 9.41.170 is an absolute prohibition on possession of a firearm by an alien, just like similar state laws that have been invalidated on equal protection grounds.

In *Chan v. City of Troy*, 559 N.W.2d 374 (Mich. Ct. App. 1997), the plaintiff was a lawfully admitted permanent resident alien who was not a United States citizen and was denied a permit to purchase a pistol by a statute which allowed the issuance of a pistol permit to a “qualified” applicant who must necessarily have been “a citizen of the United States.” *Id.* at 375. The court held:

A statute reviewed under strict scrutiny will be upheld only if the state demonstrates that its classification scheme has been precisely tailored to serve a compelling governmental interest. The City of Troy argues that the statute in question is intended to limit the accessibility of concealable weapons to the general public because of their inherent danger. Assuming this is a sufficient governmental interest, we conclude that the statute, in its treatment of legal aliens, is not “precisely tailored to serve” that interest.

Id. at 376 (Internal quotations and citations omitted).

"Had the statute excluded only illegal aliens, as opposed to all noncitizens, it may well have passed constitutional

muster." *Id.* n.3

RCW § 9.41.170 (*repealed*) denied Mr. Ibrahim the equal protection of the laws in violation of the Fourteenth Amendment.

3. The continued prosecution of Mr. Ibrahim pursuant to a repealed criminal statute violated the Equal Protection Clauses of the U.S. Constitution and the Washington State Constitution.

Although Mr. Ibrahim's alleged offense occurred several days prior to the legislature's vote to repeal the statute under which he was to be prosecuted, Mr. Ibrahim was not convicted until months after the statute was repealed. Equal protection requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. CONST. amend. XIV, § 1; WASH. CONST. art. I, § 12; *State v. Coria*, 120 Wash.2d 156, 169, 839 P.2d 890 (1992). It is intended to provide equal application of the laws. *State v. Simmons*, 152 Wash.2d 450, 458, 98 P.3d 789 (2004). The prosecution of Mr. Ibrahim for an offense which the legislature has determined should no longer be recognized as criminal directly violates this core constitutional principle.

Traditionally, courts have used three tests to determine whether this right to equal treatment has been violated: (1) the "rational relationship" test; (2) the "intermediate scrutiny" test; and (3) the "strict scrutiny" test. *State v. Schaaf*, 109 Wash.2d 1, 17, 743 P.2d 240 (1987) (quoting *State v. Phelan*, 100 Wash.2d 508, 512, 671 P.2d 1212 (1983)). Courts apply strict scrutiny if an individual is a member of a suspect class or the state action threatens a fundamental right. *State v. Osman*, 157 Wash.2d 474, 484, 139 P.3d 334 (2006). As discussed above, the right to bear arms is a fundamental right; see, *Nordyke v. King*, ___ F.3d at 4496; therefore, strict scrutiny is the appropriate test. The equal protection ramifications stemming from the retroactive application of a penal statute which has been repealed and the conduct previously proscribed therein, decriminalized, is apparently a matter of first impression², at least in this state, notwithstanding the existence, since 1901, of a "savings clause."³

² *In State v. McCarthy*, 112 Wash. App. 231, 48 P.3d 1014 (2002), Division Two of the court of appeals analyzed an equal protection argument relating to a change in sentencing law pursuant to a "rational relation to government purpose test." But in *McCarthy*, the court also noted that there was no "fundamental interest" involved.

³ RCW 10.01.040 provides:

But the analysis is straight-forward and has been set forth by the Supreme Court of Washington in the case of *State v. Wiley*, which addressed the effect of SRA amendments that downgrade crimes from a felony to a misdemeanor. The court distinguished “between a change in the elements of a crime, which does not change the status of a prior conviction, and the . . . reclassification of an entire crime, which does ...” 124 Wn.2d 679, 686 (1994):

[W]hen the Legislature modifies the elements of a crime, it refines its description of the behavior that constitutes the crime. This does not make

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

defendants convicted of the earlier crime any less culpable; instead, it clarifies the evidence required to prove the crime.

On the other hand, when the Legislature downgrades an entire crime, it has judged the specific criminal conduct less culpable. By reclassifying a crime without substantially altering its elements, the Legislature concludes the criminal conduct at issue deserves more lenient treatment. The reclassification of a crime is no mere refinement of elements, but rather a fundamental reappraisal of the value of punishment.

Id. at 687.

When the Legislature completely decriminalizes certain behavior, as it did in this case, equal protection demands that a defendant may not be convicted of an offense which is no longer a crime.

4. The actions of the trial court in advising the state of the deficiencies of its case and allowing them to be cured in violation of the court's previous order, denied Mr. Ibrahim his right to due process.

An Omnibus Hearing was held on June 4, 2009, at which time the trial was continued, over Mr. Ibrahim's objection, until June 22, 2009 because of the unavailability of the deputy prosecutor. But an omnibus order was entered on that date, containing the following representations:

(a) The Prosecutor has provided to defense all discovery in their possession or control, pursuant to CR 4.7(a).

(b) The Prosecutor has contacted law enforcement agencies to request and/or obtain any additional supplemental police reports, forensic tests, and evidence and has made them available to defendant or defense counsel.

(c) Discovery is complete except for witness interviews and

(i) All witnesses have been disclosed.

(ii) A witness list must be filed by Triage.

The state filed its Witness List on June 9, 2009, listing three witnesses, all with the Yakima Police Department: Officers Miller, Posada and Sanchez.

A triage hearing was held on Friday, June 19, 2009, at which time, the state moved, over the objection of Mr. Ibrahim, for another continuance due to the unavailability of one of the Yakima police officers. This continuance was granted, but the court also released Mr. Ibrahim on his own recognizance, noting on the record:

Well, I've reviewed the file and I don't know how the state is going to prove his nationality, because there is nobody from immigration listed on this witness list.

Two days later, on Sunday, June 21, 2009, the state sent defense counsel an email asking for a stipulation that Mr.

Ibrahim was an alien and suggesting that in the absence of such a stipulation, the state could try to find someone from ICE to testify.

On Monday, June 22, 2009, the state filed an Amended Witness List, listing "I.C.E. representative" as a witness. On June 24, 2009, the state filed a second Amended Witness List, this time listing Brenda McClain as a witness from Immigration Customs Enforcement. Also on June 24, 2009, the state provided the defense with a copy of a record from the Department of Homeland Security, which it sought, successfully, to introduce at trial. The record showed that Mr. Ibrahim was a legally admitted permanent resident, but not yet a naturalized U.S. citizen.

Mr. Ibrahim moved to dismiss the charges against him pursuant to CrR 8.3, or in the alternative, to preclude the state from admitting evidence and testimony that it determined to be necessary only after being so advised by the trial court.

Rule 8.3(b) of the Criminal Rules provides as follows:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct

when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

We operate under an adversarial system of justice, in which it is presumed that both sides to a court proceeding are operating on a level playing field:

In the Anglo-American adversary system, the parties to a dispute or their advocates square off against each other and assume roles that are strictly separate and distinct from that of the decision maker, usually a judge or jury. The decision maker is expected to be objective and free from bias. Rooted in the ideals of the American Revolution, the modern adversary system reflects the conviction that everyone is entitled to a day in court before a free, impartial, and independent judge. Adversary theory holds that requiring each side to develop and present its own proofs and arguments is the surest way to uncover the information that will enable the judge or jury to resolve the conflict.

In an adversary system, the judge or jury is a neutral and passive fact finder, dispassionately examining the evidence presented by the parties with the objective of resolving the dispute between them.

West's Encyclopedia of American Law.

The basic unfairness of allowing the state to take action in accordance with a statement made from the bench and file an

untimely amended List of Witnesses, is manifest. To condone such tactics, further adds to the appearance of impropriety.

Although dismissals are an extraordinary remedy available only when there is arbitrary prosecutorial action or governmental misconduct, including mismanagement that prejudices defendants and materially affects their right to a fair trial, *State v. Moore*, 121 Wash. App. 889, 894-95, 91 P.3d 136 (2004), the governmental misconduct referred to in CrR 8.3(b) does not require evil or dishonest acts; simple mismanagement is enough. *Id.*; *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). The failure of the state to properly analyze and prepare its case in a timely manner is tantamount to mismanagement. Allowing the state to resurrect a case based upon the comments of a sitting judge, strikes at the very heart of the fundamental fairness of our criminal justice system and so undermines the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *See, Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984).

If the court was unwilling to dismiss the case pursuant to CrR 8.3, it should, at the very least, have enforced the state's obligations pursuant to CrR 4.7. Rule 4.7(a) provides, in pertinent part,

Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing.

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

Not only was this rule violated by the late filing of an Amended Witness list; but the court's omnibus order dated June 4, 2009, and the state's representations contained therein were also violated. Allowing the prosecutor to add additional witnesses and provide additional documentary evidence in an untimely manner and at the "suggestion" of the judge at a pretrial hearing, is manifestly unfair and should not have been allowed.

5. **In the absence of an objectively reasonable fear that Mr. Ibrahim was armed and dangerous, the frisk of Mr. Ibrahim was unconstitutional and the denial of his motion to suppress evidence was error.**

Under the Washington State Constitution, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Article I, Section 7. “As a general rule, warrantless searches and seizures are per se unreasonable.” *State v. Hendrickson*, 129 Wn.2d 61, 70 (1996). There are, however, “a few ‘jealously and carefully drawn’ exceptions” *Id.* The burden is always on the State to prove one of these narrow exceptions. *Id.* at 71.

One exception to the warrant requirement is the “Terry stop”. It permits officers to briefly detain and question persons “reasonably suspected” of criminal activity. *State v. Smith*, 102 Wn. 2d 449, 452, 688 P. 2d 146 (1984) citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). Additionally, an officer may frisk a detainee for weapons if the officer has reasonable grounds to believe that person is armed and presently dangerous. *State v. Broadnax*, 98 Wn. 2d 289, 283-284, 655 P. 2d 96 (1982); *State v. Hobart*, 94 Wn. 2d 437, 441, 617 P. 2d 429 (1980).

A Terry stop is a limited intrusion short of an arrest. The constitutional limits of a Terry frisk require that: (1) “the initial stop must be legitimate; (2) a reasonable safety concern must exist to justify a protective frisk for weapons, and (3) the scope of the frisk must be limited to the protective purpose.” *State v. Collins*, 121 Wn.2d 168, 173 (1993) citing, *Adams v. Williams*, 407 U.S. 143, 146, 32 L.Ed 2d 612, 92 S.Ct. 1921.

There were no facts adduced at the suppression hearing for the court to make a finding that a reasonably prudent man would be warranted in the belief that his safety or that of others was in danger. *See, State v. Belieu*, 112 Wn.2d 587, 602 (1989). The officer must be able to point to particular facts from which he reasonably inferred that the person was armed and dangerous. *State v. Broadnax*, 98 Wn.2d 289, 293-94 (1982). A general suspicion will not suffice. *State v. Lennon*, 94 Wn. App. 573 (1999). A reasonable safety concern exists if, under the facts surrounding the search, a reasonably careful officer would have a ‘founded suspicion’ that his safety or the safety of others was threatened. *State v. Collins*, 121 Wn.2d at 173. Suspicion of narcotics activity cannot provide an automatic justification for a

pat down search. *Sibron v. New York*, 293 U.S. 50, 64, 20 L.Ed.2d 917, 88 S.Ct. 1889 (1968). Nor may a frisk be used as a pretext to search for incriminating evidence when the officer has no reasonable grounds to believe that a suspect is armed. *Id.* Close proximity to others suspected of criminal activity or presence in a high crime area, without more, will not justify a stop. *State v. Broadnax*, 98 Wn.2d 289 (1982)(overruled as to other grounds by *Minnesota v. Dickerson*, 508 U.S. 366, 371 (1993).

Mr. Ibrahim was a slightly built 19 years old man who was being totally cooperative, albeit nervous during Officer Miller's initial "social contact." The initial stop took place in broad daylight on a busy street. The entire basis for the dangerousness prong appears to rest on Mr. Ibrahim's alleged nervousness. Yet Officer Miller didn't feel the need to have Mr. Ibrahim frisked until after his back-up had arrived and after Mr. Soto had already been taken into custody and searched incident to arrest. There was no objectively reasonable rationale to spark a heightened sense of dangerousness or concern that a weapon might be present.

Accordingly, there was no justification for a Terry pat down and the seizure of the cap and pat down and it was error for the trial court to deny Mr. Ibrahim's motion to suppress the evidence.

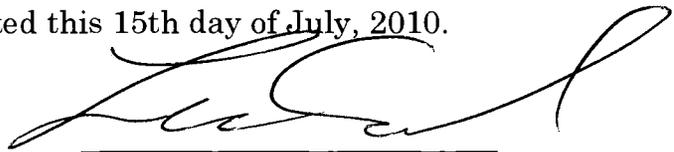
V. CONCLUSION

The statute under which Mr. Ibrahim was prosecuted was facially unconstitutional. A defendant in a criminal proceeding is entitled to insist that his conduct be judged in accordance with a rule that is constitutionally valid," *United States v. Bozarov*, 974 F.2d 1037, 1040 (9th Cir.1992) (internal quotations omitted). Furthermore the statute discriminated against Mr. Ibrahim on the basis of his membership in a protected class. It is subject to strict scrutiny, and violates his right to equal protection both as a legal permanent resident alien and as someone subject to prosecution following the repeal of a criminal statute.

The actions of the trial court in advising the state how to heal the infirmities in its case and then allowing the state to do just that in violation of its prior rulings, violated Mr. Ibrahim's right to due process.

Finally, at the time of his seizure, there was no reasonable safety concern that Mr. Ibrahim was armed and dangerous. As such, it was error for the trial court to deny Mr. Ibrahim's motion to suppress.

Respectfully submitted this 15th day of July, 2010.

A handwritten signature in black ink, appearing to read 'Lee Edmond', written over a horizontal line.

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Attorney for Appellant

AMENDED ACKNOWLEDGMENT OF SERVICE

I hereby certify under penalty of perjury that on the 15th day of July, 2010, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated below:

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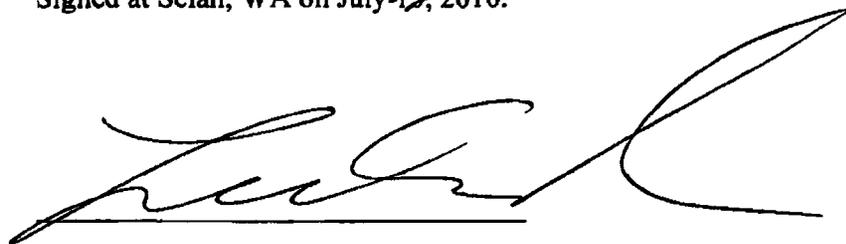
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Signed at Selah, WA on July ³⁰~~15~~, 2010.

A large, stylized handwritten signature in black ink, appearing to be the name of the signatory, written over a horizontal line.