

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
4/9/2019 11:39 AM  
BY SUSAN L. CARLSON  
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NO. 96847-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN J. SMITH,

Appellant.

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

The Honorable Charles R. Snyder, Judge

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REPLY IN SUPPORT OF  
PETITION FOR REVIEW

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A. PETITIONER DID NOT ABANDON HIS CLAIM THAT THE INSTRUCTIONS WERE CONSTITUTIONALLY INADEQUATE AS TO SUPERSEDING CAUSES BASED ON EVIDENCE BOTH OF A FAULTY HEADLIGHT AND AN AFTER-FACTORY SHIFTER.

Petitioner included in his Petition the claim that the Court of Appeals opinion presents a significant constitutional issue of due process and conflicts with *State v. Imokawa*, 4 Wn. App. 2d 545, 422 P.3d 502 (2018), review granted, 192 Wn.2d 1016 (2019). Petitioner for Review at 24-25.

The State argued in a footnote that in his Petition, Smith "appears to have abandoned" "his argument below that the headlight being off could have been a superseding cause of the collision." Contingent Cross Petition for Review at 4 n.4.

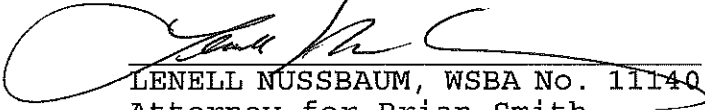
Smith fully briefed the *Imokawa* issues in his Supplemental Brief of Appellant Re: *State v. Imokawa*, filed in the Court of Appeals. The Court of Appeals opinion turned on the malfunctioning headlight facts, which it discussed. Slip Op. at 26-28. Petitioner discussed those facts again in the Petition for Review at 5-6. By focusing his limited argument space in a Petition for Review on the facts the Court of Appeals completely omitted from its opinion, Petitioner did not intend to

"abandon" his claim that the faulty headlight could be the superseding cause and that the instructions were not harmless beyond a reasonable doubt as to that superseding cause.

That error also is part of the significant constitutional issue presented by this case that warrants this Court's review. RAP 13.4(b)(3).

DATED this 9<sup>th</sup> day of April, 2019.

Respectfully submitted,

  
LENELL NUSSBAUM, WSBA No. 11140  
Attorney for Brian Smith

**LAW OFFICE OF LENELL NUSSBAUM PLLC**

**April 09, 2019 - 11:39 AM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 96847-1  
**Appellate Court Case Title:** State of Washington v. Brian J. Smith  
**Superior Court Case Number:** 14-1-01457-3

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