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NO. 91532-6

RECEIVED BY E-MAIL  
THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SAMALIA,

Petitioner.

---

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

---

PETITIONER'S SUPPLEMENTAL BRIEF

---

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A. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED

The modern convenience of a cell phone allows people to carry in their hands a tool that accesses a wealth of personal details. This Court and the United States Supreme Court have ruled that the quantity and quality of intimate information available on cell phones preclude warrantless searches. Adrian Samalia ran when a police officer confronted him about driving a stolen car and he left his cell phone in the car. The Court of Appeals could not unanimously agree whether inadvertently leaving behind a cell phone constitutes the voluntary relinquishment of a person's privacy interest in the information contained in his cell phone. Do the police lack authority of law to search a cell phone without a warrant when its owner unintentionally leaves it in a place that does not belong to him?

B. STATEMENT OF THE CASE

While on patrol, Officer Ryan Yates' license plate reader detected a stolen car. RP 33-34. The car's owner had reported it stolen two weeks earlier to Officer Yates. RP 31-33. The office followed the car and called for back-up, but when the car started pulling over, he activated his lights and signaled the car to stop. RP 34.

A male driver stepped out of the car. RP 35. Officer Yates pointed his gun at the driver and ordered him to get back inside the car. *Id.* The driver ran on foot. RP 35-36. Officer Yates chased him briefly but realized it would be too hard to follow him. RP 36. A female passenger in the car similarly fled but another officer caught her a few minutes later. RP 36.

After abandoning his chase, Officer Yates “returned to the stolen vehicle and began to search it.” CP 29; RP 46. “He found a cell phone in the center console of the vehicle.” CP 29. He was not sure if the phone was inside or on top of the center console. RP 46-47. He scrolled through the phone for information about the owner and looked for people the owner had relationships with like a mother or girlfriend. RP 49. He pushed the “contacts” button and tried calling several of the people listed as “contacts.” RP 48. After at least one unsuccessful call, he reached Deylene Telles. PR 49-50.

Officer Yates pretended to be from out of town. RP 56. He told Ms. Telles he found the phone at a bar and wanted to return it. *Id.* Ms. Telles agreed to meet Officer Yates. *Id.* Ms. Telles was Mr. Samalia’s former girlfriend and she wanted to “snoop in the phone.” RP 57.

When Ms. Telles arrived at the meeting place, two police officers arrested her for trespassing even though she was on a public sidewalk. RP 61. An officer dialed Mr. Samalia's phone and when Ms. Telles' phone rang, the officer took her phone out of her hands and asked, "who is this?" RP 61. Ms. Telles's phone displayed Adrian Samalia's name and picture from Facebook. *Id.* The officers questioned Ms. Telles about Mr. Samalia for one hour before letting her walk home. RP 62-63.

Officer Yates was not present when this exchange took place; he had given the phone to Sergeant Henne and did not know how Sergeant Henne had used the phone. RP 51-52. Later, Sergeant Henne told Officer Yates that Adrian Samalia was the phone's owner. CP 29-30. Officer Yates did not know Mr. Samalia but after receiving Sergeant Henne's information, he identified Mr. Samalia's photograph in the police database. CP 30.

Mr. Samalia was charged with possession of a stolen vehicle. CP 3. He moved to suppress the information gathered from the warrantless search of his cell phone. CP 5-10. The court denied the motion, finding Mr. Samalia did not have a reasonable expectation of privacy in the cell phone once he ran from the car without taking his cell phone. CP 30-31.

In a divided opinion, two judges from the Court of Appeals affirmed the cell phone search, ruling Mr. Samalia voluntarily abandoned it. *State v. Samalia*, 186 Wn.App. 224, 230, 344 P.3d 722, *rev. granted*, 183 Wn.2d 1017 (2015). The dissenting judge disagreed, reasoning that the privacy protections of article I, section 7 were not relinquished by leaving a cell phone inadvertently behind when fleeing from police. *Id.* at 237 (Siddoway, J., dissenting).

C. ARGUMENT

**The police seized and searched Mr. Samalia’s cell phone without a warrant or other authority of law, requiring suppression of any illegally seized evidence.**

1. *Cell phones contain a vast array of private information that require a valid warrant for the police to search their contents.*

Cell phones are a “pervasive and insistent part of daily life” and “as a category, [they] implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, and a purse.” *Riley v. California*, \_ U.S. \_\_\_, 134 S.Ct. 2473, 2484, 2488-89, 189 L.Ed.2d 430 (2014). By virtue of a cell phone’s “immense storage capacity,” and the type of data accessible, the “sum of an individual’s private life can be reconstructed.” *Id.* at 2489. “[A] cell phone search would typically expose to the government far *more* than the most

exhaustive search of a house.” *Id.* at 2491 (emphasis in original).

Because a cell phone contains an immense amount of personal information and does not pose a danger to police, “officers must generally secure a warrant before conducting” a search of a cell phone under the Fourth Amendment. *Riley*, 134 S.Ct at 2495.

*Riley* rejected the prosecution’s proposals for limited warrantless searches of cell phones. *Id.* at 2491-93. It refused to carve an exception to the warrant requirement for evidence relevant to the crime of arrest, the arrestee’s identity, or officer safety. *Id.* It would not permit the police to review the phone’s call log without a warrant. *Id.*; see *Sinclair v. State*, 118 A.3d 872, 887 (Md. 2015) (construing *Riley* to bar any manipulation of cell phone without warrant).

The warrant requirement serves two distinct constitutional protections. *Riley*, 134 S.C.t. at 2482, 2493-94; *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038–39, 29 L.Ed.2d 564 (1971). First, a magistrate’s scrutiny of the existence of probable cause ensures there is sufficient legal basis for the search. *Coolidge*, 403 U.S. at 467. Second, it ensures that the search “should be as limited as possible” so as to prevent the “rummaging in a person’s belongings.” *Id.* A warrant must be “carefully tailored to its justifications” and must

not “take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.” *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987). Because cell phones reveal “the privacies of life,” and modern technology “allows an individual to carry such information in his hand,” it is unreasonable to allow the police unlimited access to a person’s cell phone without a valid, tailored warrant or specifically proven exigency. *Riley*, 134 S.Ct. at 2495.

Before *Riley* addressed the Fourth Amendment’s prohibition on warrantless cell phone searches, this Court ruled that article I, section 7 requires a warrant for the police to view the information contained in and conveyed by a cell phone. *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). Article I, section 7<sup>1</sup> “is qualitatively different from the Fourth Amendment.” *Id.*; U.S. Const. amend. 4.<sup>2</sup> It “clearly recognizes an individual’s right to privacy with no express limitations.” *Hinton*, 179 Wn.2d at 868 (internal citations omitted). Under article I,

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<sup>1</sup> Article I, section 7 provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

<sup>2</sup> The Fourth Amendment provides:

section 7, the State may not disturb “an individual’s private affairs without authority of law.” *State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012).

A cell phone’s data is a private affair under article I, section 7 because the type of information revealed includes intimate details of a person’s activities and associations that have been historically protected in Washington. *Hinton*, 179 Wn.2d at 869-70; *see, e.g., State v. Miles*, 160 Wn.2d 236, 245-46, 156 P.3d 864 (2007) (“a person’s banking records are within the constitutional protection of private affairs” because they “potentially reveal[ ] sensitive personal information” including what a person buys, organizations they support, and where they travel); *State v. Jordan*, 160 Wn.2d. 121, 129, 156 P.3d 893 (2007) (motel registry reveals intimate details “about a person’s activities and associations,” constituting private affair); *State v. Jackson*, 150 Wn.2d 251, 261-62, 76 P.3d 217 (2003) (GPS tracking of a vehicle requires a warrant because a person’s movements shows “preferences, alignments,

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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

associations, personal ails and foibles”); *State v. Boland*, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990) (private affair includes garbage awaiting collection at curb because it “can reveal much about a person’s activities, associations, and beliefs”); *State v. Gunwall*, 106 Wn.2d 54, 68, 720 P.2d 808 (1986) (outgoing phone numbers dialed are private affair).

The private affairs inquiry is not based on an individual’s subjective expectation. *Miles*, 160 Wn.2d at 245. Instead, the court determines the privacy interests that Washington citizens have held, and should be entitled to hold, safe from governmental trespass absent a warrant. *Id.* A cell phone contains a host of private information which has been historically protected and it may not be searched by the government absent valid legal authority. *Hinton*, 174 Wn.2d at 869-70.

In *Hinton*, the police read text messages Mr. Hinton sent to Daniel Lee after they arrested Mr. Lee. This Court held that Mr. Hinton retained his privacy interest in the messages he sent to someone else’s cell phone, not merely in the information he stored on his own phone. *Id.* at 869. The *Hinton* Court explained that a person who sends a message on a cell phone does not expect the government to review that message, even if he risks someone other than the intended recipient

may read it. *Id.* at 874-75. He also did not lose his privacy interest because he was communicating about buying illegal drugs. *Id.*

*Hinton* relied on other cases where this Court has recognized that article I, section 7 bars governmental intrusions even when a person knows “children, scavengers, and snoops” might access private information. *Id.* at 873-75; *Boland*, 115 Wn.2d at 581. For example, when a person registers as a motel guest, the registry contains the customer’s name, potentially other guests, and shows where a person is at a certain moment in time. *Jorden*, 160 Wn.2d at 129. This information “is personal and sensitive, [and] it is a private affair” even though it “belongs to the motel” the motel guest has no control or possessory interest in the motel’s registry. *Hinton*, 179 Wn.2d at 873-74 (citing *Jorden*, 160 Wn.2d at 129-30).

When a person puts her trash can on the curb for collection, she may know that neighbors can rummage through it, but she does not authorize the government to do so. *Id.* (citing *Boland*, 115 Wn.2d at 581). And when a person makes telephone calls, he knows that the phone company records the numbers dialed but he retains an expectation of privacy free from governmental intrusion. *Id.* (citing *Gunwall*, 106 Wn.2d at 67).

*Hinton* and *Riley* demonstrate the unique and extensive privacy concerns limiting the government's authority to search a person's cell phone. Both opinions were issued after the suppression hearing in the case at bar. The trial court ruled that Mr. Samalia had no privacy interest in his cell phone because he fled from police without keeping possession of his cell phone. RP 15 ("I can't find any privacy right that has been infringed" by the officer examining the cell phone). *Riley* and *Hinton* dictate the opposite result.

2. *Inadvertently leaving behind a cell phone does not provide police with the authority of law to search private information on a cell phone without a warrant.*

A search occurs under article I, section 7 when the government disturbs a person's private affairs. *Hinton*, 179 Wn.2d at 868. In order to conduct such a search, the State must have the "authority of law," requiring either a valid warrant or the State to prove one of the few, jealously guarded exceptions to the warrant requirement. *Id.* at 869.

The prosecution argued that Mr. Samalia's cell phone was "voluntarily abandoned when the defendant engage[d] in a willful inaction by merely leaving property behind when he encounter[ed] the police." RP 10. The court agreed, finding "Because the driver ran from

the vehicle, he voluntarily abandoned the cell phone located in the vehicle.” CP 31.

To voluntarily abandon a privacy interest, the defendant must have “relinquished her reasonable expectation of privacy.” *State v. Evans*, 159 Wn.2d 402, 408, 150 P.3d 105 (2007) (quoting *United States v. Hoey*, 983 F.2d 890, 892–93 (8th Cir.1993)). Denial of ownership is not enough to constitute abandonment. *Id.* at 410.

Only by affirmative conduct may a person abandon a recognized privacy interest. It requires “act and intent.” *Evans*, 159 Wn.2d at 408. In *Evans*, the defendant denied he owned a briefcase in his truck, but the briefcase was locked and he objected to the police searching it. *Id.* at 405-06. This Court ruled that his actions did not constitute “voluntary abandonment” of his privacy interest in his briefcase because denying ownership is not enough to abandon it even under the Fourth Amendment. *Id.* at 412.

Other cases likewise examine whether the suspect purposefully rejected ownership in property as opposed to failing to ask for it or forgetting it. *See State v. Dugas*, 109 Wn.App. 592, 595, 36 P.3d 577 (2001) (property not abandoned even though defendant never tried to retrieve jacket during or after arrest, where he did not intentionally

distance self from jacket to hide it); *State v. Kealey*, 80 Wn.App. 162, 165, 168-69, 907 P.2d 319 (1995) (misaid purse not purposefully left behind in store and therefore defendant did not relinquish her expectation of privacy); *cf. State v. Reynolds*, 144 Wn.2d 282, 284-85, 291, 27 P.3d 200 (2001) (by taking a coat out of a car, putting it on the ground and denying ownership, defendant voluntarily abandoned it).

The voluntary abandonment test used in *Evans*, *Dugas* and the cases on which they rely are based on the reasonable expectation of privacy standard of the Fourth Amendment. 159 Wn.2d at 409. These cases mention the broader protections afforded under article I, section 7 but do not address whether article I, section 7 requires a different inquiry. *See Evans*, 159 Wn.2d at 412; *Dugas*, 109 Wn.2d at 595-96.

The differences between article I, section 7 and the Fourth Amendment dictate a narrow reading of a voluntary abandonment exception to the warrant requirement, particularly for a cell phone. Because a search's location "is indeterminative" of whether a person has relinquished his privacy interest under article I, section 7, merely leaving a cell phone in a place that is not private does not forgo an individual's private affairs. *Boland*, 115 Wn.2d at 580. While the Fourth Amendment treats a car as a place with a reduced exception of

privacy, article I, section 7 does not recognize such an automobile exception. *Snapp*, 174 Wn.2d at 191-92. Article I, section 7 does not rest on subjective expectation or evolving notions of reasonableness, unlike the Fourth Amendment. *Miles*, 160 Wn.2d at 244.

In *Hinton*, this Court explained that even when a person “does not control the area” from which information is accessed, otherwise protected private affairs are still within “the realm of article I, section 7’s protection.” 179 Wn.2d at 873. The risk that another citizen may access private information on a person’s cell phone is not “transposed into an assumed risk of intrusion by the government.” *Id.* at 874. Similarly, leaving a cell phone in a place that the owner does not have permission to be is not transposed into the intentionally voluntary abandonment of that private affair and an assumed risk that the government may access it without a warrant. *Id.*

Historically, this state “consistently” accords “heightened constitutional protection” to the home because it is “a highly private place.” *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994). “[T]he closer officers come to intrusion into a dwelling, the greater the constitutional protection” *Id.*, quoting *State v. Chrisman*, 100 Wn.2d 814, 820, 676 P.2d 419 (1984). This heightened protection “places an

onerous burden upon the government to show a compelling need to act outside of our warrant requirement.” *Id.* A cell phone contains more information than an exhaustive search of a home. *Riley*, 134 S.Ct at 2491. Given the wealth of intimate details available in a phone, and its inherent mobility, a heightened threshold showing of the owner’s purposeful and intentional relinquishment of the private affairs contained in the phone is necessary to comport with the broad privacy protections under article I, section 7.

For a cell phone inadvertently left at the scene when a suspect is confronted by police, it is not reasonable or historically permissible to assume the fleeing person intended to give police access to the intimate details contained in his cell phone without a warrant. Carrying a cell phone in public does not cede the privacy of its contents and given its size, it may be easily mislaid or unintentionally left behind. Like any cell phone owner, Mr. Samalia had a recognized privacy interest in the data available on his cell phone. *Hinton*, 179 Wn.2d at 879.

Mr. Samalia did not deny ownership or purposefully hide his relationship to the phone, like the defendant in *Reynolds*, who tried to hide his jacket from police and denied it was his. 144 Wn.2d at 285. Mr. Samalia did not toss the phone into the bushes. He ran when he was

unexpectedly confronted by an armed police officer. CP 29. The phone contained lists of his associates, labelled as contacts, which the police viewed see which of his close associates they could speak to. RP 49. Dialing Mr. Samalia's phone triggered a picture of him on Ms. Telles' phone along with his name and phone number, which the police also seized and viewed, manipulating both phones to discern the affiliation between Mr. Samalia and Ms. Telles. RP 61. Call logs, numbers dialed, and relationships with other people are part of the private affairs protection by article I, section 7. *Hinton*, 184 Wn.2d at 871-72.

The police could have seized the cell phone to prevent its destruction. *Hinton*, 174 Wn.2d at 881. They may secure it for safekeeping or for a later warrant application. *See Dugas*, 109 Wn.App. at 596-97. If time is of the essence, they can seek an immediate telephonic warrant. CrR 3.2(c); *State v. Komoto*, 40 Wn.App. 200, 214, 697 P.2d 1025 (1985) (availability of telephonic warrant factor in assessing exigent circumstances). But they may not scroll through it, look to see who the owner calls regularly, make phone calls to others, or send messages through it.

3. *No other exception to the warrant requirement applies.*

The Court of Appeals majority also noted that the officers' use of Mr. Samalia's cell phone would fall within "the exigency exception to pursue a fleeing suspect recognized in *Riley*." 186 Wn.App. at 231. But the Court of Appeals misreads *Riley*. *Riley* noted that the exigent circumstances exception to the Fourth Amendment's warrant requirement remained available for the "extreme hypotheticals" posited by the government, such as a bomb that is about to detonate or a child abductor whose cell phone shows the child's location. 134 S.Ct. at 2494. The "critical point" was that the trial court would be able to examine the circumstances "in each particular case" to determine whether there was an emergency justification for a warrantless search. *Id.* *Riley* did not declare an exigency exception for any fleeing suspect. It expressly rejected the government's request for limited cell phone searches for information about an arrestee's identity. *Id.* at 2492.

The State did not satisfy the exigent circumstances exception to the warrant because it did not prove the imperative of a warrantless search, including the unavailability of a telephonic warrant, in the circumstances of this particular case *State v. Smith*, 165 Wn.2d 511, 518, 199 P.3d 386 (2009). Officer Yates had given up pursuing the

driver when he returned to the car, found the phone and called listed contacts. RP 45-46. He never said there was insufficient time to obtain a warrant, an imminent danger, or an emergency need to search the phone and the court did not find any exigency existed. CP 28-32. Even if an exigency could exist, the State did not meet its burden of proving to the trial court that one existed here.

The Court of Appeals declined to address other fanciful scenarios posited by the prosecution on appeal that were not addressed by the trial court. The prosecution claimed in the Court of Appeals that an inventory search could have occurred had the officer impounded the car. Yet the inevitable discover doctrine does not provide authority of law under article I, section 7. *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). An inventory search may not be conducted for investigatory reasons and does not entitle the police to rummage through containers for investigatory purposes. *State v. Green*, 177 Wn.App. 332, 342-43, 312 P.3d 669 (2013). Impounding the car would not provide authority to search a cell phone without a warrant. *Id.*

The prosecution also asserted Mr. Samalia lacked standing to protest any item left in a stolen car, which the Court of Appeals did not address. 186 Wn.App. at 231. This standing analysis is subsumed in the

voluntary abandonment discussion. Mr. Samalia has standing to object to the search of his personal cell phone because he retains a privacy interest in its contents, as explained in *Hinton*. 184 Wn.2d at 873. Because he did not abandon the private affairs contained on the phone, he retains standing to object to its search.

4. *The exclusionary rule requires suppression of the illegally obtained evidence.*

When the police intrude upon a person's private affairs without valid authority of law, the illegality triggers a "nearly categorical" exclusion of the evidence gathered as a result under article I, section 7. *Winterstein*, 167 Wn.2d at 636. Unlike the Fourth Amendment, article I, section 7 emphasizes "protecting personal rights rather than ... curbing governmental actions." *Id.* Exclusion is automatic whenever the right to privacy is violated because article I, section 7 "clearly recognizes an individual's right to privacy with no express limitations." *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010), quoting *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

The trial court did not address the exclusionary rule. CP 27-32. In a conclusory sentence, the Court of Appeals characterized the cell phone search as "too attenuated" because it was used to contact another

person and from that other person's phone they found Mr. Samalia's name and photograph. 186 Wn.App. at 231. This analysis misapplies the exclusionary rule and is contrary to *Hinton*.

For the fruits of an illegal search to be too attenuated for exclusion of evidence, the prosecution would have to prove the taint of the illegally obtained evidence was so dissipated that the evidence did not derive from illegal police action. *State v. Ibarra-Cisneros*, 172 Wn.2d 880, 884, 263 P.3d 591 (2011). The attenuation doctrine has not been expressly adopted under article I, section 7. *State v. Eserjose*, 171 Wn.2d 907, 919, 259 P.3d 172 (2011).

Article I, section 7 requires the exclusion of illegally obtained evidence. *Winterstein*, 167 Wn.2d at 636. As a direct result of scrolling through and calling several listed contacts on Mr. Samalia's cell phone without a warrant, the police obtained Mr. Samalia's name, saw his picture, and confirmed Mr. Samalia owned the cell phone left in the center console of the car. RP 51-52, 61-63.

Officer Yates did not know the person who stepped out of the driver's seat and fled from the car. He did not describe what the driver looked like or testify that he had an adequate chance to observe him. It was only because the two police officers used Mr. Samalia's phone that

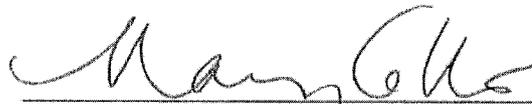
they learned Mr. Samalia's identity. Officer Yates' identification of Mr. Samalia as the driver of the car, and the State's ability to prove this identification was accurate, stemmed directly from the warrantless search of Mr. Samalia's phone. Excluding this evidence leaves the prosecution without a basis to connect Mr. Samalia to the stolen car. The information obtained directly and indirectly from the unlawful search must be excluded.

D. CONCLUSION.

For the foregoing reasons, Adrian Samalia respectfully requests this Court hold that the police violated his rights under the Fourth Amendment and article I, section 7, which requires the suppression of illegally seized evidence and reverse his conviction.

DATED this 10th day of November 2015.

Respectfully submitted,



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**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 91532-6
v.	)	
	)	
ADRIAN SAMALIA,	)	
	)	
Petitioner.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10<sup>TH</sup> DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2015.

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### **Supplemental Brief of Petitioner**

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