

FILED  
Court of Appeals  
Division III  
State of Washington  
12/5/2017 10:25 AM

NO. 34944-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

AARON FALETOGO,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

The Honorable Robert L. Zagelow, Judge

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REPLY BRIEF OF APPELLANT

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JENNIFER WINKLER  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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RAP 2.5..... 4

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A. ISSUE IN REPLY

A commissioner of this Court granted Mr. Faletogo's motion to extend time to file the appeal in this case. A panel of judges of this Court denied the State's motion to modify the commissioner's ruling, and the State did not seek review of that decision.

The State again argues in the Brief of Respondent that this appeal is time-barred.

Should this claim be rejected, however, where the State failed to seek review of this Court's prior decision in this case, thereby waiving the argument the State now advances, and the law of the case doctrine applies to preclude this Court's reconsideration of identical arguments by the State?

B. ARGUMENT IN REPLY

THE STATE WAIVED THE ARGUMENT IT NOW ADVANCES BY FAILING TO APPEAL THE DENIAL OF THE MOTION TO MODIFY.

The State appears to concede that Mr. Faletogo's claim on appeal is meritorious. Brief of Respondent (BOR) at 4 n. 1. While the State suggests the case should simply be remanded for resentencing within the correct standard range, the State offers no valid authority for the proposition that the remedy for the error is simply remand for resentencing. BOR at 11 (citing inapplicable cases not addressing voluntariness of plea).

Despite its apparent concession on the merits, the State nonetheless argues that this Court should find the appeal is time-barred. But this Court's prior ruling permitting the appeal to go forward became the law of the case, and the State waived any objection by failing to seek further review. Further, the State has offered no explanation as to why the law of the case should not apply. Mr. Faleto'go is, therefore, entitled to relief.

As a preliminary matter, a brief summary of the procedural posture of this case is necessary. Over the State's objection, a commissioner of this Court granted Mr. Faleto'go's motion to extend time to file the appeal. Appendix A. The State then moved to modify the commissioner's ruling, raising several legal, as well as several essentially equitable, arguments. App. B. Those arguments are nearly identical to those the State raises in the Brief of Respondent in pursuit of the same end. Compare State's Motion to Modify at 5-8 with BOR at 5-11.

A panel of this Court correctly rejected the State's arguments and denied the motion to modify, allowing the appeal to proceed. App. C.<sup>1</sup>

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<sup>1</sup> The arguments were correctly rejected. For example, in both documents, the State misrepresents the holding of State v. Kells, 134 Wn.2d 309, 312, 949 P.2d 818 (1998) (considering whether CrR 7.2(b) requires the State to advise a defendant of *his right to appeal a declination order* after a plea of guilty). It also misrepresents the holding of related cases. Motion to Modify at 7-8; BOR at 5-6. In both documents, moreover, the State mischaracterizes Faleto'go's 2009 correspondence with the superior court regarding concerns about his legal financial obligations as tantamount to an

When the panel's order was issued, moreover, this Court notified the State that it could seek review of the panel's decision under RAP 13.3(a). App. D (Court's cover letter). The State never sought review.

This Court should reject the State's second (or third) nearly identical attempt to prevent this Court from considering Mr. Faletogo's appeal. The State never sought review of this Court's order. In analogous circumstances, the Supreme Court has held that failure to seek review of certain orders may waive later review. See Lincoln v. Transamerica Inv. Corp., 89 Wn.2d 571, 578, 573 P.2d 1316 (1978) (where a party fails to seek discretionary review of a decision denying change of venue, review of that decision is waived absent a showing of prejudice); see also Saleemi v. Doctor's Assocs., Inc., 176 Wn.2d 368, 387, 292 P.3d 108 (2013) (party who fails to seek review of an order compelling arbitration on venue grounds until after the arbitrators award is known must show prejudice before an appellate court will reach the merits).

Relatedly, under one facet of the multifaceted "law of the case" doctrine, once there is an appellate court ruling, the court's holding must be followed in all later stages of the same litigation. Roberson v. Perez, 156

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appeal. Motion to Modify at 6; BOR at 6; see also BOR at 7 (erroneously referring to Faletogo's correspondence as "appeal").

Wn.2d 33, 41, 123 P.3d 844 (2005). This doctrine “seeks to promote finality and efficiency in the judicial process.” Id.

In 1976, RAP 2.5(c)(2) codified certain restrictions on the doctrine. RAP 2.5(c)(2) provides that “[t]he appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.”

Because the rule uses the term “may,” application of the RAP 2.5(c)(2) exception to the law of the case doctrine has been characterized as discretionary, rather than mandatory. Roberson, 156 Wn.2d at 42.

However, to avoid the doctrine, case law is clear that certain exceptions must apply. Application of the doctrine may be avoided where the law has changed between the current and former proceedings. Id. Or, the doctrine may be avoided where the appellate court’s prior decision is clearly erroneous, *and* the erroneous decision would work a manifest injustice to one party. Id. (citing First Small Bus. Inv. Co. of Cal. v. Intercapital Corp. of Or., 108 Wn.2d 324, 333, 738 P.2d 263 (1987)).

But, where an issue has been decided by this Court in prior proceedings, and no change of law warrants departure from the law of the

case, this Court applies the law of the case doctrine and will decline to revisit the issue. State v. Roy, 147 Wn. App. 309, 315, 195 P.3d 967 (2008).

Here, this Court's ruling permitting the appeal to go forward became of the law of the case. The State did not seek review of that decision, despite being advised that it could do so. Further, the State has not identified any change in the law or explained why the panel's prior decision was clearly erroneous. Rather, the State's brief rehashes the same arguments in its prior pleadings. Moreover, the brief contains unsupported and uncited factual assertions addressing what are, in essence, extra-legal exhortations. See BOR at 9-10 (including uncited factual assertions regarding prospects for retrial, intermingled with assertions supported by attachments to "Memorandum Re: Untimeliness"). Matters that are referred to in the briefing but not included in the record cannot be considered on appeal. State v. Stockton, 97 Wn.2d 528, 530, 647 P.2d 21 (1982).

In summary, this Court has already ruled that this appeal is not time-barred. The State did not appeal that decision and has failed to supply a valid reason why the law of the case doctrine should not apply. The State has, moreover, conceded that Mr. Faletogo prevails on the merits. BOR at 4 n. 1. As stated in the opening brief, remand is required so that Mr. Faletogo may withdraw his invalid guilty plea, if he chooses to do so. E.g. State v. Mendoza, 157 Wn.2d 582, 584, 141 P.3d 49 (2006).

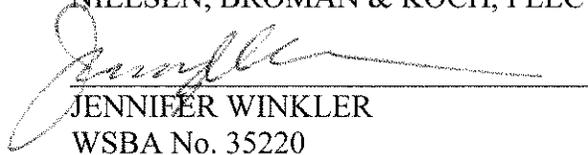
C. CONCLUSION

For the reasons set forth above and in Mr. Faletogo's opening brief, this Court should remand so that he may withdraw his plea if he chooses to do so.

DATED this 5<sup>th</sup> day of December, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, appearing to read "Jennifer Winkler", is written over a horizontal line.

JENNIFER WINKLER

WSBA No. 35220

Office ID No. 91051

Attorney for Appellant

# **APPENDIX A**

RECEIVED  
APR 13 2017  
WELTON, GROSSI & KOEN, P.L.L.C.

The Court of Appeals  
of the  
State of Washington  
Division III

FILED  
April 12, 2017  
Court of Appeals  
Division III  
State of Washington

STATE OF WASHINGTON, )  
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Respondent, )  
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v. )  
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AARON FALETOGO, )  
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Appellant. )  
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No. 34944-6-III

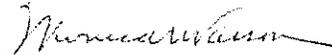
COMMISSIONER'S RULING

Having considered Aaron Faletogo's motion to extend the time to file a notice of appeal from the Walla Walla County Superior Court's July 8, 2002 conviction entered on his guilty plea to third degree assault; having also considered the record and file herein, including Mr. Faletogo's Statement of Defendant on Plea of Guilty which does not advise him that he has a right to appeal the guilty plea, and his memorandum in which he asserts that if he had been so advised he would have appealed on the ground, among others, he was not advised of the legal consequences of his plea; and having also considered the

No. 34944-6-III

State's memorandum opposing the motion<sup>1</sup>; and having reviewed the pleadings and finding no evidence that Mr. Faletogo was advised that he had a right to appeal the guilty plea itself; this Court has determined that the foregoing amounts to an extraordinary circumstance sufficient to extend the time for filing the appeal to prevent a gross miscarriage of justice, *see* RAP 18.8(b); now, therefore,

IT IS ORDERED the motion to extend the time to file the notice of appeal is granted to the date the notice was actually filed. The Clerk of Court shall set a perfection schedule for this appeal.



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Monica Wasson  
Commissioner

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<sup>1</sup> The State asserts that he had previously filed a notice of appeal in this case in which he challenged his sentence. However, the appeal cited was filed in Division One under two consolidated case numbers – 42158-1-I and 42619-2-I -, neither one of which involved the Walla Walla conviction at issue here.

# **APPENDIX B**

No. 34944-6-III

COURT OF APPEALS, DIVISION THREE

STATE OF WASHINGTON

STATE OF WASHINGTON,	)	Sup. Ct. No. 02-1-00100-6
Respondent,	)	
v.	)	MOTION TO MODIFY
	)	COMMISSIONER'S
AARON FALETOGO,	)	RULING
Appellant.	)	
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1. IDENTITY OF PARTY

The State of Washington, Respondent, asks for the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

Respondent respectfully requests that the Court of Appeals, Division III, modify the Commissioner's Ruling and dismiss the appeal as untimely.

3. RELEVANT FACTS

On March 25, 2001, while incarcerated at the Walla Walla

State Penitentiary for a 1997 murder coming out of King County, the Appellant/Defendant Aaron Faletogo assaulted another inmate with a "sap" style weapon (a pool ball in a sock). The assault was captured on videotape. State's Memorandum on Untimeliness (SMU), App. A. He was charged with assault in the second degree in Walla Walla County, and he pled guilty to assault in the third degree. SMU, App.s B and C. He was sentenced on July 8, 2002 and received a 9 month sentence. SMU, App. D.

At the time of his first appearance on this case, the Defendant was advised of his rights including his right to appeal after both trial and sentence. SMU, App. E. In pleading guilty, he acknowledged that he was waiving his right to appeal "a finding of guilt after trial" only. SMU, App. C at 2.

It is now fifteen years after the Defendant received his nine month sentence, and the State's evidence has been destroyed. See attached. In that passage of time, the Defendant has requested and received review of his sentence. SMU, App.s F, G, H, I, and J. And the Defendant has paid all his LFO's on this matter.

The Defendant is no stranger to the court of appeals. Following his conviction in King County # 97-1-00739-5, he has

sought review multiple times, filing five pro se PRP's:

- 42158-1-I (direct appeal consolidated with 42619-2-I, petition for review denied 68754-4, mandate issued in April 2000);
- 64250-2-I (2009 pro se PRP decided May 2013);
- 65796-8-I (2010 pro se PRP decided October 2010);
- 66081-1-I (2010 pro se PRP decided November 2012);
- 71380-9-I (transferred by 89684-4) (2013 pro se PRP decided February 2014);
- 73389-3-I / 918970 (2015 pro se PRP, discretionary review denied, decided January 2016).

On December 7, 2016, more than 14 years from his judgment and sentence, the Defendant filed a notice of appeal. He claims that neither his attorney, nor the court informed him that he had a right of appeal. He claims that he would have filed a timely notice of appeal if he believed he had the right.

#### 4. GROUNDS FOR RELIEF AND ARGUMENT:

The Commissioner's Ruling appears to misunderstand the State's Memorandum on Untimeliness. It misstates in the footnote that the State asserted that Faletogo had filed a notice of appeal. In fact, the State's memorandum clearly speaks to his receiving review *in the superior court* of his sentence and provides multiple appendices of just this review. SMU at 2. The Commissioner's Ruling suggests

that the State may have confused 42158-1-1/42619-2-1 with an appeal of the Walla Walla conviction. This is also incorrect as the State's memorandum clearly lists precisely those cause numbers (with the Division I notation) as being among the reviews of "his conviction in King County # 97-1-00739-5." SMU at 3.

The Commissioner's Ruling did not find that the State failed to show a waiver of the right to appeal. Rather, the Commissioner permitted a waiver of RAP 5.2 (time allowed to file notice) under the catchall provision in RAP 18.8(b). The Ruling extends the time for filing a notice of appeal by over 170 times (from 30 days to 14+ years) in order to "to prevent a gross miscarriage of justice." However, allowing the untimely appeal is the true miscarriage of justice. SMU at 4 ("The equities are readily apparent.").

In a prison assault, even victimized inmates do not testify against each other, because it puts them at further risk of escalating assaults. Therefore, the necessary evidence for such a case is either a video or a correctional officer witness. In this case, the evidence was a video. That evidence has been destroyed. No one has retained a copy, not the prosecutor's office, not the police department, and not the DOC.

It is not unreasonable that the State would have destroyed the evidence. The Defendant accepted guilt by pleading to a lesser offense. He did not appeal. He finished paying his LFO's. And fourteen years have passed. That is almost three times the maximum penalty for a class C felony and 18 x the length of his actual sentence in this case. The County Clerk even filed and then withdrew a certificate of discharge, believing every matter to be concluded.

In a criminal trial, the State bears the burden of proving guilt beyond a reasonable doubt. Sixteen years ago, the State's case was rock solid. Today, the Defendant's extreme delay has destroyed the core of the State's case. Not only is the video gone but, more than a decade after the assault, witnesses' memories and any interest in cooperating with prosecution will have degraded.

By law, a criminal defendant is not afforded years to ponder the wisdom of filing an appeal. The decision to file a notice of appeal must be made within a mere 30 days. On a sentence of nine months, this Defendant has had 14 years.

Faletogo's claims are not facially credible (1) that he only recently learned of his right to appeal and (2) that he would have timely appealed with challenges of involuntary plea and ineffective

assistance of counsel.

It is apparent that Faletogo became very well versed in the law and competent to advocate on his own behalf many years (not a mere thirty days) before he finally filed the notice of appeal. In his murder case, he has filed five PRP's pro se. And most significantly, in 2009, seven years before filing this notice of appeal, he sought review from his own sentence in this case – successfully. It is not plausible that he knew in 2009 that he could appeal from his sentence, but did not realize for an additional seven years that he could appeal from his conviction. On the contrary, by seeking review of his sentence, it is apparent that he “declined to challenge his guilty verdict.” *State v. Devin*, 158 Wn.2d 157, 166, 142 P.3d 599 (2006).

Nor is it plausible that in 2002 Faletogo would have sought to withdraw his guilty plea to a class C felony in order to go to trial on a violent, second-strike, class B felony in a case in which his brutal, premeditated, and unprovoked assault was caught on camera. The video showed:

Faletogo, Meas and Cox stood up in unison and walked together towards where Smith was sitting, with Ly blocking Smith's view of their approach. *Faletogo had a sock with one end wrapped around his hand and the other obviously had something in it, later found to be a pool ball.* When Faletogo,

Meas and Cox got to Smith, *Faletogo swung the sock and hit Smith in the head, knocking him to the floor.*

SMU, App. A at 2. If he had been found guilty of the "violent" offense of second degree assault as originally charged, his sentence range would have increased to 12+ - 14 months. RCW 9.94A.030(55)(viii) (classified as a violent offense); RCW 9.94A.525(8) (multiplier for violent offense results in offender score of two). And when serving that time, his maximum eligible good time would be significantly reduced. RCW 9.94A.729(3)(d)(ii)(B) (only 33% for a violent offense, not 50%). His community custody term would have increased from 12 months to 18 months. RCW 9.94A.701(2). And it would have been his second strike offense. RCW 9.94A.030(38)(b)(i)(B). With the Defendant's history of violence and his estimated release date of 2028, two strikes would have been an enormous risk for him. His negotiated plea was the far better deal. Advice to turn down the plea offer would have been deficient performance.

The State is not required under CrR 7.2(b) to inform a defendant of his right to appeal, but, failing such advisement, the State must demonstrate waiver by other means. *State v. Kells*, 134 Wn.2d 309, 313, 949 P.2d 818 (1998); *State v. Smith*, 134 Wn.2d

849, 953 P.2d 810 (1998); *State v. Tomal*, 133 Wn.2d 985, 948 P.2d 833 (1997); *State v. Sweet*, 90 Wn.2d 282, 581 P.2d 579 (1978)).

That burden is met here by evidence of (1) the Defendant's knowledge of his ability to appeal as demonstrated by the 2009 superior court review requested and received as to the LFO's in his sentence, (2) his legal sophistication in multiple pro se representations, and (3) the implausibility that he would not seek a plea bargain for a second strike, violent offense caught on videotape.

The Defendant's failure to appeal in this case is not an "extraordinary circumstance" under RAP 18.8(a). It is the intelligent, informed choice. Extending the time to appeal by 170+ times does not "prevent a gross miscarriage of justice." On the contrary, it works a gross miscarriage of justice.

This Court should dismiss the appeal as untimely, finding that the State has sufficiently demonstrated that Faletogo's failure to timely appeal was a conscious, intelligent, and willful choice not to pursue an appeal.

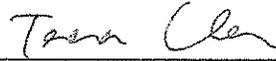
5. CONCLUSION

The Commissioner's Ruling should be modified, and the appeal should be dismissed as untimely.

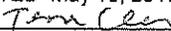
DATED: May 15, 2017.

Respectfully submitted:

SHAWN SANT  
Prosecuting Attorney



By: Teresa Chen  
Teresa Chen, WSBA# 31762  
Deputy Prosecuting Attorney

<p>Eric Nielsen &lt;nielsene@nwattorney.net&gt; &lt;sloanej@nwattorney.net&gt;</p>	<p>A copy of this Motion to Modify was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 15, 2017, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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SUPERIOR COURT OF WASHINGTON – COUNTY OF WALLA WALLA

THE STATE OF WASHINGTON,

Plaintiff,

-vs-

AARON I. FALETOGO,

Defendant.

NO. 02-1-00100-6

DECLARATION OF  
CREEENCE S. WINDLE

I, Creedence S. Windle, state and declare as follows:

I am an Investigator for the Washington State Penitentiary, located in Walla Walla, Washington. I am over 21 years of age and competent to testify as to the matters set forth herein, and testify herein from personal knowledge.

On February 24, 2017, I was requested by James L. Nagle, Prosecuting Attorney, to determine if our agency still had a VHS tape of the March 25, 2001 assault by Aaron I. Faleto, DOC#775486, on another inmate at the Washington State Penitentiary. I requested a search of the Penitentiary records by the investigations office of the Penitentiary archives. No VHS tape or other recording of the assault was located.

I declare that the foregoing is true and correct under penalty of perjury under the laws of the State of Washington.

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SUPERIOR COURT OF WASHINGTON – COUNTY OF WALLA WALLA

THE STATE OF WASHINGTON,

Plaintiff,

-vs-

AARON I. FALETOGO,

Defendant.

NO. 02-1-00100-6

DECLARATION OF  
WILLIAM DUNHAM

I, William Dunham, state and declare as follows:

I am the property custodian for the Walla Walla Police Department, City of Walla Walla, Washington. I am over 21 years of age and competent to testify as to the matters set forth herein, and testify herein from personal knowledge.

On February 24, 2017, I was requested by James L. Nagle, Prosecuting Attorney, to determine if our agency still had a VHS tape of the incident in Walla Walla Police Department investigation no. 2001-6748, in which Mr. Faletoogo is listed as a suspect. A search was conducted of our records and evidence. Our records show that the VHS tape was disposed of in 2002 per the request of Detective Randy Sandvig.

I declare that the foregoing is true and correct under penalty of perjury under the laws of the State of Washington.

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Executed this 15<sup>th</sup> day of May, 2017, at Walla Walla,  
Washington.

W H Dunham 395  
William Dunham

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SUPERIOR COURT OF WASHINGTON – COUNTY OF WALLA WALLA

THE STATE OF WASHINGTON,

Plaintiff,

-vs-

AARON I. FALETOGO,

Defendant.

NO. 02-1-00100-6

DECLARATION OF  
JAMES L. NAGLE

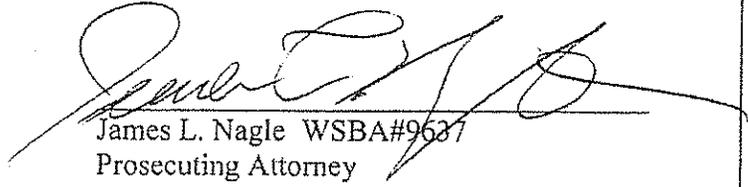
I, James L. Nagle, state and declare as follows:

I am the Prosecuting Attorney for Walla Walla County, Washington. I am over 21 years of age and competent to testify as to the matters set forth herein, and testify herein from personal knowledge.

On February 24, 2017, I sought to determine if our agency still had a VHS tape of the March 25, 2001 assault by Aaron I. Faletogo, DOC#775486, on another inmate at the Washington State Penitentiary. I conducted a search of our records. No VHS tape or other recording of the assault was located.

I declare that the foregoing is true and correct under penalty of perjury under the laws of the State of Washington.

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3 Executed this 13<sup>th</sup> day of May, 2017, at Walla Walla,  
4 Washington.

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7 James L. Nagle WSBA#9637  
8 Prosecuting Attorney

# **APPENDIX C**

FILED  
JULY 11, 2017  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 34944-6-III
Respondent,	)	
	)	ORDER DENYING
v.	)	MOTION TO MODIFY
	)	COMMISSIONER'S RULING
AARON FALETOGO,	)	
	)	
Appellant.	)	

THE COURT has considered respondent the State of Washington's motion to modify the Commissioner's Ruling of April 12, 2017, and the record and file herein;

IT IS ORDERED the motion to modify the Commissioner's Ruling is denied.

PANEL: Judges Fearing, Lawrence-Berrey and Pennell

FOR THE COURT:

  
\_\_\_\_\_  
GEORGE FEARING  
Chief Judge

# **APPENDIX D**

Renee S. Townsley  
Clerk/Administrator

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

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



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Spokane, WA 99201-1905

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July 11, 2017

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Walla Walla, WA 99362-2807

CASE # 349446  
State of Washington v. Aaron Ieti Faletogo  
WALLA WALLA CO SUPERIOR COURT No. 021001006

Counsel:

Enclosed is a copy of an Order Denying Motion to Modify the Commissioner's Ruling of April 12, 2017.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file an original and one copy (unless filed electronically) of a Petition for Review in this Court within 30 days after the Order Denying Motion to Modify the Commissioner's Ruling is filed. RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition.

Sincerely,

Renee S. Townsley  
Clerk/Administrator

RST:btb  
Attachment

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**December 05, 2017 - 10:25 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 34944-6  
**Appellate Court Case Title:** State of Washington v. Aaron Ieti Faletogo  
**Superior Court Case Number:** 02-1-00100-6

**The following documents have been uploaded:**

- 349446\_Briefs\_20171205102312D3311174\_6172.pdf  
This File Contains:  
Briefs - Appellants Reply  
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**A copy of the uploaded files will be sent to:**

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- tchen@co.franklin.wa.us

**Comments:**

Copy mailed to: Aaron Faletogo, 775486 Washington State Penitentiary 1313 N 13th Ave Walla Walla, WA 99326

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