

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 92840-7
)	
Petitioner,)	
)	REPLY TO ANSWER IN
vs,)	OPPOSITION TO
)	STATE'S REQUEST
BRUCE ALLEN HUMMEL,)	FOR 1 DAY
)	EXTENSION TO FILE
)	PETITION FOR
Respondent.)	REVIEW
_____)	

A. Identity of Moving Party

Respondent/Petitioner, State of Washington, by and through Kimberly A. Thulin, Appellate Deputy Prosecutor for Whatcom County, requests the relief designated in Part B.

B. Statement of Relief Sought

Counsel requests this Court grant a one day extension to November 17th, 2016 to permit the filing of the State's Petition for Review in this case.

The State asserts the circumstances that resulted in the late filing of the State's Petition for Review constitute extraordinary circumstances and that granting a one-day extension to permit substantive review of the State's Petition for Review

will prevent a gross miscarriage of justice. See, RAP 18.8(a) and (b), 1.2, 17.4(e).

C. Facts Relevant to Motion

The State inadvertently filed its Petition for Review one day late; not because the brief wasn't prepared or wasn't intended to be timely but because of a mistake in calendar calculations that resulted in an incorrect understanding of the Petition for Review due date. In light of Hummel's opposition to the State's request to grant a one-day extension, further explanation of the circumstances that resulted in this error may be helpful to demonstrate this request is predicated on extraordinary circumstances and that a one-day extension is necessary to prevent a gross miscarriage of justice.

When briefs, opinions, or letters are received by the Whatcom County Prosecutor's office appellate division from the appellate courts, they are reviewed by the assigned attorney. If further action is required, a staff assistant takes the pleadings, retrieves the file and completes required data entry for the case, which includes when required, calculating due dates and placing them on a shared electronic appellate calendar and in the file. The pleadings are then placed in the file, a due dated is noted on the file and the matter is given to the attorney for further action.

As explained previously, counsel initially intended to file a motion for reconsideration of the Court of Appeals decision in this matter. Pursuant to our internal procedures, the 20 day deadline was calculated by a staff assistant, and then placed in the file and on our internal appellate calendar. Counsel was

unaware the initial date calculated for the reconsideration motion fell on a Sunday which had resulted in the due date rolling over, as permitted by the rules, one additional day to November 7th 2016. (Per RAP 12.4(b) and RAP 18.6(a), since the 20 days ended on Sunday, Nov. 6th, the due date for the motion for reconsideration became Monday, November 7th). When the deadline was adjusted to reflect the deadline for filing a Petition for Review instead of a motion for reconsideration, the date on the appellate calendar and file were then modified pursuant to our process, to show a November 17th, 2016 deadline.

The calculation error was not obvious or apparent to counsel given that it was 10 days after the initial deadline for the motion for reconsideration. Counsel consequently, did not recalculate or double check the deadline and instead focused on completing the Petition for Review which required not only review of the appellate decision and the applicable law, but also required review of the extensive transcripts from Hummel's first and second first degree murder trials. In hindsight, Counsel should have cross checked the new November 17th due date with the date of the Court of Appeals opinion to ensure accuracy. (Office procedures have now been changed to ensure risk of this mistake in the future is minimalized.) Counsel's failure to cross check dates was not willful or intentional. Counsel asserts the circumstances that resulted in this unintended one-day late filing are extraordinary and constitute reason to grant a one-day extension to permit substantive consideration of the State's Petition for Review

and Hummel's answer. Granting the State's extension will prevent a gross miscarriage of justice pursuant to RAP 18.8(b).

D. Grounds for Relief

RAP 18.8(a) allows the Court to alter the provisions of RAP 10.2(c) and enlarge the time within which an act must be done in order to serve the ends of justice. RAP 1.2, 18.8(b), provides the rules of appellate procedure will be liberally interpreted to promote justice and facilitate the decision of cases on the merits so long as, in the context of filing a Petition for Review, the extension is predicated on extraordinary circumstances and will prevent a miscarriage a justice.

“Extraordinary circumstances may include instances where the filing, despite reasonable diligence was defective due to excusable error or circumstances beyond the party's control.” State v. Fox, 192 Wn.App. 512, 525, 371 P.3d 537 (2016). The length of a tolerable delay is inextricably intertwined with the excusability of the error. Scully v. Employment Sec.Dept, 42 Wn.App. 596, 712 P.2d 870 (1986).

The one –day deadline error in this case was the result of excusable error that occurred despite the State acting with reasonable diligence in filing its Petition for Review. The State believed in good faith the November 17th, filing date was timely. Once the calendar calculation error was realized, the State immediately moved, on November 18th 2016, for a one day extension of time. These facts reflect extraordinary circumstances pursuant to RAP 18.8(b) that give

this Court authority to grant an extension to prevent a gross miscarriage of justice. *See, Weeks v. Chief of State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982) (Notice of appeal timely but filed in the wrong court constituted extraordinary circumstances because the lost opportunity to appeal would constitute a gross miscarriage of justice in light of appellant's reasonably diligent conduct.), *State v. Ashbaugh*, 90 Wn.2d 432, 583 P.2d 1206 (1978) (Failure to pay filing fee with notice of appeal a mere oversight by petitioners attorney that was remedied immediately as soon as the error was brought to the defendant's attention constitutes extraordinary circumstances permitting an exception to the procedural rule.)

An extension is appropriate where the facts reflect the State did not intentionally disregard or inexcusably fail to comply with the procedural rules but instead reasonably complied with the rules and acted under a reasonably mistaken belief November 17th 2016 was the correct deadline. Additionally, the State is only requesting a one day extension. Granting a one day extension neither undermines the desirability of the Court's of upholding the finality of decisions or will result in any overt prejudice to Mr.Hummel. This extension will however, prevent a gross miscarriage of justice. *See, RAP 18.8(b)*.

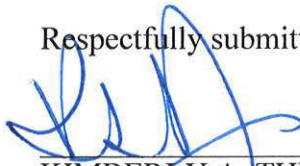
Hummel was twice convicted by a jury of his peers of murder in the first degree. After Hummel appealed the second jury's verdict, the Court of Appeals agreed the evidence proved Hummel murdered his wife but nonetheless found there was insufficient evidence to support the jury's conclusion Hummel

murdered his wife with premeditated intent. Consequently, the Court of Appeals reversed Hummel's murder conviction with prejudice. If further review or consideration of the Petition for Review on its merits is precluded, Hummel will be released from custody because of an unintended procedural mistake even though the State acted diligently and in good faith believing it was timely filing its Petition for Review.

The public has a significant interest in ensuring murderers are held accountable and that cases that involve issues of public import are reviewed on their merits. In light of the significant legal and public interest in the issues presented by this case, the consequences to the family of Alice Hummel and the community at large, granting a one-day extension will prevent a gross miscarriage of justice. The State respectfully requests this Court grant this extension to permit the substantive evaluation of the State's Petition for Review and Hummel's answer.

DATED this 16th of December, 2016.

Respectfully submitted,



KIMBERLY A. THULIN, WSBA #21210
Admin. No. 91075
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or otherwise caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's counsel, addressed as follows:

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Legal Assistant



DATE