

Supreme Court No. 80995-0  
(COA No. 33704-5-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE: THE PERSONAL RESTRAINT OF ROBERT BONDS,

ROBERT BONDS,

Respondent,

v.

STATE OF WASHINGTON,

Petitioner.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2008 JUN 16 PM 4:59

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

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RESPONDENT'S REPLY TO AMICUS BRIEF

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CLERK  
JY RONALD R. CARPENTER  
08 JUN 18 AM 8:02  
STATE OF WASHINGTON

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A. ARGUMENT

1. A PRO SE PETITIONER FACES ENORMOUS HURDLES WHEN FILING A PERSONAL RESTRAINT PETITION IN WASHINGTON. THIS COURT SHOULD REJECT ANY FURTHER BARRIERS URGED BY AMICUS.

Justice requires that this Court approve of the application of the doctrine of equitable tolling to RCW 10.73.090. Amicus suggests that the doctrine would “apply to the majority of collateral attacks.” Brief of Amicus at 12. This contention is unreasonable, and not only because the reviewing court maintains its gate-keeping discretion in deciding when circumstances warrant equitable relief. The fact is that there are already so many barriers to filing a Personal Restraint Petition (PRP) in this state that justice requires the judicious use of the doctrine. Further limiting access to post-conviction relief would not serve the interests of justice and would allow the “interest in finality of criminal judgments” to trump any other judicial value - including those of justice, equity and fair play. This Court has sought to achieve a balance between the interest in fairness and the interest in finality of judgments and should continue to do so. In Re Taylor, Matter of Taylor, 105 Wn.2d 683, 686, 717 P.2d 755 (1986); see also In re Pers. Restraint of Turay, 153 Wn.2d 44, 48 n.2, 101 P.2d 854 (2004) (in departure from

federal precedent, refusing to find petitioner abuses writ by filing successive PRPs if not previously represented by counsel).

As Amicus points out, there is no constitutional right to counsel in post-conviction proceedings in this state. Thus, most prisoners must initiate the proceedings *pro se*. Fortunately for Mr. Bonds, the prison in which he was housed had some legal research materials available to him.<sup>1</sup> In addition, he could read and write the English language. Moreover, it appears that he was fortunate enough to have access to the records and files from his trial and appeal. Thus, he could at least find some guidance in the court rules as to how to proceed in this matter.

Form 17, in the official Washington Court Rules, is a book sometimes available to prisoners that purports to tell a prisoner how to file a PRP (copy attached as Appendix A). It instructs the petitioner to (1) "state the legal reasons why you think there was some error in your case which gives you the right to a new trial or release from confinement," (2) list the facts that are important and "after each fact put the name of the person or persons who know of the fact and will support your statement of the fact, (3) list the

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<sup>1</sup> Mr. Bonds has since been transferred by the State to an Oklahoma prison and lacks access to Washington legal materials. Indeed, shortly after he filed his PRP, he was transferred from a Washington prison to an Arizona prison, which delayed his receipt of documents sent by the Court of Appeals while the PRP was pending even though he notified the court of his changed address. See

cases that support the claimed error, (4) state why “this petition is the best way I know to get the relief I want.”

Even if the prisoner reads and writes the English language, has his court file and transcripts available to him, has legal research materials available to him and finds the form and fills it out -- the form is, at best, misleading. And the Rules of Appellate Procedure do not tell a prisoner about all of the other things he must put in his pleading to have an appellate court consider his claim for relief.

Form 17 and the Rules of Appellate Procedure do not tell a prisoner that he must “demonstrate by a preponderance of the evidence either a constitutional error that worked to his actual and substantial prejudice or a non-constitutional error that constitutes a fundamental defect inherently resulting in a complete miscarriage of justice.” In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). Therefore, a prisoner might not understand that he needs to make a careful review of the record to show how the state’s case is not overwhelming and how the error effected the trial.

Form 17 and the Rules of Appellate Procedure do not tell a prisoner that just writing about his evidence is nothing “more than speculation, conjecture or inadmissible hearsay.” In re Pers.

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Mr. Bond’s motion to extend time to file Reply.

Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). In order to obtain an evidentiary hearing, a petitioner must first demonstrate that he has competent, admissible evidence to establish that he would be entitled to relief. Rice, 118 Wn.2d at 886. As example of the particularly troublesome evidentiary hurdles a *pro se* petitioner faces, in In re Pers. Restraint of Connick, 144 Wn.2d 442, 450-52, 28 P.3d 729 (2001), the Supreme Court denied a PRP because the prisoner failed to provide certified or authenticated copies of out-of-state convictions but only “informal photocopies” that he had received from the clerk of the pertinent out-of-state court.<sup>2</sup> The State did not question the authenticity of the documents. Id. at 452 n.35. Nevertheless, the Supreme Court held that the *pro se* petitioner must be held to the same standards as an attorney in this regard and the lack of certified, albeit uncontestedly accurate, documents precluded the court from granting relief. Id. at 456.

Form 17 and the Rules of Appellate Procedure and do not tell a prisoner that he cannot raise issues that were raised in his direct appeal unless the petitioner can demonstrate that the “ends of justice would be served by reexamining the issue.” In re Pers. Restraint of Gentry, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). A

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<sup>2</sup> Connick was overruled on other grounds in In re: Pers. Restraint of

petitioner may satisfy this burden only “by showing an intervening change in the law ‘or some other justification for having failed to raise a crucial point or argument in the prior application.’” Gentry, 137 Wn.2d at 388 (quoting Taylor, 105 Wn.2d at 688).

It is not surprising then that even the prisoners who actually file a timely PRP fail to get past the Chief Justice’s desk and are dismissed. RAP 16.11(b). Thus, when a prisoner actually gets past all these hurdles and gets counsel appointed who actually identifies a constitutional error at trial, this Court should judiciously apply the doctrine of equitable tolling when appropriate.

This Court should reject WAPA’s argument that the doctrine is not recognized in Washington jurisprudence and should adopt the reasoning of Division II on this point.

**2. THE AMICUS BRIEF MISPRESENTS THE DETERMINATION OF WHETHER A STATUTE OF LIMITATIONS MAY BE EXTENDED FOR CONSIDERATIONS OF EQUITY**

The Amicus brief boldly claims that RCW 10.73.090 is expressly and only a jurisdictional statute, setting forth a deadline that may not be extended for considerations of equity under any circumstances. RCW 10.73.090 provides in pertinent part that no collateral attack on a criminal conviction, “may be filed more than one year after the judgment becomes final . . . .”

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Goodwin, 146 Wn.2d 861, 873, 50 P.3d 618 (2002).

Preliminarily, it is worth noting that in the case at bar, Mr. Bonds fully complied with the one-year deadline set forth in RCW 10.73.090 and filed his PRP in a timely fashion. It is not the filing of the petition to which the State objects, but rather, his request for permission from the Court of Appeals to add an additional issue shortly after the one-year deadline had expired. The statute does not expressly speak to amendments of a timely-filed petition granted in the discretion of the court.

Furthermore, the United States Supreme Court explained its reasoning for treating a deadline as permanent and jurisdictional as opposed to a statute of limitations subject to extension for considerations of equity, in John R. Sand & Gravel Co. v. United States, \_\_ U.S. \_\_, 128 S.Ct. 750, 753, 169 L.Ed.2d 591 (2008). In Sand & Gravel, the Court ruled that whether a filing deadline is jurisdictional, and thus immune from any equitable considerations, depends on how the deadline has been historically treated. Sand & Gravel, 128 S.Ct. at 754-56. The limitations rule at issue in Sand & Gravel had a history of being applied strictly, without equitable considerations, dating from the 1800s and continuing in all permutations of the statute. Id. at 754.

Applying that reasoning here, there is no history of treating RCW 10.73.090 as purely jurisdictional. The statute was enacted

in 1989, with the intent of imposing time limits on collateral attacks where no such time limits had previously existed. See House Bill Report, HB 1071 (Feb. 2, 1989), attached as Appendix B.<sup>3</sup> The statute has not been amended.

Since its enactment, the Court of Appeals has repeatedly considered equitable grounds for extending the time for filing under RCW 10.73.090, and this Court has never indicated those decisions were fundamentally wrong. See State v. Littlefair, 112 Wn.App. 749, 51 P.3d 116 (2002), rev. denied, 149 Wn.2d 1020 (2003) (RCW 10.73.090 “functions as a statute of limitation, and not as a jurisdictional bar” and “is subject to the doctrine of equitable tolling”); In re Personal Restraint of Hoisington, 99 Wn.App. 423, 431, 993 P.2d 296 (2000) (same); see also In re Pers. Restraint of Skylstad, 160 Wn.2d 944, 954 n.8, 162 P.3d 413 (2007) (finding petition timely filed and therefore declining to address the petitioner’s argument that “we should equitably toll the statute of limitations.” (emphasis added)); In re Carlstad, 150 Wn.2d 583, 80 P.3d 587 (2003) (noting equitable tolling “permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed,” but

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<sup>3</sup> The House Bill Report may be viewed on-line by: <http://www.leg.wa.gov/LawsAndAgencyRules/>; then following links to Bill Information; Detailed Legislative Reports; Advanced Search for “HB 1071.”

declining to apply equitable tolling to late-filed PRPs where petitioners did not present grounds for equitable relief (emphasis in Carlstad; internal citation omitted)).

The Legislature has never altered the statute or otherwise indicated its displeasure with court rulings in which considerations of equity arose as a basis to extend the one-year filing deadline of RCW 10.73.090. See e.g., In re Detention of Elmore, 162 Wn.2d 27, 34, 168 P.3d 1285 (2007) (explaining legislative amendment to RCW 71.09.090 enacted due to Legislature's displeasure with a Court of Appeals decision).

Contrary to the assertion in the Amicus brief, Shumway v. Payne, 136 Wn.2d 383, 964 P.2d 349 (1998); and In re Pers. Restraint of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998), say nothing about the doctrine of equitable tolling. Considerations of equity were not raised in either case as a basis to extend the deadline for filing a PRP, and thus the issue was neither discussed nor ruled upon.

Finally, the Amicus brief warns this Court against consulting federal court precedent, claiming the provisions for filing federal habeas petitions are unlike those for filing a collateral attack in Washington. However, this Court has looked at federal decisions determining the propriety of a collateral attack on other occasions.

In Skylstad, the court looked to “federal statutes similar to RCW 10.73.090,” to determine whether a PRP is timely filed when the sentence is not final but the direct appeal of the conviction itself has been final for over one year. 160 Wn.2d at 950-51. The Skylstad Court found federal court interpretations of its procedural rules for habeas filings, “apposite and persuasive” even though not technically binding. Id. at 951 n.4.

Accordingly, the argument put forward by amicus should be disregarded. It does not accurately set forth court decisions applying RCW 10.73.090 or other pertinent and persuasive considerations.

3. THIS COURT SHOULD STRIKE PAGES 16-20 OF  
THE AMICUS BRIEF

In this case the only issues raised in the State’s petition for review related to the application of equitable tolling. The state did not argue the underlying merits of the court closure question at any point in the proceedings. The State’s supplemental brief does not argue that the ultimate ruling on the merits of the court closure issue was in error. Thus, this Court’s order granting review cannot be construed to grant review of that issue. Nonetheless amicus addresses this issue. Because that issue is not before this Court, pages 16-20 of the amicus brief should be stricken. See State v.

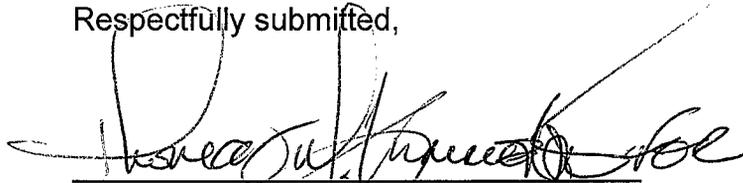
Gonzalez, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988) (“We have many times held that arguments raised only by amici curiae need not be considered,” especially when the issue is not adequately briefed by the parties).

B. CONCLUSION

For the reasons stated above, and those set forth in Respondent’s Supplemental Brief, this Court should find the Amicus Brief presents incorrect legal analysis and improper factual arguments, and should affirm the decision of the Court of Appeals.

Dated this 16th day of June 2008.

Respectfully submitted,



NANCY P. COLLINS (28806)  
Washington Appellate Project (91052)  
Attorneys for Respondent

## **APPENDIX A**

FORM 17. Personal Restraint Petition for Person Confined by State or Local Government

[Rule 16.7]

No. [appellate court]

[Put name of appellate court that you want to hear your case.]  
OF THE STATE OF WASHINGTON

[Put your name here.], )  
 )  
Petitioner. ) PERSONAL RESTRAINT PETITION

If there is not enough room on this form, use the back of these pages or use other paper. Fill out all of this form and other papers you are attaching before you sign this form in front of a notary.

A. STATUS OF PETITIONER

I, \_\_\_\_\_,  
(full name and address)

apply for relief from confinement. I am \_\_\_ am not \_\_\_ now in custody serving a sentence upon conviction of a crime. (If not serving a sentence upon conviction of a crime) I am now in custody because of the following type of court order:

\_\_\_\_\_  
(identify type of order)

1. The court in which I was sentenced is \_\_\_\_\_.

2. I was convicted of the crime(s) of \_\_\_\_\_.

3. I was sentenced after trial \_\_\_\_, after plea of guilty \_\_\_\_ on  
\_\_\_\_\_. The judge who imposed sentence was  
(date of sentence)

\_\_\_\_\_  
(name of trial court judge)

4. My lawyer at trial court was \_\_\_\_\_  
(name and address if known; if none, write "none")

5. I did \_\_\_ did not \_\_\_ appeal from the decision of the trial court. (If the answer is that I did), I appealed to \_\_\_\_\_.

(name of court or courts to which appeal was taken)

My lawyer on appeal was \_\_\_\_\_  
(name and address if known; if none, write "none")

The decision of the appellate court was \_\_\_ was not \_\_\_ published. (If the answer is that it was published, and I have this information), the decision is published in

\_\_\_\_\_  
(volume number, Washington Appellate Reports or

Washington Reports, and page number)

6. Since my conviction I have \_\_\_ have not \_\_\_ asked a court for some relief from my sentence other than I have already written above. (If the answer is that I have asked), the court I asked was \_\_\_\_\_

(name of court or courts in which relief was sought)

Relief was denied on \_\_\_\_\_

(date of decision or, if more than one, dates of all decisions)

7. (If I have answered in question 6 that I did ask for relief), the name of my lawyer in the proceeding mentioned in my answer to question 6 was \_\_\_\_\_

(name and address if known; if none, write "none")

8. If the answers to the above questions do not really tell about the proceedings and the courts, judges and attorneys involved in your case, tell about it here:

#### B. GROUNDS FOR RELIEF

(If I claim more than one reason for relief from confinement, I attach sheets for each reason separately, in the same way as the first one. The attached sheets should be numbered "First Ground", "Second Ground", "Third Ground", etc.). I claim that I have \_\_\_\_\_ (number) reason(s) for this court to grant me relief from the conviction and sentence described in Part A.

\_\_\_\_\_ Ground  
(First, Second, etc.)

1. I should be given a new trial or released from confinement because (Here state legal reasons why you think there was some error made in your case which gives you the right to a new trial or release from confinement.):

2. The following facts are important when considering my case (After each fact statement, put the name of the person or persons who know the fact and will support your statement of the fact. If the fact is already in the record of your case, indicate that, also.):

3. The following reported court decisions (include citations if possible) in cases similar to mine show the error I believe happened in my case (If none are known, state "None known".): \_\_\_\_\_

4. The following statutes and constitutional provisions should be considered by the court (If none are known, state "None known".):

\_\_\_\_\_  
5. This petition is the best way I know to get the relief I want, and no other way will work as well because \_\_\_\_\_  
\_\_\_\_\_

C. STATEMENT OF FINANCES

If you cannot afford to pay the filing fee or cannot afford to pay an attorney to help you, fill this out. If you have enough money for these things, do not fill out this part of the form.

1. I do \_\_\_ do not \_\_\_ ask the court to file this without making me pay the filing fee because I am so poor I cannot pay the fee.

2. I have a spendable balance of \$\_\_\_\_\_ in my prison or institution account.

3. I do \_\_\_ do not \_\_\_ ask the court to appoint a lawyer for me because I am so poor I cannot afford to pay a lawyer.

4. I am \_\_\_ am not \_\_\_ employed. My salary or wages amount to \$\_\_\_\_\_ a month. My employer is \_\_\_\_\_

\_\_\_\_\_  
(name and address)

5. During the past 12 months I did \_\_\_ did not \_\_\_ get any money from a business, profession or other form of self-employment. (If I did, it was \_\_\_\_\_ and the total income I got was \$\_\_\_\_\_.)

(kind of self-employment)

6. During the past 12 months, I

did did not get any rent payments. If so, the total amount I got was \$\_\_\_\_\_.

\_\_\_ \_\_\_ get any interest. If so, the total amount I got was \$\_\_\_\_\_.

\_\_\_ \_\_\_ get any dividends. If so, the total amount I got was \$\_\_\_\_\_.

\_\_\_ \_\_\_ get any other money. If so, the amount of money I got was \$\_\_\_\_\_.

7. \_\_\_ \_\_\_ have any cash except as said in answer 2. If so, the total amount of cash I have is \$\_\_\_\_\_.

\_\_\_ \_\_\_ have any savings accounts or checking accounts. If so, the amount in all accounts is \$\_\_\_\_\_.

\_\_\_ \_\_\_ own stocks, bonds, or notes. If so, their total value is \$\_\_\_\_\_.

8. List all real estate and other property or things of value which belong to you or in which you have an interest. Tell what each item of property is worth and how much you owe on it. Do not list household furniture and furnishings and clothing which you or your family need.

Items	Value
-------	-------

_____	_____
_____	_____
_____	_____



---

Then sign below:

I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct.

\_\_\_\_\_ [date].

\_\_\_\_\_ [sign here]

Amended effective November 21, 2006.

## **APPENDIX B**

HOUSE BILL REPORT

HB 1071

BY Representatives H. Myers, Padden, Nealey, Patrick, Wolfe, Wood, P. King and Crane

Limiting personal restraint petitions.

House Committee on Judiciary

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. (17)

Signed by Representatives Appelwick, Chair; Crane, Vice Chair; Padden, Ranking Republican Member; Belcher, Brough, Dellwo, Hargrove, Inslee, P. King, R. Meyers, Moyer, H. Myers, Patrick, Schmidt, Scott, Tate and Van Luven.

Minority Report: Do not pass. (2)

Signed by Representatives Locke and Wineberry.

House Staff: Pat Shelledy (786-7149)

AS REPORTED BY COMMITTEE ON JUDICIARY FEBRUARY 2, 1989

BACKGROUND:

After a defendant is convicted of a crime, the defendant may appeal the conviction directly to the appellate court if the defendant did not plead guilty and waive the right to an appeal. Court rule requires the defendant to file a notice of appeal within 30 days after entry of the judgment and sentence or the defendant waives the right of appeal.

In addition to direct appeals, the Constitution, statutes and court rules allow convicted defendants to challenge a judgment by a **collateral attack**. One mechanism of **collateral attack** is the writ of habeas corpus which a defendant may pursue by filing a "personal restraint" petition. Defendants may also move to withdraw guilty pleas, move for a new trial, and move to vacate a judgment.

Court rules establish the grounds for challenging a conviction through a personal restraint petition. Those grounds include

the following: (1) the convicting court lacked jurisdiction, (2) the conviction violated the state or federal constitution; (3) material facts exist, not disclosed at trial, which in the interest of justice require the petitioner's release; (4) there are sufficient reasons to retroactively apply a post conviction change in the law; (5) there are "other grounds" for a **collateral attack** on the conviction; (6) the conditions or manner of the petitioner's restraint violate the state or federal constitution; or "other grounds" exist to challenge the legality of the detention.

Current law imposes no time limit on filing a personal restraint petition. Also, no limits exist on the number of petitions a petitioner may file as long as different grounds are asserted each time.

#### SUMMARY:

SUBSTITUTE BILL: This will requires a petitioner to file a **collateral** appeal within one year of final judgment. The time limit would not apply to certain grounds for the petition. Those grounds are as follows: (1) newly discovered evidence if the defendant acted with reasonable diligence in discovering the evidence; (2) the statute the defendant was convicted under is unconstitutional on its face; (3) the conviction is barred by double jeopardy; (4) the defendant pled not guilty and the evidence at trial was insufficient to convict; (5) the sentence imposed was in excess of the court's jurisdiction; or (6) a significant change in the law material to the conviction should be applied retroactively.

Defendants and incarcerated persons will receive notice of the time limit and exceptions. A one-year "grandfather" provision is included. Additionally, the petitioner must certify that the basis for the petition is not repetitive of prior petitions. If the petitioner has filed prior petitions, the person must show good cause why the person did not raise the basis for relief in the previous petition. The court of appeals will dismiss on its own motion petitions that are repetitive, frivolous, or that fail to show good cause why the relief was not requested in previous petitions.

SUBSTITUTE BILL COMPARED TO ORIGINAL: The substitute version adds the sixth exception to the time limit and the court of appeals review and dismissal provisions.

Fiscal Note: Requested February 2, 1989.

House Committee - Testified For: Seth Dawson, Snohomish County Prosecutor; David Bruneau, Clallam County Prosecutor; Mike Sullivan, Pacific County Prosecutor; Chris Quinn-Brintnall, Pierce County Prosecutor; Seth Fine, Snohomish County Prosecutor.

House Committee - Testified Against: Bob Stalker, Evergreen Legal Services; Kern Cleven, WACDL.

House Committee - Testimony For: Offenders who have already exhausted or ignored their appellate rights can repeatedly file an unlimited number of petitions years after conviction. The lack of reasonable limits places unreasonable burdens on the state to respond to the petitions and prove cases years later if the petition is granted.

House Committee - Testimony Against: The large influx of petitions in recent years is due to the SRA. Those petitions are nearly through the system so this bill is unnecessary. A one-year time limit unconstitutionally restricts habeas corpus rights.

HB 1071 6/15/99 [ ]

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

IN RE THE PERSONAL RESTRAINT PETITION OF )  
)  
)  
ROBERT BONDS, )  
)  
)  
)  
Petitioner. )

NO. 80995-0

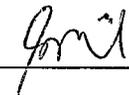
RECEIVED  
SUPERIOR COURT  
CLERK OF SUPERIOR COURT  
08 JUN 18 PM 8:20  
BY RONALD R. CARPENTER

**CERTIFICATE OF SERVICE**

I, MARIA RILEY, CERTIFY THAT ON THE 16<sup>TH</sup> DAY OF JUNE, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **ANSWER TO PETITION FOR REVIEW** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |   |   |
|---|---|
| <input checked="" type="checkbox"/> MICHELLE LUNA-GREEN<br>PIERCE COUNTY PROSECUTING ATTORNEY<br>930 TACOMA AVENUE S, RM 946<br>TACOMA, WA 98402-2171           | <input checked="" type="checkbox"/> U.S. MAIL<br><input type="checkbox"/> HAND DELIVERY<br><input type="checkbox"/> _____ |
| <input checked="" type="checkbox"/> PAMELA BETH LOGINSKY<br>WA ASSOCIATION OF PROSECUTING ATTORNEYS<br>206 10 <sup>TH</sup> AVENUE SE<br>OLYMPIA, WA 98501-1399 | <input checked="" type="checkbox"/> U.S. MAIL<br><input type="checkbox"/> HAND DELIVERY<br><input type="checkbox"/> _____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 16<sup>TH</sup> DAY OF JUNE, 2008.

X \_\_\_\_\_ 

**Washington Appellate Project**  
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