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## I. INTRODUCTION

Decisions about whether to impose taxes and how to spend tax revenue are within the Legislature's plenary authority. In 2007, by statutory directive, the Treasurer transferred \$215 million from the general fund into the education legacy trust account. In 2009, the Treasurer transferred \$67 million from the education legacy trust account to the general fund. The Legislature authorized both transfers, and the Governor approved them. Nothing about these transfers was unusual. Appellant Estate of James H. Jack objects to the second of these transfers. In the Estate's view, the Legislature created the 2005 estate tax with one sole and permanent purpose. Once a tax is imposed, the argument goes, the Legislature can never change the permissible uses of revenues from a particular tax.

Review of the Court of Appeals' unpublished decision in this case is not necessary because the challenges in this case fall within well-established principles articulated in this Court's case law. First, each Legislature is free to act, unconstrained by the dictates of previous Legislatures or expectations that the status quo will prevail. And article VII, section 5 of the Washington Constitution does not preclude the Legislature from changing the object to which a tax is applied.

Second, this Court has, in a number of cases, described three non-exclusive factors for determining whether a budget bill contains substantive law, inconsistent with article II, section 19 of the Washington Constitution. The decision below merely applied this well-established test, and the Court of Appeals correctly determined that a decision about how to spend tax revenue was appropriate subject matter for a budget bill.

Because review of this case would merely involve application of well-established principles in this Court's case law, this case does not meet any of the criteria in RAP 13.4(b). However, if the Court does grant review, it should also review the State's affirmative defenses of statute of limitations, mootness, and standing. The State raised these arguments at each stage of the litigation, and their review would avoid the necessity of addressing the constitutional issues raised by the Estate.

## II. NATURE OF CASE AND DECISION

### A. Facts

In 2005, the Legislature enacted a "stand-alone" estate tax in response to this Court's decision in *Estate of Hemphill v. Dep't of Revenue*, 153 Wn.2d 544, 105 P.3d 391 (2005).<sup>1</sup> Laws of 2005, ch. 516, § 16. The Legislature explained that it intended to replace revenues that

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<sup>1</sup> The previous estate tax was known as a "pick-up tax," because Washington participated in a federal estate tax regime that expressly allowed the states to share in estate tax revenues.



would be lost by not having an estate tax, including the “ability to fund programs vital to the peace, health, safety, and support of the citizens of the state.” Laws of 2005, ch. 516, § 1.

In a separate bill the same year, the Legislature created the education legacy trust account. Laws of 2005, ch. 514, § 1101, codified at RCW 83.100.230. The education legacy trust account originally provided: “Expenditures from the account may be used only for deposit into the student achievement fund and for expanding access to higher education through funding for new enrollments and financial aid, and other educational improvement efforts.” Laws of 2005, ch. 514, § 1101.

Over the years, the Legislature amended the way education legacy trust account funds could be used four times. In 2008, it allowed funds from the account to be transferred into the general fund by adding the following sentence: “During the 2007-2009 fiscal biennium, moneys in the account may also be transferred into the state general fund.” Laws of 2008, ch. 329, § 924 (effective April 1, 2008). In 2010, the Legislature amended the statute to allow transfers to the general fund during the 2009 to 2011 biennium, though no funds were in fact transferred pursuant to that renewed statutory authority. Laws of 2010, 1st Sp. Sess., ch. 37, § 953; *see also* CP at 65 (¶ 3).

In 2012, the Legislature deleted the then-expired reference authorizing moneys to be transferred to the general fund. Laws of 2012, 1st Sp. Sess., ch. 10, § 9. Therefore, as of July 10, 2012, the statute allowed no funds to be transferred from the education legacy trust account to the general fund, and none have been. In the same 2012 bill, the Legislature repealed the student achievement fund and instead added a reference permitting moneys from the education legacy trust account to be used for “support of the common schools.” Laws of 2012, 1st Sp. Sess., ch. 10, §§ 7, 9. In 2015, the Legislature again amended the statute by adding the following sentence: “During the 2015-2017 biennium appropriations from the account may be made for support of early learning programs.” Laws of 2015, 3d Sp. Sess., ch. 4, § 977.

Since 2005, all funds collected from the estate tax have been deposited into the education legacy trust account, as required by statute. RCW 83.100.220; CP at 68 (§ 4). Other tax revenues, including those from the cigarette tax, have also been deposited into that account. *See* Laws of 2005, ch. 514, § 1102 (directing a portion of cigarette tax revenues into the education legacy trust account under former statute).

Since the 2005 inception of the education legacy trust account, the Legislature has transferred monies between that account and the general fund in both directions. In 2007, the Legislature directed a \$215 million

transfer from the general fund into the education legacy trust account. *See* CP at 104 (§ 5). In 2009, the Legislature directed the Treasurer to transfer \$67 million from the education legacy trust account to the general fund. Laws of 2009, ch. 564, § 1702. The Treasurer made the transfer on June 9, 2009. CP at 65 (§ 3). Because funds in the education legacy trust account from different taxes are commingled, it is unknown whether the funds transferred included estate tax funds. CP at 65 (§ 4). It is also unknown whether any transferred estate tax funds were spent for purposes other than education, as over \$13 billion in general fund monies are spent annually on education. CP at 68 (§ 6).

Such transfers between accounts are common in appropriations legislation, which often contain sections directing the Treasurer to make various funds transfers. For example, monies have been transferred into the education legacy trust account from other sources besides the general fund. The 2010 budget directed a total of \$25 million transferred from the shared game lottery account and state lottery account to the education legacy trust account. Laws of 2010, 1st Spec. Sess., ch. 37, § 803.

**B. Procedural Facts**

Just once, the Legislature transferred funds from the education legacy trust account to the general fund, on June 9, 2009. Nearly three years later, on June 8, 2012, William Wall filed suit against several state

defendants in Thurston County Superior Court, asserting that the transfer violated article VII, section 5 of the Washington Constitution, and requesting declaratory and injunctive relief.<sup>2</sup> CP at 336. In October 2012, an amended complaint added the Estate of James H. Jack as an additional plaintiff. CP at 2. Mr. Jack passed away in September 2010, and his estate paid estate taxes in May 2011, long after the Treasurer transferred the challenged funds. CP at 53, 54.

The State moved for summary judgment, asserting several threshold affirmative defenses, including the statute of limitations, mootness, and standing. CP at 26-44. Plaintiffs filed a cross-motion on their article VII, section 5 constitutional argument, and the State responded by requesting summary judgment on this constitutional issue as well. CP at 70-81 (Plaintiffs' motion), 82-99 (Defendants' response).

The trial court ruled that Mr. Wall did not have standing, but that the Estate of Jack did. CP at 152. The trial court otherwise rejected the State's threshold arguments. CP at 151-52. On the article VII, section 5 issue, the trial court ruled that the Legislature acted consistently with the Constitution when it changed the way education legacy trust account funds could be used, but granted plaintiffs the opportunity to conduct more

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<sup>2</sup> Attorneys for Mr. Wall previously made a demand to the Attorney General that he institute legal action on the sole basis of article VII, section 5, which was declined. This demand did not specify on whose behalf it was being made. CP at 21-23.

discovery about whether any of the money transferred was collected prior to the change in the law. CP at 152-53.

After the trial court's initial ruling, the State produced undisputed evidence that all the funds transferred were collected after the Legislature changed the law, using standard accounting principles. CP at 283-85. Plaintiffs moved for reconsideration of the trial court's initial ruling, and raised a new argument based on article II, section 19. CP at 247-67. The trial court denied the reconsideration motion and granted summary judgment to the State. CP at 305-12 (letter opinion), 313-17 (order).

The Estate of Jack appealed.<sup>3</sup> The Court of Appeals affirmed in an unpublished decision. *William E. Wall v. State*, slip op. no. 46641-4-II (Aug. 26, 2015). The Court of Appeals ruled that article VII, section 5 did not apply, but on a different ground than that argued by the State. The State had cited a number of early Washington Supreme Court cases holding that article VII, section 5 applies only to property taxes, not to excise taxes like the estate taxes at issue here. Resps.' Br. at 25-33. The Court of Appeals did not address this issue and instead ruled that the plain language of article VII, section 5 applies only to laws imposing a tax, not to laws spending tax revenue. Slip op. at 5-6. The Court of Appeals applied this Court's three-factor, article II, section 19 test, and held that

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<sup>3</sup> Plaintiffs did not appeal the trial court's ruling that Mr. Wall lacked standing, and therefore the Estate is the only appellant.

the appropriations legislation permitting the challenged transfer did not improperly contain substantive law in a budget bill. Slip op. at 10-11. The Court of Appeals opted not to address the State's threshold arguments, which included the statute of limitations, mootness, and standing. Slip op. at 4 n.6. The Estate seeks review.

### III. ISSUES

1. Does the two-year statute of limitations in RCW 4.16.130 apply to a challenge to the Treasurer's transfer of funds between accounts pursuant to Legislative authority, when no specific statute of limitations applies to such a situation?
2. Where the Estate seeks as its sole remedy a budgetary funds transfer that would likely have no practical effect, is the case moot?
3. Where the Estate could not possibly have paid any of the taxes that it asserts were illegally transferred, does it lack standing?
4. Is article VII, section 5 limited to legislation imposing a tax?
5. Is article VII, section 5 limited to property taxes?
6. If article VII, section 5 applies to excise taxes, is the Legislature ever permitted to change how tax revenues are used once a tax is imposed?
7. Is the Legislature's inclusion of a budgetary decision about how to spend tax receipts in broadly titled appropriations legislation consistent with article II, section 19?
8. Did the Legislature comply with article II, section 37 by including the full text of the education legacy trust account statute and its amendment in 2008 legislation?

#### **IV. REASONS WHY THIS COURT SHOULD DENY REVIEW**

Because the Estate does not have taxpayer standing, and the issues in this case are stale, the Court has no need to accept review or to reach the constitutional issues the Estate raises. But even if the Court did reach those issues, this Court's established case law forecloses the Estate's constitutional challenges.

##### **A. The Estate's Constitutional Challenges Are Untimely And Moot, And The Estate Lacks Standing.**

The Court of Appeals did not address the State's threshold arguments, remarking in a footnote that the State did not cross-appeal. Slip op. at 4 n.6. But the State, having won complete relief at the trial court, had nothing to appeal. And this Court, of course, may affirm on any ground supported by the briefing and the record. *Huff v. Wyman*, slip op. no. 92075-3, at 4 (Nov. 12, 2015). This Court should deny review. But if this Court accepts review, it should address the State's affirmative defenses, which are meritorious and would avoid reaching the constitutional issues raised by the Estate.

##### **1. The Estate's claim was not brought within the applicable two-year statute of limitations.**

The fund transfer at the core of this dispute occurred on June 9, 2009. CP at 65. Mr. Wall filed this action on June 8, 2012, one day less than three years after the transfer. The Estate joined the action in October

2012, more than three years after the transfer. Even assuming the Estate's claims relate back to Mr. Wall's initial complaint, he filed that complaint after the applicable two-year statute of limitations.

RCW 4.16.130 is the two-year "catchall" statute of limitations that applies when no other statute specifically covers the type of claim at issue: "An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued."

This catch-all provision applies here because no other statute of limitations applies. The Estate relied on the three-year limitation period in RCW 4.16.080(2). CP at 112-14. That statute applies to "[a]n action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated." This limitation period "has generally been applied to torts and tort-like claims." *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 837, 991 P.2d 1126 (2000). But RCW 4.16.080(2) does not apply in this case. The Estate's claims do not allege torts or tort-like claims. The Estate did not allege injury to itself or someone else's personal property, but rather sought to correct what it believed to be an improper policy decision in a budget. See CP at 17, 107 (explaining motivations behind amended complaint).



The need to quickly resolve challenges to the Legislature's budget decisions also counsels such a result. Under the Uniform Declaratory Judgments Act, lawsuits must be brought within a "reasonable time." *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 159, 293 P.3d 407 (2013). Because of the need for quick and decisive action to correct an alleged budgetary problem, neither Mr. Wall nor the Estate instituted this action within a reasonable time.<sup>4</sup> And at a minimum, the delay in bringing this action demonstrates that the dispute lacks the public import necessary for this Court to accept review.

**2. The issues in this case are moot because no meaningful relief can be provided to the Estate.**

It is too late to provide any relief to the Estate, even if such relief were warranted. "A case is moot if a court can no longer provide effective relief." *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793, 796 (1984). The Estate challenges a 2009 budget decision. Of course, the money at issue was spent long ago. CP at 65 (¶ 5). And the statutory language allowing such transfers is expired and is no longer on the books. Laws of 2012, 1st Sp. Sess., ch. 10, § 9.

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<sup>4</sup> A "reasonable time" is generally determined by analogy to the time allowed for a similar action as prescribed by statute or rule. *Schreiner Farms*, 173 Wn. App. at 159. Because RCW 4.16.130 is the statute of limitations that applies, this action was not instituted within a reasonable time as it was beyond this analogous statute of limitations.

The Estate's requested remedy is illusory. If this Court were to order \$67 million transferred from the general fund to the education legacy trust account, the Legislature would need to appropriate money for such a transfer in a future budget. But the Legislature could then merely appropriate \$67 million less than it otherwise would have from the general fund. Both accounts are used to fund education. In fact, the Legislature spends over \$13 billion per year from the general fund on education. CP at 68 (¶ 6). The State's obligation to properly fund education remains the same either way.

The Estate primarily seeks a ruling that the Legislature violated the Constitution. *See* CP at 18 (¶¶ 1-2). But this Court generally does not issue advisory opinions. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 416, 27 P.3d 1149 (2001). This is also not a dispute where no relief would have been possible. Indeed, nearly a year passed between the time the Legislature authorized a transfer and when the transfer was made, but the Estate did not timely attempt to stop the transfer. Laws of 2008, ch. 329, § 924 (legislation authorizing transfers effective April 1, 2008); CP at 65 (¶ 3) (Treasurer made transfer on June 9, 2009, pursuant to 2009 legislation specifically directing transfer). The case is moot.

**3. The Estate does not have taxpayer standing.**

The Estate seeks to stretch the doctrine of taxpayer standing beyond its acceptable limits. Original plaintiff William Wall asserted an interest as a general taxpayer. *See* CP at 53. In the Amended Complaint, the Estate asserted claims as a plaintiff that had paid the estate tax. CP at 14-15. The trial court dismissed Wall for lack of standing, but did not dismiss the Estate. The court concluded that by paying the estate tax, the Estate created a sufficient “heightened connection . . . nexus” sufficient for standing. CP at 162-63. The trial court erred.

The apparent premise behind taxpayer standing is that a taxpayer *might* have had his or her taxes used in an unconstitutional manner. *See, e.g., Dick Enters., Inc. v. Metro. King Cnty.*, 83 Wn. App. 566, 573, 922 P.2d 184 (1996) (for taxpayer standing, “plaintiff must show that it pays the type of taxes funding the project [being challenged]”). But that hypothetical link cannot possibly exist in this case. The Estate paid estate taxes in 2011, long *after* the June 2009 funds transfer. CP at 54. Therefore, none of the taxes paid by the Estate could possibly have been subject to this transfer. This is just as true of the Estate as it was of Mr.

Wall, who was dismissed for lack of standing. The trial court correctly dismissed Mr. Wall, and it should have dismissed the Estate as well.<sup>5</sup>

**B. The Estate's Constitutional Arguments Are Without Merit.**

The 2008 Legislature did not violate a 2005 statute by changing the law. See *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007) (“No legislature can enact a statute that prevents a future legislature from exercising its lawmaking power.”) Further, the undisputed evidence demonstrates that the State collected the funds transferred in 2009 after the 2008 statute became law. Therefore, defendants complied with the law that was in effect at the time of the transfer. The Estate’s article VII, section 5 challenge has no merit.

The Legislature’s actions were also consistent with article II, section 19, as interpreted by this Court in *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 62 P.3d 470 (2003). Lastly, the Estate raises its article II, section 37 argument for the first time in this Court, and in any event, the argument is without merit. All of these arguments are controlled by established case law, and do not merit further review.

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<sup>5</sup> An example illustrates the point. Suppose Spokane County is alleged to have used property tax revenues illegally. Would a Seattle resident, who owns no property in Spokane and has never paid property taxes there, have standing to challenge the use of funds? The answer obviously should be no. That no proper plaintiff existed in this case undercuts any argument that this is a matter of substantial public interest. RAP 13.4(b)(4).

**1. Even if Article VII, section 5 applies, the Legislature complied with it.**

Article VII, section 5 provides: “No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.” The court below concluded that this provision did not apply to the 2008 legislation authorizing a funds transfer because it was not a law imposing a tax. The State argued that article VII, section 5 did not apply based upon different reasoning. Resps.’ Br. at 25-33.

This Court need not resolve whether article VII, section 5 applies because recent case law demonstrates that the Legislature’s actions were well within constitutional bounds. This Court has already held that one Legislature may amend what an earlier Legislature has done. *Farm Bureau*, 162 Wn.2d at 290. There, plaintiffs alleged that tax increases and expenditures in 2005 legislation were inconsistent with an earlier statute, the Taxpayer Protection Act, passed by initiative. *Id.* This Court rejected the challenge, explaining, “That which a prior legislature has enacted, the current legislature can amend or repeal.” *Id.* at 290.

The Court of Appeals applied the same principle to article VII, section 5. *Wash. State Hosp. Ass’n v. State*, 175 Wn. App. 642, 647-49, 309 P.3d 534 (2013). There, the Court held that amending an earlier

statute to allow approximately \$200 million from a hospital safety net assessment fund to be expended instead of making state general fund payments to hospitals, did not violate article VII, section 5. *Id.* Following *Farm Bureau*, the Court of Appeals concluded that the 2011 Legislature acted within its plenary authority to change the law. *Id.* at 649.

*Farm Bureau*, *Wash. State Hosp. Ass'n*, and the Court of Appeals' opinion in this case are consistent, with all three of the opinions having concluded that a later Legislature's change to an earlier law is permissible under constitutional principles. Therefore RAP 13.4(b)(1), providing for review of inconsistent decisions, is not satisfied.

A further fact precludes a decision on this constitutional issue. The question that the Estate seeks to appeal—whether the Legislature can impose a tax when the law states one purpose for those tax revenues and then change the law and use previously collected revenues for another purpose—is not presented in this case. At the initial hearing on the parties' cross-motions for summary judgment, the trial court delayed a final ruling on the merits to allow the Estate to obtain discovery on this timing issue. The resulting undisputed evidence in the record demonstrates that the State collected all of the money transferred *after* the change in the law. CP at 283-85. Surely it is not the case that once the Legislature imposes a tax, it can never change the way the tax revenues

are used or the accounts into which those funds may be transferred. The facts here do not support review by this Court.

**2. The transfer was consistent with the three-part test under Article II, section 19.**

The Estate's primary challenge to the funds transfer under article II, section 19 is that the appropriations bill authorizing the transfer improperly contained substantive law in a budget. This Court has already given ample guidance regarding the three-factor test for analyzing this issue in the context of appropriations bills, and additional guidance to the courts below is unnecessary. *Compare, e.g., Charles*, 148 Wn.2d at 629-31 (appropriations bill lowering employer retirement contributions for public employees did not violate three-factor test), *with Washington State Legislature v. State*, 139 Wn.2d 129, 144-48, 985 P.2d 353 (1999) (requirement that low-income families pay monthly copayment in connection with child care assistance, which defined eligibility for public assistance and was of a continuing nature, constituted impermissible substantive law in a budget). The petition thus fails to present a question meriting review. RAP 13.4(b).

The Court of Appeals correctly applied this Court's test in this case. This Court has described the test as follows:

We decline to adopt a categorical definition of "substantive law," but where the policy set forth in the budget has been

treated in a separate substantive bill, its duration extends beyond the two-year time period of the budget, or the policy defines rights or eligibility for services, such factors may certainly indicate substantive law is present.

*Wash. State Legislature*, 139 Wn.2d at 147.

The Court of Appeals correctly reasoned that “not a single criteria articulated by our Supreme Court applies to the amendments to former RCW 83.100.230.” Slip op. at 10. The Court of Appeals explained that the first factor was not met because the subject matter had not been treated in separate substantive legislation in the past. Slip op. at 10. It also explained that the second factor was not met because both amendments to the statute were limited to two years. Slip op. at 10-11. And third, the challenged statutory amendments, unlike those disallowed in other cases, defined no rights or eligibility for services. Slip op. at 11 (citing *Wash. State Legislature*, 139 Wn.2d at 147; *Flanders v. Morris*, 88 Wn.2d 183, 186, 558 P.2d 769 (1977)). Because the Court of Appeals correctly applied the article II, section 19 analysis articulated and explained by this Court, review of this issue is unnecessary. The issue is not a significant question of law or of substantial public interest. RAP 13.4(b)(3), (4).

There is also no merit to the Estate’s “subject in title” challenge.

The title of the 2008 appropriations bill being challenged is:

*AN ACT Relating to fiscal matters; amending RCW ... 83.100.230, ...; reenacting and amending RCW 70.105D.070; amending 2007 c 522 [listing numerous*



sections]; adding new sections to 2007 c 522 (uncodified); repealing 2007 c 522 s 713 (uncodified); making appropriations; and declaring an emergency.

Laws of 2008, ch. 329, § 924 (emphasis added). That title was broad enough to include the change in the use of funds in the education legacy trust account because it plainly and specifically cites to RCW 83.100.230. And the greatest latitude is afforded the Legislature in titling appropriations bills “because their purpose is to allocate state funds to such a great number of state needs.” *Charles*, 148 Wn.2d at 628. The Estate’s challenge is without merit, and does not warrant review.

**3. The Legislature complied with Article II, section 37, by stating the full text of RCW 83.100.230 in the 2008 legislation.**

For the first time in its Petition for Review, the Estate asserts that the Legislature violated article II, section 37. Because this challenge was not raised below, this Court should decline to consider it. RAP 2.5(a). Regardless, the challenge fails to present a significant constitutional question. RAP 13.4(b)(3). Article II, section 37 provides that “No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.”

The 2008 legislation included the full text of the amended statute:

The education legacy trust account is created in the state treasury. Money in the account may be spent only after appropriation. Expenditures from the account may be used only for deposit into the student achievement fund and for

expanding access to higher education through funding for new enrollments and financial aid, and other educational improvement efforts. During the 2007-2009 fiscal biennium, moneys in the account may also be transferred into the state general fund.

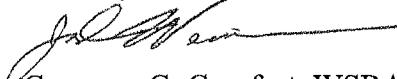
Laws of 2008, ch. 329, § 924. The bill set forth the entire text of the statute as amended. This is exactly what article II, section 37 requires:

#### V. CONCLUSION

Because established case law controls the outcome of this dispute, review is not warranted. The Court of Appeals reached conclusions consistent with this Court's established case law, and no new significant question of law is presented. RAP 13.4(b)(1), (3). If review is granted, however, this Court should also grant review of the States' statute of limitations, mootness, and standing arguments. These threshold issues are meritorious, have been raised at each stage of the litigation, and would avoid the need to reach the constitutional issues raised by the Estate.

RESPECTFULLY SUBMITTED this 3rd day of December, 2015.

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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 this 3<sup>rd</sup> day of December, 2015, at Tumwater, WA.

  
\_\_\_\_\_  
Candy Zilinskas, Legal Assistant

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**Subject:** William E. Wall v. The State of Washington, No. 92497-0 - FOR FILING

Please file the attached document entitled State of Washington 's Answer to Petition for Review. Thank you.