Hon. Douglass North
Hearing Date: October 2, 2015
Hearing Time: 8:30 AM

IN THE SUPERIOR COURT THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CITY OF KIRKLAND,

Plaintiff/Appellant,

v.

HOPE A. STEVENS,

Defendant/Respondent.

NO. 15-1-01772-8 SEA

BRIEF OF AMICUS CURIAE NATIONAL CRIME VICTIM LAW INSTITUTE

I. INTRODUCTION AND INTEREST OF AMICUS CURIAE

The National Crime Victim Law Institute ("NCVLI") is a nonprofit educational and advocacy organization located in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In

addition, NCVLI actively participates as amicus curiae in court cases involving crime victims' rights nationwide, including cases that have reached the U.S. Supreme Court.

This case involves important issues concerning crime victims' rights to privacy, and right to be treated with respect, dignity, courtesy and sensitivity. For these reasons, NCVLI respectfully submits that the Court should allow it to present its arguments to this Court.[1]

II. STATEMENT OF THE CASE

T.O. and her 17-year-old son C.O., are the victims in this domestic violence case brought by the City of Kirkland. The victims twice agreed to be interviewed by defense counsel, who declined to participate. Nonetheless, without regard to the applicable court rule authorizing depositions only when witnesses refuse to submit to interviews and other protections for crime victims' rights, the trial court ordered T.O. and C.O. be deposed. During lengthy depositions about the domestic violence incident at issue in this case, the only subject matter about which either victim refused to answer questions was about CO's medical history. At these times C.O.'s private counsel timely and properly asserted his physician-patient privilege. At no time did C.O. waive his privilege or answer questions about his medical conditions such that waiver could be implied.

Remarkably, the trial court then ordered C.O. to sit for second and third depositions regarding the privileged medical issues. The defendant repeatedly and erroneously reported T.O. and C.O. had refused to answer other questions about such issues as alcohol use the night of the incident.

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[1] Counsel are not clear as to the appropriate procedures for filing an amicus brief, as the rules of court do not appear to specifically address the subject. If the Court believes that a motion for leave to file is required, we would request that this Statement of Interest section serve as that motion. The City of Kirkland does not oppose the filing of this brief.

C.O.'s right not to answer questions about medically privileged issues is supported by multiple Washington statutory privileges, none of which appear to have been considered by the trial court in ordering him to answer questions and in ultimately dismissing the case based in significant part on his refusal to do so. More broadly, domestic violence victims should not be forced to waive their right to confidentiality in medical conditions as the price for cooperating with a criminal prosecution. This Court should overturn the trial court's unsupported dismissal decision which failed to consider the rights of crime victims.

III. ARGUMENT

A. RCW 7.69.10 And Const. Art. I §35 Afford Specific Protections For Victims, Including Victims Who Are Witnesses. An Interpretation Of CrR 4.6 And CrR 4.7 That Undermines Or Infringes On These Protections Is Impermissible.

1. Victims' Constitutional and Statutory Rights.

Washington protects crimes victim's rights through both a statute and a constitutional amendment. Consideration of both is crucial to the correct interpretation of criminal rules. In 1981, Washington enacted a crime victims' rights statute. It calls for "vigorous" support of victims' rights as follows:

> In recognition of the severe and detrimental impact of crime on victims, survivors of victims, and witnesses of crime and the civic and moral duty of victims, survivors of victims, and witnesses of crimes to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, and in further recognition of the continuing importance of such citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this state, the legislature declares its intent, in this chapter, to grant to the victims of crime and the survivors of such victims a significant role in the criminal justice system. **The legislature further intends to ensure that all victims and witnesses of crime are treated with *dignity, respect, courtesy, and sensitivity;* and that the rights extended in this chapter to victims, survivors of victims and witnesses of crime are honored and protected by law enforcement agencies, prosecutors and judges *in a manner no less vigorous than the protections afforded criminal defendants.***

RCW 7.69.010 (emphases added.)

In 1989, the citizens of Washington amended the Washington Constitution to further protect the rights of crime victims. Article I, section 35 begins with an acknowledgement of the important role victims play in the criminal justice system:

> Effective law enforcement depends on cooperation from victims of crime. To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights.

The Amendment goes on to afford victims of felonies various rights, including (with some qualifications) the right to be informed of and attend trial and to make a statement at sentencing and at any proceeding where the defendant's release is considered. Const. art. I, § 35.

The legislative intent and plain language of the Amendment is "to accord [victims] due dignity and respect." *Id.* This language echoes that of RCW 7.69.010, which is designed "to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity." Although the rights enumerated in Article I, section 35 of the Constitution do not specifically address pretrial interviews, to interpret a provision of the criminal rules to give greater protections to the defendant at the *expense* of a victim's constitutional rights would be antithetical to the victims' rights provisions. As RCW 7.69.010 states, " . . .[t]he legislature further intends to ensure that . . . the rights extended in this chapter to victims, survivors of victims, and witnesses of crime are honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants."

2. The special context of domestic violence should lead to even greater protection for victims.

The defendant in this case is charged with domestic violence assault – specifically assault on her half-sister and her nephew. The Washington Legislature has enacted laws to "recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide." Wash. Rev. Code Ann. § 10.99.010. The Legislature has also stated that "[i]t is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated." *Id.*

"Without the cooperation of victims and witnesses in reporting and testifying about crime, it is impossible in a free society to hold a criminal accountable." President's Task Force on Victims of Crime, FINAL REPORT, at vi (1982). If the trial court's ruling is affirmed, it will have a chilling effect on the reporting of domestic violence crimes – crimes that are already significantly underreported. Victims of domestic violence will know that, as a price of reporting their abuse to law enforcement, they can expect to not only be forced to answer questions in advance of trial, but also to have to forfeit any confidentiality in communications that they may have had with medical professionals.

In light of the fact that many domestic violence victims do not wish to be involved in the criminal justice system, the trial court's ruling also could set a precedent that can be used to block many prosecutions of abusers. Defendants charged with domestic violence could simply demand multiple depositions of a domestic violence victims and insist that they waive important rights – such as medical privacy – as a condition of prosecution. Then, if at any point the victims refused to answer questions (even about confidential or privileged medical

information), the defendant could simply claim that his rights had been violated and demand a dismissal.

3. CrR 4.6 and 4.7

The applicable court rules at issue in this case start with Washington's Criminal Rule 4.6(a) and 4.7. Rule 4.6(a) (in relevant part) allows a deposition of a crime victim only where a victim refused to discuss a case with defense counsel:

> Rule 4.6 Depositions
> (a) When Taken. Upon a showing that a prospective witness may be unable to attend or prevented from attending a trial or hearing or **if a witness refuses to discuss** the case with either counsel and that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a party and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

In this case, the trial court violated CrR 4.6(a) in ordering a deposition when C.O., a victim of the charged offense, had agreed to be a defense interview. The victim has the right to set reasonable conditions regarding the interview, including specifically that it not be recorded. See *States v. Mankin,* 158 Wn. App. 111 (2010).

The trial court compounded its error in then ordering additional depositions requiring the victims answer questions regarding privileged and confidential medical information, despite the assertion of privilege. Third party discovery in criminal cases is normally governed by CrR 4.7(e), which provides:

> Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material and information not covered by sections (a), (c) and (d).

In order to inquire into areas covered by privilege, the defendant must make showings of both materiality and of reasonableness . The Defendant must make a "particularized"

showing of both. *State v. Kalakosky*, 121 Wn.2d 525, 548-49, 852 P.2d 1064 (1993). In this case, the Defendant made neither showing.

Information is not material or discoverable simply upon the assertion that it "may lead to" material information. A defendant seeking additional discovery must present something more than "bare assertion" defendants and must "advance some factual predicate which makes it reasonably likely" that the requested discovery will bear information material to the defense. *State v. Blackwell*, 120 Wn.2d 822, 829, 845 P.2d 101 (1993). Moreover, evidence is material only if there is a reasonable probability that it would impact the outcome of the trial. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Gregory*, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006). "The mere possibility that an item of undisclosed evidence might have helped the defense or might have affected the outcome of the trial. . .does not establish 'materiality' in the constitutional sense. *Mak*, 105 Wn.2d at 704-705 (emphasis in the original).

These points are illustrated by *State v. Thomas*, 150 Wn.2d 821 (2004), wherein the Supreme Court upheld a trial court ruling that a witness could not be questioned during his deposition about his drug use at the time of the crime and excluding questions about drug use at trial absent "concrete" evidence that the witness was under the influence.

The defendant relies on the bare assertion that C.O. had prior mental health issues leading to unpredictable behavior. If such a slim and unsupported assertion justifies intrusive and repeated depositions, then every domestic violence defendant will allege in every case that the victim was prone to unpredictable behavior – and that the victim must surrender his or her medical records to the defense. Such an outcome will gravely harm prosecution of domestic violence in this state.

Moreover, the defendant's need to such information is unexplained. Of course, to the extent that she was somehow confronted with behavior necessitating some kind of self-defense, she is obviously free to testify about her observations. Extraneous medical information about a victim in domestic violence case does not assist the trier of fact in determining whether the defendant committed an assault on the specific evening in question. *Cf. State v. Gonzalez*, 110 Wash. 2d 738, 746, 757 P.2d 925, 929 (1988) ("history showing that the complainant has previously engaged in sexual intercourse, by itself, is inadmissible in a rape trial").

B. The Court Violated C.O.'s Statutory Rights And Privileges by Ordering Him to Answer Questions About His Medical and Mental Health.

Remarkably, the trial court ordered victims in a domestic violence case to forfeit their right of privacy in medical records as the price for cooperating with the State's criminal prosecution. This Court should overturn this broad and ill-considered ruling, which threatens to undermine efforts to prosecute domestic abusers.

1. Several statutes afford privacy in his medical/mental health records.

A privilege by its nature attaches to communications between the patient and provider. The privilege applies not just to records, but to the confidential communications contained therein.

> RCW 5.60.060. Who are disqualified—Privileged communications
> ...
> (9) A mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter 18.225 RCW may not disclose, or be compelled to testify about, any information acquired from persons consulting the individual in a professional capacity when the information was necessary to enable the individual to render professional services to those persons except . . .
>
> (None of the exceptions apply here.)

C.O.'s mental health records are also privileged communications under RCW 18.83.110. This statute provides that communication between a patient and his psychologist is privileged against compulsory disclosure to the same extent that attorney client communications are:

> Confidential communications between a client and a psychologist shall be privileged against compulsory disclosure to the same extent and subject to the same conditions as confidential communications between attorney and client, but this exception is subject to the limitations under RCW 70.96A.140 and 71.05.360(8) and (9). [2]

The psychologist-patient privilege applies to counseling records to the extent they document statements made during the counseling sessions. *Redding v. Virginia Mason Medical Center*, 75 Wn.App . 424, 427, 878 P.2d 483 (1994).

Furthermore, mental health records of juveniles are given heightened protection. *See e. g.*, RCW 71.34.340 (listing specific instances where juvenile records are subject to release (none of which include as discovery in criminal cases, and stating juvenile mental health records are "not admissible as evidence in any legal proceeding outside this chapter, except in guardianship or dependency" without consent).

2. The City of Kirkland did not violate the defendant's rights based on the victim's assertion of privilege.

The rules regarding dismissal of criminal charges filed by the State presuppose that the State has somehow violated a defendant's rights. Actions that a crime victim may or may not take do not provide a valid basis for dismissal. This point is well illustrated by *State v. Clark*, 53 Wash. App. 120, 765 P.2d 916 (Wash. Ct. App. 1988), where the defendant attempted to interview a four-year-old sexual assault victim. The young child had previously

[2] RCW 70.96A.140 and 71 .050.360 concern involuntary commitments and have no relevance in the present case.

given three pretrial interviews, but refused to answer questions during a fourth. In holding that dismissal of the case was inappropriate, *Clark* explains:

> The right to interview a witness does not mean that there is a right to have a successful interview. This is not a case where the State interfered with the interview, nor is it a case where a key witness arbitrarily refused to talk to defense counsel. Rather, this is a case where the difficulties in the interview were largely unavoidable. A 4–year–old girl was extremely reluctant to discuss the details of sexual abuse. We are satisfied that there was not a failure to provide discovery or compulsory attendance of witnesses and that the circumstances involved here did not justify the dismissal.

53 Wash. App. at 124-25, 765 P.2d at 918-19.

Clark illustrates a broader point. Like any other citizen, a victim of a crime is obligated to testify about non-privileged information *at trial*. But a victim of a crime is not obligated to answer repeated questions from a defense attorney in advance of trial, particularly where those questions concern confidential medical information. To be sure, "the defendant's right to compulsory process includes the right to interview a witness in advance of trial." *State v. Wilson*, 149 Wash. 2d 1, 12-13, 65 P.3d 657, 662 (2003) (*citing State v. Burri,* 87 Wash.2d 175, 181, 550 P.2d 507 (1976)). But just as a defendant has rights, so too does the victim. *See* Wash. Const., art. I, § 24 (noting victim's right to be treated with "due dignity and respect"). "[A] defendant's right of access to a [victim] exists co-equally with the [victim's] right to refuse to say anything. . . . The defendant's right of access is not violated when a witness chooses voluntarily not to be interviewed. *See United States v. Black*, 767 F.2d 1334, 1338 (9th Cir. 1985) (internal quotations omitted).

In any event, to overturn the trial court's decision here, this Court need not determine precisely what rights a victim may or may not have to refuse to answer questions regarding privileged information pretrial. It is enough to reverse the court below to conclude any refusal made by the *victim* during the deposition does not justify dismissal of the *State's*

criminal case. Just as a crime victim is not required to agree with everything that the State does, the State does not represent the victim – and does not vouch for everything that a victim does.

A defendant is not entitled to have the State's criminal charges against him dismissed simply because he does not like answers he is receiving from a victim during some pre-trial proceeding. A defendant is entitled to dismissal of the State's case only where the State has behaved improperly. *See State v. Wilson*, 149 Wash.2d 1, 9, 65 P.3d 657, 661 (Wash. 2003) (to obtain dismiss under CrR 8.3(b), a defendant must show "arbitrary action or *governmental* misconduct" emphasis added0). *Cf. State v. Hofstetter*, 75 Wash.Ct.App. 390, 397, 878 P.2d 474 (1994) (dismissal might be proper in a case where prosecutors instructed the victim not to speak to the defense outside the presence of the prosecutor).

Rather than dismiss this case, the proper course of action was for the trial court to allow the case to proceed to trial, at which time the defendant could fully cross-examine the victims in front of a jury. The defendant is also entitled to bring to the jury's attention any refusal by a victim to cooperate in answering legitimate questions.[3] But the defendant is not entitled to escape justice through the simple expedient of pointing to some action that the victim may have taken leading up to the trial.

C. The Trial Court Plainly Erred In Dismissing The Case Because The Defendant Had No Constitutional Right To Force Crime Victims To Waive Their Rights and Privileges.

The trial court dismissed the case based on T.O.'s and C.O.'s failure to make themselves available for a second deposition by defense counsel related to privileged and

[3] A defendant, however, should not be permitted to draw to the jury's attention the fact that the crime victim has legitimately invoked privilege over certain confidential information. Because a victim has a legal right to refuse to answer such questions, the victim's actions would shed no light on issues at trial.

confidential medical issues. The trial court apparently proceeded from the premise that a criminal defendant has a constitutional right to forcibly overrule a victim's privacy privileges. This conclusion was plainly incorrect and should be overturned.

1. A defendant lacks any constitutional right to compel a crime victim to answer questions.

The trial court stated that a defendant has a "distinct right" to obtain such testimony (through deposition or other means) from a victim:

> Here the defendant's right to a fair trial has been materially affected, in that the defendant is now at the point where she is compelled to choose between two distinct rights, either proceed as scheduled and hear testimony from many witnesses for the first time during trial, thereby violating her effective assistance of counsel, right to confront witnesses, and right to fair due process, or give up her right to speedy trial and ask for yet another extension in hopes the witnesses may cooperate. The government simply cannot force a defendant, a criminal defendant, to choose between these rights.

Tr. of Motion Proceedings (Jan. 13, 2015) at 15.

The trial court's premise was simply wrong, and no violation of the defendant's rights was implicated by the victims' conduct. It is well settled that a criminal defendant does not have a federal constitutional right to discovery. The United States Supreme Court has held "[t]here is no general constitutional right to discovery in a criminal case . . . ." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). This rule has been repeatedly followed in a long line of cases. *See, e.g., United States v. Youker*. 2015 WL 3658167 (E.D. Wash. June 12, 2015) ("[t]here is no general constitutional right to discovery in a criminal case") (internal quotations omitted); *Kaley v. United States*, 134 S. Ct. 1090, 1101 (2014) (same) (internal quotations omitted); *United States v. Fort*, 478 F.3d 1099, 1102 (9th Cir. 2007) (same) (internal quotations omitted).

While the prosecution cannot deliberately withhold exculpatory evidence from a criminal defendant and therefore, in a sense, a defendant can force the Government "to speak" – i.e., to provide her exculpatory information useful to the defense. But the well-known *Brady* rule "did not create" a general right to discovery, *Weatherford*, 429 U.S. 545, 559 (1977), much less a constitutional command that crime victims have to answer pre-trial questions from defense counsel. Indeed, the prohibition against *the State* withholding evidence does not even create constitutional license for fishing expeditions to through Government files to see what might turn up. *See, e.g., Pennsylvania v. Ritchie,* 480 U.S. 39 (1987) (neither the Fifth Amendment nor the Sixth Amendment require that the prosecution allow a defense attorney to rummage through sensitive child abuse information in search of potentially helpful information).

Washington has adopted many rules of discovery to ensure that a defendant has adequate information to prepare for trial. These rules are not required by the federal constitution and certainly do not mandate that a crime victim must answer any question, particularly those that violate privileges.[4]

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[4] Indeed, only about ten states allow depositions in criminal cases, and most of those states do so only to preserve testimony. As one leading criminal law hornbook has explained:

> Less than a dozen states allow for the use of depositions as a basic discovery procedure. In the vast majority of the states and in the federal system, the deposition is available in criminal cases primarily for the purpose of preserving the testimony of a witness likely to be unavailable at trial.

5 Wayne R. LaFave, CRIMINAL PROCEDURE § 20.2(e) (3d ed. updated through Dec. 2014).

> There are many reasons why the vast majority of states do not generally allow depositions. One common reason is that, unlike civil cases, criminal cases generally involve police reports and other prior recorded statements of witnesses (including crime victims). *Id.* As a result "the witness' prior statement contributes to the argument that there is less need for discovery depositions in the criminal justice process and therefore the value of such further disclosure is more readily out-weighed by the burden imposed upon the deposed witness.

This case does not present a close issue. This is not a case where the defendant was somehow in the dark as to what the victims might say. The defendant had not only police reports about statements from the victims, but approximately three hours of deposition testimony defense counsel obtained from them. In such circumstances, the defendant is not complaining that she is unprepared to present a defense, but rather that she wants license to force crime victims to answer questions about privileged information. Neither State or the federal Constitution give the defendant a right to force a crime victim to undergo that kind of intrusive and potentially demeaning scrutiny before trial.

2. The victim's refusal to answer every question put to him does not implicate the defendant's Sixth Amendment rights.

The trial court ruled that that if the defendant here heard trial testimony from a witness for the first time, it would "violat[e] her [right to] effective assistance of counsel, right to confront witnesses, and right to fair due process." Tr. of Motion Proceedings (Jan. 13, 2015) at 15. This unexplained conclusion lacks any legal foundation.

Remarkably, the defendant cites *State v. Gonzalez*, 110 Wn.2d 738, 757 P.2d 925 (Wash. 1988), for the proposition that a victim's refusal to answer questions is a denial of the right to effective assistance of counsel. In fact, *Gonzalez* is instructive because it holds the opposite. In *Gonzalez* a rape victim refused to answer questions during a deposition about her sexual history. On the defendant's motion, the trial court suppressed her testimony. On appeal, the Supreme Court reversed the trial court's decision. The Court explained a defendant "is not entitled to discovery if the trial court determines that the harm to the complainant outweighs the usefulness of the requested information to the defendant." *Id.* at

747. In this case, the trial court made no such finding and accordingly its decision must be reversed.

With regard to the right to confront witnesses, the trial court was equally confused. The right to confront witnesses "is basically a trial right." *Barber v. Page*, 390 U.S. 719, 725 (1968); *see also Peterson v. California*, 604 F.3d 1166, 1170 (9th Cir. 2010) (admission of hearsay statements at preliminary hearings does not violate the right to confront witnesses). At any trial in this case, the victims would have appeared and been cross-examined – the "primary interest secured by the Confrontation Clause . . . ." *State v. Foster*, 135 Wash. 2d 441, 456, 957 P.2d 712, 720 (1998). The defendant had a right to confront those witnesses at the trial – not repeatedly in discovery proceedings.

Finally, with regard to the right to "fair due process," that general right is not violated when two victims both appear for ninety minute pre-trial depositions – answering questions except for privileged information about confidential medical issues. The trial court (and defense counsel) cited no authority that any situation remotely comparable to what happened below was somehow a violation of due process. The rights afforded the defendant under the state constitution are generally no greater than the Sixth Amendment rights under the U.S. Constitution. *State v. Knutson*, 121 Wn.2d 766 (1993); *State v. Gonzalez*, 110 Wn.2d 738 (1988).

In sum, the trial court's ruling that moving forward with this case would somehow have violated a constitutional right of the defendant was plainly erroneous.

IV. CONCLUSION

For the foregoing reasons, amici ask this court to reverse the trial court's dismissal of the charges against the defendant.

DATED this 18th day of September, 2015.

On Behalf of the National Crime Victim Law Institute

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The above counsel of record appreciates the assistance of counsel listed below in the preparation of this brief. Professor Cassell and Ms. Garvin would like to serve as co-counsel on this case, but lack sufficient funds to pay the pro hac vice fee for this pro bono representation. They currently have pending a request for waiver of the fee with the Washington State Bar.

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CERTIFICATE OF SERVICE

On the 18th day of September, 2015, I caused to be served upon the following, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document:

Lacey Offutt, WSBA #45655 Tamara McElyea, WSBA #42466 Moberly & Roberts 12040 – 98th Ave. NE, Suite 101 Kirkland, WA 98034 *Attorneys for Appellant*	☐ Via Hand Delivery – ABC Legal ☒ Via U.S. Mail, 1st Class, Postage Prepaid ☐ Via CM/ECF System ☐ Via Overnight Delivery ☐ Via Facsimile ☒ Via Email
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 18th day of September, 2015.

DARLA MORAN
Legal Assistant