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SUPREME COURT
STATE OF WASHINGTON

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BY RONALD R. CARPENTER

SUPREME COURT NO. 84660-0

byh
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

YUSSUF ABDULLE,

Respondent.

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

The Honorable Barbara Mack, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED IN SUPPLEMENTAL BRIEF</u>	1
B. <u>SUPPLEMENTAL STATEMENT OF THE CASE</u>	2
C. <u>SUPPLEMENTAL ARGUMENT</u>	4
THE COURT OF APPEALS APPLIED THE LONGSTANDING AND WELL-REASONED RULE GOVERNING SUPPRESSION HEARINGS	4
1. <u>The State Failed to Meet its Burden of Proving a Knowing, Voluntary, and Intelligent Waiver</u>	4
2. <u>The Established Rule in <i>Davis</i> and <i>Erho</i> is Not “Incorrect and Harmful.” It Should Not be Abandoned.</u>	7
3. <u>This Court Should Reject Any Argument that <i>Davis</i> and <i>Erho</i> Create Additional Suppression Hearing Hurdles</u>	13
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Heinemann v. Whitman County</u> 105 Wn.2d 796, 718 P.2d 789 (1986).....	10
<u>In re Rights to Waters of Stranger Creek</u> 77 Wn.2d 649, 466 P.2d 508 (1970).....	8
<u>State v. Abdulle</u> 155 Wn. App. 1046, 2010 WL 1756792 (2010).....	4
<u>State v. Barber</u> ___ Wn.2d ___, ___ P.3d ___, 2011 WL 172088 (2011).....	8
<u>State v. Bartholomew</u> 101 Wn.2d 631, 683 P.2d 1079 (1984).....	10
<u>State v. Braun</u> 82 Wn.2d 157, 509 P.2d 742 (1973).....	8
<u>State v. D.R.</u> 84 Wn. App. 832, 930 P.2d 350 (1997) <u>rev. denied</u> , 132 Wn.2d 1015 (1997).....	5
<u>State v. Davis</u> 12 Wn. App. 288, 529 P.2d 1157 (1974).....	7
<u>State v. Davis</u> 73 Wn.2d 271, 438 P.2d 185 (1968).....	1, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14
<u>State v. Dodd</u> 8 Wn. App. 269, 505 P.2d 830 (1973).....	7
<u>State v. Erho</u> 77 Wn.2d 553, 463 P.2d 779 (1970).....	1, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14
<u>State v. Haack</u> 88 Wn. App. 423, 958 P.2d 1001 (1997) <u>rev. denied</u> , 134 Wn.2d 1016 (1998).....	5, 7, 13, 14

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Hensler</u> 109 Wn.2d 357, 745 P.2d 34 (1987).....	10
<u>State v. Huxoll</u> 38 Wn. App. 360, 685 P.2d 628 (1984) <u>rev. denied</u> , 102 Wn.2d 1021 (1984)	7
<u>State v. Kier</u> 164 Wn.2d 798, 194 P.3d 212 (2008).....	7
<u>State v. Lanning</u> 5 Wn. App. 426, 487 P.2d 785 (1971) <u>rev. denied</u> , 80 Wn.2d 1001 (1971)	7
<u>State v. Levy</u> 156 Wn.2d 709, 132 P.3d 1076 (2006).....	7, 14
<u>State v. Mark</u> 34 Wn. App. 349, 661 P.2d 157 (1983) <u>rev. denied</u> , 100 Wn.2d 1007 (1983)	7
<u>State v. Ruud</u> 6 Wn. App. 57, 491 P.2d 1351 (1971) <u>rev. denied</u> , 80 Wn.2d 1005 (1972)	7
 <u>FEDERAL CASES</u>	
<u>Culcombe v. Connecticut</u> 367 U.S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961).....	10
<u>Lego v. Twomey</u> 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972).....	8, 10
<u>Miranda v. Arizona</u> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	1, 4, 5, 6, 8, 9
<u>North Carolina v. Butler</u> 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979).....	5

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>United States v. Raddatz</u> 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980).....	12
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CrR 3.5	2
Drizin & Leo, et. al., <u>Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century</u> 2006 Wis. L. Rev. 479 (2006)	11, 12
Drizin & Leo <u>The Problem of False Confessions in the Post-DNA World</u> 82 N.C. L. Rev. 891 (2004)	12
Drizin & Reich <u>Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions</u> 52 Drake L. Rev. 619 (2004)	10, 11
Findley & Scott <u>The Multiple Dimensions of Tunnel Vision in Criminal Cases</u> 2006 Wis. L. Rev. 291 (2006)	11
Leo & Ofshe <u>The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations</u> 88 J. Crim. L. & Criminology 429 (1998)	11
Leo & Ofshe <u>The Decision to Confess Falsely: Rational Choice and Irrational Action</u> 74 Denv. U. L. Rev. 979 (1997)	12

TABLE OF AUTHORITIES (CONT'D)

	Page
Pepson & Sharifi	
<u>Lego v. Twomey: The Improbable Relationship Between An Obscure Supreme Court Decision and Wrongful Convictions</u> 47 Am. Crim. L. Rev. 1185 (2010).....	9, 10
White	
<u>False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions</u> 32 Harv. C.R.-C.L. L. Rev. 105 (1997)	11
U.S. Const. Amend. V	4

A. ISSUES PRESENTED IN SUPPLEMENTAL BRIEF

1. In State v. Davis¹ and State v. Erho,² this Court set forth a clear rule. The rule makes sense and remains fully supported today. Where the Court of Appeals properly followed this Court's authority, should the decision be affirmed?

2. Under Davis and Erho, when an alleged waiver of Miranda³ rights is disputed and the State fails to present potentially corroborating evidence within its control; it fails to meet its burden of proving a knowing, intelligent, and voluntary waiver. Here, the State failed to support the disputed testimony of the interrogating detective with the testimony of the other detective who also witnessed the interrogation. Did the Court of Appeals properly rely on settled authority to hold Respondent's custodial statements were inadmissible?

3. This Court has recognized the compulsion inherent in custodial questioning and the danger associated with improperly compelled confessions. The holdings in Erho and Davis ensure the validity of an alleged waiver is based upon more than a "swearing contest"

¹ State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968).

² State v. Erho, 77 Wn.2d 553, 463 P.2d 779 (1970).

³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

between the accused and the interrogating officer when independent evidence exists. Should this Court adhere to stare decisis and reject the State's attempt to disrupt the settled and well-reasoned law?

B. SUPPLEMENTAL STATEMENT OF THE CASE⁴

On August 13, 2008, Detective Steven Hoover arrested Yussuf Abdulle on suspicion of forgery for an incident that occurred June 9, 2008. After arresting him, Hoover put Abdulle in the back seat of a police car on the passenger side. Hoover sat next to Abdulle, behind the driver, Detective Rich Newell. The car was a regular, unmarked sedan. Hoover said it was not equipped with a "silent partner." He identified no screening or barrier between the front and back seats. Abdulle said Hoover and Newell talked to each other inside the car, but he was unable to focus on what was said because he was nervous and afraid he would be arrested and lose his job. 1RP 10-11, 48, 59.⁵ The King County prosecutor charged Abdulle with two counts of forgery on November 17, 2008. CP 1-5.

Prior to trial, the State sought to introduce custodial statements Abdulle made to police. At the CrR 3.5 hearing, Abdulle and Hoover's

⁴ A detailed statement of facts is presented in the Brief of Appellant (BOA), at pages 3-12.

⁵ The index to the citations to the record is found in the BOA at 1, n.1.

descriptions of the events relating to Abdulle's alleged waiver of his right to counsel and to remain silent differed substantially. Hoover admitted Abdulle unequivocally requested counsel during the interrogation, but claimed Abdulle later agreed to talk to in exchange for a cigarette and glass of water. 1RP 16-19, 25, 29, 32.

Abdulle said Hoover continued to show him photographs, comment on his immigration status, and question him about the case after he requested counsel. Abdulle denied he ever asked Hoover questions, and only asked Hoover to return the cigarettes Hoover had taken from him. Abdulle intended to remain silent and not answer questions after his request for counsel. 1RP 49-52, 62-64. Hoover admitted he engaged in "chit-chat" following Abdulle's unequivocal request for counsel but claimed the "chit-chat" did not involve questions about the case. 1RP 17-19, 29, 32.

The State did not produce Newell, or explain his absence. Nonetheless, the State asked the trial court to believe Hoover's testimony to find a voluntary waiver. 1RP 67, 74-75. Accepting Hoover's testimony as more credible and reliable, the court found the statements admissible. 1RP 81-83.

Relying on this Court's decisions in Erho, 77 Wn.2d 553, and Davis, 73 Wn.2d 271, the Court of Appeals reversed. The court concluded

that when an accused denies waiving the right to counsel, and the State, without explanation, fails to call other officers who were present to corroborate the interrogating officer's testimony, the accused's alleged statements are inadmissible. State v. Abdulle, 155 Wn. App. 1046, 2010 WL 1756792, *1 (2010).

The State sought review of the Court of Appeals decision, suggesting the holdings of Davis and Erho misinterpret Miranda.⁶ See Petition for Review. This Court granted review on November 30, 2010.

C. SUPPLEMENTAL ARGUMENT⁷

THE COURT OF APPEALS APPLIED THE LONGSTANDING
AND WELL-REASONED RULE GOVERNING SUPPRESSION
HEARINGS

1. The State Failed to Meet its Burden of Proving a
Knowing, Voluntary, and Intelligent Waiver

Custodial statements made by an accused are inadmissible unless preceded by (1) a full advisement of rights, and (2) a voluntary, intelligent and knowing waiver of rights, including the right to have counsel present at questioning. U.S. Const. Amend. V; Miranda, 384 U.S. at 469-73. The

⁶ The State does not dispute admission of Abdulle's alleged custodial statements was prejudicial and has not sought review of that holding. The Court of Appeals also held Abdulle's argument was properly raised on appeal, and the state has not sought review of that holding.

⁷ Abdulle incorporates the arguments in his BOA at 12-20, Reply Brief of Appellant at 1-10, and Answer to State's Petition for Review at 1-10.

State bears the burden of showing an alleged waiver was voluntary, knowing, and intelligent. North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979); Miranda, 384 U.S. at 474-75; State v. D.R., 84 Wn. App. 832, 835, 930 P.2d 350 (1997), rev. denied, 132 Wn.2d 1015 (1997).

The rule of law governing suppression hearings in Washington is well established: when the voluntariness of an alleged waiver is disputed, and the State has control over independent evidence, the State must either present it or explain its absence on the record. Erho, 77 Wn.2d at 557; Davis, 73 Wn.2d at 271; State v. Haack, 88 Wn. App. 423, 433-34, 958 P.2d 1001 (1997), rev. denied, 134 Wn.2d 1016 (1998).

This case presents the same type of "swearing contest" at issue in Davis and Erho. In Davis, Belknap was convicted of attempted escape from jail. The court held a pre-trial hearing on Belknap's motion to suppress statements he allegedly made to police after his arrest. Davis, at 274. Although two police officers were present when Belknap was questioned, only the police captain and Belknap testified at the suppression hearing. Relying on the captain's version of events, the trial court found Belknap had validly waived his Miranda rights and denied the motion to suppress. Davis, 73 Wn.2d at 275.

This Court held the State failed to meet its burden to prove the validity of Belknap's alleged waiver. The Court's opinion referred to six factors it has traditionally considered in deciding whether an admission had not followed a valid waiver. Davis, 73 Wn.2d at 282-83. First, the statement was made while Belknap was in police custody. Second, the court assumed the police had both the opportunity and the means readily available to establish substantial corroborating evidence. Third, the only evidence of waiver the State presented was the testimony of one interrogating officer. Fourth, no evidence corroborated the officer's testimony. Fifth, Belknap completely contradicted the officer's testimony. Finally, the prosecution failed to produce the only other witness present during the interrogation, another officer, nor did it explain his absence. Finding this last element determinative, the Court reversed and remanded the case based on the State's failure to meet its burden. Davis, 73 Wn.2d at 285-88.

The Erho facts are similar. Despite the presence of four officers at the scene of the arrest and two officers accompanying Erho in the patrol car, the State produced only one officer's testimony regarding Miranda warnings. Erho, 77 Wn.2d at 556-58. In direct contradiction to the interrogating officer's testimony, Erho testified the police read no

warnings at the time of his arrest or before reaching the police station.
Erho, 77 Wn.2d at 558.

The Court of Appeals properly found Davis and Erho control this case. The State attempted to establish a voluntary waiver based on a “swearing contest” between Abdulle and Hoover even though it had access to Newell’s testimony. The State failed to explain why it did not call Newell, the only other witness to the interrogation and alleged waiver, nor did it explain his absence. By failing to do either, the State failed to present sufficient evidence of waiver.

2. The Established Rule in *Davis* and *Erho* is Not “Incorrect and Harmful.” It Should Not be Abandoned.

Washington courts have consistently applied the Davis and Erho rule in numerous cases over a 40-year period.⁸ The decisions are an established rule of law which should only be changed for the most compelling reasons. See, e.g., State v. Kier, 164 Wn.2d 798, 804-05, 194 P.3d 212 (2008) (the burden is on the party seeking to overrule a decision

⁸ State v. Ruud, 6 Wn. App. 57, 61, 491 P.2d 1351 (1971), rev. denied, 80 Wn.2d 1005 (1972); State v. Lanning, 5 Wn. App. 426, 432, 487 P.2d 785 (1971), rev. denied, 80 Wn.2d 1001 (1971); State v. Davis, 12 Wn. App. 288, 291-92, 529 P.2d 1157 (1974); State v. Dodd, 8 Wn. App. 269, 274, 505 P.2d 830 (1973); State v. Mark, 34 Wn. App. 349, 351-52, 661 P.2d 157 (1983), rev. denied, 100 Wn.2d 1007 (1983); State v. Huxoll, 38 Wn. App. 360, 363-64, 685 P.2d 628 (1984), rev. denied, 102 Wn.2d 1021 (1984); Haack, 88 Wn. App. at 433-34; State v. Levy, 156 Wn.2d 709, 728, 132 P.3d 1076 (2006).

to show that it is both incorrect and harmful); In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (“The doctrine [of stare decisis] requires a clear showing that an established rule is incorrect and harmful before it is abandoned”).⁹ The State cannot show why the established rule in Davis and Erho is incorrect and harmful, or should be abandoned.

The State argues Davis and Erho misinterpret Miranda in light of subsequent cases discussing the proper burden of proof at suppression hearings. Petition at 7 (citing Lego v. Twomey, 404 U.S. 477, 484, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972)); but see, State v. Braun, 82 Wn.2d 157, 162, 509 P.2d 742 (1973) (citing both Lego and Davis with approval)). But the concerns addressed by Davis and Erho are not contingent on a specific burden of proof standard, but rather on ensuring “some firmer guaranty that constitutional rights have been observed . . . than can be provided by a mere ‘swearing contest’ between the accused and one interrogating police officer.” Davis, 73 Wn.2d at 287-88; Erho, 77 Wn.2d at 559.

⁹ This Court recently confirmed the standard is conjunctive; requiring a clear showing the established rule is “both harmful *and* incorrect.” State v. Barber, ___ Wn.2d ___, ___ P.3d ___, 2011 WL 172088 *12 (83640-0, filed January 20, 2011) (emphasis in original).

As Davis and Erho recognized, Miranda's factual criteria for determining the validity of an alleged waiver are of "little value in determining whether the police in a particular case have followed the mandate of Miranda, if the only proof relative to such criteria is the testimony of one interrogating officer – the very person who allegedly violated the accused's constitutional rights." Davis, 73 Wn.2d at 286; Erho, 77 Wn.2d at 557-58. Indeed, Erho recognized when the admissibility of a confession comes down to a "swearing contest," trial courts routinely find the officer more credible than the accused. Erho, 77 Wn.2d at 558. Erho's finding is even more prevalent today:

The empirical data and scholarship concerning the practical realities on the ground (i.e., in the courtroom), moreover, has illuminated a disturbing trend: police officers commonly commit perjury at suppression hearings, trial judges often accept that perjured testimony based, in part, on the low standard of proof employed at those hearings, which then, in turn, leads to wrongful convictions based on erroneously admitted evidence.

Pepson & Sharifi, Lego v. Twomey: The Improbable Relationship Between An Obscure Supreme Court Decision and Wrongful Convictions, 47 Am. Crim. L. Rev. 1185, 1227 (2010).

The State of Washington has an interest in the fairness and integrity of its criminal justice system, and this Court has made clear the admission of unreliable evidence offends the principle of fairness

embodied in the right to due process. See State v. Bartholomew, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984) (“We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability.”) See also, Culcombe v. Connecticut, 367 U.S. 568, 581, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961) (The goal of ensuring the voluntariness of confessions is that the “engine of the criminal law is not to be used to overreach individuals who stand helpless against it.”)

The holdings of Davis and Erho remain consistent with this Court’s concerns – pre-and post-Lego – that the compulsion and coercion inherent in custodial questioning raises reliability concerns. See State v. Hensler, 109 Wn.2d 357, 362, 745 P.2d 34 (1987) (citing Heinemann v. Whitman County, 105 Wn.2d 796, 806, 718 P.2d 789 (1986) (“The overall concern of our prior cases is with the dual purposes of (1) protecting the individual from the potentiality of compulsion or coerced inherent in in-custody interrogation, and (2) protecting the individual from deceptive practices of interrogation.”)

Contrary to past assumptions that false confessions were rare and due to physical coercion, recent empirical studies show that standard interrogation techniques produce false confessions.¹⁰ Because

¹⁰ See Pepson & Sharifi, Lego v. Twomey, 47 Am. Crim. L. Rev. 1185; Drizin & Reich, Heeding the Lessons of History: The Need for Mandatory

interrogations proceed from a presumption of guilt, the purpose of an interrogation is not to elicit information, but to elicit a confession. See Findley & Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 334 (2006) (“[I]nterrogation process [is] designed to break suspects down, convince them that they are doomed, and then make a confession appear to be a rational or risk-reducing choice.”) Consequently, in order to move a person from denial to admission, interrogators use a number of tactics which also increase the risk of a false confession:

Interrogators try to break down a suspect’s anticipated resistance by: repeatedly accusing the suspect of committing the crime and lying about it; cutting off and interrupting denials; attacking alibis or assertions of innocence as illogical, implausible, or untrue; insisting that no one will believe the suspect’s protestations of innocence; and, most importantly, accumulating real or fabricated evidence said to prove the suspect’s guilt incontrovertibly.

Drizin & Leo, et. al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479, 516

Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions, 52 Drake L. Rev. 619, 634 (2004); White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 108-09 (1997); Leo & Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations*, 88 J. Crim. L. & Criminology 429, 472-96 (1998).

(2006); Leo & Ofshe, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Denv. U. L. Rev. 979 (1997).

Moreover, studies suggest a false confessor whose case goes to trial faces a 75 to 80 percent chance of conviction. Drizin & Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891, 960-62 (2004); Leo & Ofshe, 88 J. Crim. L. & Criminology at 483-84. See also United States v. Raddatz, 447 U.S. 667, 677-78, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980) (“the resolution of a suppression motion can and often does determine the outcome of the case[.]”). Other comprehensive studies indicate false confessions contribute to between 14 and 25 percent of erroneous convictions. Drizin & Leo, 82 N.C. L. Rev. at 906-07. Altogether, Drizin and Leo documented 125 proven false confessions between 1971 and 2002, with 31 percent taking place between 1998 and 2003. Drizin & Leo, 82 N.C. L. Rev. at 932.

The danger of a wrongful conviction based on a false confession is precisely the kind of injustice the holdings in Davis and Erho seek to prevent. As the above scholarship shows, the dangers of false confessions are as prevalent, and the reasons for the rule remain as pressing, as they were in 1968. The State cannot show why the rule set forth in Davis and Erho is harmful and incorrect, or should be abandoned.

3. This Court Should Reject Any Argument that *Davis* and *Erho* Create Additional Suppression Hearing Hurdles

The State may claim, as it does in its petition, that Davis and Erho create a barrier to admissibility that is “an empty gesture that wastes significant public resources and judicial time.” Petition at 8, 10. This Court should reject any such claim under the Court of Appeals decision in Haack, 88 Wn. App. 423.

In Haack, the State presented no corroborating evidence during a pretrial suppression hearing because none existed. A single officer was present during Haack’s alleged waiver and subsequent interrogation. Haack appealed the finding of admissibility, claiming the lack of additional officers or witnesses at his interrogation violated Erho’s corroboration rule.

The court affirmed Haack’s conviction, clarifying the State need not present independent corroborating evidence “in every instance in which the defendant disputes the giving of warnings and intelligent waiver of the right to remain silent.” Rather, “where such independent evidence exists, it must either be presented or the State must explain on the record why the evidence is not being presented.” Haack, 88 Wn. App. at 433.

Haack does not change Erho or Davis, it merely clarifies that police need not use multiple officers to interrogate a person, nor must

police obtain written acknowledgment of waiver. Haack, 88 Wn. App. at 433-35. See also Levy, 156 Wn.2d at 728 (upholding Court of Appeals finding that an officer who participated in the search of a car was not required to testify under Davis because his testimony would have been cumulative as several other officers also participated in the search). Haack thus ensures the State's "parade of horrors" never leaves the starting line.

The Court of Appeals properly applied the longstanding rule of law governing suppression hearings in Washington. The Court of Appeals decision is consistent with Davis, Erho, and Haack and should be affirmed.

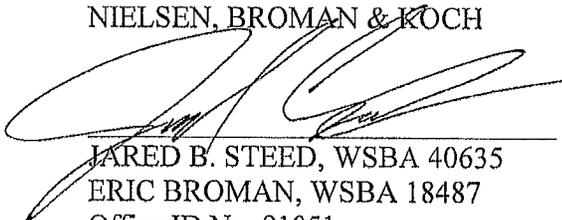
D. CONCLUSION

This Court should affirm the Court of Appeals, and reverse Abdulle's conviction and remand for a new trial.

DATED this 31st day of January, 2011.

Respectfully submitted,

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YUSSUF ABDULLE,

Respondent.

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NO. 84660-0

CLERK

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF JANUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE SUPPLEMENTAL BRIEF OF RESPONDENT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KING COUNTY PROS/APPELLATE UNIT SUPERVISOR
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SEATTLE, WA 98106

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JANUARY, 2011.

x Patrick Mayovsky

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