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Supreme Court No. 90188-1  
Court of Appeals No. 29056-5-III

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

CHAD EDWARD DUNCAN,  
Defendant/Petitioner.

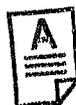
APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT  
Honorable Blaine G. Gibson, Suppression Hearings  
Honorable James C. Lust, Trial/Sentencing Hearings

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SUPPLEMENTAL BRIEF OF PETITIONER

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**A. ISSUES PRESENTED**

1. Since the directive to pay LFO's was based on unsupported findings of ability to pay, whether the matter should be remanded for the sentencing court to make individualized inquiry into Mr. Duncan's current and future ability to pay before imposing LFOs including costs of incarceration and medical care?

2. Whether a police officer's warrantless search of a car violates Article 1, Section 7 of the Washington Constitution when performed as a "protective sweep" of a vehicle for guns, where all occupants are handcuffed and detained in a patrol car?

**B. SUPPLEMENTAL STATEMENT OF THE CASE**

Petitioner incorporates the facts as stated in his brief and reply brief of appellant and petition for review. The following clarification is provided as to the facts recited by the Court of Appeals regarding discovery of the gun at *Slip Opinion*, p. 13–14

After the three occupants of the car were frisked, handcuffed, and placed in separate patrol cars, the officers performed what they later described as "clearing the vehicle" or a "protective sweep," including popping the trunk open. RP 2/14/11 at 71, 81–82, 93. During that process, from outside the driver's side of the vehicle Officer Jeff Ely saw

through the open door aluminum shell casings on the floorboard and seat of the car *from what* appeared to be a small caliber handgun. RP 2/14/11 71–72, 120. From outside the car Officer Marc Scherzinger also saw the spent shell casings in the car. RP 2/14/11 93. The officers did not testify they saw a gun in the car at this time.

In what officers referred to as a subsequent "frisk" of the inside of the car ostensibly to prevent possible discharge risks in towing if any gun were in the car, they opened the front passenger door and saw a handgun between the passenger door and the seat. RP 2/14/11 72–73, 101–02. According to the trial court's conclusions of law, the firearm had not been visible from outside the vehicle. CP 207 (¶ 6). Officer Ely seized the gun and placed it in his car. The car was subsequently towed to an impound lot and the shell casings were retrieved during execution of a search warrant. RP 2/14/11 73–75.

### **C. SUPPLEMENTAL ARGUMENT**

1. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into Mr. Duncan's current and future ability to pay before imposing LFOs including costs of incarceration and medical care.

There is insufficient evidence to support the trial court's finding that Mr. Duncan has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47–48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915–16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12 and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 9.94A.760(2)<sup>1</sup> and RCW 70.48.130<sup>2</sup> provide, respectively, that if the

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<sup>1</sup> In pertinent part, RCW 9.94A.760, Legal Financial Obligations, provides:  
(2) If the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration, the court may require the offender to pay for the cost of incarceration at a rate of fifty dollars per day of incarceration,

court determines an offender has the means to do so, it may require the offender to pay for the cost of incarceration and/or medical care. RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay

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if incarcerated in a prison, or the court may require the offender to pay the actual cost of incarceration per day of incarceration, if incarcerated in a county jail. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision shall take precedence over the payment of the cost of incarceration ordered by the court. All funds recovered from offenders for the cost of incarceration in the county jail shall be remitted to the county and the costs of incarceration in a prison shall be remitted to the department.

<sup>2</sup> In pertinent part, RCW 70.48.130, Emergency or necessary medical and health care for confined persons--Reimbursement procedures--Conditions—Limitations, provides:

...

(4) As part of the screening process upon booking or preparation of an inmate into jail, general information concerning the inmate's ability to pay for medical care shall be identified, including insurance or other medical benefits or resources to which an inmate is entitled. The inmate may also be evaluated for medicaid eligibility and, if deemed potentially eligible, enrolled in medicaid. This information shall be made available to the authority, the governing unit, and any provider of health care services. To the extent that federal law allows, a jail or the jail's designee is authorized to act on behalf of a confined person for purposes of applying for medicaid.

(5) The governing unit or provider may obtain reimbursement from the confined person for the cost of health care services not provided under chapter 74.09 RCW, including reimbursement from any insurance program or from other medical benefit programs available to the confined person. Nothing in this chapter precludes civil or criminal remedies to recover the costs of medical care provided jail inmates or paid for on behalf of inmates by the governing unit. As part of a judgment and sentence, the courts are authorized to order defendants to repay all or part of the medical costs incurred by the governing unit or provider during confinement.

(6) To the extent that a confined person is unable to be financially responsible for medical care and is ineligible for the authority's medical care programs under chapter 74.09 RCW, or for coverage from private sources, and in the absence of an interlocal agreement or other contracts to the contrary, the governing unit may obtain reimbursement for the cost of such medical services from the unit of government whose law enforcement officers initiated the charges on which the person is being held in the jail: PROVIDED, That reimbursement for the cost of such services shall be by the state for state

costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), 344 P.3d at 685. “This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.” *Id.* The remedy for a trial court’s failure to make this inquiry is remand for a new sentencing hearing. *Id.*

*Blazina* further held trial courts should look to the comment in court rule GR 34 for guidance. *Id.* This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id.* (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or

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prisoners being held in a jail who are accused of either escaping from a state facility or of committing an offense in a state facility.

food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id.* at 915–16. The individualized inquiry must be made on the record. *Blazina*, 182 Wn.2d 827, 344 P.3d at 685.

Here, the judgment and sentence contains a boilerplate statement that the trial court has "considered" Mr. Duncan's present or future ability to pay legal financial obligations. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939,

845 P.2d 1331 (1993)). The trial court's determination “as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ” *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, despite the boilerplate language in the judgment and sentence, the record does not show the trial court took into account Mr. Duncan’s financial resources and the potential burden of imposing LFOs on him, including the means to pay costs of incarceration and costs of medical care. *See* 7 RP 991–93. Despite finding him indigent for this appeal, the Court failed to “conduct on the record an individualized inquiry into [Mr. Duncan’s] current and future ability to pay in light of such nonexclusive factors as the circumstances of his incarceration and his

other debts, including nondiscretionary legal financial obligations, and the factors for determining indigency status under CR 34” as is required by *Blazina*. Washington Supreme Court orders dated August 5, 2015, pp. 1–2, in *State v. Mickle* (90650-5/31629-7-III) and *State v. Bolton* (90550-9/31572-6-III) (granting Petitions for Review and remanding cases to the superior court “to reconsider the imposition of the discretionary legal financial obligations consistent with the requirements” of *Blazina*).

The boilerplate finding that Mr. Duncan has the present or future ability to pay LFOs is not supported by the record. The matter should be remanded for the sentencing court to make an individualized inquiry into Duncan’s current and future ability to pay before imposing LFOs including costs of incarceration and medical care. *Blazina*, 344 P.3d at 685.

The superior court’s denial of Mr. Duncan’s pro se motion to terminate LFOs does not render his appeal issue moot or render remand unnecessary. Whatever consideration was given by the court to petitioner’s ability to pay in context of possibly terminating LFOs is irrelevant to the issue whether the discretionary LFOs should have been imposed in the first place. Such consideration also does not render remand unnecessary, as the superior court must re-consider whether to impose no,

all or some discretionary LFOs after making individualized inquiry into petitioner's current or future ability to pay.

A motion for post-judgment relief encounters quite different standards than inquiry into current or future ability to pay. The court may reduce or convert costs only if payment imposes a manifest hardship on the defendant or the defendant's family *and* the defendant is not in contumacious default. RCW 10.01.160(4); RCW 9.94A.6333(2)(c)(iii), (d); RCW 9.94B.040(3)(d). Non-restitution interest accrued during incarceration shall be waived following release from confinement on a motion by the defendant only if the interest creates a hardship (RCW 10.82.090(2)(a)) and other non-restitution interest can be waived upon a motion after release from total confinement only if the individual has made a good faith effort to pay and the interest accrual is causing a significant hardship. RCW 10.82.090(2)(c). "Good faith effort" means that the offender has either (i) paid the principal amount in full; or (ii) made at least fifteen monthly payments within an eighteen-month period, excluding any payments mandatorily deducted by the department of corrections." *Id.* Restitution principal cannot be waived or modified, and restitution interest cannot be waived but can be reduced if the principal has been paid in full. RCW 10.82.090(2)(b). For purposes of reduction or

waiver of interest under subsections (a)(b) or (c), the court may reduce or waive interest on legal financial obligations only as an incentive for the offender to meet his or her legal financial obligations. RCW 10.82.090(2)(d).

None of these post-sentencing remission standards allow an offender such as Mr. Duncan to challenge the initial imposition of legal financial obligations made by the trial court on the basis of current or future inability to pay. Further, Department of Corrections is authorized to make mandatory deductions from inmate wages for repayment of the legal financial obligations actually imposed by the court. The department is constrained only by statutory guidelines setting forth specific formulas allowing for fluctuating amounts to be withheld, based on designated percentages and inmate account balances, assuring inmate accounts are not reduced below indigency levels RCW 72.11.020; RCW 72.09.111(1); RCW 72.09.015(15).

“A decision to grant or deny a motion to remit<sup>3</sup> LFOs is a determination of whether the defendant should be required to pay based on the conditions as they exist when the request is made. It does not alter or amend the judgment but rather changes the requirement of payment based

on a present showing that payment would impose manifest hardship.”  
*State v. Smits*, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009), as amended  
(Dec. 14, 2009) (footnote in original). Changing the requirement of  
payment does not alter the LFOs assessed in Mr. Duncan’s judgment and  
sentence. Remand is necessary to allow the superior court to re-consider  
whether to impose no, all or some discretionary LFOs after making  
individualized inquiry into his current or future ability to pay.

2. The warrantless search of his car for a gun violated Article 1,  
Section 7 because Mr. Duncan had been arrested and was not able to  
access a weapon or destroy evidence, and the State has failed to establish  
any other exception to the search warrant requirement.

Washington citizens have a constitutional right to privacy,  
guaranteed by the Washington State Constitution, although there are  
limited exceptions to this right. Wash. Const. art. I, § 7; *See State v.*  
*Snapp*, 174 Wn.2d 177, 187, 275 P.3d 289 (2012). Article 1, section 7 of  
the Washington State Constitution states that warrantless searches are per  
se unreasonable, subject to few limited drawn out exceptions. *Snapp*, 174  
Wn.2d at 187–88. Article 1, section 7 provides, “No person shall be

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<sup>3</sup> “Remit means (1) “To pardon or forgive;” (2) To abate or slacken, to mitigate  
damages....” BLACK’S LAW DICTIONARY 1409 (9th ed.2009).

disturbed in his private affairs, or his home invaded, without authority of law.”

In *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710 (2009), the United States Supreme Court held that warrantless searches of a vehicle do not violate a citizen’s right to due process when (1) the arrestee is within reaching distance of the passenger compartment at the time of the search or (2) it is reasonable to believe the vehicle contains evidence of the offense of arrest. *Gant*, 556 U.S. at 351. This Court subsequently held that the Washington State Constitution does not permit warrantless vehicle searches after the arrest of a recent occupant of that vehicle, when law enforcement has reasonable belief that evidence relevant to the crime of arrest is within. *Snapp*, 174 Wn.2d at 197. It ruled that reasonable belief and probable cause in the collecting of evidence from a vehicle, subject to warrantless search incident to arrest, violates article 1, section 7 of the Washington State Constitution. *Snapp*, 174 Wn.2d at 181–82 (citing *Gant*, 556 U.S. at 338). Specifically, after the suspect exits the vehicle and cannot access it, there is no longer a risk of police officer safety or the destruction of evidence. *State v. Valdez*, 167 Wn.2d 761, 775, 224 P.3d 751 (2009). After a suspect has been “ ‘secured and removed’ “ from their

vehicle, they cannot threaten law enforcement safety or destroy evidence. *Snapp*, 174 Wn.2d at 189 (quoting *Valdez*, 167 Wn.2d at 777).

a. Scope of the protective sweep was unlawful.

Petitioner's fundamental position is that the opening of the vehicle door during the protective sweep was unlawful under *Gant*, *Snapp* and progeny. Under the Washington Constitution, a valid investigatory stop may include a protective sweep of the suspect's vehicle when the search is necessary to assure officer safety. *State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986). The protective sweep must be objectively reasonable. *State v. Larson*, 88 Wn. App. 849, 853–54, 946 P.2d 1212 (1997). A protective sweep is a “quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a  **cursory visual inspection**  of those places in which a person might be hiding.” *Maryland v. Buie*, 494 U.S. 325, 327, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) (emphasis added). In the context of a search incident to an arrest, a protective sweep is lawful where there are “articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Buie*, 494 U.S. at 334.

Permissible protective sweeps are not limited to buildings; concerns for officers' personal safety may justify the search of a vehicle in the course of a *Terry* stop to confirm that no one else is inside. *E.g.*, *United States v. Thomas*, 249 F.3d 725 (8th Cir.2001). However, a protective sweep may include opening the door of a vehicle only if the nature of the vehicle prevents officers from seeing whether additional occupants are inside. *See id.*

In *Thomas*, the vehicle being searched was a large passenger van with a sheet hanging behind the driver and front passenger seats. “[T]he officers had reasonable suspicion to believe that Thomas [who was driving a van] had just committed an armed bank robbery. In order to protect their safety while they stopped Thomas, the officers needed to ensure that others would not be emerging from the van. Unlike the typical vehicle, the officers could not see inside the van from the outside, making it necessary to enter the van to determine if it contained additional occupants.... We agree with the district court that the search of the van was reasonably necessary for the officers' personal safety in conducting the stop because other occupants in the van could pose a significant danger to the officers. Thus, having lawfully been in the van searching for occupants, the items

that were in plain view of the officers could be seized as evidence without a warrant.” *Thomas*, 249 F.3d at 729-30.

In *United States v. Jones*, 471 F.3d 868 (8th Cir. 2006), the vehicle being searched had heavily tinted side and rear windows, “preventing any view into the back seat, even with a flashlight. Although the front windshield was clear, the tall split-bench front seat also obscured any view of the back seat.” *Id* at 870–71. The court concluded the officers entered the vehicle lawfully during the protective sweep and were authorized to seize a gun and drugs in plain view because, “ ‘[i]n order to protect their safety ..., the officers needed to ensure that others would not be emerging from the [vehicle]’ and ‘the officers could not see inside the [vehicle] from the outside, making it necessary to enter the [vehicle] to determine if it contained additional occupants.’ ” *Jones*, 471 F.3d at 875, citing *Thomas*, 249 F.3d at 729-30.

Unlike the atypical vehicles in *Thomas* and *Jones*, there was nothing in this record to suggest police could not easily see into the car—indeed, they were able to see tiny shell casings from their vantage point outside the car—or that they had an obstructed view of the interior. Police observed two passengers and a driver in the car at the time of the stop, and they had the three people safely locked away in separate patrol cars.

Officer safety was not reasonably at issue, there was sufficient time to request a search warrant, and the warrantless intrusion into the car by opening the passenger door was unlawful.

b. The unlawful intrusion leading to plain view does not justify seizure of the gun.

The plain view doctrine is an exception to the warrant requirement that applies after the police have intruded into an area where there is a reasonable expectation of privacy. *State v. O'Neill*, 148 Wn.2d 564, 582, 62 P.3d 489 (2003). "[T]he 'plain view' doctrine justifies a seizure only when the officer has lawful 'access' to the seized contraband under some prior Fourth Amendment justification and when the officer has probable cause to suspect that the item is connected with criminal activity." *State v. Gibson*, 152 Wn. App. 945, 954, 219 P.3d 964 (2009) (citing *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S. Ct. 3319, 77 L. Ed. 2d 1003 (1983)). If the requirements of the plain view doctrine are satisfied, then the object may be lawfully seized. *Kennedy*, 107 Wn.2d at 10.

The "plain view" doctrine allows officers to seize an item without a warrant if, *while acting in the scope of an otherwise authorized search*, they acquire probable cause to believe that the item is evidence of a crime. *State v. Johnson*, 104 Wn. App. 489, 501, 17 P.3d 3 (2001) (emphasis

added). As discussed above, police exceeded the scope of a lawful protective sweep and therefore did not have lawful access to the seized contraband. The gun was impermissibly seized by the officers.

c. Other exceptions to the warrant requirement do not apply.

There were no “exigent circumstances.” Where police have probable cause to conduct a search, they may do so without a warrant when “*they are confronted by emergencies and exigencies* which do not permit reasonable time and delay for a judicial officer to evaluate and act upon probable cause applications for warrants by police officers.” *State v. Ringer*, 100 Wn.2d 686, 701, 674 P.2d 1240 (1983) (citing *State v. Smith*, 88 Wn.2d 127, 135, 559 P.2d 970 (1977)). Here, there is no showing that any exigent circumstances existed.<sup>4</sup> The vehicle was lawfully parked at the side of a road, immobile and unoccupied. There were at least four officers at the scene of the detention and there apparently was very light traffic in the area. Presumably any one officer could have radioed or telephoned for a search warrant, while yet another could have watched over the car for safety reasons. There was no showing that exigent circumstances obviated the need to seek a warrant prior to the search, and

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<sup>4</sup> The time of night was certainly no hindrance for obtaining a telephonic search warrant. The stop of the car occurred on July 9, 2009, around 1:00 a.m. 1 RP 65–66, 70. Officer Ely was working swing shift at the time, 5:00 p.m. to 3:40 a.m. 1 RP 66. He was able to

the search of the car and trunk were therefore illegal.

The “open view” doctrine does not apply where police had intruded into a constitutionally protected space prior to observing the gun.

A further narrow exception to the exclusionary rule allows law enforcement to conduct a warrantless inventory search following lawful impoundment of a vehicle. *State v. Greenway*, 15 Wn. App. 216, 218, 547 P.2d 1231, *rev. denied*, 87 Wn.2d 1009 (1976). As noted by the Court of Appeals, the State does not advance a justification for lawful impoundment or rely upon the inventory exception. *Slip Opinion*, n.6 at 26.

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obtain a telephonic search warrant for the impounded car the following night, July 10, from a Yakima Municipal Court judge at 12:06 a.m. 3 RP 373–74.

**D. CONCLUSION**

For all these reasons, all fruits of the illegal search of the car and trunk must be suppressed and the matter remanded for retrial.

Alternatively the case should be remanded to make an individualized inquiry into Mr. Duncan's current and future ability to pay before imposing LFOs including costs of incarceration and medical care.

Respectfully submitted on September 28, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 28, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of supplemental brief of appellant:

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**Subject:** State v. Chad Edward Duncan, #90188-1

Dear Mr. Carpenter:

Please find attached the supplemental brief of Mr. Duncan, petitioner. Thank you.  
Susan Gasch

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