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STATE OF WASHINGTON
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SUPREME COURT NO. 90751-0

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ANTOINE BROCK,

Respondent.

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

The Honorable Susan Craighead, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Does Wash. Const. art. 1, section 7, protect against the warrantless search of items associated with an arrestee that were not in the arrestee's actual possession at the time of or immediately before the arrest?

2. Must "immediately before" in the context of the "time of arrest" rule be narrowly construed such that items not in the arrestee's actual possession for at least several minutes preceding initiation of a custodial arrest may not be lawfully searched incident to that arrest?

3. Where the evidence leading to the decision to make a custodial arrest of a crime suspect is the product of a search of an item conducted in violation of the suspect's art.1, section 7 rights, is any subsequent post-arrest "inventory search" of the same item equally unlawful due to the prior taint arising from the initial search?

B. STATEMENT OF THE CASE

Antoine Brock was charged with 10 counts of second degree identity theft, three counts of forgery, and one count of methamphetamine possession. CP 35-41. All charges stemmed from a warrantless search of Brock's backpack following his arrest for providing "false information" to Officer Eric Olson. CP 6-20.

Brock moved to suppress, arguing the search violated his rights under art. 1, section 7. CP 23-34. The prosecution responded the search

was lawful for several reasons, including abandonment, search incident to arrest and "as part of the booking procedure." CP 88-93.

The only testimony at the suppression hearing was Officer Olson's. 1RP¹ 6-72. According to Olson, Golden Gardens Park is closed to the public from 11:30 p.m. to 6:00 a.m. 1RP 13. Olson was patrolling the park at about 3:00 a.m. on May 21, 2008, when he noticed an individual in the men's bathroom. 1RP 11, 21. Olson waited outside until Brock came out carrying a backpack. 1RP 23-24, 26.

Olson identified himself as a police officer and told Brock he was not allowed in the park after closing. 1RP 24-26. When Brock said he was unaware the park was closed, Olson directed him to set down his backpack and submit to a pat-down for weapons. 1RP 25-26. Brock complied and no weapons were found. 1RP 26.

Brock denied having any identification, so Olson asked for his name, date of birth and social security number. According to Olson, Brock "said his name was Dorian Halley, his date of birth was 07/19/67 with a social security number 560-32-4581." 1RP 27. Olson then seized Brock's backpack and directed Brock to stand or sit near Olson's patrol car so he could continue his investigation. 1RP 30, 32-33. Brock's backpack

¹ There are three volumes of verbatim report of proceedings referenced as follows: 1RP - 6/13/11; 2RP - 6/14/11; and 3RP - 6/28/11.

was placed in the front passenger area of the patrol car. 1RP 32. The backpack compartments were all zipped closed. 1RP 57-58.

Olson was unable to validate the identification information Brock provided, so he arrested him for providing false information. Brock was read his Miranda warnings but not handcuffed. 1RP 33, 35-36, 38.

Olson then returned to his patrol car and searched Brock's backpack in an attempt to determine Brock's true identity, and in the process discovered a small bag of marijuana, a small bag of methamphetamine, and a "green inmate DOC badge" with Brock's picture and name on it. 1RP 40-43. As Olson returned to Brock to take him into full custody, Brock said, "Backpack's not mine." 1RP 43. Olson handcuffed Brock and put him in the back of the patrol car. 1RP 44, 58. Approximately 10 minutes had elapsed between when Brock left the bathroom until he was handcuffed by Olson. CP 62 (finding of fact Q).

Olson then conducted a second search of the backpack and discovered evidence leading to the identity theft and forgery charges and more suspected drugs and paraphernalia. 1RP 48-50. Olson also checked and discovered an active "DOC arrest warrant." At that point Olson was committed to booking Brock into jail. 1RP 50.

In its oral ruling denying the suppression motion, the court found Olson had probable cause to stop and arrest Brock for trespassing. 2RP 4,

9. With regard to the search of Brock's backpack, however, the court expressed concern that it may have run afoul of the decision in Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), which it noted precluded warrantless searches of automobiles once a defendant no longer has access. 2RP 9-10. The court felt constrained to limit application of Gant to vehicle searches, however, and therefore found the post-arrest search of Brock's backpack lawful as a search incident to arrest. Id. The court specifically rejected the prosecution's arguments that the search was simply a pre-booking "inventory search," that it was lawful because Brock denied the backpack was his, or that discovery of the evidence was inevitable. 2RP 11. Subsequently filed written findings and conclusions track the court's oral rulings. CP 59-65. Brock's motion to reconsider was denied. CP 79-82; 2RP 18-19.

Brock was convicted on stipulated evidence of all charges except one count of identity theft. CP 42-45, 96-101; 2RP 30-33. Following sentencing,² Brock appealed. CP 66-78.

The Court of Appeals reversed, concluding the search of the backpack violated art. 1, section 7, because "Brock did not have actual and

² Brock was sentenced to concurrent 24-month terms for the forgery and methamphetamine convictions, and concurrent 50-month Drug Offender Sentencing Alternative sentences for the identity theft convictions. CP 47-58; 3RP 19-20

exclusive possession of his backpack at or immediately preceding the time of his arrest." State v. Brock, 182 Wn. App. 680, 689, 330 P.3d 236 (2014), review granted, 340 P.3d 228 (2015). This Court subsequently granted the prosecution's petition for review. Id.

C. ARGUMENTS

1. THE SEARCHES WERE UNLAWFUL BECAUSE BROCK DID NOT HAVE ACTUAL POSSESSION OF THE BACKPACK AT THE TIME OF ARREST OR IMMEDIATELY BEFOREHAND

The Fourth Amendment to the U.S. Constitution and article 1, section 7 of the Washington Constitution protect people from unreasonable searches and seizures and invasions of privacy. In some circumstances, art. 1, section 7 provides greater protection than its federal counterpart. See e.g., York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 306, 178 P.3d 995 (2008) (random drug testing of student athletes violates art. 1, section 7, but not Fourth Amendment).

Only a valid warrant and a few narrowly drawn and jealously guarded exceptions to the warrant requirement provide the authority of law required by art. 1, section 7. State v. Williams, 171 Wn.2d 474, 485, 251 P.3d 877 (2011); State v. Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). Under both federal and state constitutions, the burden is on the State to prove an applicable exception when a search is conducted without a warrant. Katz

v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Where the State fails to prove an applicable exception, evidence from the search must be suppressed. State v. Ruem, 179 Wn.2d 195, 208-09, 313 P.3d 1156 (2013); State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

A search incident to arrest has historically been an exception to the warrant requirement, and allows an immediate search in order to secure the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. State v. Valdez, 167 Wn.2d 761, 773, 224 P.3d 751 (2009); Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). This exception has been broadly applied to searches of bags, backpacks and purses incident to the arrest of their owners, and to searches of automobiles incident to the arrest of their occupants. See e.g., State v. Ringer, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983), State v. Stroud, 106 Wn.2d 144, 150–51, 720 P.2d 436 (1986); State v. Smith, 119 Wn.2d 675, 835 P.2d 1025 (1992); New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). As this Court has noted, however, “the search incident to arrest exception has been stretched beyond [its] underlying justifications, permitting searches beyond what was necessary for officer safety and preservation of the evidence of the crime of arrest.” Valdez, 167 Wn.2d at 774.

The scope of a permissible search incident to arrest was set forth by the U.S. Supreme Court in Chimel. In Chimel, an arrest warrant was issued and the suspect was arrested at his home for burglary of a coin shop. 395 U.S. at 753. Upon arrest, officers searched his entire home. Id. at 754. The Court held the search extended far beyond the arrestee's person and area within his immediate control, and thus was not necessary for officer safety or to preserve evidence that could be concealed or destroyed, and was therefore unconstitutional. 395 U.S. at 768.

In Belton, the reasoning in Chimel was adapted to the context of a search incident to arrest involving occupants of an automobile. 453 U.S. at 460. The Belton court cited Chimel for its holding that the scope of the officer's search could extend to the area within the immediate control of the arrestee to prevent the arrestee from securing weapons or concealing or destroying evidence, and reasoned that the occupant of an automobile would have immediate control over the entire passenger compartment. Id. Under the facts of Belton, the warrantless search was reasonable, and thus constitutional, because the four arrestees were not physically restrained and were sufficiently proximate to the car to gain access. 453 U.S. at 455.

In Stroud, this Court recognized our state constitution provides more privacy protection than its federal counterpart. 106 Wn.2d at 148-50. The Stroud Court nevertheless broadened the scope of the exception,

stating: “During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence.” Id. at 152. Thus, under Stroud, the fact that a defendant is in custody and in a patrol car during the search, and unable to access evidence or a weapon, was immaterial. Id. at 152.

Subsequently in Smith, this Court, relying on Belton, adopted a two-part test to establish the validity of a search incident to arrest: “(1) if the object searched was within the arrestee's control when he or she was arrested; and (2) if the events occurring after the arrest but before the search did not render the search unreasonable.” 119 Wn.2d at 681.³

The Smith Court held that both requirements were met in that case.

As to the first prong:

Smith was wearing the fanny pack when Officer Gonzales tackled him. The fanny pack fell off during the struggle that preceded the arrest, and was within “one or two steps” of Smith at the time of the arrest. Thus Smith was in actual physical possession of the fanny pack just prior to the arrest, and the fanny pack was within his reach at the moment of arrest.

³ The Smith court analyzed the exception under the Fourth Amendment, not under Washington's more protective art. 1, section 7. 119 Wn.2d at 678; see also Parker, 139 Wn.2d at 493 (art. 1, § 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment).

119 Wn.2d at 682. As to the second prong:

[Smith] asserts that the fact that he was handcuffed and in the back of the police car when Gonzales opened his bag rendered the search unreasonable. . . . We reject [this] argument[] . . . [O]nce she arrested Smith, Officer Gonzales acted reasonably in taking steps necessary to assure her safety. Gonzales' actions were reasonable because Smith initially tried to run away, he disobeyed Gonzales' order to stop, and because the arrest occurred in a parking lot filled with a large group of people. Handcuffing Smith and placing him in the back of the police car prior to any search of the fanny pack were reasonable actions under those circumstances. Therefore the fact that Smith was handcuffed in the back of the police car during the search does not make that search unreasonable.

119 Wn.2d at 682-83.

But in Arizona v. Gant, the United States Supreme Court rejected such broad readings of Belton and of the search incident to arrest exception. Rodney Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car. 129 S. Ct. at 1715. Police officers then searched his car and discovered cocaine in the pocket of a jacket on the backseat. 129 S. Ct. at 1715.

Gant was charged with possession of a narcotic for sale and possession of paraphernalia. He moved to suppress the evidence seized from his car on grounds it was obtained in violation of the Fourth Amendment. Gant argued Belton did not authorize the search of his car

because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his car. 129 S. Ct. at 1715.

The Court agreed, and rejected the then prevailing interpretation of Belton as authorizing a vehicle search incident to every recent occupant's arrest. 129 S. Ct. at 1714. The Court specifically held:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

129 S. Ct. at 1723

Thereafter, this Court observed:

[T]he Court in Gant issued a necessary course correction to assure that a search incident to the arrest of a recent vehicle occupant under the Fourth Amendment takes place “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” Gant, 129 S. Ct. at 1719.

State v. Patton, 167 Wn.2d 379, 394, 219 P.3d 651 (2009). The Court held likewise that under art. 1, section 7:

[A]n automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed.

167 Wn.2d at 383. The risk to officer safety or the possibility that evidence will be destroyed must “exist at the time of the search.” 167 Wn.2d at 395.

Then in Valdez, this Court again noted the improper overexpansion of the search incident to arrest exception:

[A]fter an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception. Stroud's expansive interpretation to the contrary was influenced by an improperly broad interpretation of Belton[.]

167 Wn.2d at 777. This Court further noted “[t]he search incident to arrest exception, born of the common law, arises from the necessity to provide for officer safety and the preservation of evidence of the crime of arrest, and the application and scope of that exception must be so grounded and so limited.” 167 Wn.2d at 775.

More recently, this Court clarified the permissible scope of a search incident to arrest in State v. Byrd, 178 Wn.2d 611, 310 P.3d 793 (2013). The Court began by noting there are two types of searches incident to arrest: (1) “a search . . . of the area within the control of the arrestee” and (2) “a search . . . of the person of the arrestee by virtue of the lawful arrest.” 178 Wn.2d at 617 (quoting United States v. Robinson, 414

U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)). The first type of search "must be justified by concerns that the arrestee might otherwise access the article to obtain a weapon or destroy evidence." Id. (citing Chimel, supra). The second type of search "require[s] 'no additional justification' beyond the validity of the custodial arrest." Id. at 618 (quoting Robinson, 414 U.S. at 235).

The type of search conducted is determined by applying the "time of arrest" rule. Id. at 620-23. Under the rule, a search may be conducted of an arrestee's personal possessions, such as a purse or backpack, without further justification if it was in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest. Id. at 623. This Court emphasized, "that the proper scope of the time of arrest rule is narrow, in keeping with this 'jealously guarded' exception to the warrant requirement." Id. As such, it does not apply to items that are simply within the arrestee's reach, or merely constructively possessed. Id.

Several months after Byrd, this Court issued its decision in State v. MacDicken, 179 Wn.2d 936, 319 P.3d 31 (2014). In MacDicken, the defendant was arrested while carrying a laptop bag and pushing a rolling duffel bag. Id. at 938-39. The defendant was ordered to the ground by an officer, handcuffed, and placed next to the patrol car. Id. Another officer searched the bags after moving MacDicken a car-length away. Id. The

court concluded the bags were in the defendant's actual and exclusive possession at the time of arrest and were immediately associated with his person. Id. at 942. It held that the search of the bags was a part of a lawful search incident to arrest of the defendant's person. Id.

Applying the "time of arrest" rule to the facts here, it is clear the backpack was not part of Brock's person at the time of or immediately preceding his arrest. Nor is there any basis to find the search was justified for purposes of officer safety or preservation of evidence.⁴ Therefore Officer Olson violated Brock's rights under the Fourth Amendment and article 1, section 7, by conducting a warrantless search of his backpack.

Upon his initial encounter with Olson, Brock was separated from his backpack when Olson had directed him to set it aside and submit to a frisk for weapons. Following the frisk, which produced no weapons, Olson asked Brock for identification information and then took the backpack and secured it in his patrol car while he checked the accuracy of the information Brock had provided. 1RP 25-30, 57. Unable to validate the identification information, Olson arrested Brock for providing false information, but did not handcuff him. 1RP 33, 35-36, 38.

⁴ In fact, the trial court's unchallenged factual finding was that Officer Olson "did not articulate any officer safety reason to search the backpack." CP 61-62 (finding of fact J).

At that point Olson returned to his patrol car and conducted a preliminary search of the backpack to try to determine Brock's true identity, believing it authorized as a "search incident to arrest." CP 62 (unchallenged finding of fact J). In the process Olson discovered a small bag of marijuana, a small bag of methamphetamine, and a "green inmate DOC badge" with Brock's picture and name on it. 1RP 40-43. Olson, now 10 minutes into the encounter, handcuffed Brock and secured him in the back of his patrol car. CP 62 (unchallenged finding of fact Q); 1RP 44, 58. Olson then conducted a more thorough search of the backpack and discovered the evidence leading to the identify theft and forgery charges and more suspected drugs and drug paraphernalia. 1RP 48-50.

Officer Olson candidly admitted that when he placed Brock under custodial arrest, Brock did not have possession of the backpack, nor had it been in his possession immediately preceding the arrest as Olson had seized it very early in the encounter. 1RP 32. Likewise, the record provides no basis to conclude Officer Olson searched the backpack out of fear it contained a weapon Brock could access or evidence he might try to destroy. To the contrary, Olson admitted that once he seized it, Brock had no access to the backpack whatsoever. 1RP 57.

Officer Olson attempted to justify his initial search of the backpack in part on grounds that he was trying to establish Brock's true identity. CP

61 (finding of fact J). Olson attempted to justify his subsequent and more thorough search of the backpack at least in part on grounds that it was required before the jail would take possession of Brock's belongings once he was booked. CP 62 (finding of fact N). While establishing Brock's true identity and attempting to comply with jail policies may be worthy goals, these are not recognized as exception to the warrant requirement.

Furthermore, as discussed in more detail in section C.2, infra, even if Olson could have done an inventory search before or after arriving at the jail, this does not cure the taint of the prior illegal search, because Washington does not recognize the “good faith” or “inevitable discovery” doctrines. State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009); State v. Afana, 169 Wn.2d 169, 184, 233 P.3d 879 (2010).

In sum, Brock no longer had access to the backpack or its contents since shortly after encountering Officer Olson, there was no threat to officer safety, and therefore there was no possibility that evidence related to his arrest for providing false information could be destroyed. Under Chimel, Gant, Patton, Valdez, Byrd and MacDicken, the warrantless search of Brock's backpack was unconstitutional, and all evidence seized as a result should have been suppressed. See Ruem, 179 Wn.2d at 208-09; Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The trial court's failure to suppress requires reversal, and the

Court of Appeals correctly concluded as much. This Court should affirm.

2. OFFICER OLSON'S VIOLATION OF BROCK'S ARTICLE 1, SECTION 7 RIGHTS OCCURRED WELL BEFORE ANY INVENTORY SEARCH WAS CONDUCTED.

In an attempted end-run around the "time of arrest" rule, the prosecution argues that even if the initial search that revealed Brock's true identity and the drug evidence was not a lawful search incident to arrest, the subsequent more thorough search was a lawful "inventory search." Petition for Review at 13-16. The prosecution is wrong.

Under art. 1, section 7, inventory searches are permitted without a warrant "because they (1) protect the . . . owner's (or occupants') property, (2) protect law enforcement agencies/officers and temporary storage bailees from false claims of theft, and (3) protect police officers and the public from potential danger." State v. Tyler, 177 Wn.2d 690, 701, 302 P.3d 165 (2013). But searches conducted for purposes of criminal investigatory do not fall within the inventory search exception. Id.

After Tyler, the Court of Appeals affirmed a trial court's determination that receipts found during a warrantless search of a car after arrest of its driver were not admissible under the "inventory search" exception. State v. Green, 177 Wn. App. 332, 340-43, 312 P.3d 669 (2013). Division One agreed with the trial court's determination that the officer's

admission "that his seizure of the receipts was for investigatory purposes and that he 'really didn't know at that point' whether the receipts were evidence of any criminal activity" meant the receipts were not discovered within scope of a lawful inventory search. Id. at 643. As in Green, here Officer Olson's initial search was for investigative purposes as he was attempting to confirm Brock had given him false identification information. CP 62 (unchallenged finding of fact J).

The Green court noted State v. Montague, 73 Wn.2d 381, 438 P.2d 571 (1968), presents a significantly different factual scenario that led to the opposite result. Green, 177 Wn. App. at 641-42. In Montague, the defendant was pulled over for a traffic infraction and he was unable to produce a valid driver's license or vehicle registration. Police arrested him and impounded his car. Per police procedure, prior to impoundment the car had to be searched for valuables and any valuables found listed on a property card. While conducting the search, an officer looked in a brown paper bag on the floor of the car and found it contained eight small plastic bags filled with what appeared to be marijuana. The defense motion to suppress was denied and a conviction for unlawful possession of marijuana followed. 73 Wn.2d at 382-83. On appeal, this Court affirmed, stating:

When . . . the facts indicate a lawful arrest, followed by an inventory of the contents of the automobile preparatory to or following the impoundment of the car, and there is found to

be reasonable and proper justification for such impoundment, and where the search is not made as a general exploratory search for the purpose of finding evidence of a crime but is made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person's detention, property belonging to him, then we have no hesitancy in declaring such inventory reasonable and lawful, and evidence of crime found will not be suppressed.

73 Wn.2d 385 (emphasis added).

Here, Officer Olson informed Brock he was under arrest for providing false information, but did not handcuff him and instead informed him he was not necessarily going to jail as Olson's "investigation was just beginning." CP 61 (finding of fact H); 1RP 36, 39. Olson then investigated Brock's backpack by searching it to try to determine Brock's true identity. CP 61 (finding of fact J); 1RP 40-43. Clearly this was a search for evidence of a crime, because discovery of Brock's true identity would support Olson's claim Brock had committed the offense of providing false information.⁵

Importantly, this initial search was conducted before Olson had made a decision on whether to take Brock to jail. As such, it could not have been motivated by a need to conduct a pre-booking inventory of Brock's

⁵ See RCW 9A.76.175:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

belongings in order to protect his property, to protect against false claims of theft by Brock, or to "protect police officers and the public from potential danger." Tyler, 177 Wn.2d at 701. Rather, the search served a purely investigative purpose and therefore falls outside the scope of a lawful inventory search. Id.; Green, 177 Wn. App. at 342-43. And as discussed in section C.1., supra, neither was the search authorized incident to arrest because Block did not have actual possession of the backpack at the time of arrest or immediately before.

It was the investigative discoveries made during that unlawful initial search that ultimately prompted Olson to handcuff and jail Brock. The unlawful search of the backpack revealed Brock's true name, which in turn led to discovery of the warrant for arrest. CP 61-62 (findings of fact J - L). As such, it was the act of engaging in an unlawful search that led Olson into having to jail Brock because of the outstanding warrant, which led to the subsequent search of the backpack that revealed evidence of identify theft and forgery. All of it should have been suppressed, because it was all the product of the initial unlawful search. Ruem, 179 Wn.2d at 208-09.

D. CONCLUSION

For the reasons stated, this Court should affirm the Court of Appeals' decision in this matter.

DATED this 20th day of February 2015

Respectfully submitted,

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Attached for filing today is the supplemental brief of respondent for the case referenced below.

State v. Antoine Brock

No. 90751-0

Supplemental Brief of Respondent

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