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NO. 87654-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF

RUSSELL D. McNEIL and HERBERT C. RICE,

Petitioners.

RESPONSE TO BRIEF OF *AMICI CURIAE*
WASHINGTON DEFENDER ASSOCIATION AND
AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON

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I. INTRODUCTION

Amici curiae, American Civil Liberties Union of Washington (ACLU) and Washington Defender Association (WDA), request that this Court supplant its established retroactivity test with the test adopted by the Nevada Supreme Court in *Colwell v. State*, 118 Nev. 807, 59 P.3d 463 (2002). See Brief of *Amici Curiae* Washington Defender Association and American Civil Liberties Union of Washington, at 16-20. This Court recently reaffirmed its established test in *In re Personal Restraint Petition of Haghghi*, No. 87529-4, ___ Wn.2d ___, ___ P.3d ___, 2013 Wash. LEXIS 747 (Sept. 12, 2013). The Court held that the applicable test is derived from in the retroactivity test of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). ACLU and WDA do not explain why the decision reached by this court less than two months ago is both wrong and harmful.

Amici curiae have also not “provided developed argumentation to assist in the fashioning of any broader retroactivity principles.” *Commonwealth v. Cunningham*, No. 38 EAP 2012, majority slip op. at 12 (Penn. Oct. 30, 2013). Instead, *amici curiae* urges this Court to overrule numerous cases in favor of a retroactivity test that is ““all sail, no anchor””. *State v. Gunwall*, 106 Wn.2d 54, 60, 720 P.2d 808, 76 A.L.R.4th 517 (1986) quoting Deukmejian & Thompson, *All Sail and No Anchor -- Judicial Review Under the California Constitution*, 6 Hastings Const. L.Q. 975 (1979).

Amici curiae's request must be denied because Nevada's standardless retroactivity test is inconsistent with the strong interest in finality inherent in an orderly criminal justice system, with this Court's pre- and post-*Teague* precedents, and with the limitations on the Court's jurisdiction and authority reflected in Chapter 10.73 RCW and Chapter 7.36 RCW.

II. ISSUE PRESENTED

Whether any abandonment or modification of the *Teague* retroactivity test is compelled by the Washington Constitution?

III. ARGUMENT

Less than 2 months ago, this Court reaffirmed that the retroactivity test announced in *Teague* is the test in Washington. See *In re Personal Restraint of Haghghi, supra*. WDA and ACLU request that this Court overrule this precedent in favor of Nevada's standardless open-ended *Teague* rule. This request must be denied as *Haghghi* is supported by the precedent it cites and its ruling supports the policy consideration of finality without creating unnecessary confusion for courts. See generally *State v. Guzman Nuñez*, 174 Wn.2d 707, 713-14, 285 P.3d 21 (2012) (explaining the requirements for overruling a prior case).

In addition, *amici curiae* have not provided any framework for a broader retroactivity rule. As the Pennsylvania Supreme Court recently noted, litigants who advocate broader retrospective extension of a new federal

constitutional rule have a duty to persuade the court: (1) that the new rule resonates with the state's norms; (2) that, despite the strong interest in finality inherent in an orderly criminal justice system, there are good grounds to consider the adoption of broader retroactivity doctrine which would permit the rule's application at the collateral review stage; and (3) that the new rule is consistent with legislative restrictions on the court's jurisdiction. *Cunningham*, slip. op. at 13-14.

Finally, WDA and the ACLU fail to tether their request for an independent state retroactivity test to our constitution or to preexisting state law. This violates the rule announced in *Gunwall* that a deviation from federal rules "must spring not from pure intuition, but from a process that is at once articulable, reasonable and reasoned." 106 Wn.2d at 63. Consideration of both the Washington constitution and preexisting state law clearly establish that only the legislature may modify or abandon the *Teague* retroactivity test.

A. THE WASHINGTON CONSTITUTION DOES NOT SUPPORT OR REQUIRE THE ADOPTION OF A MORE LENIENT RETROACTIVITY TEST THAN THAT CONTAINED IN *TEAGUE*.

The federal constitution "neither prohibits nor requires retrospective effect" of new decisions. *Linkletter v. Walker*, 381 U.S. 618, 629, 85 S. Ct. 1731, 14 L. Ed. 2d 601(1965). "As Justice Cardozo said, 'We think the federal constitution has no voice upon the subject.'" *Id.*, quoting *Great*

Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364, 53 S. Ct. 145, 77 L. Ed. 2d 360 (1932) (referring to state court's prospective overruling of prior decision).

The Washington Constitution also contains no provision requiring the retroactive application of new rules to already final decisions. The only provision in the Washington Constitution that authorizes a court to reopen a final judgment in a criminal case is article 1, § 13. This provision is very narrow and does not permit challenges that go beyond the face of a final judgment of a court of competent jurisdiction. *In re Runyan*, 121 Wn.2d 432, 441-42, 853 P.2d 424 (1993). This limit precludes the retroactive application by the judiciary of virtually all new rules of constitutional law to already final convictions.

**B. PREEXISTING STATE LAW DOES NOT SUPPORT
OR REQUIRE THE ADOPTION OF A MORE
LENIENT RETROACTIVITY TEST THAN THAT
CONTAINED IN *TEAGUE*.**

In addition to the narrow constitutional grant of authority to review already final convictions, the legislature may also empower a court to grant collateral relief. For the first 58 years of statehood, the Washington legislature limited a court's authority to open a final judgment to that granted in the constitution. *See* Laws of 1854, p. 213, §445 (codified as Remington's Revised Statutes § 1075). This restriction foreclosed the retroactive application of new constitutional rules to already final convictions as these

violations would not appear on the face of the judgment. *See, e.g., In re Grieve*, 22 Wn.2d 902, 158 P.2d 73 (1945). Under this restriction, a sentence could only be collaterally attacked if it was in excess of that authorized by statute. *See, e.g., Bass v. Smith*, 26 Wn.2d 872, 176 P.2d 872 (1947).

In 1947, the legislature authorized courts, for the first time, to examine constitutional claims asserted in a collateral attack when the judgment is fair on its face. Laws of 1947, ch. 256, § 3. This new authority, however, did not immediately herald the retroactive application of new constitutional rules to final decisions. In fact, this Court did not apply a new rule to an already final case until 1970.

In 1970, this Court set aside a death sentence in a case in which potential jurors were not asked whether their reservations about the death penalty would prevent them from following the law. *See Hawkins v. Rhay*, 78 Wn.2d 389, 474 P.2d 557 (1970) (giving retroactive effect to *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968)). This Court's retroactive application of *Witherspoon* to Hawkins' death sentence was compelled by the United States Supreme Court's decision in *Boulden v. Holman*, 394 U.S. 478, 89 S. Ct. 1138, 22 L. Ed. 2d 433 (1969), rather than by a state statute or the state constitution.

Between 1970 and the legislature's adoption of RCW 10.73.100(6) in 1989, this Court granted relief from judgments based upon rules

announced after the judgments were final on only two occasions. *In re Farney*, 91 Wn.2d 72, 583 P.2d 1210 (1978); *In re Gunter*, 102 Wn.2d 769, 689 P.2d 1074 (1984). Neither decision was based on the state constitution or any state statute. Rather, both were based on binding precedent from the United States Supreme Court.

In *Farney*, this Court examined the retroactive effect of *Breed v. Jones*, 421 U.S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975). *Breed* prohibited adult court prosecution for an offense which a juvenile court had already adjudicated. This Court held that *Breed* would be given retroactive effect in cases that were final before the decision was issued. The Court determined that this result was compelled by *Robinson v. Neil*, 409 U.S. 505, 93 S. Ct. 876, 35 L. Ed. 2d 29(1973). *Farney*, 91 Wn.2d at 75-76.

In *Gunter*, 102 Wn.2d 769, 689 P.2d 1074 (1984), this Court examined the retroactive effect of *State v. Tongate*, 93 Wn.2d 751, 613 P.2d 121 (1980). *Tongate* held that enhanced punishment under RCW 9.95.040 required proof beyond a reasonable doubt that the defendant was armed with an actual deadly weapon when he committed the crime. The Court held that *Tongate* must be given retroactive effect. The Court determined that this result was compelled by *Ivan v. New York*, 407 U.S. 203, 92 S. Ct. 1951, 32

L. Ed. 2d 659 (1972).¹ *Gunter*, 102 Wn.2d at 772-73.

During this same 19 year period, this Court rejected the retroactive application of a new rule in nine separate cases. In each of these cases, this Court applied the federal retroactivity standard.

- *State v. Duckett*, 73 Wn.2d 692, 697, 440 P.2d 485 (1968), held that the “rule that an accused has a right to counsel at the lineup stage of the proceeding is not retroactive and only affects confrontations conducted after June 12, 1967.” In so holding, the Court followed the United States Supreme Court’s decision in *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967).²
- In *Massey v. Rhay*, 76 Wn.2d 78, 455 P.2d 367 (1969), this Court denied relief to a petitioner who alleged his confession was extracted in violation of *Miranda*.³ This Court reached this result solely on the grounds that the United States Supreme Court had refused to apply *Miranda* retroactively in

¹*Ivan* held that *In re Winship*, 397 US 358, 90 S Ct 1068, 25 L Ed 2d 368 (1970), was to be given complete retroactive effect. *Winship* held that the proof beyond a reasonable doubt standard must be applied at the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult.

²*Stovall* contained a 3-prong analysis which focused on (1) the purpose to be served by the new rule, (2) the extent of reliance by law enforcement authorities on the old standard, and (3) the effect of retroactive application on the administration of justice. 388 U.S. at 297.

³*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Johnson v. New Jersey, 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966).

- In *Brumley v. Charles R. Denney Juvenile Ctr.*, 77 Wn.2d 702, 466 P.2d 481 (1970), this Court held that the rule that indigent juveniles be afforded appointed legal counsel to represent them in delinquency adjudicatory proceedings,⁴ absent an appropriate waiver, would not be applied “to adjudications of delinquency which were finalized prior to May 15, 1967.” *Brumley*, 77 Wn.2d at 710. Prior to applying the Supreme Court’s *Stovall* retroactivity test to reach this result, this Court noted that the Supreme Court’s announcement of the *Gault* rule in a decision that was itself a retroactive one, did not serve as a clear mandate that the *Gault* rule should be applied retroactively. *Brumley* at 706. This Court’s nonretroactivity determination was contrary to the decision reached in a number of other jurisdictions. *Id.* at 705-06 (citing to cases from Arizona, Massachusetts, New Jersey and Wisconsin).
- *Wood v. Morris*, 87 Wn.2d 501, 514-15, 554 P.2d 1032 (1976), held that a conviction based upon a guilty plea that

⁴See *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

was entered without knowledge of the full consequences of the plea would not be set aside, if the conviction was final prior to the United States Supreme Court's decision in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). In reaching this decision, the Court followed United States Supreme Court precedent. *See Wood*, 87 Wn.2d at 514 (citing *Halliday v. United States*, 394 U.S. 831, 89 S. Ct. 1498, 23 L. Ed. 2d 16 (1969)).

- In *McRae v. State*, 88 Wn.2d 307, 559 P.2d 563 (1977), this Court refused to apply *Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966), which prohibits transferring a juvenile to adult court without a hearing, to convictions that were final prior to 1966. The Court reached this decision by applying the federal test for retroactivity that was announced in *Stovall*. *See McRae*, 88 Wn.2d at 310-13.
- *In re Vensel*, 88 Wn.2d 552, 555-56, 564 P.2d 326 (1977), extended the requirement that the record must show on its face that a guilty plea was voluntarily and intelligently entered to justice courts. This Court gave the rule prospective effect only in light of the adverse impact that retroactive application would have on the administration of justice in Washington.

In reaching this conclusion, the Court relied upon *Wood v. Morris*, 87 Wn.2d 501, 514, 554 P.2d 1032 (1976), which was supported by the United States Supreme Court's decision in *Halliday v. United States*, 394 U.S. 831, 89 S. Ct. 1498, 23 L. Ed. 2d 16 (1969). See *Vensel*, 88 Wn.2d at 555.

- *In re Myers*, 91 Wn.2d 120, 587 P.2d 532 (1978), overruled on other grounds by *In re Hews*, 99 Wn.2d 80, 660 P.2d 263 (1983), refused to give retroactive effect to a rule barring an instruction that every killing of a human being is presumed to be without excuse or justification, to cases that were final prior to the issuance of *State v. Roberts*, 88 Wn.2d 337, 562 P.2d 1259 (1977). The Court based its decision on the United States Supreme Court's decision in *Hankerson v. North Carolina*, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977). *Myers*, 91 Wn.2d at 125. The Court also found that the interest of the state in achieving a final judgment outweighs any interest in retroactively applying subsequently developed legal standards. *Id.* Finally, the Court noted that executive clemency⁵ was "available for those cases that are

⁵While this Court cannot create a parole system or order post-release supervision not otherwise authorized by statute, the Governor of Washington has the authority to condition a commutation upon a prisoner's post-release good behavior and compliance with housing and other restrictions. See generally *Spencer v. Kees*, 47 Wash. 276, 91 P. 963 (1907). The

particularly deserving.” *Id.*

- *In re Saave*, 103 Wn.2d 322, 692 P.2d 818 (1985), refused to apply the rule announced in *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), to cases that were final prior to the issuance of the *Payton* decision. The Court reached this result by applying the federal test for retroactivity that was announced in *Stovall*. *Suave*, 103 Wn.2d at 328.
- *In re Taylor*, 105 Wn.2d 683, 717 P.2d 755 (1986), overruled by *In re Personal Restraint of Nichols*, 171 Wn.2d 370, 375-76, 256 P.3d 1131 (2011),⁶ refused to apply new vehicle search rules to cases that were final prior to *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983). The Court reached this result by applying the federal test for retroactive announced in *Stovall*. *Taylor*, 105 Wn.2d at 691-92.

Three years after this Court issued its opinion in *Taylor*, the legislature placed new limits upon the filing of collateral attacks. In the interest of finality, the legislature enacted a one-year time limit on the filing

Governor can return a released individual to prison, albeit after a hearing, upon a violation of the conditional commutation. See *In re Pers. Restraint of Bush*, 164 Wn.2d 697, 193 P.3d 103 (2008).

⁶*Nichols* recognized that the retroactivity balancing test utilized in *Taylor* was superseded by the *Teague* test.

of habeas corpus and related petitions. *See* Laws of 1989, ch. 395, § 1 (codified at RCW 10.73.090); Laws of 1989, ch. 395, § 3 (codified at RCW 7.36.130). The legislature did create an exception to this time limit for changes in the law that the legislature expressly provides should be applied retroactively and to changes that the courts determined should be applied retroactively. *See* RCW 10.73.100(6). The legislature is presumed to know that this Court applied federal retroactivity analysis and that very few new rules merited retroactive application under this standard.⁷ In adopting this exception, the legislature did not instruct the courts to apply a more lenient test.

Three years later, this Court adopted the Supreme Court's *Teague* test for retroactivity. *See In re St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992). Thirteen years later, after noting that inasmuch as the law favors finality of judgments, the courts will not routinely apply new decisions of law to cases that are already final, this Court invited the legislature to amend RCW 10.73.100(6) by adopting a different retroactivity test. *See State v. Evans*, 154 Wn.2d 438, 448-49, 114 P.3d 627, *cert. denied*, 546 U.S. 983 (2005). Apparently the legislature agreed with this Court's assessment, that petitioners have not made a compelling case for a different state retroactivity

⁷*See, e.g., Snohomish County v. Anderson*, 123 Wn.2d 151, 156, 868 P.2d 116 (1994) ("the Legislature is presumed to be familiar with judicial decisions of the Supreme Court construing existing statutes and the state constitution").

test, as no changes were made to RCW 10.73.100(6).

This history resulted in this Court announcing on September 12, 2013, that *Teague's* applicability to questions of retroactivity of new rules is no longer an open question. See *Haghighi*, slip op. at 6. This unbroken line of court and legislative precedent precludes the adoption of the Nevada Supreme Court's open-ended *Teague* test.

C. THE NEVADA SUPREME COURT RETROACTIVITY TEST IS STANDARDLESS.

In *Gunwall*, this Court recognized that its rulings must not spring “from pure intuition” or “from the brow of an Olympian jurist agonizingly meditating upon constitutional mysteries.” 106 Wn.2d at 63, quoting Nock, *Seizing Opportunity, Searching for Theory: Article I, Section 7*, 8 U. Puget Sound L. Rev. 331, 347-48 (1985). To maintain the public's confidence, this Court's independent state rules must arise “from a process that is at once articulable, reasonable and reasoned.” *Gunwall*, 106 Wn.2d at 63. The Nevada Supreme Court's open ended *Teague* rule violates this standard.

In *Cowell v. State*, 118 Nev. 807, 59 P.3d 463 (2002), *cert. denied*, 540 U.S. 981 (2003), the Nevada Supreme Court noted that “*Teague* is not controlling on this court, other than in the minimum constitutional protections established by its two exceptions.” *Colwell*, 59 P.3d at 470. Nonetheless, after recognizing that the concern for finality that supported the *Teague* rule applied equally to state courts and that the *Teague* rule was

“sound in principle,” the Nevada Supreme Court adopted an open-ended qualified *Teague* test. *Colwell*, 59 P.3d at 471.

The open-ended *Teague* test follows the “general framework of *Teague*, but reserve[s] the Nevada Supreme Court’s] prerogative to define and determine within this framework whether a rule is new and whether it falls within the two exceptions to nonretroactivity.” *Colwell*, 59 P.3d at 471. The open-ended *Teague* test contains no “bright-line rule for determining whether a rule is new.” *Colwell*, at 472. The open-ended *Teague* test, without explaining what factors would be applied to make the required determinations, “allow[s] the possibility that [conduct other than “primary, private individual”] conduct may be constitutionally protected from criminalization and warrant retroactive relief.” *Colwell*, at 472. The open-ended *Teague* test also does “not distinguish a separate requirement of ‘bedrock’ or ‘watershed’ significance” in determining whether a new rule seriously diminishes accuracy. *Colwell*, at 472.

Since adopting the open-ended *Teague* test, the Nevada Courts have yet to give retroactive effect to a procedural rule that a court applying *Teague* has found to not apply retroactively. Compare *Schriro v. Scherlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) (rule announced in *Ring v. Arizona*, 536 U.S. 584, 603-609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), that a jury, not a judge, must determine whether an aggravating circumstance

which renders an individual eligible for a death sentence, does not apply retroactively to cases that are already final), *with Colwell v. State, supra* (same result applying the open-ended *Teague* test). *Compare Whorton v. Bockting*, 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007) (*Crawford v. Washington*⁸ is not retroactive to cases that were already final when *Crawford* was issued), *with Ennis v. State*, 122 Nev. 694, 137 P.3d 1095, 1101-02 (2006) (same result applying the open-ended *Teague* test). This means that the parameters of Nevada's open-ended *Teague* test are still unclear.

Since Nevada adopted its open-ended *Teague* test, both the Idaho Supreme Court and the Minnesota Supreme Court elected to adhere to the original *Teague* test rather than adopt Nevada's open-ended *Teague* test. *See Rhodes v. State*, 149 Idaho 130, 233 P.3d 61, 70 n.2 (2010), *cert. denied*, 131 S. Ct. 1571 (2011); *Danforth v. State*, 761 N.W.2d 493, 497-98 (Minn. 2009). These courts made this decision on the grounds that "Nevada's modified version of *Teague* . . . would only lead to the same problems that accompanied the *Linkletter* standard." *Rhodes*, 233 P.3d at 70 n. 2, citing *Danforth*, 761 N.W.2d at 499.⁹

⁸*Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

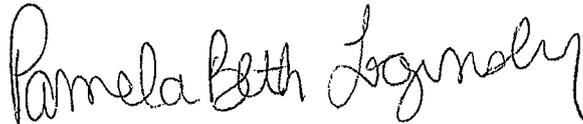
⁹*Danforth* described its problems with Nevada's open-ended *Teague* test as follows:

We choose not to adopt *Colwell*--Nevada's modified version of *Teague*--out of concern that it would only lead to the same problems that

IV. CONCLUSION

Since the *Teague* retroactivity test is consistent with the principle of finality and with history, any request to modify the test must be directed to the legislature rather than to the courts.

Respectfully submitted this 1st day of November, 2013,



Pamela B. Loginsky, WSBA 18096
Special Deputy Prosecuting Attorney

accompanied the *Linkletter-Stovall* standard. *Colwell* widened *Teague's* first exception, which is that a new rule is given retroactive effect if the rule establishes that it is unconstitutional to proscribe certain "primary, private individual conduct" as criminal. 59 P.3d at 472. *Colwell* said other conduct beyond primary, private individual conduct might also be protected from criminalization and warrant retroactive relief. *Id.* As to the second *Teague* exception, *Colwell* eliminated the bright-line requirement that the new criminal procedure rule have "watershed" or "bedrock" significance, instead declaring that "if accuracy is seriously diminished without the rule, the rule is significant enough to warrant retroactive application." *Id.* We note that no other state has followed Nevada's lead and adopted this framework. The *Colwell* standard would expand the retroactive application of new rules of constitutional procedure to cases where the absence of the new rule seriously diminished the accuracy of the trial but did not affect the fundamental fairness of the criminal proceeding. But relitigating cases in which a fundamentally fair trial has been held seriously distorts the allocation of very limited resources available to the criminal justice system. This is contrary to the well-established principle that a defendant is entitled to a fair trial, not a perfect trial. And the *Colwell* formula does not address one of the key failings of the *Linkletter-Stovall* test--a "serious" diminishment in "accuracy" as a trigger to retroactivity is not only not a bright-line standard, it invites the type of inconsistent and troubling results that so bedeviled the *Linkletter-Stovall* multi-factor test.

PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein. On November 1, 2013, I e-mailed a copy of the document to which this proof of service is appended to:

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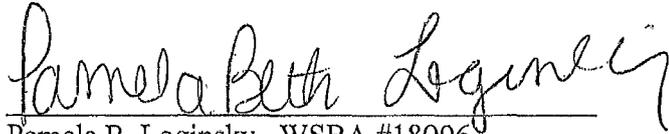
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Signed under the penalty of perjury under the laws of the state of
Washington this 1st day of November, 2013, at Olympia, Washington.

A handwritten signature in cursive script that reads "Pamela Beth Loginsky". The signature is written in black ink and is positioned above a horizontal line.

Pamela B. Loginsky, WSBA #18096
Special Deputy Prosecuting Attorney

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Subject: In re Personal Restraint of McNeil and Rice, No. 87654-1

Dear Clerk and Counsel:

Attached for filing is the State's Response to Brief of *Amici Curiae* Washington Defender Association and American Civil Liberties Union of Washington.

Please contact me if you should encounter any difficulty in opening the attachment.

Sincerely,

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