

Oct 28, 2016, 2:20 pm

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
Respondent,

vs.

ANDRE JACOB NUNEZ,  
Petitioner.

NO. 93618-8

MEMORANDUM RE:  
UNTIMELY FILING OF  
PETITION FOR  
REVIEW

**I. STATEMENT OF FACTS**

Mr. Nunez is represented by counsel. On August 4, 2016, Division Three of the Court of Appeals sent a letter to the attorneys, including Mr. Nunez's appellate counsel. *See* Appendix A.

The letter read, in pertinent part, as follows:

If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

*See* Appendix (emphasis in original). The 30 day deadline would have been September 5, 2016. September 5 was a holiday, so there was no mail service on Sunday, September 4 or Monday, September 5. This means that the petition would have had to been received by the court on Saturday,

 ORIGINAL

September 3. Appellant admits to mailing the petition for review the day before, on September 2, 2016.

## II. ARGUMENT

RAP 18.8(b), which governs the issue of extensions of time, provides as follows:

*Restriction on extension of time.* The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration. The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section. The motion to extend time is determined by the appellate court to which the untimely notice, motion or petition is directed.

RAP 18.8(b). The issue of timeliness was addressed in the case of *State v. Moon*, 130 Wn. App. 256, 261 (2005):

RAP 18.8(b) governs disposition of untimely appeals. *State v. Ashbaugh*, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978). RAP 18.8(b) provides: **The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time** within which a party must file a notice of appeal.... The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

**We apply this test rigorously.  
Consequently, there are very few instances**

**in which Washington appellate courts have found that this test was satisfied.** *See Reichelt v. RaymarkIndus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988). The burden is on Moon to provide “sufficient excuse for [his] failure to file a timely notice of appeal” and to demonstrate “sound reasons to abandon the [judicial] preference for finality.” *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993). Moon has failed to meet this burden here.

130 Wn. App. at 260 (emphasis added).

- 1. There are no extraordinary circumstances here and Nunez has set forth none in his motion for extension of time.**

Counsel for Nunez mailed his petition from Seattle one day before it was due in Spokane. He did not file by electronic facsimile transmission, an option that was also outlined for him by the Court of Appeals. He provides no explanation at all why the petition for review was mailed at such a late date or why he did not file by electronic facsimile transmission in order to meet the strict deadline of RAP 18.5(c). And he sets forth absolutely no extraordinary circumstances as to why he mailed the petition so late or was unable to complete the petition in a timely fashion. Mail from Seattle to Spokane typically does not happen overnight and he does not assert that the mail was sent with an overnight guarantee. Per their website, the United States Post Office does has an overnight delivery service called “Priority Mail Express” and the price includes tracking information with “USPS Tracking.” Counsel has not provided any of the tracking information for his petition. This Court can assume that there is none since it has not been provided. The next fastest

method of delivery would be Priority Mail, which takes 1-3 days. So, unless the petition had been mailed via “Priority Mail Express” there is no way via US Mail that counsel for Nunez could have expected the petition to be received in Spokane before the 30-day deadline.

**2. Nunez has not met his burden of providing a sufficient excuse for his failure to file a petition for review and to demonstrate sound reasons to abandon the judicial preference for finality.**

Nunez has provided no excuse for his failure to file a timely petition. The only excuse given is that he is “unsure why it took the Petition five days to get from Seattle to Spokane via U.S. mail.” Petition at 2. This is not a sufficient excuse. In fact, it provides no excuse. He seems to blame the post office, yet he mailed his petition the day before it had to be in Spokane. This is not a sufficient excuse. Furthermore, Nunez fails to demonstrate any sound reasons to abandon the judicial preference for finality. Counsel’s untimely mailing of the petition for reasons unknown is not a sound reason to abandon the preference for finality.

**3. Nunez has not demonstrated how granting him an extension of time will prevent a gross miscarriage of justice.**

Petitioner has not demonstrated any extraordinary circumstance in his case. Further, he has failed to demonstrate a “gross miscarriage of justice” as required under RAP 18.8(b). In fact, he has not even asserted that there will be a gross miscarriage of justice if his motion is not granted. And a showing of neglect is insufficient to establish a gross miscarriage of justice. This court should decline to accept his petition and

dismiss it as untimely.

### III. CONCLUSION

The petition should be dismissed for all the above reasons. A showing of neglect is insufficient to establish “extraordinary circumstances” or “a gross miscarriage of justice,” both of which must be proved by the Petitioner.

Respectfully submitted this 27th day of October, 2016,

s/Tamara A. Hanlon  
Tamara A. Hanlon, WSB 28345  
Senior Deputy Prosecuting Attorney  
Yakima County, Washington  
128 N. Second Street, Room 329  
Yakima, WA 98901  
Telephone: (509) 574-1210  
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tamara.hanlon@co.yakima.wa.us

# APPENDIX A

Renee S. Townsley  
Clerk/Administrator

(509) 456-3082  
TDD #1-800-833-6388

*The Court of Appeals  
of the  
State of Washington  
Division III*



500 N Cedar ST  
Spokane, WA 99201-1905

Fax (509) 456-4288  
<http://www.courts.wa.gov/courts>

August 4, 2016

**E-mail**

Joseph Anthony Brusic  
Tamara Ann Hanlon  
Yakima County Prosecuting Attorney's Office  
128 N 2nd St Rm 329  
Yakima, WA 98901-2621

Eric William Lindell  
Lindell Law Offices, PLLC  
PO Box 379  
7241 185th Ave NE  
Redmond, WA 98073-0379  
contact@lindelllaw.com

CASE # 323749  
State of Washington v. Andre Jacob Nunez  
YAKIMA COUNTY SUPERIOR COURT No. 121016645

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

A handwritten signature in cursive script that reads "Renee S. Townsley".

Renee S. Townsley  
Clerk/Administrator

RST:btb  
Attachment

c: **E-mail** Honorable Douglas Federspiel  
c: Andre Jacob Nunez, #373913  
Airway Heights Corrections Center  
P.O. Box 2049  
Airway Heights, WA 99001

Oct 28, 2016, 2:17 pm

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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on October 28, 2016, by agreement of the parties, I emailed a copy of the above document to Eric Lindell at ericlindell@icloud.com.

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

DATED this 28th day of October, 2016 at Yakima, Washington.

s/Tamara A. Hanlon  
TAMARA A. HANLON WSBA  
#28345  
Senior Deputy Prosecuting Attorney  
Yakima County, Washington  
128 N. Second Street, Room 329  
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## OFFICE RECEPTIONIST, CLERK

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Friday, October 28, 2016 2:21 PM  
**To:** 'Tamara Hanlon'  
**Cc:** Eric Lindell (ericlindell@icloud.com)  
**Subject:** RE: State v. Andre Jacob Nunez 936188

Received 10-28-16.

Supreme Court Clerk's Office

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**From:** Tamara Hanlon [mailto:Tamara.Hanlon@co.yakima.wa.us]  
**Sent:** Friday, October 28, 2016 2:04 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** Eric Lindell (ericlindell@icloud.com) <ericlindell@icloud.com>  
**Subject:** State v. Andre Jacob Nunez 936188

Good afternoon,

Attached for filing is the Sates Memorandum RE: Untimely Filing of Petition for Review.

Case name: State v. Andrew Jacob Nunez

Supreme Court Case Number: 93618-8

Court of Appeals Case Number: 323749-III

Appellate counsel for defense, Eric Lindell, is cc'ed.

Thank you,

***Tamara A. Hanlon***

Senior Deputy Prosecuting Attorney

Appellate Unit

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