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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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In re Personal Restraint Petition of

GLENN NICHOLS,

Petitioner.

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**RESPONDENT'S SUPPLEMENTAL BRIEF**

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**A. ISSUES**

1. A defendant may not argue for the first time in a personal restraint petition that evidence should have been suppressed under the exclusionary rule, when he was afforded a full and fair opportunity to litigate the claim at trial. Nichols argues in this petition that drugs found on him should have been suppressed because the State violated his rights under article 1, section 7 of the Washington Constitution by reviewing his motel registration. Nichols could have raised this argument in the trial court, but he failed to do so. Has Nichols waived the right to raise this argument in this petition?

2. In State v. Jordan,<sup>1</sup> the Washington Supreme Court held that article 1, section 7 of the Washington Constitution precludes a police officer from conducting a random, suspicionless search of a motel registry; the court signaled that it would rule differently if police had particularized and individualized suspicion prior to viewing the registry. Here, an informant told police that he went to a motel with a drug seller, who proceeded to obtain drugs from room 56 of the motel and sell them to the informant. Based on this information, the officers viewed the registry information for room 56 and subsequently arrested Nichols for drug

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<sup>1</sup> 160 Wn.2d 121, 156 P.3d 893 (2007).

offenses. Did the officers have the requisite particularized and individualized suspicion to allow them to view the registry information for room 56 without offending article 1, section 7?

**B. STATEMENT OF THE CASE**

In February of 2004, the Seattle Police Department conducted a buy operation using a confidential informant, Charles Ream, to buy drugs from Toreka Ativalu. The initial goal was to use the buys to obtain a search warrant for Ativalu's home. App. D at 1 (Findings of Facts and Conclusions of Law).<sup>2</sup>

On February 26th, Ream went to Ativalu's home to buy cocaine. When Ream tried to buy the drugs, Ativalu told him that she was out of drugs but planned to meet her supplier. After a few moments, Ativalu, Ream, and a person known only as "Robert," drove to a Travel Lodge Motel in Seattle. When they arrived at the motel, Robert and Ream remained in the car, while Ativalu exited. Ativalu then yelled for Robert to call "OG" to find out what motel room OG was in. Robert called someone on his cell phone, asking if OG was present. Robert apparently spoke with OG and asked him what room he occupied. Robert then hung

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<sup>2</sup> The State will reference the appendices attached to the State's Response to Personal Restraint Petition (Apr. 11, 2008).

up and yelled to Ativalu that OG was in room 56. Ream saw Ativalu go into room 56 of the Travel Lodge. Roughly five minutes later, Ativalu exited room 56 and returned to the car, where she handed Ream several pieces of crack cocaine. Ream later returned to Detective Rudy Gonzalez's car and informed Gonzalez about what had occurred. App. D at 2-3.

Based on this and other controlled buys, the officers were able to obtain a search warrant for Ativalu's home. Gonzalez then contacted Sergeant Caylor and Officer Nelson to inform them that Ativalu apparently had purchased cocaine from someone in room 56 of the Travel Lodge. App. D at 3.

Roughly two hours later, Sergeant Caylor and Officer Nelson went to the Travel Lodge and asked the motel clerk who was registered for room 56.<sup>3</sup> They learned that the occupant of room 56 was the defendant, Glenn Nichols. The clerk provided the officers with the registration receipt for room 56 and a photocopy of Nichols's identification. Officer Nelson then ran Nichols's name through dispatch, and learned that Nichols's driver's license was suspended in the third degree. App. D at 3.

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<sup>3</sup> This fact appears in the January 4, 2005, transcript of the proceedings in this case. 1/4/05RP 30-31. The State has filed a motion in this Court to Transfer Report of Proceedings from Direct Appeal.

A few moments later, Nichols drove into the Travel Lodge parking lot. As Nichols exited his car, Officer Nelson asked him whether he was Glenn Nichols. When Nichols responded “yes,” the officer informed Nichols that his license was suspended and that the officer wanted to speak with him. At this point, Nichols tried to reenter his car, but the officers apprehended and arrested him. The officers then searched Nichols incident to arrest and found approximately 15 grams of crack cocaine, 2 grams of marijuana, and \$470 in cash, including one of the marked bills used earlier that day in a controlled buy. App. D at 3-4.

The State charged Nichols with Possession of Cocaine with Intent to Deliver and Possession of Marijuana. Appendix A (felony judgment and sentence); Appendix B (misdemeanor judgment and sentence). At trial, Nichols moved to suppress the evidence, arguing that the officers did not have the right to arrest him for Driving While License Suspended in the Third Degree.<sup>4</sup> The court denied this motion, and Nichols was found guilty by bench trial of both charges; he received a sentence of 60 months of total confinement. Appendix A and B. Nichols appealed, arguing that his state and federal rights were violated when the court ordered him to

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<sup>4</sup> Nichols apparently argued that the statute the officers relied on to arrest him, RCW 46.20.289, had been overturned by the Court in City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004). The trial court rejected this argument, noting that RCW 46.20.289 had not yet been overturned at the time of Nichols’s arrest. App. C at 4.

provide a biological sample for DNA identification. Appendix C (appellate court ruling).<sup>5</sup> This Court affirmed his conviction, and the mandate issued on January 11, 2008. Appendix C.

Nichols then filed this Personal Restraint Petition (“PRP”), arguing that the officers violated his constitutional rights by viewing the motel registry of room 56 without a search warrant. In its brief filed on April 11, 2008, the State, citing State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007), agreed that the officers violated Nichols’s constitutional rights by viewing the motel registry information without a warrant. This Court found that Nichols’s petition raised a debatable issue, appointed counsel for Nichols, and asked for clarification on two points: (1) whether Nichols has waived his right to present this argument here; and (2) whether State v. Jorden applies to searches of a motel registry when the officers have individualized suspicion that the occupant of a particular room has engaged in criminal activity.

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<sup>5</sup> Nichols also filed a Statement of Additional Grounds, alleging that insufficient evidence existed to support his conviction, that a photocopy of the buy money was improperly introduced at trial, and that the prosecutor and his attorney committed misconduct. This Court rejected each of those arguments. App. C.

**C. ARGUMENT**

In his PRP, Nichols asserts that the evidence of drugs found on him should be suppressed because the officers violated his article 1, section 7 rights by viewing the motel registry for his room without a warrant. The PRP should be denied and dismissed. Because Nichols failed to raise this claim in the trial court, he has waived his right to raise it here. In any event, the Washington Supreme Court in Jorden held only that police may not randomly search a motel registry without a warrant; here, the police had particularized and individualized suspicion, before viewing the registry, that the occupant of room 56 was engaged in criminal activity.

**1. BY NOT RAISING THE ISSUE IN THE TRIAL COURT, NICHOLS WAIVED HIS RIGHT TO ARGUE THAT EVIDENCE SHOULD HAVE BEEN SUPPRESSED BASED ON THE OFFICERS' REVIEW OF HIS MOTEL REGISTRATION.**

A petitioner may not argue for the first time in a PRP that evidence should be suppressed based on the exclusionary rule. Because Nichols failed to argue in the trial court that the search of the motel registry violated his rights under article 1, section 7 of the Washington Constitution, he cannot raise that argument in this petition.

Washington courts have long recognized that “collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders. These are significant costs which require that collateral relief be limited.” In re Personal Restraint of Cook, 114 Wn.2d 802, 809, 792 P.2d 506 (1990) (quoting In re Personal Restraint of Hews, 99 Wn.2d 80, 86, 660 P.2d 263 (1983)).

The United States Supreme Court recognized one such limitation on collateral relief by refusing to allow a state prisoner to seek relief via federal habeas corpus on the ground that evidence obtained in violation of the Fourth Amendment was introduced at trial, where the defendant had a full and fair opportunity to litigate the claim in the state courts. Stone v. Powell, 428 U.S. 465, 494, 96 S. Ct. 3037, 49 L. Ed.2d 1067 (1976). The Court noted that the primary justification for the exclusionary rule is the deterrence of police conduct that violates Fourth Amendment rights. Id. at 486. Weighing the utility of the rule against the costs of extending it to collateral relief, the Court observed that application of the exclusionary rule diverted the focus of the trial from the truth-finding process, and concluded that any additional incremental deterrent provided by applying

the rule at the considerable remove of a habeas corpus proceeding would be outweighed by the costs to other values vital to our criminal justice system. Id. at 489-95.

This Court adopted this limitation in In re Personal Restraint of Rountree, 35 Wn. App. 557, 668 P.2d 1292 (1983). Rountree had claimed, in a PRP, that his arrest was without probable cause, and that the resulting evidence should have been suppressed at his trial. Id. at 557-58. Relying on the same policy considerations discussed in Powell, this Court held that "a criminal defendant who has had the opportunity for full and fair litigation of his Fourth Amendment claim at trial and on direct appeal may not be granted relief from personal restraint on the basis that evidence obtained through an unconstitutional search or seizure was introduced at his trial." Id. at 558. The Court contrasted application of the exclusionary rule with questions "directly connected with the *truthseeking function of the courts*," which are properly brought in a PRP. Id. at 559 (emphasis added). The Court concluded that applying the exclusionary rule — already a harsh result — in a collateral attack would "undermine both the criminal justice system's search for truth and society's interest in the finality of judgments while not appreciably advancing Fourth Amendment interests." Id.

This Court should follow Rountree in this case. Nichols had a full and fair opportunity below to litigate his claim that the cocaine and marijuana found on him should have been suppressed based on the exclusionary rule. He nevertheless failed to make this argument. Application of the exclusionary rule in this collateral attack, four years removed from the events at issue, would subvert the truth and the finality of the judgment while not substantially advancing the purposes behind the exclusionary rule.<sup>6</sup> Nichols has waived his right to argue that evidence should have been suppressed pursuant to the exclusionary rule.

**2. NICHOLS'S ATTORNEY WAS NOT INEFFECTIVE FOR NOT SEEKING SUPPRESSION ON THIS BASIS.**

Nichols argues that, even if he is precluded from raising his suppression claim on collateral attack, his PRP should nevertheless be granted because his trial and appellate counsel were ineffective for not

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<sup>6</sup> As the Supreme Court recognized, there is little additional deterrent effect of applying the exclusionary rule in a collateral relief proceeding: "Nor is there reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant." Stone v. Powell, 428 U.S. 465, 493, 96 S. Ct. 3037, 49 L. Ed.2d 1067 (1976).

arguing suppression of the drugs based on the officers' viewing the registration form for room 56. This argument also fails.

In Kimmelman v. Morrison, 477 U.S. 365, 382-83, 106 S. Ct. 2574, 91 L. Ed.2d 305 (1986), the Court declined to apply Powell's restriction on federal habeas review of Fourth Amendment claims to Sixth Amendment claims of ineffective assistance of counsel based on the failure to raise a Fourth Amendment issue at trial. Noting the "highly demanding" standard to establish ineffective assistance of counsel, the Court observed that this standard "differs significantly from the elements of proof applicable to a straightforward Fourth Amendment claim." Id. at 382. "Although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim . . . , a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief." Id.

In order to demonstrate ineffective assistance of trial counsel, the defendant bears the burden to show: (1) that trial counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, in that there is a reasonable probability that but for counsel's errors, the outcome would have been different. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) (citing Strickland v. Washington, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)). The reviewing

court should begin with the “strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment.” State v. Glenn, 86 Wn. App. 40, 45, 935 P.2d 679 (1997). If either part of the test is not satisfied, the inquiry need go no further. Hendrickson, 129 Wn.2d at 78. Where a claimed error was part of a legitimate trial strategy or tactical decision, it does not constitute ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Nor is failure to raise all conceivable nonfrivolous issues on appeal ineffective assistance; the exercise of independent judgment in deciding which arguments will be successful on appeal "is at the heart of the attorney's role in our legal process."<sup>7</sup> In re Personal Restraint of Lord, 123 Wn.2d 296, 314, 868 P.2d 835 (1994).

Nichols has failed to show that either trial or appellate counsel was deficient for not seeking suppression of the drugs based on the officers' viewing the motel registration of room 56. There is no authority, even now, to support the claim that a search of a motel registry based on

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<sup>7</sup> Where a factual issue such as this one is not raised in the trial court, it is rare that the record will be sufficient for direct appellate review. Here, for example, there is nothing in the record about what signs may have been posted at the motel's registration desk informing guests that their registration information would be subject to police inspection. Cf. Jorden, 160 Wn.2d at 124 (guests were not told of the possibility for random, suspicionless searches of the registry by law enforcement).

*particularized and individualized suspicion* runs afoul of article 1, section 7. Indeed, at the time of trial and appeal, there was no decision by the Washington Supreme Court preventing officers from conducting even random, suspicionless searches of motel registries.<sup>8</sup> Nichols's counsel had no obligation to move to suppress evidence based on a search of a motel registry when no published decision in Washington supported this argument. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) (not ineffective for counsel to rely on pattern jury instruction where no published case had questioned it). Furthermore, Nichols's counsel moved to suppress the evidence on different grounds, which suggests that his attorney made a reasoned decision not to move for suppression based on the search of the motel registry. See State v. Nichols, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007) (counsel was not ineffective for not bringing suppression motion, in part because counsel moved to suppress evidence on different grounds).

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<sup>8</sup> From 2000, the federal law was that random, suspicionless searches of a motel's guest registry did not violate a defendant's constitutional rights. United States v. Cormier, 220 F.3d 1103, 1108 (9th Cir. 2000). The trial court's Findings of Fact and Conclusions of Law denying Nichols's motion to suppress were issued on January 23, 2005. On February 23, 2005, this Court held that a random, suspicionless search does not violate a defendant's article 1, section 7 rights. State v. Jorden, 126 Wn. App. 70, 74, 107 P.3d 130 (2005). Nichols filed his brief on direct appeal on October 10, 2005. It was not until April 26, 2007 that the Washington Supreme Court held that random, suspicionless searches violated a defendant's article 1, section 7 rights. State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007).

Nor has Nichols demonstrated that counsel's failure to raise this specific suppression issue caused him prejudice. As explained below, the argument that officers with particularized and individualized suspicion could not search a motel registry would likely have failed, both in the trial court and in the appellate court. Under the facts of this case, police inspection of the registry for room 56 was appropriate, and the courts would have concluded the same.

3. **STATE V. JORDEN PROHIBITS ONLY RANDOM, SUSPICIONLESS SEARCHES OF MOTEL REGISTRIES; BECAUSE THE SEARCH HERE WAS BASED ON PARTICULARIZED AND INDIVIDUALIZED SUSPICION, THERE WAS NO VIOLATION OF ARTICLE 1, SECTION 7.**

Even if this Court were to reach the merits of Nichols's argument, his claim would still fail. In Jorden, the Washington Supreme Court was faced with a random, suspicionless search of a motel registry. The court throughout its opinion repeatedly emphasized the importance of these characteristics of the search to its analysis and holding. See, e.g., Jorden, 160 Wn.2d at 127 ("this court has consistently expressed displeasure with **random and suspicionless searches**"); at 127-28 ("in each of the cases cited [by the State], law enforcement had a **particularized and**

**individualized suspicion** about the suspect that *preceded* review of the registry"); at 129 ("Our most important inquiry then becomes whether a **random and suspicionless search** of a guest registry reveals intimate details of one's life."); at 130 ("We hesitate to allow a search of a citizen's private affairs where the government cannot express at least an **individualized or particularized suspicion** about the search subject or present a valid exception to a warrantless search."); at 130 ("we hold that the practice of checking the names in a motel registry for outstanding warrants **without individualized or particularized suspicion** violated the defendant's article I, section 7 rights"); at 130-31 ("Reports of such observations [of behavior suggesting criminal activity] may engender the **requisite individualized suspicion** that is notably missing from current program techniques.") (italics in original, bold added).

Here, the officers had the "requisite" individualized suspicion before looking at the motel registry. An SPD confidential informant, Ream, met with Toreka Ativalu, who told the informant that she was going to get cocaine for him. Ream and Ativalu then drove, along with someone named Robert, to the Travel Lodge motel, where Ativalu asked Robert where "OG" was staying. Robert told her that OG was staying in room 56 and Ativalu went to room 56, only to return to the car a few

moments later with cocaine. Ream provided this information to the police. Under these circumstances, the officers had a "particularized and individualized" suspicion that the occupant of room 56 was involved in the sale of drugs. Accordingly, article 1, section 7 did not preclude the officers from viewing the registry for that room.

**4. THE JORDEN COURT DID NOT CONSIDER MUNICIPAL CODES THAT HAVE LONG REQUIRED THAT MOTEL REGISTRIES BE AVAILABLE TO LAW ENFORCEMENT.**

In concluding that random viewing of motel registries violated article 1, section 7, the Jorden court never considered the myriad municipal codes that require motels to retain registries and to allow law enforcement access to those registries. Jorden, 160 Wn.2d at 128 n.5 (because the State failed to cite these municipal codes in its briefing, the court refused to consider the argument that such codes provided evidence that Washington citizens have not historically held the information in motel registries free from governmental trespass). Had the court considered these municipal codes, it might well have concluded that even random, suspicionless searches do not implicate private affairs, and thus do not violate article 1, section 7.

Article 1, section 7 protects against warrantless searches of a citizen's private affairs ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."). Private affairs are "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). The defendant has the burden of showing that his "private affairs" were disturbed in a way that implicates article 1, section 7. State v. Jackson, 82 Wn. App. 594, 601-02, 918 P.2d 945 (1996). To determine whether a governmental act implicates a "private affair," the court considers: (1) the historical protections afforded to the perceived interest, (2) the purpose for which the information is sought and by whom it is kept, and (3) the nature of the information and whether that information reveals intimate details. Jorden, 160 Wn.2d 126-27.

Based on the information considered by the Jorden court, these three factors suggested that the *random, suspicionless* search of a motel registry by police intruded on a citizen's private affairs. Jorden, 160 Wn.2d at 126-31. This is not the case, however, when dealing with a search of a motel registry based on particularized and individualized suspicion. To the contrary, the first two factors (historical protections, the

purpose for seeking the information) suggest that a search of a motel registry based on particularized and individualized suspicion does *not* intrude on an interest that Washington citizens have held or should be entitled to hold private.

First, when deciding whether an act implicates a “private affair,” the courts consider whether that interest has historically been protected from governmental interference. To analyze this question, the courts consider preexisting state law on the issue. See State v. McKinney, 148 Wn.2d 20, 27-28, 60 P.3d 46 (2002) (Department of Licensing records); State v. Gunwall, 106 Wn.2d 54, 66, 720 P.2d 808 (1986) (electronic communications); State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990) (curbside garbage collection). Here, preexisting state law shows that law enforcement historically has had access to motel registries. Many municipal codes have long required hotels to keep, at a minimum, a record of every guest’s name and address, and have provided that the registry is available for inspection by law enforcement. See Bellevue Municipal Code 5.24.020 (2006) (originally enacted in 1961, amended in 1974); Fife Municipal Code 5.34.010(B) (2006) (originally enacted in 1998); Olympia Municipal Code 5.36.040 (2006) (originally enacted in 1918); Seattle Municipal Code 6.98.020 (2006) (originally enacted in 1962). Everett's

Municipal Code allows for inspection of a motel registry if the officer has reasonable suspicion that criminal activity has occurred. Everett Municipal Code 5.100.090 (2006) (originally enacted in 1974, amended in 2005).

Further, unlike the situation with random, suspicionless searches of motel registries, there is ample evidence that individuals have historically *never* held a privacy interest in viewing of motel registries based on individualized suspicion. Indeed, as noted in Jorden, there is “common law authority that includes the use of guest registries in relation to the prosecution of a criminal suspect” where “law enforcement had a particularized and individualized suspicion about the suspect that *preceded* review of the registry.” Jorden, 160 Wn.2d at 127-28 (emphasis in original) (citing Gunwall, 106 Wn.2d at 56; State v. Tharp, 96 Wn.2d 591, 593, 637 P.2d 961 (1981); State v. Tweedy, 165 Wash. 281, 283, 5 P.2d 335 (1931)).

Second, when deciding whether a governmental act implicates a private affair, the courts consider whether the information obtained is gathered by or for the government and whether the information is retained for law enforcement purposes. In Jorden, the court considered only RCW 19.48.020, which requires every hotel to keep a record of its guests.

Based solely on this statute, which does not specifically allow for access by law enforcement, the court found no evidence that the motel records were gathered for purposes of law enforcement. Jorden, 160 Wn.2d at 128. The municipal codes cited above, however, which specifically allow law enforcement access to the motel registries, show that the details on the registry are, in fact, sought at least in part for law enforcement purposes.

Thus, two out of the three relevant factors suggest that a search of a motel registry based on particularized and individualized suspicion does not implicate a "private affair." Nichols has failed to meet his burden to show that police viewing of a motel registry *based on particularized and individualized suspicion* that the occupant is engaged in criminal activity implicates a "private affair" in violation of article 1, section 7.

**D. CONCLUSION**

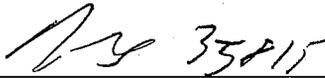
This Court should decline to address Nichols's suppression claim, because he waived it by failing to raise it in the trial court. In any event, the Jorden court held only that a random and suspicionless search of a motel registry by police violated article 1, section 7 of the Washington Constitution. The court suggested that police would be permitted to view a motel registry if they could show individualized suspicion that an

occupant was involved in criminal activity. Here, the officers had such individualized suspicion. For these reasons, this Court should deny and dismiss Nichols's personal restraint petition.

DATED this 15<sup>th</sup> day of January, 2009.

Respectfully submitted,

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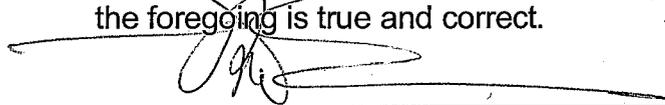
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Lila J. Silverstein**, the attorney for the petitioner, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Respondent's Supplemental Brief**, in IN RE PERSONAL RESTRAINT PETITION OF GLENN NICHOLS, Cause No. 59750-7-I, in the Court of Appeals for the State of Washington, Division I.

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



Name  
Done in Seattle, Washington

01-15-2009  
Date