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SUPREME COURT OF THE STATE OF WASHINGTON

SCOTT WALTER MAZIAR,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Petitioner.

**SUPPLEMENTAL BRIEF OF PETITIONER WASHINGTON
STATE DEPARTMENT OF CORRECTIONS**

ROBERT W. FERGUSON
Attorney General

JEFFREY T. EVEN, WSBA # 20367
Deputy Solicitor General

MICHAEL P. LYNCH, WSBA # 10913
Senior Counsel

PATRICIA D. TODD, WSBA # 28452
Assistant Attorney General

PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200
Office ID # 91087

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I. INTRODUCTION

State law provides in black letter that “[a]n issue of fact, in an action for the recovery of money only . . . shall be tried by a jury.” RCW 4.40.060; *see also* RCW 4.44.090; RCW 4.48.010. This right to a trial by jury has stood firmly in statute since the first territorial legislature. The legislature reiterated it after statehood, and it remains the law today. There is no dispute that in this action the Washington State Department of Corrections (State) demanded a jury trial. The superior court denied the State’s request and entered judgment for the plaintiff, Scott Walter Maziar, based upon a bench trial. The Court of Appeals affirmed.

The law is unambiguous that actions involving the State “shall proceed in all respects as other actions.” RCW 4.92.030. And when the legislature waived the State’s sovereign immunity for tort liability in 1961, it specified that the State would be liable “to the same extent” as private litigants. RCW 4.92.090. Under these statutes, the same civil procedures that apply to private parties, including the option of requesting a jury trial, apply to the State. Indeed, the factors that this Court considers in determining a right to trial by jury inquire only into the nature of the cause of action, not the identity of the party seeking a jury trial. It therefore follows that if Mr. Maziar enjoys a right to a jury, then so does the

State. Conversely, if the State does not enjoy a right to trial by jury, then neither does Mr. Maziar.

The plain statutory language makes this an easy case. For that reason, this Court may not need to reach the question of whether article I, section 21 of the Washington Constitution also entitles the State to a jury trial. If the Court does reach the question, however, the Court should conclude that the State, like all other litigants, is constitutionally entitled to request a jury in an action for damages. The Court of Appeals erred by ignoring the plain language of article I, section 21, and categorically excluding the State from the parties entitled to request a jury.

This Court should reverse the decision of the Court of Appeals, vacate the judgment, and remand this action to the superior court for a jury trial on Mr. Maziar's claims.

II. ISSUES

1. Do statutes allowing a litigant to request a jury trial, and providing that actions involving the State shall proceed as all other actions, provide for jury trials on request of the State?
2. Does article I, section 21 of the Washington Constitution, which provides for jury trials without distinguishing among litigants, apply to actions involving the State just as it applies to actions involving private litigants?

III. STATEMENT OF THE CASE

The State employed Mr. Maziar as a correctional officer on McNeil Island. CP at 2. Mr. Maziar alleged that he was injured after a shift while returning to the mainland on the state-operated McNeil Island ferry. CP at 3. Although he initially demanded a jury trial, Mr. Maziar moved to strike the jury shortly before the scheduled trial date, asserting that there is no jury trial right in a maritime action. CP at 209, 213. The State opposed that motion, asserting that the right to a jury trial applies to maritime cases. CP at 24-25. The trial court ruled in favor of Mr. Maziar, striking the jury. CP at 238. Following a bench trial, the court awarded a judgment for monetary damages in favor of Mr. Maziar. CP at 133. The State appealed.

The primary issue briefed to the Court of Appeals was whether the right to a jury trial applies to a negligence-based maritime action seeking monetary relief and brought in state court. *Maziar v. Dep't of Corr.*, 180 Wn. App. 209, 215, 327 P.3d 1251 (2014).¹ The Court of Appeals concluded that the State was correct that a jury trial right applies to

¹ Mr. Maziar raised two further issues before the Court of Appeals on which the court ruled in favor of the State. *Maziar*, 180 Wn. App. at 215. This Court denied Mr. Maziar's crosspetition for review as to those issues, and they are not before this Court.

The Court of Appeals decision under review is the second decision by that court in this action. An earlier opinion resolved issues unrelated to the present appeal. *Maziar v. Dep't of Corr.*, 151 Wn. App. 850, 216 P.3d 430 (2009).

maritime actions. *Maziar*, 180 Wn. App. at 215. On its own initiative, the court then expanded its examination of the jury trial right beyond what the parties had briefed. The court concluded that the law does not afford a jury trial right to the State, and that therefore the trial court did not err by striking the jury at Mr. Maziar's request. The first opportunity the State had to brief this issue was in its motion for reconsideration, which the court denied.

This Court granted review on the State's petition, which raised only questions concerning whether state law accords a jury trial at the State's request. This is accordingly the sole topic of this appeal.

IV. ARGUMENT

A. Standard of Review

This appeal presents pure questions of law, which are reviewed de novo. *In re Petersen*, 180 Wn.2d 768, 780, 329 P.3d 853 (2014).

B. The Plain Language of Several Statutes Entitles the State to a Jury Trial in an Action for Damages

State law unambiguously entitles all civil litigants to a jury trial in an action to recover money damages. The legislature has provided:

An issue of fact, in an action for the recovery of money only, or of specific real or personal property *shall be tried by a jury*, unless a jury is waived, as provided by law, or a reference ordered, as provided by statute relating to referees.

RCW 4.40.060 (emphasis added). A second statute clearly states:

All questions of fact other than those mentioned in RCW 4.44.080, shall be decided by the jury, and all evidence thereon addressed to them.

RCW 4.44.090.² Yet a third statute provides: “*Any party* shall have the right in an action at law, upon an issue of fact, to demand a trial by jury.” RCW 4.48.010 (emphasis added).³ These statutes make no exceptions, whether for the State or any other litigants. To the contrary, another unambiguous statute provides that actions involving the State “shall proceed in all respects as other actions.” RCW 4.92.030. When statutory language is unambiguous, as it is here, courts “give effect to that language and that language alone because we presume that the legislature says what it means and means what it says.” *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004).

The first three statutes discussed above plainly confer a jury trial right to civil litigants. RCW 4.40.060 (jury trial on claims for money damages); RCW 4.44.090 (jury trial on issues of fact); RCW 4.48.010 (jury trial on issues of fact in actions at law). And the fourth statute unambiguously provides that actions involving the State “shall proceed in all respects as other actions.” RCW 4.92.030. Accordingly, no further

² RCW 4.44.080 provides that questions of law are to be decided by the court.

³ See also CR 38(b) (providing that “any party” can request a jury trial); CR 39(a)(2) (reserving questions of fact to the jury and citing RCW 4.40.070 and RCW 4.44.090).

analysis is required and this Court should reverse the Court of Appeals based upon the plain language of these four statutes.

C. Statutes Entitling Civil Litigants to Request a Jury Trial Extend to the State Without Regard to the Intent of Territorial Legislatures

The Court of Appeals ignored the statutes' plain language and erroneously restricted the scope of the statutory jury trial right based upon an historical analysis that looked at when the statutes were enacted. *Maziar*, 180 Wn. App. at 230-34. This analysis was misguided for two reasons. First, the statutes must be construed in light of the State's 1961 waiver of sovereign immunity for tort liability. Second, the historical analysis upon which the Court of Appeals based its conclusion is factually wrong.

1. Tort Actions Against the State After the Waiver of Sovereign Immunity Proceed in the Same Way As Other Tort Actions

In waiving its sovereign immunity to tort liability in 1961, the State consented "to the maintaining of a suit or action against it for damages arising out of its tortious conduct *to the same extent as if it were a private person or corporation.*" Laws of 1961, ch. 136, § 1 (enacting RCW 4.92.090) (emphasis added).⁴ The 1961 statute was codified in the

⁴ Two years later, the legislature amended RCW 4.92.090 to read in its current form:

same chapter as RCW 4.92.030, which already provided that actions involving the state “shall proceed in all respects as other actions.” RCW 4.92.030.⁵ “Other actions,” of course, entailed a right to trial by jury for civil litigants in damages actions.⁶ RCW 4.40.060; RCW 4.44.090; RCW 4.48.010. The legislature is presumed to know the laws that already exist at the time it passes a statute. *Thurston County v. Gorton*, 85 Wn.2d 133, 138, 530 P.2d 309 (1975). The 1961 legislature therefore presumably understood that allowing the State to be sued “to the same extent” as private parties meant that the jury trial right that attaches to actions between private litigants would also attach to actions against the State.

Statutes that are added to an existing statutory scheme are “read in connection with other statutes pertaining to the same subject matter.” 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 22.35 (2009). The new statute and the pre-existing statutes

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

Laws of 1963, ch. 159, § 2.

⁵ The Court of Appeals did not consider either RCW 4.92.090 or .030.

⁶ RCW 4.40.060 entitled the State to demand a jury trial because this is an action for damages. But the function of the jury is broader than determining the *amount* of damages, and includes determining issues of fact more generally. RCW 4.40.060; RCW 4.44.090; RCW 4.48.010. This includes assessing witness credibility, a contested matter in the present case. *Morse v. Antonellis*, 149 Wash. 2d 572, 574, 70 P.3d 125 (2003) (“A jury is free to believe or disbelieve a witness, since credibility determinations are solely for the trier of fact.”).

relating to the same subject matter are read together, as if they had all been originally enacted in that form. 1A Singer, §22.35.; *see also Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (statutes are construed in light of all that the legislature has said on a given subject). Accordingly, when the legislature waived sovereign immunity to tort liability by enacting RCW 4.92.090 in 1961, that new statute took its place beside the pre-existing statute providing that actions against the State proceed as any other action. RCW 4.92.030. And both RCW 4.92.090 and .030 must be read in conjunction with statutes entitling civil litigants to demand jury trials in damages actions.

The Court of Appeals erroneously concluded that, since there was no such thing as a civil tort claim against the State until 1961, statutes enacted at an earlier time could not have intended that jury trials would be permitted in such actions. But it is the intent of the 1961 legislature that matters when construing the 1961 act. When the legislature waived the State's sovereign immunity in 1961, it did not enact a whole new system of civil procedure for tort actions against the State. Rather, it was assumed that existing procedures would apply to actions against the State. This is particularly so in light of the fact that RCW 4.92.030 required actions involving the State to proceed like other civil actions. As the Oregon Court of Appeals reasoned when it concluded that the State of Oregon has

a statutory right to jury trial, “we are not aware of any authority for the proposition that when the state is a litigant in a civil action it does not have the same statutory rights as any other litigant.” *Thorp v. Dep’t of Motor Vehicles*, 4 Or. App 552, 557, 480 P.2d 716 (1971).

The Court of Appeals similarly erred in relying upon a pre-1961 decision to conclude that RCW 4.40.060 could not apply to the State. *Maziar*, 180 Wn. App. at 232-33 (discussing *Dexter Horton Bldg. Co. v. King County*, 10 Wn.2d 186, 116 P.2d 507 (1941)). The lower court relied upon that decision for the proposition that jury trials may be demanded only in common law actions. *Maziar*, 180 Wn. App. at 232. But in reaching this conclusion, the court ignored the 1961 legislation waiving sovereign immunity and RCW 4.92.030 providing that actions involving the State proceed as other actions.

Additionally, this Court has previously held that unless the legislature directs otherwise, the State is subject to the same litigation procedures as private litigants. For example, this Court rejected the State’s argument that a new statutory cause of action adopted in 1971 did not obligate the State to pay a filing fee. Rather, the Court reasoned that the legislature enacted the law with full knowledge of the existing laws and that there was “no reason for the legislature to specifically mention the payment of filing fee [in the 1971 statute] in view of the existing general

law on the subject.” *Gorton*, 85 Wn.2d at 138; *see also King County v. Superior Court*, 104 Wash. 268, 271, 176 P. 352 (1918) (state’s waiver of sovereign immunity for local government subjected cities and counties to suit as an ordinary party litigant); *Hickey v. City of Bellingham*, 90 Wn. App. 711, 714, 953 P.2d 822 (1998) (“When municipal corporations became subject to suit the same as an ordinary party litigant, they became answerable under the same general rules governing procedure in the superior courts.”).

When the legislature waived the state’s sovereign immunity in 1961, it placed the State in the same position as other civil litigants regarding the jury trial right. In order to decide otherwise, it would be necessary to conclude that the legislature intended not merely to place the State on par with other civil litigants but to affirmatively disadvantage the State relative to them. Such a conclusion is unsustainable in light of the requirement that the State be liable “to the same extent” as private parties and that actions involving the state “shall proceed in all respects” like other actions. RCW 4.92.090, .030. The State, accordingly, is entitled to demand a jury trial in damages actions, as are other civil litigants.

2. Statutes Adopted After Statehood Entitle the State to Demand a Jury Trial

The Court of Appeals was also wrong when it concluded that the State is not statutorily entitled to demand a jury trial because the statutes in question were originally enacted before statehood. *Maziar*, 180 Wn. App. at 231. The lower court reasoned that the territorial legislature could not have been thinking of the State when providing for a right to a jury trial, because neither the State nor tort claims against it yet existed. *Maziar*, 180 Wn. App. at 231.⁷

The lower court was wrong as a simple matter of historical fact because two of the three statutes providing for jury trial rights were reenacted or amended after statehood. The legislature reenacted RCW 4.40.060 in its current form in 1893, after statehood. Laws of 1893, ch. 127, § 33. The legislature amended RCW 4.48.010 into its current form in 1984. Laws of 1984, ch. 258, § 512. The latter amendment occurred not only well after statehood, but also after the waiver of the State's sovereign immunity. Laws of 1961, ch. 136, § 1 (enacting RCW 4.92.090). Moreover, the legislature not only enacted RCW 4.92.030 after statehood (Laws of 1895, ch. 95, § 3), but also amended that section three

⁷ The statute currently codified as RCW 4.40.060 was originally enacted by the first territorial legislature. Laws of 1854, p. 164, § 183. The statute currently codified as RCW 4.44.090 was first enacted in 1869. Laws of 1869, p. 56, § 228. Although not mentioned by the Court of Appeals, the statute now codified as RCW 4.48.010 was first enacted in 1854. Laws of 1854, p. 168, § 206.

times after the waiver of sovereign immunity. Laws of 1988, ch. 202, § 3; Laws of 1986, ch. 126, § 3; Laws of 1971, ch. 81, § 24. The lower court's view that the statutes were somehow frozen in their 1889 meaning is untenable in light of the legislature's continuing legislation over the intervening century. *See Maziar*, 180 Wn. App. at 233 (concluding that the meaning of RCW 4.40.060 and RCW 4.44.090 did not expand beyond their then-existing reach).

The lower court simply got its facts wrong about the history of statutes providing for jury trials. Once that factual error is corrected, the reasoning of the court unravels.

In sum, the Court of Appeals erred in concluding that the State is not statutorily entitled to demand a jury trial. This case should be remanded to the superior court for a jury trial.

D. The State is Also Entitled to a Jury Trial Under the Washington Constitution

This case can be resolved entirely on statutory grounds, because RCW 4.40.060, RCW 4.44.090, and RCW 4.48.010 provide all litigants with a right to a jury trial pursuant to RCW 4.92.030. The Court of Appeals, however, also erred in concluding that the State is not entitled to a jury trial under article I, section 21 of the Washington Constitution. The court's analysis of the constitutional question must be rejected because:

(1) it is inconsistent with the plain language of article I, section 21 and
(2) it conflicts with this Court's two-step analysis for determining the constitutional scope of the jury trial right.

1. By Its Plain Language Article I, Section 21 Does Not Exclude the State

The plain language of article I, section 21 provides for a right of trial by jury, without limitation:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Const. art. I, § 21 (emphasis added).

The Court of Appeals rejected the possibility that article I, section 21, could afford the State a right to trial by jury under *any* circumstances, based upon the general proposition that article I, as a whole, addresses only individual rights. But nothing in the plain language of section 21 excludes the State from its scope. And in contrasting section 21 with other sections of article I, we see that although some of those sections clearly address individual rights, others do not. *See Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (the use of different words presumably indicates a difference in meaning); *see also State v. Sheppard*, 79 Wash. 328, 329-30, 140 P. 332 (1914) (reading

constitutional provisions enacted contemporaneously *in pari materia*). In particular, section 21 contrasts with the immediately following section, which affords the right to trial by jury in a criminal context only to “the accused.” Const. art. I, §22. Section 22 grants the right only to one side in criminal trials, reinforcing the plain language reading of section 21 as applying to all litigants without any unstated restriction.

Article I contains other examples of specific provisions that address individual rights. *See, e.g.*, Const. art. I, §§ 1, 3-7, 9, 11-17, 19, 20, 24, 25, 27, 28, 30, 33-35 (protecting rights of “persons” or “individuals” or otherwise in context addressing private rights). But other provisions, in contrast, address structural principles of state government or limit legislative authority in general ways. *See, e.g.*, Const. art. I, § 2 (providing that the United States Constitution is the supreme law of the land); § 8 (restricting legislative authority to irrevocably grant any privilege, franchise, or immunity); § 10 (requiring open administration of justice without delay); §18 (subordinating the military to civil power); § 23 (prohibiting bills of attainder, ex post facto laws, or laws impairing the obligations of contract); § 26 (restricting the call of a grand jury); § 29 (providing that constitutional provisions are mandatory); § 31 (prohibiting keeping a standing army). These different provisions demonstrate that article I does not exclusively grant individual rights.

The Court of Appeals was accordingly incorrect in pronouncing that as a blanket matter every provision of article I addresses only individual rights. By its plain language, article I, section 21 does not exclude the State, and this plain language should be given effect. *See Malyon v. Pierce County*, 131 Wn.2d 779, 799, 935 P.2d 1272, (1997) (“Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well.”); *see also Standard Oil Co. v. Arizona*, 738 F.2d 1021, 1028-31 (9th Cir. 1984) (neutrally-worded Seventh Amendment of the United States Constitution grants states the right to a jury trial in some circumstances).⁸

Furthermore, constitutional history refutes the notion that article I, section 21 was designed solely to protect individual rights. Among the sources to which the framers of the Washington Constitution looked in developing this section was the proposed constitution submitted to the constitutional convention by W. Lair Hill. Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution* 46 (2d ed. 2013). Hill explained his proposed counterpart to article I, section 21 as protecting the jury system in general. W. Lair Hill, *Washington: A Constitution Adapted to the Coming State*, Morning Oregonian, July 4, 1889, at 9

⁸ Though not binding, interpretations of the scope of the Seventh Amendment can assist in interpreting article 1, section 21. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 647, 771 P.2d 711, 780 P.2d 260 (1989).

(<https://lib.law.washington.edu/content/guides/waconst-oregonian> (go to “July 4, 1889, at 9”, click on “page 9”)). In particular, Hill explained that the jury trial right is important because “the average judgment of a number of persons drawn together . . . is more likely to be correct than the judgment of any one person . . .” Utter & Spitzer at 16. Article I, section 21, therefore, fulfills the broader purpose to protect the jury system more generally.

2. The Court of Appeals Analysis Disregards, and Conflicts With, This Court’s Established Two-Step Analysis for Determining the Constitutional Scope of the Jury Trial Right

In addition to disregarding the Washington Constitution’s plain language, the Court of Appeals’ treatment of article I, section 21 ignored this Court’s existing standard for determining the scope of the jury trial right, and instead introduced the notion that the identity of the party claiming the jury trial right is relevant to the scope of that right.

This Court applies a two-step analysis to determine the scope of the constitutional right to a jury trial. “The first step is to determine the scope of the jury trial right as it existed at the State constitution’s adoption in 1889.” *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 884, 224 P.3d 761 (2010) (citing *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 647, 771 P.2d 711, 780 P.2d 260 (1989)). As to that first step, the Court in *Sofie*

held that an action at law for damages was within the jury's province in 1889 and so is within the scope of the jury trial right. *Sofie*, 112 Wn.2d at 645 (discussing the statute now codified as RCW 4.48.010, considered at pages 5, 6, and 11 above). "The second step is to determine the causes of action to which the right attaches." *Endicott*, 167 Wn.2d at 884. "[T]he inquiry is not whether the specific cause of action existed in 1889, but rather whether the type of action is analogous to one available at that time." *Endicott*, 167 Wn.2d at 884. At no point has this Court indicated that the identity of the parties is a factor. *See id.* at 884-85; *see also Dep't of Natural Res. v. Littlejohn Logging, Inc.*, 60 Wn. App. 671, 674, 806 P.2d 779 (1991) (holding that "the parties had a right to jury trial" in an action by the State to recover fire suppression costs).

The Court concluded in *Endicott* that a negligence-based maritime action seeking monetary relief brought in state court is among the types of cases to which a jury trial right applies under article I, section 21. *Endicott*, 167 Wn.2d at 885. This is so because "the fact finding function of the jury in [a maritime case] is to determine damages for negligence." *Id.* As this Court continued, "[t]his is exactly what *Sofie* held to be within the scope of the 1889 jury trial right." *Id.* Further, the second step is also satisfied because "the negligence remedy [in a maritime action] is the same 'basic cause of action' available at common law against nonmaritime

employers.” *Endicott*, 167 Wn.2d at 885. (citing *Sofie*, 112 Wn.2d at 650). This Court accordingly held “that the Washington constitutional right to a jury trial attaches in a [maritime] claim, *with the result that either a plaintiff or a defendant may demand a jury trial on such a claim.*” *Id.* (emphasis added).

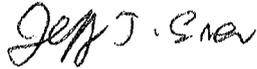
Endicott reveals yet another flaw in the analysis of the Court of Appeals. The lower court concluded that while Mr. Maziar was entitled to a jury trial if he wanted one, the State was not. *Maziar*, 180 Wn. App. at 225. But this Court’s analysis admits of no such distinction between the parties. Indeed, the inquiry relates to the nature of the cause of action, not the identity of the party seeking a jury trial. It therefore follows that if Mr. Maziar enjoys a right to a jury trial, then so does the other party to the case—even if that other party is the State. Conversely, if the State does not enjoy a right to a trial by jury, then neither does Mr. Maziar. *See Sofie*, 112 Wn.2d at 645 (“*either party shall have the right in an action at law, upon an issue of fact, to demand a trial by jury*” (quoting *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 385, 47 P. 958 (1897)(emphasis added)); *see also Endicott*, 167 Wn.2d at 884.

V. CONCLUSION

For these reasons, this Court should reverse the decision of the Court of Appeals, vacate the trial court's judgment, and remand to the superior court for the purpose of holding a trial by jury.

RESPECTFULLY SUBMITTED this 19th day of December, 2014.

ROBERT W. FERGUSON
Attorney General



JEFFREY T. EVEN, WSBA # 20367
Deputy Solicitor General

MICHAEL P. LYNCH, WSBA # 10913
Senior Counsel

PATRICIA D. TODD, WSBA # 28452
Assistant Attorney General

PO Box 40100

Olympia, WA 98504-0100

(360) 753-6200

Office ID # 91087

Counsel for Appellant Department of
Corrections

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington that I served, via electronic mail and USPS regular mail a true and correct copy of the foregoing document upon the following:

Eric Dickman
E. DICKMAN LAW FIRM
P.O. Box 66793
Seattle, WA 98166-0793
eric@edickman.com
kathleen@dickman.com

Dated this 19th day of December, 2014, at Olympia,
Washington.

A handwritten signature in black ink, reading "Stephanie N. Lindey". The signature is written in a cursive style with a large, looped initial "S".

Stephanie N. Lindey
Legal Secretary

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Dear Clerk,

Attached for filing in case number 90780-3, please find the Supplemental Brief of Petitioner Washington State Department of Corrections.

Thank you,

<< File: 90377-8 DOC Supplemental Brief.pdf >>

Stephanie N. Lindey
Solicitor General Division
PO Box 40100
Olympia, WA 98504-0100
(360) 586-3114
StephanieL1@atg.wa.gov