SUPREME COURT NO. 87669-0
COURT OF APPEALS NO. 41037-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

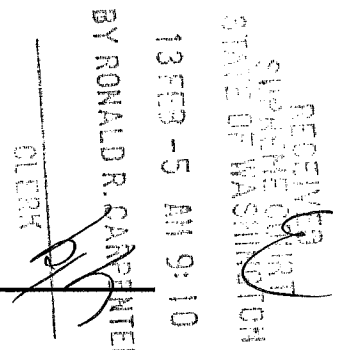
STATE OF WASHINGTON,

Respondent,

v.

JONATHAN NICHOLAS RODEN,

Petitioner.



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

The Honorable James J. Stonier

(CORRECTED) SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUE FOR REVIEW

Did the police violate Mr. Roden's right to privacy under the Washington Privacy Act, article I, section of the Washington Constitution, and the Fourth Amendment by conducting a warrantless search of a cell phone and intercepting his private text messages without consent?

B. STATEMENT OF THE CASE

The State charged Roden with attempted possession of heroin, a controlled substance. CP 27-28. At a suppression hearing, the State presented evidence that a detective accessed an iPhone seized earlier from a suspected drug dealer, Daniel Lee, during his arrest. The detective spent five or ten minutes looking at numerous text messages and noticed several messages from Roden asking to buy drugs. 5RP 6-11. Posing as Lee, the detective replied to Roden's text message and engaged in a series of text messages to arrange a drug transaction with Roden. When Roden arrived at a local grocery store for the transaction, the detective arrested him. 5RP 12-13, 18-20. The detective typed out the text messages in his report and had them transcribed as evidence. 5RP 9-11.

Roden moved to suppress the evidence but the trial court denied his motion. CP 23-26. On July 14, 2010, the trial court entered an order on stipulated facts, finding Roden guilty of attempted possession of heroin, a controlled substance. 8RP 3-4; CP 29-31. Citing State v.

Wojtyna, 70 Wn. App. 689 (1993), the court concluded that "there is no expectation of privacy in a communication transmitted to a device such as an iPhone." CP 25.

Roden appealed, arguing that the trial court erred in denying his motion to suppress evidence of the text messages because the detective's warrantless search of the iPhone and interception of private text messages violated his rights under the Washington Privacy Act. A majority of the Court of Appeals affirmed, concluding that "Roden impliedly consented to the recording and/or interception of the text messages that he sent to the dealer's iPhone." State v. Roden, 169 Wn. App. 59, 68, 279 P.3d 461 (2012). The majority held that Roden "had no reasonable expectation of privacy in his text messages," thus, he "impliedly consented to the recording of the text messages that he sent." Id. The majority relied on State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002), which it considered "binding precedent." Id. Judge Van Deren dissented, concluding that Roden did not impliedly consent and the detective's warrantless search of the iPhone leading to the interception of Roden's text messages violated the Washington Privacy Act; article I, section 7 of the Washington Constitution; and the Fourth Amendment of the United States Constitution. Id. at 68-83.

C. ARGUMENT[1]

1. RODEN HAD A REASONABLE EXPECTATION OF PRIVACY IN HIS TEXT MESSAGES THEREFORE THE WARRANTLESS SEARCH OF THE iPHONE AND INTERCEPTION OF HIS PRIVATE TEXT MESSAGES VIOLATED THE WASHINGTON PRIVACY ACT.

Washington "has a long history of statutory protection of private communications and conversations." State v. Clark, 129 Wn.2d 211, 222, 916 P.2d 384 (1996). In 1967, the Legislature enacted the Privacy Act, RCW 9.73.030, "one of the most restrictive in the nation." State v. Faford, 128 Wn.2d 476, 481, 910 P.2d 447 (1996). The Privacy Act requires that "*all* parties to a private communication must consent to its disclosure" which "adds an additional layer of protection." State v. Christensen, 153 Wn.2d 186, 198, 102 P.3d 789 (2004). It "significantly expands the minimum standards of the federal statute and offers a greater degree of protection to Washington citizens." State v. O'Neil, 103 Wn.2d 853, 879, 700 P.2d 711 (1985).

RCW 9.73.030(1)(a) provides in relevant part:

> [I]t shall be unlawful for . . . the state of Washington, its agencies, and political subdivisions to intercept, or record any:
>
> (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or

[1] This Court reviews a trial court's legal conclusions on a motion to suppress de novo. State v. Schultz, 170 Wn.2d 746, 753, 28 P.3d 484 (2011).

> more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication, regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication.

Evidence obtained in violation of the statute is inadmissible in a criminal case. RCW 9.73.050. In balancing the legitimate needs of law enforcement to obtain information in criminal investigations against the privacy interests of individuals, the Privacy Act "tips the balance in favor of individual privacy at the expense of law enforcement's ability to gather evidence without a warrant." Christensen, 153 Wn.2d at 199.

Private means "belonging to one's self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or public." State v. Modica, 164 Wn.2d 83, 87-88, 186 P.3d 1062 (2008). A communication is private when parties manifest a subjective intention that it be private and where that expectation is reasonable. Id. at 88 (citing State v. Christensen, 153 Wn.2d 186, 193, 102 P.3d 789 (2004)). Factors bearing on the reasonableness of the privacy expectation include the duration and subject matter of communication; the location of the communication and the potential presence of third parties; and the role of the nonconsenting party and his or her relationship to the consenting party. Clark, 129 Wn.2d 211 at 225-

27. "While each of these factors is significant in making a factual determination as to whether a conversation is private, the presence or absence of any single factor is not conclusive for the analysis." State v. Kipp, 171 Wn. App. 14, 23, 286 P.3d 68 (2012)(quoting Clark, 129 Wn.2d at 227).

In State v. Faford, a neighbor used a police scanner to eavesdrop on the defendants' cordless telephone conversations. When the neighbor heard discussions about a marijuana grow operation in their home, he reported them to the police. The police went to the home and discovered a growing operation. The defendants were charged and convicted of cultivating marijuana and conspiracy to cultivate marijuana. Faford, 128 Wn.2d at 479-81. On appeal, the defendants argued that evidence of the intercepted phone conversations and the growing operation was obtained in violation of the Privacy Act. Id. at 481.

Focusing on the intent and subjective expectations of the parties to the conversation, this Court concluded that the defendants "clearly intended the information related in their telephone conversations to remain confidential between the parties to the call, regardless of their use of a cordless telephone instead of a conventional telephone." Id. at 484-85. This Court rejected the State's argument that because technology exists to easily intercept cordless telephone conversations, society has no

reasonable expectation in those calls, "we have repeatedly emphasized in considering constitutional privacy protections, the mere possibility that intrusion on otherwise private activities is technologically feasible will not strip citizens of their privacy rights." Id. at 845. Concluding that the interception of the defendants' cordless telephone conversations violated the Privacy Act, this Court held that the trial court erred in admitting evidence of the phone conversations and reversed. Id. at 488-89.

In State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002), a detective set up a sting operation by establishing an internet e-mail account and an ICQ chat room account using a screen name of Amber, a fictitious thirteen-year-old girl. Townsend began communicating with Amber, sending e-mails and ICQ messages containing graphic discussions about sexual topics, which the detective stored and recorded. Townsend eventually made arrangements with Amber to meet at a motel to have sex. When Townsend went to the motel room and asked for Amber, the detective arrested him. Townsend was charged and convicted of attempted second degree rape of a child. Id. at 670-71.

On appeal, Townsend argued that his e-mails and ICQ messages to Amber were private communications and therefore unlawfully recorded without his consent in violation of the Privacy Act. Id. at 671-73. This Court held that Townsend's communications to Amber were private given

the subject matter of the communications, concluding that "[w]hile interception of these messages was a possibility, we cannot say that Townsend's subjective intention that his communications were private was unreasonable under the circumstances." Id. at 674. While holding that the e-mail and ICQ messages were private, this Court affirmed Townsend's conviction, concluding that he impliedly consented to the recording of the messages. Id. at 675-79.

In State v. Christensen, Christensen was a suspect in a robbery. The sheriff alerted the mother of Christensen's then-girlfriend, Lacey Dixon, and asked her to look out for any evidence of the crime. When Christensen called the Dixon home for Lacey, Mrs. Dixon answered the phone and handed the cordless handset to her daughter, who took it upstairs to her bedroom and closed the door. Mrs. Dixon activated the speakerphone function of the cordless phone system by pressing a button on the base unit. She listened to Christensen admitting his involvement in the robbery and testified at trial as to the substance of the conversation that she overheard. Christensen was convicted of second degree robbery. Christensen, 153 Wn.2d at 190-91.

On appeal, Christensen argued that based on their reasonable expectations and subjective intent, the conversation between him and Lacey was private. The State contended that because Christensen and

Lacey knew it was possible that their calls would be monitored, their expectation of privacy was not reasonable despite their subjective intent. Id. at 192-93. This Court recognized "Washington's long-standing tradition of affording great protection to individual privacy." Id. at 198-200. Accordingly, this Court reversed, concluding that "[b]ased on the subjective intentions and reasonable expectations of Christensen and Lacey, their conversation was a private one," emphasizing that the Privacy Act "puts a high value on the privacy of communications." Id. at 200.

Like the cordless telephone conversations in Faford and Christensen and the e-mails and ICQ messages in Townsend, the text messages Roden sent to Lee for the purpose of buying drugs were private communications between himself and Lee. The detective admitted that he was posing as Lee when he was texting with Roden. 5RP 20. It is evident that Roden subjectively intended and expected that his text messages to Lee were private because as in Faford, Townsend, and Christensen, the subject matter of the communication involved illegal activity. Moreover, Roden and Lee knew each other. The communication was not an inconsequential, nonincriminating telephone conversation with a stranger. See Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992).

Importantly, as this Court concluded in Faford, Townsend, and Christensen, Roden's subjective intention that the communications were private was reasonable despite the possibility that the text messages could be easily intercepted. Observing that technology was racing ahead with ever increasing speed, the Faford Court cautioned that the "sustainability of our broad privacy act depends on its flexibility in the face of a constantly changing technological landscape." Faford, 128 Wn.2d at 485-86. This Court declared, "We will not permit the mere introduction of new communications technology to defeat the traditional expectation of privacy in telephone conversations." Id. at 486. Stating that "[w]e adhere to *Faford*," the Christensen Court reaffirmed that "[w]e must interpret the privacy act in a manner that ensures that the private communications of this state's residents are protected in the face of an ever-changing technological landscape. This must be done so as to ensure that new technologies cannot be used to defeat the traditional expectation of privacy." Christensen, 153 Wn.2d at 197.

Citing Faford, the Townsend Court reiterated that the "mere possibility that interception of the communication is technologically feasible does not render public a communication that is otherwise public." 147 Wn. 2d at 674. In concluding that Townsend impliedly consented to the recordings, the Court pointed out that "in *Faford* we were confronted

with communications over a cordless telephone that were intercepted by someone who was not a party to the telephone conversations. There was no suggestion there that the communicators had either consented to the communications being recorded or advised that they might be recorded."[2] 147 Wn. 2d at 678. The Court distinguished Faford from Townsend where the "communication was undertaken not by a third party but by a party who was the recipient of the communication." Id. As in Faford, a third party, the detective, intercepted Roden's text messages intended for Lee. The detective posed as Lee and engaged in an exchange of text messages to arrange a drug transaction. Unlike in Townsend, Roden did not impliedly consent to the detective's interception of his private text messages to Lee because the detective was not the "recipient of the communication."

Furthermore, State v. Wojtyna, 70 Wn. App. 689, 855 P.2d 315 (1993) has no application here where distinguishable from text messages, a phone number is not a private communication. In Wojtyna, the police seized a pager pursuant to the arrest of a drug dealer. When Wojtyna

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[2] RCW 9.73.030(3) provides:
Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

called the pager, the detective returned his call and arranged a drug transaction where Wojtyna was arrested for attempted possession of a controlled substance. 70 Wn. App. at 691. Division One of the Court of Appeals likened the case to State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993), which involved a "line trap" placed by the phone company tracing Riley's "hacking activity" to his home. The Court observed that the tracer discovered nothing more than Riley's phone number and determined that a phone number, unless it is itself communicated, does not constitute a communication. The Court concluded that discovering Riley's phone number via a tracer did not implicate the Washington Privacy Act. Wojtyna, 70 Wn. App. at 694-95 citing Riley, 121 Wn.2d at 33-34. Following Riley, the Wojtyna Court concluded there was no violation of the Washington Privacy Act because "all that was learned from the pager was the telephone number of one party, the party dialing." 70 Wn. App. at 695.

Under Faford, Townsend, and Christensen, reversal is required because the detective's warrantless search of the iPhone and interception of Roden's private text messages to Lee violated his rights under the Privacy Act.[3]

[3] Authorization was not issued here, but under RCW 9.73.090(5), the court may authorize the interception, transmission, recording, or disclosure of

2. RODEN HAD A PRIVACY INTEREST IN HIS TEXT MESSAGES, A PRIVATE AFFAIR, THEREFORE THE WARRANTLESS SEARCH OF THE iPHONE AND INTERCEPTION OF HIS PRIVATE TEXT MESSAGES VIOLATED ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.

Article I, section 7 states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision protects a person's home and private affairs from warrantless searches. State v. Carter, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). The protections guaranteed by article I, section 7 are qualitatively different from those under the Fourth Amendment. State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002). Warrantless searches are per se unreasonable under the Washington Constitution, subject to a limited set of carefully drawn exceptions. State v. Snapp, 127 Wn.2d 177, 187, 275 P.3d 289 (2012).

In determining whether a search violated article I, section 7, courts undertake a two-step analysis. State v. Valdez, 61 Wn.2d 761, 772, 224 P.3d 751 (2009). The first step is to determine whether the State has intruded into a person's private affairs. If the State has disturbed a privacy interest, the second step is to determine whether the required authority of

communications or conversations if the court determines there is probable cause to believe that the communication or conversation concerns the unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell controlled substances.

law justifies the intrusion, which is satisfied only by a valid warrant, limited to a few jealously guarded exceptions. Valdez, 167 Wn.2d at 772.

Private affairs are "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass." State v. Athan, 160 Wn.2d 354, 366, 158 P.3d 27 (2007). In determining whether an interest constitutes a private affair, "we look at the historical treatment of the interest being asserted, analogous case law, and statutes and laws supporting the interest asserted." Id. at 366. As argued above, under this Court's decisions in Faford, Townsend, and Christensen, Roden's text messages to Lee were private and likewise constitute a private affair. Furthermore, the Privacy Act establishes that "[t]he State of Washington has a long history of extending strong protections to telephonic and other electronic communications." State v. Gunwall, 106 Wn.2d 54, 66-68, 720 P.2d 808 (1986). In Gunwall, this Court cited the Privacy Act to support its decision that use of a pen register without authority of law violated article I, section 7 of the Washington Constitution. 106 Wn.2d at 66. This Court recognized that the statute "is broad, detailed and extends considerably greater protections to our citizens in this regard than do comparable federal statutes and rulings thereon." Id. Washington's historical treatment of the right to privacy substantiates that text messages are protected as private affairs.

To determine whether the detective unlawfully intruded into Roden's private affairs by searching the iPhone without a warrant and intercepting his text messages, this Court should view smart phones as "laptops' new equivalents." Matthew E. Orso, Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence, 50 Santa Clara L. Rev. 183, 219 (2010). "[C]ell phones contain a wealth of private information, including emails, text messages, call histories, address books, and subscriber numbers . . . similar to a personal computer that is carried on one's person." United States v. Zavala, 541 F.3d 562, 577 (5th Cir.2008).[4]

In reasoning that the standard for searching smart phones should be the same standard that applies to laptops, Mr. Orso cites an unpublished opinion, State v. Washington, 110 Wn. App. 1012 (2002), where the police arrested Washington on suspicion of auto theft. Incident to arrest, an officer saw a bag on the floor of the car. She unzipped the bag and discovered a laptop inside, which Washington said he bought the night before for fifty dollars. Suspecting that Washington stole the laptop, the officer brought it to the police station and its files were searched to determine its lawful owner. From information found in the computer, the

[4] As of December 31, 2011, there were approximately 331,594,848 active cellular phones in the United States. CTIA-The Wireless Association, Semi-Annual Wireless Survey (2012).

police contacted the owner who confirmed that the laptop had recently been stolen. Washington was convicted of possession of stolen property. 50 Santa Clara Law Rev. at 216 citing Washington, 2002 WL 104492 at 1.

On appeal, the Court of Appeals, determined that "compliance with the warrant requirement is necessary to ensure that the police are justified in invading a person's privacy interest to search for evidence." The Court held that the police had probable cause to arrest Washington and search his bag incident to arrest, but the warrantless search of the computer's files was improper because it did not fall under any exception to the warrant requirement. 50 Santa Clara Law Rev. at 216-17 citing Washington, 2002 WL 104492 at 3.

As Mr. Orso concluded, [f]or computers and smart phones alike, courts should require that police obtain a warrant before examining the contents of these devices." 50 Santa Clara Law Rev. at 224. Here, the detective arrested and searched Lee and lawfully seized his iPhone. Similar to Washington, the detective's subsequent search of the iPhone without a warrant was improper. It is evident that a search warrant can be properly obtained as in State v. Andrews, 2013 WL 80161 at 1, where the officer obtained a warrant to search a material witness's cell phone and used a digital camera to photograph text messages he found on the cell phone.

The search of a cell phone, as in the search of a laptop, requires "authority of law" under article I, section 7. Reversal is required because Roden had an expectation of privacy in his text messages contained in Lee's iPhone and the detective's warrantless search of the iPhone and interception of Roden's private text messages to Lee violated his right to privacy under article I, section 7 of the Washington Constitution.

3. RODEN HAD A REASONABLE EXPECTATION OF PRIVACY IN HIS TEXT MESSAGES THEREFORE THE WARRANTLESS SEARCH OF THE iPHONE AND INTERCEPTION OF HIS PRIVATE TEXT MESSAGES VIOLATED THE FOURTH AMENDMENT.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" U.S. Const. amend. IV. The fundamental purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." Camara v. Mun. Ct., 387 U.S. 523, 528, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). A search occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).

As Judge Van Deren discussed in her dissent, the United States Supreme Court recently addressed the impact new technology has on the fundamental right to privacy protected under the Fourth Amendment, which suggest that the public has a reasonable expectation of privacy in text message communications. State v. Roden, 169 Wn. App. at 77-81 citing United States v. Jones, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012), City of Ontario, Cal v. Quon, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010).

In Quon, the Supreme Court recognized that "[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior." 130 S. Ct. at 2629. In Jones, the Supreme Court observed that "[p]rivacy is not a discrete commodity, possessed absolutely or not at all." 132 S. Ct. at 947 (Sotomayor, J., concurring)(quoting Smith v. Maryland, 442 U.S. 735, 749, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979)(Marshall, J., dissenting)). The Court reasoned that it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties, explaining that this approach is "ill suited to the digital age." The Court concluded that "whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all

information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection." 132 S. Ct. at 957 (Sotomayor, J., concurring).

The Sixth Circuit Court of Appeals determined that "the mere *ability* of a third-party intermediary to access the contents of communications cannot be sufficient to extinguish a reasonable expectation of privacy." State v. Warshak, 631 F.3d 266, 286 (6th Cir. 2010). The Court pointed out that it is reasonable to expect privacy during a telephone call despite the ability of an operator to listen in and the ability of a rogue mail handler to rip open a letter does not make it unreasonable to assume that sealed mail will remain private on its journey across the country. Id. "Therefore, the threat or possibility of access is not decisive when it comes to the reasonableness or an expectation of privacy." Id.

When applying the analysis in Quon, Jones, and Warshak here, Roden had a reasonable expectation of privacy in text messages that he sent to Lee and it is an expectation of privacy that society is willing to accept as reasonable. See also, United States v. Park, 2007 WL 1521573 at 8 (N.D.Cal. May 23, 2007)(because the search of the cell phone's contents was not conducted out of concern for officer safety or preservation of evidence, the officers should have obtained a warrant). Undoubtedly, society recognizes that it is reasonable to expect that a

detective cannot search an iPhone without a warrant, intercept private text messages, pose as the owner of the iPhone, and engage in an exchange of text messages with the sender of the messages. "The Fourth Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction." Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 613-14, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

Accordingly, reversal is required because the warrantless search of the iPhone violated Roden's right to privacy under the Fourth Amendment. "The Fourth Amendment must keep pace with the inexorable march of technological progress, or its guarantees will wither and perish." Warshak, 631 F.3d at 285 (citing Kyllo v. United States, 533 U.S. 27, 34, 121 S. Ct. 2038, 150 L. Ed 2d 94 (2001)(noting that evolving technology must not be permitted to "erode the privacy guaranteed by the Fourth Amendment").

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Roden's conviction of attempted possession of heroin, a controlled substance because the trial court erred in denying his motion to suppress, where the warrantless search of the iPhone violated his right to privacy under the

Washington Privacy Act, article I, section of the Washington Constitution, and the Fourth Amendment.

DATED this 4th day of February, 2013.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Petitioner, Jonathan Nicholas Roden

DECLARATION OF SERVICE

On this day, the undersigned sent by e-mail, a copy of the document to which this declaration is attached to Sean Brittain, Cowlitz County Prosecutor's Office, 312 SW 1st Avenue, Kelso, Washington 98626-1739.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of February, 2013 in Kent, Washington.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law

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Clerk of the Court
Washington Supreme Court

Unfortunately, a few typographical errors were discovered after Petitioner's Brief was filed yesterday. Please replace the brief with the attached corrected brief.

Thank you very much,
Valerie Marushige
Attorney for Petitioner, Jonathan Nicholas Roden.
Case No. 87669-0