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Court of Appeals  
Division III  
State of Washington

NO. 33779-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

CHRISTIAN ALFREDO SANCHEZ

Appellant.

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BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant sets forth four assignments of error. These can be summarized as follows (Appellant's Brief at pg. 6);

1. Officer Orth's Stopping of the Volvo was a Pretextual Stop.
2. Officer Orth did not have Probable cause to Stop the Volvo.
3. Officer Orth's Demand for Identification of the Passengers was an Unlawful Detention.
4. Officer Orth's Demand for the Passengers to Exit the Vehicle was an Unlawful Seizure.

Then within the body of his brief he lists the following (These are listed verbatim);

- I. BOTH THE STATE AND FEDERAL CONSTITUTIONS PROHIBIT UNREASONABLE SEARCHES AND SEIZURES.
- II. THE POLICE LACKED PROBABLE CAUSE TO STOP THE DEFENDANT'S VEHICLE FOR A TRAFFIC INFRACTION.
- III. THE TRAFFIC STOP WAS UNLAWFUL AS IT WAS A PRETEXT FOR AN UNRELATED CRIMINAL INVESTIGATION.
- III. THE DEFENDANT WAS UNLAWFULLY SEIZED.
- IV. THE SEARCH OF THE DEFENDANT CANNOT BE JUSTIFIED AS A SEARCH INCIDENT TO ARREST.
- VI. THE STOP WAS UNLAWFUL AS THE POLICE LACKED ANY REASONABLE SUSPICION UPON WHICH TO DETAIN THE DEFENDANT.
- VIII. THE POLICE LACKED AUTHORITY TO DETAIN AND SEARCH THE VEHICLE'S PASSENGERS.
- VII. ALL FRUITS OF THE UNCONSTITUTIONAL SEARCH AND SEIZURE OF THE DEFENDANT MUST BE SUPPRESSED.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

Sanchez has listed four assignments of error but included eight areas of the law in the body of his brief which appear to be

inclusive of the four specific assignments the State will address each of the eight areas set forth by Roman numeral in the body of his brief.

1. The State does not dispute that both the United States and Washington State Constitutions prohibit certain types of searches and seizures. The State does dispute that there was any violation of either Constitution in this case.
2. The officer had a legal basis to stop the vehicle Sanchez was riding in.
3. The trial court properly denied the motion to suppress, the initial stop was not a pretext stop.
4. Sanchez was not unlawfully seized.
5. The search of Sanchez was a valid search incident to arrest.
6. Officer Orth lawfully made a lawful stop based on the totality of the facts before him at the time of the stop.
7. There was lawful authority to detain and search the passengers for more than one reason.
8. There was no unconstitutional search therefore there is no “fruit” of the poisonous tree that should or must be suppressed.

So that this court will have uniformity when reviewing the State’s response the State shall use the same Roman numeral designations in the body of this response as used by Sanchez even though they are not sequential nor are some of the proper Roman numeral for a legal document. The State will respond in the order briefed by Sanchez not by the actual order set out by those Roman numeral headings.

## II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set

forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record in the body of the brief as needed. The unchallenged findings of fact are attached in Appendix A.

### III. ARGUMENT

#### **Response to Allegation I limitations on search and seizure.**

Clearly both the United States Constitution and the Washington State Constitutions address search and seizure that the limitations placed on the State when a search or seizure is conducted by an agent for the State. As was so expertly stated in State v. Hinton, 179 Wn.2d 862, 868-9, 319 P.3d 9 (2014)

When presented with arguments under both the state and federal constitutions, we start with the state constitution. It is well established that article I, section 7 is qualitatively different from the Fourth Amendment and provides greater protections. Article I, section 7 " is grounded in a broad right to privacy" and protects citizens from governmental intrusion into their private affairs without the authority of law.

The private affairs inquiry is broader than the Fourth Amendment's reasonable expectation of privacy inquiry. Under the Fourth Amendment, a search occurs if the government intrudes upon a subjective and reasonable expectation of privacy. Under article I, section 7 a search occurs when the government disturbs "those privacy interests which citizens of this state *have held, and should be entitled to hold*, safe from governmental trespass absent a warrant." (emphasis added). The "authority of law" required by article I, section 7 is a valid warrant unless the State shows that a search or seizure falls within one of the

jealously guarded and carefully drawn exceptions to the warrant requirement. (Citations omitted, emphasis in original.)

There were not instances throughout interaction between Officer Orth and Sanchez where Officer Orth violated Sanchez's rights under either Constitution or the Washington State Constitution.

**Response to Allegation II there was a legal basis for the traffic stop.**

RCW 46.61.021(2) provides that an officer may detain a person stopped for a traffic infraction for a reasonable period of time "to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction." State v. Glossbrener, 146 Wn.2d 670, 49 P.3d 128 (2002) The Glossbrener court went on to state;

There is no dispute that Trevino's original stop of Glossbrener was valid. Thus, Trevino had the authority to detain Glossbrener long enough to check for warrants and to check Glossbrener's license, insurance and registration. *See* RCW 46.61.021(2). In addition, Trevino's suspicion that Glossbrener might be intoxicated allowed him to detain Glossbrener for an additional period of time in order to determine whether he was in fact intoxicated. However, any additional detention beyond the point at which Trevino determined that Glossbrener was not intoxicated and that he was not going to cite Glossbrener for either the headlight infraction or the open container infraction would be justified only if Trevino had an objectively reasonable concern for officer safety. *See Kennedy*, 107 Wn.2d at 12, 726 P.2d 445 (detention,

pursuant to Terry v. Ohio, 392 U.S. 1, 21-24, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), may include a limited search of the suspect's vehicle when necessary to assure officer safety). If Trevino was justified in searching the vehicle based on officer safety, it would be reasonable to allow him to detain Glossbrener while awaiting backup in order to safely conduct the search. (Some citations omitted.)

In Sanchez's case there was one patrol officer who validly stopped a vehicle for traffic infraction and immediately upon contact with that car he determined that there was a very very strong odor of marijuana emanating from that car. When he makes the logical inquire, an inquiry which is dictated by the current change in the possession of marijuana statute, regarding the ages of the occupants to determine if the possession of the controlled substance was legal

All occupants denied they are of a legal age to possess marijuana which as set forth in Glossbrener allows for the additional detention. This stop then morphs again when the officer observes furtive movements by the defendant while the officer was continuing his investigation of the drug charge, which once again per the analysis in Glossbrener would allow the continued detention and the search of the vehicle for officer safety purposes. When this part of the process begins the defendant makes and unsolicited statement that he, a self-proclaimed minor, is in possession of marijuana, a controlled substance.

The Glossbrener court stated they "...agree with the reasoning in

Larson and conclude that Kennedy did not limit an officer's ability to search the passenger compartment of a vehicle based on officer safety concerns to only situations in which either the driver or passenger remain in the vehicle. Instead, a court should evaluate the entire circumstances of the traffic stop in determining whether the search was reasonably based on officer safety concerns.” Id at 679 In this case the officer did not even get to the lawfully allowed search for officer safety, he took the prudent route and had a search warrant issued for the interior of the car, the contents of which are not at issue herein. The drugs that were found were found through the spontaneous statement of Sanchez upon his lawful removal from the car as the officer prepared to secure the occupants of the car for officer safety reasons.

This court stated this test in State v. McLean, 178 Wn.App. 236, 244-5, 313 P.3d 1181 (2013):

Both the Fourth Amendment and article I, section 7 of the Washington Constitution prohibit unreasonable seizures. A traffic stop is a seizure.. Warrantless seizures are per se unreasonable, unless an exception to the warrant requirement applies. The State bears the burden of establishing an exception to the warrant requirement.

One exception is an investigative stop, including a traffic stop, that is based on a police officer's reasonable suspicion of either criminal activity or a traffic infraction. A reasonable suspicion exists when specific, articulable facts and rational inferences from those facts establish a substantial possibility that criminal activity or a traffic infraction has occurred or is about to occur.

When reviewing the lawfulness of an investigative stop, we evaluate the totality of the circumstances presented to the police officer. Those circumstances may include the police officer's training and experience. (Citations omitted.)

The trial court based its ruling on the totality of the information presented to it at that suppression hearing. The court found that Officer Orth's testimony was credible and that his actions as a patrol officer enforcing the traffic laws after observing the driver of the car Sanchez was riding in commit a traffic infraction was reasonable. The officer's actions are supported the law.

**Response to Allegation "III" the traffic stop was not a pretext stop.**

Appellant claims that the actions of the officer when he stopped the care Appellant was riding in was a "pretext" stop. The case proceeded through a motion to suppress, where Sanchez challenged the stop, the length of the stop and the actions of the officer at the stop. These challenges have been raised in this appeal. The State supplemented the record to include the findings of fact and conclusions of law regarding the actual stipulated facts trial and the facts that were considered by the trial court when it determined guilt.

The formal findings of fact from the motion to suppress as well as

those entered after the stipulated facts trial<sup>1</sup> where not challenged in the trial court and they have not been challenged on appeal, therefore they are verities. The trial court entered 29 findings following the motion to suppress. CP 6-16. Trial counsel for Sanchez, who is also counsel for this appeal, signed those findings, there is no limitation to that signature. Sanchez has not challenged the findings, however he does challenge the conclusions that were entered by the trial court, challenges the trial court's legal conclusions, which, because they were "entered... following a suppression hearing[,] carry great significance for a reviewing court." State v. Collins, 121 Wn.2d 168, 174, 847 P.2d 919 (1993). Therefore this court will review a trial court's findings of fact in a suppression hearing for substantial evidence. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wn.2d 1016 (2002). Unchallenged findings are verities on appeal. State v. Valdez, 167 Wn.2d 761, 767, 224 P.3d 751 (2009) (citing State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005)). The court will review questions of law de novo. Valdez, 167 Wn.2d at 767; unchallenged findings of fact are verities on appeal" Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). See also, City of Seattle v. May, 151 Wn.App. 694, 697, 213 P.3d 945 (2009),

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<sup>1</sup> The State filed a supplementary designation for these finding and conclusions. They had not been filed with this court at the time this brief was filed.

aff'd, 171 Wn.2d 847, 256 P.3d 1161 (2011). This court shall therefore limit its review to a de novo determination of whether the trial court properly derived conclusions of law from its factual findings. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

While the written findings of fact do not include the specific statement by the trial court that the actions of the officer was not pretextual in nature, the oral ruling specifically does state that the actions of the officer did not amount to a pretext stop. Sweeten v. Kauzlarich, 38 Wn. App. 163, 169, 684 P.2d 789 (1984) (oral opinion does not become final unless or until it is incorporated in written findings of fact and conclusions of law; oral decision can be used to explain but not to impeach written findings and conclusions). In addition, even if this court were to find the trial court's written findings are incomplete or inadequate, this court can look to the trial court's oral findings to aid our review. State v. Robertson, 88 Wn.App. 836, 843, 947 P.2d 765 (1997), review denied, 135 Wn.2d 1004, 959 P.2d 127 (1998).

The trial court in its oral ruled stated;

I had one of my questions before the hearing after I'd read the briefing obviously before the hearing, was on page 7 of 39, again, the indication that Officer Orth began to follow the vehicle until he says the driver failed to signal, they turning into the 16th Street market. My question mark was articulate the distance. Well, that was confirmed in the hearing itself. It was a quarter mile or

less. It was not a significant difference. It wasn't like he was following this vehicle all the way through town waiting for them to commit a traffic infraction that would have then given rise to find out why there had been the actions taken by the vehicle and the driver that he previously testified to. RP 141

...

And it did state, you know, again, if the traffic infraction had not been committed there would not have - - it would not have given rise to a level to constitute a stop. And I actually think that Officer Orth acknowledged that in his testimony. RP 142

...

So I do see this to be as it manifested itself from the point of observing the vehicle in the church parking lot, observing the driver's actions, having a traffic infraction, which I am finding was committed. There was a legitimate basis to stop once the stop was done and we got the smell of marijuana and we have a question mark as to age of occupants in the vehicle, which then leads to the movements in the vehicle . It all transpires into again , I think it was appropriately set forth under what the law provides for.

I certainly note the defendant's objection for the record . But I am denying the motion to suppress on that basis . Because I don't believe it was a pretextual stop under these facts and the case law in the area. RP 144

...

THE COURT: And I actually think you - -that would be my answer, Mr. Silverthorn. And that's why I said in this case what was so compelling to me was the totality of the circumstances that you have less than a quarter of a mile. You have less than ten minutes from the, you know, point of , well , the stop. And you get the rest of it . But it wasn't, you know, Ladson was a very odd case. I mean, first of all, it was odd because the officer was willing to offer up what he offered up .

MR . SILVERTHORN: It was odd. He was willing to be honest.

THE COURT: And so I think that's certainly, you know, has put it into a much different light. But again, we don't have - - you have got a patrol officer . You don't have undercover drug detectives down doing traffic stops, you have actually got a guy in Officer Orth who is in his reasonable duties as a police officer. He's a patrol officer.

Further I think all that plays significantly into at least from this court ' s perspective why this case I - - I wouldn't find it . I think it becomes a lot different if you have those other factors to start entering into , you know , I think you could get to a Ladson . Although, I don't know how much since Ladson there actually has been that basis found. And obviously the - -that case.

THE COURT: Yeah - -

MR. BOWMAN: And there were cases where Ladson was followed.

THE COURT: You know with Arreola, but you know, even again with Arreola the mixed motive traffic stop. I think - - I think the Supreme Court is scrambling to not distance itself necessarily from Ladson but to give a basis indicating it' s got to be a wider perspective. RP 144-46

Appellant argues that State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999) is controlling in this case. This court address Ladson in State v. Rainey, 107 Wn.App. 129, 137, 28 P.3d 10 (2001):

A pretextual traffic stop violates article I, section 7 of the state constitution, because it is a warrantless seizure. State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999). There is a fundamental difference between detaining a citizen to search for evidence of crimes and a stop to enforce the traffic code. Id. at 358 n.10. "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." State v. DeSantiago, 97 Wn. App. 446, 451, 983

P.2d 1173 (1999) (citing Ladson, 138 Wn.2d at 351).

"When determining whether a given 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. If the court concludes that the search or seizure was unconstitutional, evidence resulting from the search or seizure must be suppressed. *Id.* at 359.

The Ladson court started the analysis stating;

We begin our analysis by acknowledging the essence of this, and every, pretextual traffic stop is that the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving. Therefore the reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation.

The Washington State Constitution, article I, section 7, prohibits law enforcement from stopping or arresting a suspect "as a pretext to search for evidence." State v. Michaels, 60 Wn.2d 638, 644, 374 P.2d 989 (1962); see State v. Ladson, 138 Wn.2d 343, 357-58, 979 P.2d 833 (1999). Thus, law enforcement "may enforce the traffic code, so long as they do not use the authority to do so as a pretext to conduct an unrelated criminal investigation." State v. Snapp, 174 Wn.2d 177, 199, 275 P.3d 289 (2012). Whether a stop or arrest is pretextual depends on the "totality of the circumstances," including the acting officer's "subjective intent" and the "objective reasonableness" of his or her behavior. Ladson, 138

Wn.2d at 358-59. Thus, the acting officer must have been "actually motivated," "both subjectively and objectively," by the need to address the traffic offense, not a desire to search. State v. Montes-Malindas, 144 Wn.App. 254,260, 182 P.3d 999 (2008); see Snapp, 174 Wn.2d at 199.

The Supreme Court in State v. Chacon Arreola, 176 Wn.2d 284, 290 P.3d 983, 986 (2012) addressed the issue of pretext stops and determined that there needed to be a new methodology used by the courts to determine whether the actions of the State were pretextual in nature. In Arreola the court in a very short synopsis of the case stated, "The issue in this case is whether a traffic stop motivated primarily by an uncorroborated tip, but also independently motivated by a reasonable articulable suspicion of a traffic infraction, is unconstitutionally pretextual under article I, section 7 of the Washington State Constitution and State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999)." The Arreola case was factually akin to what has been termed a "pretext" stop than the case presently before this court. In the suppression hearing the officer testified that one of his primary reasons for initiating the stop was the previous report Arreola's vehicle was being operated by someone who might be under the influence of alcohol. Id at 986-7 The Arreola court ruled:

We hold that a mixed-motive traffic stop is not

pretextual so long as the desire to address a suspected traffic infraction (or criminal activity) for which the officer has a reasonable articulable suspicion is an actual, conscious, and independent cause of the traffic stop. So long as a police officer actually, consciously, and independently determines that a traffic stop is reasonably necessary in order to address a suspected traffic infraction, the stop is not pretextual in violation of article I, section 7, despite other motivations for the stop.

State v. Downing 151 Wn.2d 265, 272-3 (2004) “We will not disturb the trial court's decision unless the appellant or petitioner makes "a clear showing . . . [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citing MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959)). “The reviewing court finds an abuse of discretion only where no reasonable person would take the position adopted by the trial court.” State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

The record before the trial court and this court make it clear that the actions of the patrol officer were not pretextual. This was an officer who was on routine patrol, he was not tasked with any specific type of enforcement on the day in question. He observed a vehicle in the parking lot of a church that was not in session. It is noteworthy that Sanchez makes extensive mention of the location of the first observation and that

the alleged innocent nature of this car being in the parking lot of a church on a Sunday makes it an affront to a person religious freedoms, however he does not acknowledge that this was a Seventh Day Adventist Church, a Christian faith that worships not on the “traditional” day, Sunday, but on the “seventh day” which is interpreted as Saturday. “The presence of a vehicle coming from a church parking lot on a Sunday in the afternoon is not suspicious in anyway.” (Apps brief at 23) “The major weekly church worship service occurs on Saturday, typically commencing with Sabbath School which is a structured time of small-group study at church.”

(<https://www.adventist.org/en/information/official-statements/documents/article/go/-/sabbath-observance/>)

Therefore a car roaming in the parking lot of this specific church would at least elicit an inquiring thought in most people and in this instance in Officer Orth. This was followed by the attempt to hide the identity of the driver by putting the “hoodie” up. These facts clearly justified the officer turning to follow the car after which it committed the failure to signal infraction, which the court found to have been committed, an act that then led to the legal stop of the car. From this flowed the added facts of the very very strong odor of the controlled substance marijuana and the denial by all occupants that they were of the legal age to possess marijuana.

Here after a very brief encounter with the car Sanchez was riding in Officer Orth observed a traffic infraction being committed directly in front of him. This process was short ongoing and fluid as the court pointed out in the findings of fact the entire process was extremely short. Findings of Fact - 15, 26, 27 (CP 64-5, 67)

**Response to Allegation “III” the defendant was lawfully seized.**

Because Sanchez alleges that the initial stop was based on a pretext he addresses this allegation from that point of view. The error in that is that this was not a pretextual stop. (Apps brief at 32) The next error in his analysis is that this encounter was such that upon first contact that officer was able to ascertain that there was a reasonable, articulable, suspicion of criminal activity. The possession of a controlled substance by individuals who admitted that they were not old enough to possess marijuana legally. In this section of his analysis he also disregards the fact that the actual seizure flowed from this lawful stop for a traffic violation, followed by the very very strong smell of marijuana, still a controlled substance, just a regulated one, which was then followed, most importantly for this portion of the analysis, the furtive movements of the occupants of this car. Four occupants in one car with one officer present at the time of the furtive movements which then moved the investigation of the possible criminal drug possession to an officer safety issue which allowed the officer to take

the modest steps needed to insure his safety.

Officer Orth's initial contact with the vehicle was centered on the driver, then when he approached and was confronted with the overpowering odor of marijuana and the admission by all occupant of the car that they were legally old enough to possess the controlled substance he was legally able to continue this stop to investigate the new crime.

State v. Creed, 179 Wn.App. 534, 540, 319 P.3d 80 (Div. 3 2014)

addressed this;

"A *Terry* investigative stop only authorizes police officers to briefly detain a person for questioning without grounds for arrest if they reasonably suspect, based on 'specific, objective facts,' that the person detained is engaged in criminal activity or a traffic violation. To satisfy the reasonable suspicion standard, the officer's belief must be based on objective facts. This "objective basis," or "reasonable suspicion," must consist of "'specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity.'" (Citations omitted.)

Officer Orth's testimony is clearly supported by this standard.

What must be addressed is the actions of the occupants and the reaction by Officer Orth which is allowed by the law.

Creed then goes on to discuss the ongoing detention of an individual, "[e]ach individual possesses the right to privacy, meaning that person has the right to be left alone by police unless there is probable

cause based on *objective facts* that the person is committing a crime." State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008) (emphasis added).”

Clearly Article I, section 7 of the state constitution provides greater protection to individuals against warrantless searches of their automobiles than the Fourth Amendment. State v. Glenn, 140 Wn.App. 627, 633, 166 P.3d 1235 (2007). This is a strict rule with narrowly construed exceptions. Glenn, 140 Wn.App. at 633, 166 P.3d 1235. The State bears the heavy burden of proving that a warrantless search falls within an exception. Glenn, 140 Wn.App. at 633, 166 P.3d 1235. One exception to the warrant requirement allows an officer, during a valid Terry stop, to "make a limited search of the passenger compartment to assure a suspect person in the car does not have access to a weapon." State v. Kennedy, 107 Wn.2d 1, 13, 726 P.2d 445 (1986). This protective search for officer safety is limited to areas "within the investigatee's immediate control." Kennedy, 107 Wn.2d at 12, 726 P.2d 445. In such cases, the officer must be able to “point to ‘specific and articulable facts’ which create an objectively reasonable belief that a suspect is ‘armed and presently dangerous.’” State v. Glossbrener, 146 Wn.2d 670, 680, 49 P.3d 128 (2002) (quoting State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993)). This court will evaluate “the entire circumstances of the traffic stop” to determine

whether the search was reasonably based on officer safety concerns. Glossbrener, 146 Wn.2d at 679, 49 P.3d 128. Once again in the case there was one officer, four occupants of the car, the actions of the defendant caused Officer Orth concern and after Sanchez made motions in the front seat “appeared as if he was attempting to conceal something.” . . .”I observed the rear seat passengers moving around.” (RP 26-7) following these observation Officer Orth “immediately requested assistance at my location.” (RP 26-7) Orth then recontacted the vehicle [a]nd I advised the rear seat passengers to put their hands on the back of the headrests and the front seat passenger to put his hands on the dash.” (RP 27)

[I]f a suspect [makes] a furtive movement appearing to be concealing a weapon or contraband in the passenger compartment, a protective search is generally allowed." State v. Chang, 147 Wn.App. 490, 496, 195 P.3d 1008 (2008) (citing Kennedy, 107 Wn.2d at 12, 726 P.2d 445). In Kennedy, a police officer signaled to the defendant to pull over his vehicle; the officer reasonably suspected that the defendant had committed drug crimes. 107 Wn.2d at 3, 9, 726 P.2d 445. After the signal, the officer observed the defendant "lean forward as if to put something under the seat." Kennedy, 107 Wn.2d at 3, 726 P.2d 445. Our Supreme Court stated that the defendant's "furtive gesture" gave the officer "an objective suspicion that [the defendant] was secreting something under the

front seat of the car." Kennedy, 107 Wn.2d at 11, 726 P.2d 445.

Here the officer would have been justified to conduct a search similar to that done in Kennedy. However Officer Orth did **not** conduct the protective search, he instead removed the occupants, had a drug dog walk the perimeter of the car and then he applied for a search warrant, which is not before this court. Orth had a legal basis for an officer's protective search for a weapon under the front seat of the vehicle and that search would have been reasonable. Kennedy, 107 Wn.2d at 13, 726 P.2d 445. Here, the totality of the circumstances indicates that Officer Orth had an objectively reasonable belief that Sanchez was armed and dangerous, this was exacerbated when the backseat passengers also began to move around. Understandably, these actions, in totality, with the recent actions of the driver clearly attempting to obscure his identity with his "hoodie" caused Officer Orth to be concerned that an occupant was reaching for a weapon or was concealing a weapon.

During the subsequent search of the car pursuant to the valid search warrant a warrant that Sanchez did not challenge in the trial court nor in this court on appeal, Officer Orth "...found a firearm under the front passenger...floor mat." (RP 30)

The above is a long path to the final analysis, the defendant was not "unlawfully" seized nor detained nor searched. Officer Orth observed

a traffic violation, which was a legal basis to stop the car. The other information that was contained in his head was taken into account by the trial court as per the analysis set forth by our state Supreme Court. That ripened into a drug investigation when the officer obtained probable cause that there was a substance in the car that could not be possessed by anyone in that car. With a minimally intrusive act of taking identification to confirm no one could possess this controlled substance the officer was then confronted with furtive actions on the part of more than one occupant which then took this drug investigation and layered on the lawful removal of the occupants of the car for a search for officer safety. This portion of this ongoing contact never occurred because the officer took the laudable step of obtaining a search warrant after this defendant confessed his personal possession of the controlled substance marijuana.

**Response to “VI” the search of the defendant incident to arrest was lawful.**

It is the State’s position that the arrest was lawful and therefore the seizure of any and all items that flow from that arrest could legally be used in the case against this defendant. The defendant was being legally removed from the vehicle for officer safety reasons when he blurted out that he had marijuana on his person. Further, the actual search of Sanchez did not occur until after he admitted, without questioning by

Officer Orth, to the possession of a controlled substance that he could not possess. (RP 28-30) There

Prior to the passage of I-502, former RCW 69.50.4014 (2012) criminalized the possession of 40 grams or less of marijuana as a misdemeanor. Section 20(3) of I-502 proposed an amendment to former RCW 69.50.4013 providing that "**[t]he possession, by a person twenty-one years of age or older**, of useable marijuana or marijuana-infused products in amounts that do not exceed those set forth in section 15(3) of this act is not a violation of this section, this chapter, or any other provision of Washington state law." (Emphasis added.) I-502 did not eliminate the crime of possession of marijuana. Instead, it exempted from the reach of the statute possession by adults over the age of 21 who possessed less than an ounce of the substance. LAWS OF 2013, ch. 3, §§ 15, 20. In other words, those under age 21 still cannot possess marijuana and those over age 21 can possess only up to one ounce without violating the statute. The statute now treats certain types of possession differently for those over 21, but it is not a repeal of the statute nor even a change of law for those under 21 years of age or those over 21 who possess large quantities. Simple put the language of the initiative, now statute, allows some people to avoid prosecution if they obey the law, the young men in this car were not obeying the law.

There is also the consideration of the fact that even if there was one occupant who was of legal age Officer Orth having smelled the very very strong odor of marijuana would have had legal justification for further investigation because Washington law does provide that a person is guilty of driving while intoxicated if he has a THC concentration of 5.00 or higher in his blood level within two hours of driving. RCW 46.61.503 and/or 502(1)(b), (2). This section of the law is not dependent on age or quantity possessed. There is also a new section of RCW 46.61 the “open container” law that addresses the fact that no one can have marijuana in a car that is on the highway unless those drugs are in the trunk this section also makes it an infraction to smoke marijuana in a car. RCW 46.61.745 et seq.

The final search of Sanchez that resulted in the seizure of controlled substances was lawful. It arose through a series of interactions between Officer Orth and this vehicle and its occupants. None of those interactions was unlawful. The trial court heard that testimony of the witnesses, in this case Officer Orth and the defendant and he found the testimony of Officer Orth credible. The court did not find that testimony of Sanchez credible. (RP 136-9) "Determinations of credibility are for the fact finder and are not reviewable on appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court has often stated that “[w]e

will not disturb the trial court's decision unless the appellant or petitioner makes "a clear showing . . . [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citing MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959))." State v. Downing, 151 Wn.2d 265, 272-3 (2004)

**Response to "VI" the stop was lawful.**

Appellant cites to numerous cases regarding stop, seizure and detention but in his analysis ignores the actions of the occupants of the car and in particular his own actions. This is yet again a repeat of the process and is based on and is determined by the trial court and therefore this court's determination of the initial stop. The ruling in the trial court was a discretionary ruling by the finder of fact. The analysis of the stop, detention, removal and search of the defendant is set forth above. Once again Officer Orth made a valid stop of the car Sanchez was riding in. The law regarding this is set forth above and is now controlled by State v. Chacon Arreola, 176 Wn.2d 284, 291-92, 290 P.3d 983 (2012). The trial court reviewed all of the facts presented by the State and Sanchez and ruled regarding pretext, probable cause and officer safety. The state has addressed those at length above.

Here Appellant argues that the officer saw a car in a church

parking lot on a Sunday and the driver pulled up his “hoodie” he stopped the car Sanchez riding in and because he was merely the passenger he should not have been disturbed. He however continues to ignore the totality of the contact. The Officer observed a car in an empty church parking lot, a Seventh Day Adventist church where worship services are on Saturday not Sunday, the drive clearly took actions to hide his identity. The officer had the legal right to check out this car and he was in the process of doing that when it turned into a parking lot without signaling. The facts submitted to this court in the finding of fact were not disputed. All actions of the officer were lawful and but for the continuing actions of the occupants of the car the probability is that the driver would have been issued a citation for the traffic infraction. However, they had been smoking marijuana, obviously in the car, to an extent that Officer Orth described it as a “very very strong odor” of marijuana and they next denied a legal ability to possess that controlled substance, followed closely by the furtive actions of several of the occupants while there was only one officer present. The facts of this case can’t be viewed in isolation.

The Officer had “an individualized” suspicion that Sanchez, a minor, was in a car that contained a controlled substance, the office had an individualize suspicion that Sanchez was attempting to hide something in the car and after Sanchez was removed from the, an act that was justifiable

for officer safety he confessed to possession of a controlled substance as he was removed from the car for officer safety purposes.

As correctly stated by Sanchez under Washington law, the police may not detain a citizen unless there is a substantial possibility that criminal conduct has occurred or is about to occur. State v. Mendez, 137 Wn.2d 208, 223 (1999) Here it started with an infraction, proceeded to the drug possession investigation, then officer safety and finally for this defendant the final act of confession resulting in the search of Sanchez's person and the discovery of drugs. Sanchez also cites State v. Mercer, 45 Wn.App. 769, 727 P.2d 676 (Wn.App. Div. 3 1986) as supportive of his claim, [c]ircumstances must be more consistent with criminal than innocent conduct." Id at 774. However the paragraph that this portion of one sentence is found states:

Under some circumstances, a person may be detained briefly for questioning, even though probable cause for arrest may be absent; such detention need only be supported by a well-founded suspicion of criminal activity based upon specific and articulable facts. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982); State v. Gluck, 83 Wn.2d 424, 426, 518 P.2d 703 (1974). The officer's experience will be taken into account in assessing whether a suspicion of wrongdoing was justified under the circumstances. State v. Samsel, supra 39 Wn.App. at 570-71, 694 P.2d 670; State v. Selvidge, 30 Wn.App. 406, 409-10, 635 P.2d 736 (1981), review denied, 97 Wn.2d 1002 (1982). Although the circumstances must be more consistent with criminal than innocent conduct,

"reasonableness is measured not by exactitudes, but by probabilities." State v. Samsel, supra 39 Wn.App. at 571, 694 P.2d 670.

When looked at in a more complete fashion Mercer actually supports the actions by Officer Orth.

**Response to "VIII" the police lawfully detained and searched the persons located in the suspect vehicle.**

The State does not dispute that the passengers in the suspect car had rights that were and are separate from those of the driver. However most of the cases cited by Sanchez in this section of his brief are not applicable to the facts that were before Officer Orth, the trial court and now this court.

Sanchez's rights were not violated when he was sitting in the suspect vehicle. When the initial stop occurred it almost instantly ripened into a drug investigation. The officers very limited questioning regarding the age of the occupants. When they confirmed that no one in the car could legally possess the controlled substance the officer had a legal basis to continue his detention.

As repeated several times above this case does not just stop with the initial contact regarding an infraction. It has several layers. Officer Orth did not ask to see the identification of Sanchez and the others because of the infraction that the driver had committed, he did so because

as soon as he approached the vehicle he smelled the “very, very strong” odor of marijuana, which as a minimum is an additional citation, one that is not an infraction.

By his own admission at the time of the valid stop after the commission of a traffic infraction literally in front of the officer Sanchez was not of legal age to possess any marijuana. Officer Orth had a legal basis for the continued detention of the occupants of the car. He was confirming their ages as part of the investigation of the drug possession, which as described numerous times above morphed into the final arrest and search of Sanchez. It is very important for this court to recognize that the officer did not go immediately to Sanchez. He first removed and secured the driver of the car to insure that the car could not flee, he then when to the next logical position in the car and removed Sanchez for officer safety purposes. The blurted out confession regarding his own possession of a controlled substance there was no interrogation, no questions asked. What was occurring was being done in the common course of an officer safety setting. Sanchez cites to State v. Larson, 93 Wn.2d 638, 642, 611 P.2d 771 (1980) as supportive of his position that there was no reason for Officer Orth to question Mr. Sanchez, but as the State has pointed out repeatedly the facts in this case distinguish it. The second Officer Orth made contact with the driver following a valid stop

the officer smelled the very very strong odor of marijuana which in the terms of Larson constitutes “other circumstances [which] give the police independent cause to question passengers.”

Most of the cases cited by Sanchez in this section involve, like here, the valid stop of a car for a traffic violation and subsequent to that the issue of a citation to a passenger. None of the cases cited have a fact pattern such as the one recite over and over above.

**Response to allegation “VII” There was no fruit of the poisonous tree as a result of an unconstitutional search. The stop of the suspect vehicle was lawful, the very very strong smell of marijuana gave Officer Orth a basis for continued detention and officer safety allowed him to remove the occupants of the car.**

Once again that State does not dispute that the so called fruit of the poisonous tree will be suppressed if it is seized as a result of an illegal arrest and/or search no such problem exists in this case.

#### IV. CONCLUSION

The trial court took testimony from Officer Orth and the defendant. It evaluated that testimony as dictated by Areola. After that analysis the court determined the stop was not pretextual, that the smell of marijuana allowed the officer to extend the detention, that the actions of the occupants of the car and Sanchez specifically were such that the officer had a legitimate concern for officer safety with gave Officer Orth a legal basis to remove the occupants of the car to search the vehicle for weapons.

Prior to that search Sanchez, who had already stated that he was not 21 years old, self-confessed that he was in possession of marijuana a drug which he could not legally possess.

The court denied the motion to suppress and convicted Sanchez in a trial to the bench. The suppression ruling was a discretionary ruling which any reasonable jurist could and would make based on the facts submitted. The court then found Sanchez guilty as charged. All of these actions are supported by the facts and the law and should not be disturbed on appeal.

For the reasons set forth above this court should deny this appeal.

Respectfully submitted this 24<sup>th</sup> day of April 2016,

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# APPENDIX A

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SUPERIOR COURT  
YAKIMA CO WA

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,  
  
Plaintiff,  
  
vs  
  
CHRISTIAN ALFREDO SANCHEZ  
DOB 1/15/94  
  
Defendant,

) Case No 14-1-00269-1  
)  
) ~~PROPOSED~~ FINDINGS OF FACT &  
) CONCLUSIONS OF LAW AS TO  
) DEFENDANT'S MOTION TO  
) SUPPRESS

Defendant's Motion to Suppress being heard by the bench, and this Court being fully apprised of the facts, circumstances and arguments of counsel, the Court makes the following findings of fact and conclusions of law by preponderance of the evidence

**I. FINDINGS OF FACT**

1 The Court heard testimony from Officer Orth of the Sunnyside Police Department Officer Orth testified he had been a law enforcement officer for six years He was on duty February 16, 2014, working from 6 00 a m to 6 00 p m Officer Orth testified he was on patrol driving Eastbound on Lincoln Avenue in Sunnyside when he observed a Volvo leaving the Seventh Day Adventist Church parking lot He testified the vehicle was exiting from the back portion of the lot On cross examination, he clarified that when he saw vehicle in the parking lot

1 he was a few hundred yards away He saw the vehicle and parking lot coming up on his right  
2 According to Officer Orth, the time was 2 26 p m , church was not in session and there were no  
3 other vehicles in the lot As he passed by the lot in his patrol car, he observed the driver putting  
4 up the hood of his hoodie Officer Orth acknowledged on cross examination that it is not illegal  
5 to wear a hoodie in the city of Sunnyside Officer Orth admitted it was odd for a vehicle to be in  
6 the church parking lot when church was not in session, and for the driver to attempt to conceal  
7 his identity by pulling the hood up on his hoodie

8           2       As the officer passed, the vehicle pulled Westbound onto Lincoln, driving away  
9 from the officer

10           3       Officer Orth testified that both the presence of the vehicle in that parking lot at  
11 that time and the driver covering his face were suspicious So he turned his vehicle around and  
12 began to follow the Volvo The Volvo was not speeding He entered the license plate into his  
13 computer to check the registration Officer Orth testified that he did not recall whether he  
14 received a return from the system because the vehicle, after passing through an intersection  
15 controlled with traffic signals, made a quick right turn into the parking lot of a mini mart He did  
16 not observe the vehicle use a turn signal He testified to a medium level of traffic that included  
17 both vehicle and pedestrians outside the mini mart, although Officer Orth could not testify with  
18 precision how many vehicles or pedestrians were around He testified that he believed the  
19 vehicle posed a danger by turning immediately after the intersection without a signal, and that he  
20 activated his lights to conduct a traffic stop at that time The vehicle parked in the stall closest to  
21 the mini-mart's entrance and Officer Orth pulled up behind it

22           4       Officer Orth further testified that he would have pulled over any other vehicle for  
23 the same infraction of failure to signal, given the circumstances of the intersection and traffic  
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1           5       The Court was impressed with Officer Orth's knowledge of both the marijuana  
2 laws of Washington and the traffic infraction for which he stopped the vehicle. Even though he  
3 couldn't quote the actual citation for the infraction of failure to signal, he certainly knew it was  
4 \$124 for the ticket, or \$175 if there is a collision, which certainly leads this court to conclude  
5 he's familiar with the type of traffic infraction for which he pulled over the vehicle.

6           6       Officer Orth testified that he received a dispatch notification that someone from a  
7 business across the street had called and reported youths smelling of marijuana coming into the  
8 business and that those youths had gone behind the church. Officer Orth elaborated that he didn't  
9 receive that information until after he initiated the traffic stop.

10          7       Officer Orth approached the driver's side of the vehicle to contact the driver. The  
11 windows were initially up, but the driver rolled his down. When he did, Orth noted the  
12 overwhelming odor of marijuana coming from the vehicle. Officer Orth testified that he is  
13 familiar with the odor of marijuana through his training and experience as a patrol officer.

14          8       Defendant was one of the non-driving occupants of the Volvo, seated in the front  
15 passenger seat. Officer Orth did not know the age of any of the four occupants, guessing they  
16 could have been anywhere from 16 to 24 years of age. At that point his focus changed from a  
17 traffic infraction to a drug investigation. Officer Orth testified he was aware of recent changes in  
18 state law where persons 21 years of age or older can lawfully possess marijuana.

19          9       Officer Orth asked the occupants if they were 21, and all said "no." The officer  
20 then asked for identification from all in the vehicle in order to confirm their age and identity. He  
21 took those documents back to his vehicle. When he sat down in his seat, before he could confirm  
22 identifications through dispatch, Officer Orth saw Defendant duck down as if he were hiding or  
23 retrieving something at his feet.  
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1           10     During this portion of the contact, Officer Orth was alone and there were four  
2 occupants of the Volvo

3           11     At that point Officer Orth's focus changed to officer safety he called for a second  
4 unit and he immediately returned to the Volvo Upon his return, Orth told the back seat  
5 passengers to put their hands on the headrest in front of them and he told front seat occupants to  
6 put their hands on the dashboard in front of them He asked the driver to step out, then secured  
7 the driver back in his patrol car, after telling him he was being detained for drug possession

8           12     He then went back to car and asked the defendant to step out, and as soon as  
9 defendant stepped out he made a statement to Officer Orth that he had marijuana on him  
10 Defendant was placed into custody for possession of marijuana He was handcuffed and searched  
11 pursuant to that arrest Located on Defendant's person was a meth pipe, marijuana in a pill  
12 bottle, and several baggies with a white crystalline substance

13           13     Officer Orth testified he never did finish checking the identifications of all the  
14 passengers, as his focus had shifted to officer safety with the movements of Defendant in the  
15 Volvo Additionally, he never cited the driver for the failure to use a signal As well, he stated  
16 the information from the local business, obtained after pulling over the vehicle, factored very  
17 little into his investigation

18           14     Officer Orth then testified that he contacted a K9 officer to check vehicle, the dog  
19 alerted on the vehicle indicating the presence of a controlled substance, so it was impounded  
20 pending application for a search warrant Pursuant to a search warrant, Orth searched the vehicle  
21 and found a firearm under the front passenger floormat

22           15     Officer Orth further testified under cross examination specific to the CAD logs  
23 that this Court found to be significant The first two pages of the CAD log show the stop was  
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1 initiated at 1426 hours and that by 1436 hours Officer Orth had called for the jail van and 1437  
2 hours he called out that he had four in custody That becomes significant for the court's rulings

3 16 The Court finds that the 11 minutes of this traffic stop is not unreasonable,  
4 especially in light of the fluid change from potential citation for a moving violation, to drug  
5 investigation, to a situation implicating the officer's safety

6 17 Officer Orth didn't recall whether one or both entrances to the church parking lot  
7 were gated He was also asked about whether the windshield was cracked or if there was body  
8 damage to the Volvo, he didn't recall any damage on the vehicle

9 18 The Court also heard testimony from Defendant, who testified that he recalled  
10 being stopped in February, to being present in the Volvo with 3 friends He recalled that they had  
11 pulled into the church parking lot to turn around and go back to the mini-mart for cigarettes He  
12 testified they did not go to the back portion of the church but turned around in front of an awning  
13 that separated the front from the back of the complex Defendant further testified that he  
14 observed two other cars parked in the back He noted that one of the two entrances was gated so  
15 they left the way they entered, through the ungated entrance

16 19 Defendant testified seeing the police ahead of them, but denied the officer passed  
17 them, saying instead the officer was in front of them, then came up behind them Defendant  
18 stated the windows were down because there was such an odor of marijuana that they were airing  
19 out the car

20 20 On redirect examination, Officer Orth rebutted the assertion that he was "in front  
21 of" the Volvo, he stated he was not in front of the vehicle, instead, he re-iterated that he had  
22 passed by and had to turn around to catch up to the vehicle  
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1           21     Defendant testified he saw the police car behind them in the Volvo, and he  
2 initially testified specifically that he screamed at driver to turn on the turn signal before the  
3 driver pulled into the mini-mart, and further that he saw the signal turn on

4           22     Defendant testified that after he and his companions were pulled over, that Officer  
5 Orth had asked for identification. He further testified about a lot of activity back and forth  
6 between the Volvo and the police car that there was a K9 involved, that there was an inquiry for  
7 permission to search the car (which was not granted), and that he was then removed from the car.  
8 He testified regarding a lot of back and forth that Orth did not testify to, back and forth activity  
9 that Defendant indicated was taking place after the traffic stop had been initiated. He  
10 acknowledged that he was worried because of the smell, that he had been smoking marijuana.  
11 Indeed, he testified that they all had been smoking marijuana, including the driver.

12           23     Defendant testified that he did not offer information to the officer because the  
13 officer did not directly ask him the question as to whether he knew about the marijuana or where  
14 the smell was coming from, instead the officer directed the question to the group as a whole.  
15 Then Defendant indicated the driver was trying to stop him from speaking, and kept interrupting  
16 him when he did try to answer the officer's questions.

17           24     Officer Orth, on rebuttal, testified that the driver was calm during the traffic stop  
18 and did not interrupt Defendant's attempts to answer questions.

19           25     Comparing Defendant's version of events to the CAD logs, the timeframes  
20 involved do not lend themselves to Defendant's version of events. Also, the Court does not find  
21 credible the Defendant's testimony that he was not answering the question about marijuana  
22 because it was not directly asked of him and the driver was interrupting him and he didn't have a  
23 chance to offer it up. The Court notes that Defendant acknowledged he was under the influence  
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1 of marijuana The officer was not The timeframe supports the officer's version of events, not the  
2 Defendant's This is not a situation where the officer had a vehicle pulled over for a very long  
3 period of time Those factors weighed upon the Court's mind regarding credibility This was stop  
4 that, based upon the occupants' and specifically the Defendant's actions, turned into more than  
5 what it started out as

6 26 This was a situation where an officer was validly following a vehicle for some  
7 suspicious circumstances and then the vehicle committed an infraction directly in front of him  
8 The officer did not follow it through neighborhoods waiting for something to happen This all  
9 happened in a very compressed timeframe It is less than a quarter of a mile between initial  
10 sighting of the vehicle and pulling it over Once the officer pulled over the vehicle, contacted the  
11 driver, and noticed the odor of marijuana, there is no basis to claim that the contact should just  
12 end It was legitimate and reasonable, under the circumstances, based on the ages of the  
13 occupants of the vehicle, to request identification Once the officer had the identifications and he  
14 had returned to his patrol car to sort them out, then the Defendant's actions caused him to be  
15 concerned for officer safety, return to the Volvo, remove the driver and remove the Defendant  
16

17 27 By totality of the circumstances, it is apparent that Officer Orth observed the  
18 vehicle in front of him commit a traffic infraction and pulled it over as he would any other  
19 vehicle for that infraction This was not a pretext stop

20 28 As to the seizure of the passengers and the request for their identification, the  
21 officer's plain scent of marijuana, coupled with the legitimate question as to their age changed  
22 the playing field from a traffic infraction to a controlled substance investigation and their  
23 identification became reasonable as the stop morphed into a criminal investigation  
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By *Ruth E Reukauf*  
Judge Ruth Reukauf

DECLARATION OF SERVICE

I, David B. Trefry state that on April 24, 2016 emailed a copy, by agreement of the parties, of the Respondent's Brief, to Mr. Shane Silverthorn at shane@silverthornlawoffice.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24<sup>th</sup> day of April, 2016 at Spokane, Washington.

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