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SUPREME COURT OF THE STATE OF WASHINGTON

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In re Detention of  
ROLANDO REYES.

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SUPPLEMENTAL BRIEF OF THE STATE OF WASHINGTON

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## I. INTRODUCTION

A judge's decision to hold a hearing in chambers relating to matters having no impact on the subsequent trial provides no basis for reversing the finding that Mr. Reyes is a sexually violent predator. After a bench trial, the trial court found that Mr. Reyes was a sexually violent predator based on his prior convictions for Rape of a Child and other sexually violent offenses and a determination that his Pedophilia, Exhibitionism, and Frotteurism made it likely that he would commit predatory acts of sexual violence if not confined in a secure facility. Mr. Reyes does not challenge the legal or factual basis for his commitment, but instead argues that this finding must be reversed because a hearing addressing purely legal and ministerial matters ten days before his trial was held in the judge's chambers.

Mr. Reyes failed to object before the trial court to the closing of the hearing, and even on appeal offers no attempt to show that the closure of the hearing affected his trial in any way. Mr. Reyes thus waived his ability to raise this issue on appeal. The Court should adhere to its prior jurisprudence and reject Mr. Reyes's argument that this Court should import "structural error" analysis from criminal cases addressing a defendant's right to a public trial to his civil case. Similarly, the Court should reject Mr. Reyes's attempt to rely on the rights of the general

public, as opposed to his own right, for public judicial proceedings, because he lacks standing to assert the public's rights. Finally, even if this Court were to allow this issue to be raised for the first time on appeal, and even if the Court applied a "structural error" analysis that presumes prejudice, the remedy would not be to overturn Mr. Reyes's commitment as a sexually violent predator, but rather would be a remand for filing of the transcript of the hearing or argument at a public hearing on the legal issues addressed in the in-chambers hearing.

## **II. STATEMENT OF THE ISSUES**

A. May a civil litigant raise for the first time on appeal an objection to a pretrial hearing on a purely legal question being held in chambers, where the litigant did not object at trial and neither alleges nor demonstrates any prejudice resulting from the closure?

B. Should this Court overrule its precedent that structural error is not applicable to a civil proceeding, where a person found to be a sexually violent predator in a civil proceeding argues for automatic reversal of this finding but fails to allege prejudice from a pretrial hearing held in chambers involving only legal argument?

C. Does a civil litigant, even if he has waived objection to an in-chambers proceeding by failing to object at trial, nevertheless have

standing to object to a court closure on behalf of the public under article I, section 10 of the state constitution?

### **III. STATEMENT OF THE CASE**

Rolando Reyes was convicted in 1997 of Child Rape in the First Degree for an incident involving a nine-year-old boy and an eight-year-old boy, who Mr. Reyes forced to perform oral sex on him upon threat of having his pit bull attack them. CP 19-20. Mr. Reyes was fourteen years old at the time. CP 19. In 2002, Mr. Reyes was convicted of burglary for an incident in which he forced his way into a home and grabbed the breasts of an adult female neighbor. CP 21. While Mr. Reyes was imprisoned for the burglary, the State petitioned to commit him to the Special Commitment Center pursuant to RCW 71.09. CP 3. While at the Special Commitment Center awaiting a trial to determine if Mr. Reyes should be committed as a sexually violent predator, he committed two additional sexual assaults of custodial staff. CP 7-8. The State's petition was withdrawn and then refiled after Mr. Reyes completed his sentence for those crimes. CP 3-4.

The State's petition alleged the Child Rape and Burglary convictions as qualifying sexually violent offenses, and also alleged that Mr. Reyes suffered from several mental abnormalities and a personality disorder, including Pedophilia; Frotteurism (paraphilic interest in rubbing

against a non-consenting person); Exhibitionism; and antisocial personality disorder. CP 8. The State's expert alleged that due to these mental abnormalities and personality disorder, Mr. Reyes was at "extremely high" risk of committing sexually violent offenses if not confined in a secure facility. CP 9.

Ten days before the sexually violent predator trial began, the trial court heard argument on Mr. Reyes's motion to dismiss for lack of jurisdiction. CP 58-78. The motion had been noted approximately five weeks earlier for hearing as a special setting in front of the trial court. Supp. CP 337. Briefs addressing the motion were filed as pleadings in the court file, which was not sealed. CP 58-78; Supp. CP 312-36.

The record shows that the trial judge, Mr. Reyes's attorney, and his Guardian Ad Litem were present for the hearing, and the State's attorney appeared by telephone. RP 2. While the verbatim report of proceedings indicates that the matter was heard in chambers, there is no indication that the State's attorney was aware of this fact. RP 2. Neither the judge nor Mr. Reyes's representatives noted on the record that the hearing was in chambers, and nothing else in the record indicates or suggests that the State's attorney was aware that the hearing was not being conducted in open court. RP 2.

Three matters were discussed at the hearing: Case scheduling (RP 2-3); the status of the Guardian Ad Litem appearing as Mr. Reyes's attorney instead (RP 3-8); and a motion entitled "Motion to Dismiss Jurisdiction." (RP 8-17). After brief argument, the trial court denied the motion to dismiss, commenting that it did not believe that jurisdiction was a "big issue here." RP 16. Mr. Reyes did not claim that this ruling was legally incorrect in the Court of Appeals, nor does he challenge it in this Court.

At a bench trial, Mr. Reyes was found to be a sexually violent predator based on his prior conviction for Rape of a Child in the First Degree, other sexual offenses, and the court's determination that he suffered from Pedophilia, Exhibitionism, and Frottuerism, which made him likely to commit predatory acts of sexual violence if not confined in a secure facility. CP 307-11.

#### IV. ARGUMENT

##### A. **Because Mr. Reyes Failed To Object to Conducting the PreTrial Hearing in Chambers, He Cannot Raise it for the First Time on Appeal**

This Court's appellate rules and longstanding practice establish that a court may refuse to hear any claim of error not raised at trial, except for claims of "manifest error affecting a constitutional right." RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). As this Court

has noted, the underlying policy of the rule is to encourage efficient use of judicial resources by allowing the trial court to correct errors rather than have an appeal and retrial. *Id.* Another beneficial result of the rule is that it encourages parties to be vigilant in assisting the trial court to prevent error in the first instance, rather than providing incentives to remain silent despite error in the hopes of raising the error on appeal if unsuccessful at trial. To meet RAP 2.5(a) and raise an error not objected to below, an appellant must show “(1) the error is manifest, and (2) the error is truly of constitutional dimension.” *O’Hara*, 167 Wn.2d at 98. To show that an error is manifest, an appellant must demonstrate actual prejudice by making “a plausible showing . . . that the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* at 99 (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)) (internal quotation marks omitted).

Here, Mr. Reyes seeks to raise the issue of whether the hearing in chambers violated the constitutional provision ensuring that justice be “administered openly.” Appellant’s Opening Br. at 35 (citing Wash. Const. art. I, § 10). Not only did Mr. Reyes fail to object to the in-chambers hearing, but his attorneys actively participated in the in-chambers hearing, apparently without informing the State’s counsel (participating by telephone) of the closure. RP 1-21. Because he failed to

object before the trial court, Mr. Reyes cannot raise the issue on appeal unless he shows a manifest error, including a showing of prejudice. RAP 2.5(a); *O'Hara*, 167 Wn.2d at 98.

Mr. Reyes does not even allege, let alone make a plausible showing, that the asserted error had practical and identifiable consequences in the trial of the case. Nor could he. First, the brief hearing involved purely legal and ministerial issues, and Mr. Reyes does not assert that the legal issues were resolved incorrectly. Second, the hearing did not involve witnesses whose testimony might have been affected by the closure, which could have repercussions during the trial if the testimony were used for impeachment purposes. *See State v. Bone-Club*, 128 Wn.2d 254, 261-62, 906 P.2d 325 (1995). Third, the presence of Mr. Reyes's representatives at the hearing and the court reporter's transcript assures Mr. Reyes that no improprieties occurred while the hearing was being conducted in chambers. *See State v. Smith*, 181 Wn.2d 508, 517, 334 P.3d 1049 (2014) (distinguishing prior case in holding sidebars not a public trial violation in part because defendant's attorney was present and thus prevented the appearance of impropriety); *In re Det. of Morgan*, 180 Wn.2d 312, 326, 330 P.3d 774 (2014) (finding no violation of open courts in part because the evidence admitted and decision made in closed hearing were filed in the open record, thus allowing "meaningful public access").

In short, there are no practical and identifiable consequences to Mr. Reyes from conducting the hearing in chambers, so Mr. Reyes cannot establish that the alleged error was “manifest.” This Court should thus refuse to hear his claim.

**B. The Court Should Not Overrule Its Precedent and Import “Structural Error” and Related Analyses from Criminal Cases into Civil Cases**

Mr. Reyes offers no explanation as to how the court closure conceivably could have affected his subsequent trial. Instead, he argues that the Court should presume prejudice based on a “structural error” analysis applicable to criminal cases. Pet. Review at 5-8.<sup>1</sup> Structural error is error that defies harmless error analysis and “necessarily render[s] a *criminal trial* fundamentally unfair or an unreliable vehicle for determining *guilt or innocence*.” *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (emphasis added). Washington courts, including this Court, have already rejected the application of structural error to a civil case, and this Court should adhere to its prior rulings because they are well founded in precedent, constitutional text, and policy.

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<sup>1</sup> The State believes that even in criminal cases, application of structural error to open courts violations, without requiring objection at the time of trial or a showing of any prejudice, is both harmful and incorrect and should be overturned. Since this case can be resolved by applying existing case law to reject application of structural error in a civil case, the State does not present argument on this issue, but merely notes its position.

**1. This Court Has Already Rejected Attempts to Apply “Structural Error” in Civil Cases**

A majority of this Court has found that courtroom closure in a civil case is not “structural error,” and that a respondent must show prejudice to obtain appellate relief. *In re Det. of D.F.F.*, 172 Wn.2d 37, 48, 256 P.3d 357 (2011) (J.M. Johnson, J., and Chambers, J., concurring in result) (stating that “ ‘structural error’ analysis does not apply to the civil context” but still granting relief because the respondent “demonstrate[d] sufficient prejudice to warrant relief”); (Madsen, C.J., C.W. Johnson, J., and Fairhurst, J., dissenting) (“both precedent and common sense suggest that structural error analysis is ill suited for” civil cases). In again rejecting application of structural error in a civil case, this Court later confirmed the effect of the concurring and dissenting opinion in *D.F.F.*, recognizing that “[f]ive justices of this court explicitly rejected the proposition that the concept of ‘structural error’ had a place outside of criminal law.” *Saleemi v. Doctor’s Associates, Inc.*, 176 Wn.2d 368, 385-86, 292 P.3d 108 (2013) (citing *D.F.F.*, 172 Wn.2d at 48, 53).

Court of Appeals opinions are in accord. *E.g.*, *In re Det. of Ticeson*, 159 Wn. App. 374, 386-87, 246 P.3d 550 (2011) (requiring civil litigant in sexually violent predator commitment proceeding to show prejudice before raising open courts issue for first time on appeal),

*abrogated on other grounds by State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012); *In re Dependency of J.A.F., E.M.F., V.R.F.*, 168 Wn. App. 653, 662-63, 278 P.3d 673 (2012) (requiring parent challenging termination of parental rights to show prejudice in order to raise open courts issue for first time on appeal). Mr. Reyes has not shown and cannot show that these cases are harmful and incorrect such that they should be overruled. *See, e.g., In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (stare decisis requires a showing that precedent is incorrect and harmful before being abandoned).

Courts rejecting structural error in civil cases have explained some of the troubling aspects of importing that doctrine. For example, as Chief Justice Madsen pointed out in her dissent in *D.F.F.*, applying structural error to a violation of article I, section 10, which protects the public at least as much as the litigants to a proceeding, leads to the logical conclusion that the public may be able to challenge final civil judgments and obtain automatic reversal even where none of the parties wish a new trial. *D.F.F.*, 172 Wn.2d at 367-68. Such outcomes are avoided if structural error is limited to violations of a criminal defendant's right to a public trial pursuant to article I, section 22.<sup>2</sup> Similarly, the operation of

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<sup>2</sup> Recent opinions from this Court addressing open court issues have not always been consistent or clear regarding distinctions between criminal defendants' rights derived from article I, section 10 and article I, section 22, sometimes relying solely on

double jeopardy in a criminal trial ensures that only a defendant can rely on the structural error doctrine, whereas in a civil case, any party could raise on appeal a violation of a public trial right and, if structural error applied, demand reversal and a new trial. *See In re Det. of Reyes*, 176 Wn. App. 821, 847 n.26, 315 P.3d 532 (2013) (noting possibility that either litigant could gain reversal). Thus, in a sexually violent predator proceeding any of the parties could demand a new trial for closures despite showing no prejudice whatsoever from the closure. Likewise, if structural error applied to civil cases, decisions affecting adoption or parental rights, such as those presented by the oral argument companion to this case,<sup>3</sup> would be subject to automatic reversal despite no showing of prejudice. This would needlessly create uncertainty and prevent permanence in a child's family situation. Neither precedent nor common sense demands such retrials and the incumbent tax on judicial and litigant resources and accompanying lack of finality.

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article I, section 22, sometimes citing article I, section 10, and sometimes discussing "public trial rights" without specifying whether one or both constitutional provisions apply. *E.g.*, *State v. Slert*, 181 Wn.2d 598, 334 P.3d 1088 (2014) (lead opinion of González, J., Madsen, C.J., C. Johnson, J., J. Johnson, J.) (stating that violations of article I, section 10 are structural error); *State v. Beskurt*, 176 Wn.2d 441, 293 P.3d 1159 (2013) (lead opinion of C. Johnson, J., Owens, J., J. Johnson, J. and Johanson, J.P.T.) (stating that structural error remedy of new trial applicable to article I, section 22 violations but not article I, section 10 violations). Nevertheless, because the Court's open courts jurisprudence finding structural error all involve criminal cases, the defendant's right to a public trial pursuant to article I, section 22 was necessarily present in those cases.

<sup>3</sup> This Court set oral argument in *In re Adoption of M.S.M.-P*, Wash. Supreme Court No. 90467-7, as a companion case to the present case.

**2. Courts Have Repeatedly Refused to Treat Civil Commitments of Sexually Violent Predators as Criminal Proceedings**

Mr. Reyes's claim that structural error should be applied to his case because proceedings to commit sexually violent predators are "quasi-criminal" fails for at least two reasons. Pet. Review at 5-8. First, prior court decisions have already rejected application of structural error in civil cases involving involuntary commitment proceedings, including sexually violent predator proceedings. *D.F.F.*, 172 Wn.2d at 48-50 (concurring and dissenting opinions) (involuntary commitment for psychiatric treatment); *Ticeson*, 159 Wn. App. at 381 (involuntary commitment as sexually violent predator). Mr. Reyes has not proven, as is his burden, that these decisions are incorrect and harmful. Second, Washington courts do not characterize sexually violent predator proceedings as quasi-criminal, but instead consistently hold that the sexually violent predator statute is resolutely civil in nature. *E.g.*, *In re Det. of Strand*, 167 Wn.2d 180, 191, 217 P.3d 1159 (2009); *In re Det. of Williams*, 147 Wn.2d 476, 488, 55 P.3d 597 (2002); *In re Det. of Petersen*, 138 Wn.2d 70, 91, 980 P.2d 1204 (1999); *In re Det. of Young*, 122 Wn.2d 1, 23, 857 P.2d 989 (1993).

Washington courts have refused to confer numerous criminal protections upon respondents in sexually violent predator commitment proceedings, including the Sixth Amendment right to confront witnesses,

the ex post facto and double jeopardy clauses, the rule of lenity, and the presumption of innocence. *Petersen*, 138 Wn.2d at 91 (Fifth and Sixth Amendment rights do not attach to civil proceedings under RCW 71.09); *In re Det. of Stout*, 159 Wn.2d 357, 369-71, 150 P.3d 86 (2007) (no Sixth Amendment right to confront witnesses in SVP proceeding); *Young*, 122 Wn.2d at 21-26, 51 (refusing to apply ex post facto and double jeopardy clauses and the Fifth Amendment privilege against compulsory self-incrimination in SVP proceedings); *In re Det. of Aqui*, 84 Wn. App. 88, 101, 929 P.2d 436 (1996) (refusing to apply rule of lenity and presumption of innocence in SVP cases), *abrogated on other grounds by In re Det. Of Henrickson*, 140 Wn.2d 686, 2 P.3d 473 (2000). Similarly, this Court should reject Mr. Reyes's attempt to rely on the structural error doctrine that this Court has already determined is inapplicable to civil proceedings.

**C. Mr. Reyes Lacks Standing To Rely on the Rights of the Public to an Open Hearing**

To the extent that Mr. Reyes seeks to assert the rights of the public to an open hearing pursuant to article I, section 10, he fails to meet the well-established test for third-party standing, and his attempt should be rejected. As correctly noted by the Court of Appeals, this Court has long applied the third-party standing test used by the United States Supreme Court in *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d

411 (1991). *Reyes*, 176 Wn. App. at 845. Under that test, in order to assert the rights of third parties a litigant must establish three criteria: 1) an “injury in fact” suffered by the litigant; 2) a close relationship with the third party; and 3) some hindrance to the third party’s ability to protect his or her own interests. *Id.* (quoting *Powers*, 499 U.S. at 410-11).

The Court of Appeals correctly determined that Mr. Reyes fails to meet any one of the three *Powers* criteria, let alone all of them, and Mr. Reyes offers no argument disputing the Court of Appeals conclusion. *Id.*; Pet. Review at 10. Mr. Reyes failed to establish any injury in fact because he cannot show prejudice from the closure, he claims no close relationship with the public, and prior cases in which the press and other members of the public have asserted a right to open proceedings show no hindrance to the public’s ability to protect the right. *Id.* (citing *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982); *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004); *Bennett v. Smith Bundy Berman Britton, P.S.*, 176 Wn.2d 303, 291 P.3d 886 (2013)). *See also, e.g., Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993) (newspaper challenge to statute requiring information regarding child sexual assault victims not be disclosed to public); *Federated Publ’ns, Inc. v. Kurtz*, 94 Wn.2d 51, 615 P.2d 440 (1980) (newspaper petition challenging closure of court proceedings); *State ex*

*rel. Snohomish County Superior Court v. Sperry*, 79 Wn.2d 69, 483 P.2d 608 (1971) (appeal based on art. I, § 10 by newspaper reporter of contempt order).

The Court of Appeals also properly rejected Mr. Reyes's attempt to rely on this Court's decision in *D.F.F.* to bolster his claim that he may assert the rights of the public. The appellant in *D.F.F.* did not argue, and the court did not address, whether the appellant could assert on the public's behalf its right to attend mental health commitment proceedings. *Reyes*, 176 Wn. App. at 846 (citing *D.F.F.*, 172 Wn.2d at 39-41). Instead, four justices in the lead opinion held that a litigant has a personal right (and therefore standing) to have his hearing in public. *D.F.F.*, 172 Wn.2d at 39-40. The remaining five justices, both the concurrence and dissent, did not address standing. *Id.* at 47-57. Thus, *D.F.F.* provides no support for a claim that Mr. Reyes has third-party standing to assert the rights of the public.

Mr. Reyes acknowledges that the Court of Appeals applied the correct test for third-party standing, but nevertheless argues for unspecified alterations to the test because of the "quasi-criminal" nature of civil commitment proceedings for sexually violent predators. Pet. Review at 10. There are at least two fatal flaws to this argument. First, as discussed above, this Court has repeatedly rejected attempts to treat sex

predator civil commitment proceedings as criminal, and repeatedly recognized them as civil. Second, the third-party standing test derived from the United States Supreme Court in *Powers* applies equally to criminal cases, as *Powers*, a criminal case, itself demonstrates. *Powers*, 499 U.S. at 411. Accordingly, the Court should reject any attempt by Mr. Reyes to rely on third-party standing.

**D. Even If Mr. Reyes Had Properly Preserved the Issue, the Remedy for Violation of the Open Courts Provision Would Not Be a New Trial**

Even if Mr. Reyes was able to overcome the numerous procedural hurdles to have his claim heard and the Court concluded that the pretrial hearing should not have been conducted in chambers and was structural error, the proper remedy in this case is not a remand for a new trial. Rather, the remedy would be filing in the public court file the transcript of the hearing, or at most a remand for a public hearing on the issues addressed in the chambers discussion. This Court has recognized that where an open courts violation involves closure of a pretrial proceeding that can be repeated without any effect on the trial, the proper remedy is not necessarily reversal, even when applying a structural-error analysis. *State v. Njonge*, 181 Wn.2d 546, 554 n.3, 334 P.3d 1068 (2014) (citing *Waller v. Georgia*, 467 U.S. 39, 40, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)).

There is no evidence or argument that holding the hearing in chambers affected the trial in any way. Unlike a case in which witnesses' testimony may have been affected by a closed hearing and whose affected testimony at least conceivably could have lasting impacts on the trial, here there is no lingering impact of the chambers discussion that could have affected the trial. *Cf. State v. Bone-Club*, 128 Wn.2d 254, 261-62, 906 P.3d 325 (1995) (remanding for new trial where testimony at closed suppression hearing may have been impacted by closure, and even if suppression hearing in public produced the same result, defendant should have benefit of altered testimony for impeachment purposes at trial). Similarly, this is not a case where the entire involuntary commitment proceeding was closed to the public. *Cf. D.F.F.*, 172 Wn.2d at 38, 47 (reversing involuntary commitment finding where entire proceeding was closed to the public; concurring opinion finding sufficient prejudice where entire proceeding closed to public). Therefore, reversal of the finding that Mr. Reyes is likely to commit predatory acts of sexual violence if not confined in a secure facility is not necessary to uphold the constitutional mandate that justice be administered openly.

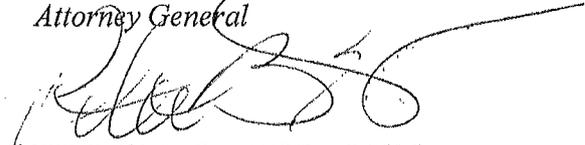
## V. CONCLUSION

After a full and public trial, the superior court found that Mr. Reyes was a sexually violent predator and ordered him committed to the

Special Commitment Center pursuant to RCW 71.09. Mr. Reyes does not now claim any error in the trial, nor does he dispute the court's finding. Rather, he seeks a new trial because a pretrial hearing to argue a purely legal motion was conducted in the judge's chambers. By failing to object to the trial court, he cannot raise the objection on appeal without showing prejudice. This longstanding rule allows the trial court to correct errors, prevents gamesmanship, and still protects those litigants who have actually been prejudiced by constitutional violations. Mr. Reyes makes no attempt to show prejudice. This Court should affirm.

RESPECTFULLY SUBMITTED this 25th day of March 2015.

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**CERTIFICATE OF SERVICE**

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of Supplemental Brief of the State of Washington to be served on the following via first class mail, postage prepaid, and via e-mail:

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DATED at Olympia, Washington this 25th day of March 2015.

  
KRISTIN D. JENSEN  
Confidential Secretary

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**Subject:** RE: 89465-5 In re Detention of Reyes, Supplemental Brief of the State of Washington

Rec'd 3/25/2015

**From:** Jensen, Kristin (ATG) [mailto:KristinJ@ATG.WA.GOV]  
**Sent:** Wednesday, March 25, 2015 2:01 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** gibsonc@nwattorney.net; Gonick, Peter (ATG)  
**Subject:** 89465-5 In re Detention of Reyes, Supplemental Brief of the State of Washington

Dear Clerk:

Attached for filing in the above matter, please find the Supplemental Brief of the State of Washington.

Respectfully,  
Kristin  
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