NO. 92086-9

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN W. PALM,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Because significant time and effort goes into achieving a jury verdict, appellate courts recognize the broad discretion of trial court judges in addressing problems that occur during a trial, and they reverse jury verdicts in the narrowest of circumstances. The routine application of these well-accepted principles to the facts here does not implicate an issue of substantial public interest. Here, the trial court neglected to tell the parties about local jury selection procedures, which caused confusion about which jurors in the pool were subject to peremptory challenges. The trial court accepted responsibility for this confusion and determined that the best way to ensure a fair trial was to allow John Palm and the Department of Labor and Industries to each exercise an additional peremptory challenge after it had impaneled the jury but before the jury had heard any arguments or evidence. This remedy was well within the trial court's broad discretion to administer jury selection and to fashion appropriate remedies when misunderstandings occur.

Palm did not suffer any prejudice when the Department struck his friend from the jury with its additional peremptory challenge. Palm used his additional peremptory challenge to strike the juror who replaced his friend. Contrary to Palm's arguments, prejudice cannot be presumed because the trial court complied with jury selection statutes. Further, *State*

v. Williamson, 100 Wn. App. 248, 250, 253, 996 P.2d 1097 (2000), authorizes post-impanelment peremptory challenges in a circumstance such as this one. This Court should decline to review this fact-specific case involving trial court discretion.

II. COUNTERSTATEMENT OF THE ISSUES

Discretionary review is not warranted in this case, but if the Court were to grant review the following issue would be presented:

1. Did the trial court abuse its discretion when it allowed the Department to exercise a peremptory challenge against Palm's friend after the jury had been sworn and impaneled where the Department did not exercise a challenge earlier due to a misunderstanding of local jury selection procedures?[1]

III. COUNTERSTATEMENT OF THE CASE

A. The Board Determined that Palm's Age, Obesity, and Deconditioning Caused His Conditions, Not His Work as an Electrician

In 2009, Palm filed a workers' compensation claim for medical conditions in his shoulder, back, and left knee for his work as an electrician. *See* CP 147-48. After an evidentiary hearing involving three

[1] Palm includes an issue statement with regard to medical testimony but does not argue this issue anywhere in his petition. Pet. 4. Just as this Court considers only assignments of error that are supported by argument, citation to authority, and references to the record, it should also decline to review issues that are not briefed in the petition. *See Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 807-08, 225 P.3d 213 (2009).

medical witnesses, the Board of Industrial Insurance Appeals affirmed the Department's decision not to allow the claim. CP 123-27. The Board determined that Palm's age, obesity, general living, and deconditioning caused his conditions, not the distinctive conditions of his employment. CP 127. Palm appealed to superior court. CP 406.

B. After the Jury Was Sworn and Impaneled but Before Any Testimony or Merits Argument, the Trial Court Allowed Both Parties to Exercise an Additional Peremptory Challenge Due to a Misunderstanding of Local Jury Selection Procedures

Before voir dire, the trial court did not explain to counsel the process for exercising peremptory challenges. *See* RP 1-31; *see also* RP 133; CP 403.[2]

During voir dire, juror 20 stated that she had a close acquaintance with Palm. RP 33-34. Initially, she stated that the acquaintance would make it difficult or impossible for her to be fair to both sides. RP 34. Upon further questioning by the trial court, however, she agreed that she would not be reluctant to make the right decision. RP 34-35. Later, when questioned by Department's counsel, juror 20 stated that she was "a very fair person" who "can see both sides." RP 97.

After voir dire, the parties took turns exercising peremptory challenges, with Palm going first. RP 125-26. The challenged jurors stood up and left the box but were not replaced in the box by prospective jurors

[2] Citations to "RP" are to the June 11, 2013 report of proceedings.

from the gallery. *See* RP 134; CP 382. Palm exercised all three peremptory challenges. RP 125-26. Department's counsel elected not to exercise his third peremptory challenge, apparently not realizing that juror 20 was the 12th juror:

> THE COURT: And the Department's third and final. As to the first 12.
> [DEPARTMENT'S COUNSEL]: Thank you, okay.
> THE COURT: Wa[i]ves the third. Okay. Now, I'll have the bailiff indicate where the 12th juror is.
> THE BAILIFF: The 12th juror is No. 20.
> THE COURT: Okay. So we have the presumptive alternate, then, would be No. 21. Each party has a right to one challenge as to an alternate.
> [DEPARTMENT'S COUNSEL]: I don't understand. Could you say that again, please?
> THE COURT: Yes. We have the 12, the 12th would be No. 20, and, then, there is – we'll have one alternate and you each have one challenge as to the alternate.

RP 126-27.

Palm then challenged the presumptive alternate, juror 21. RP 127. Department's counsel then attempted to exercise a peremptory challenge against juror 20:

> [DEPARTMENT'S COUNSEL]: Oh, No. 20, we challenge No. 20. Because you called No. 20, correct?
> THE COURT: No.
> THE BAILIFF: You stay right there.
> THE COURT: Twenty would be one of the first 12.
> [DEPARTMENT'S COUNSEL]: I'm sorry.
> THE COURT: So the presumptive alternate would now be No. 22.
> [DEPARTMENT'S COUNSEL]: No problem.

RP 127.

When the Department did not challenge juror 22 as the alternate, the trial court swore and impaneled the jury. RP 127-28. After the jury was impaneled, the Department asked for a sidebar, which led the trial court to make further inquiries of juror 20:

> THE COURT: Okay. We had a little bit of a discussion off the record with counsel and I wanted to inquire based on that discussion of No. 20. I talked to you early on about your acquaintance with the plaintiff. So, I am going to pose that question again, whether you think that you could be fair and impartial to both sides, because you did say it's a pretty close acquaintance and you might even feel awkward sitting where you are sitting right now because of that acquaintance, so, ah, if you don't mind addressing that.
> JUROR NO. 20: As I said earlier, I'm confident I can be fair, however, if the ruling went against my friend, John, would I wonder if he would always wonder if my vote was the one that did him in and that would concern me as far as a future relationship.
> THE COURT: Would that cause you to or influence you to change your decision or opinion - -
> JUROR NO. 20: No.
> THE COURT: - - in any way or under any circumstance.
> JUROR NO. 20: No.

RP 128-29.

After another discussion with counsel off the record, the trial court decided to give each party an additional peremptory challenge because it had not explained the jury selection process:

> Counsel . . . for the Department said that he misunderstood and he intended to use challenges to Juror No. 20 because of her previous responses. I asked her a couple of questions on the record. They were consistent with what she said earlier in voir dire and probably emphasized if nothing else

> why [Department's counsel] chose not to use a challenge for cause. But he still had concerns.
>
> I was – it appeared clear to me that [Department's counsel] had not understood how the selection process generally goes in Whatcom County, and for that, I take responsibility because I didn't bother to tell you, gentlemen, maybe it's something we should have addressed or I should have addressed. I should never assume that counsel is familiar with that, even if counsel is local and practices sometime, sometimes in this or the other courts in this county.
>
> So I made the decision to grant each party an additional peremptory challenge and I think that brings us up to the point where we are now.

RP 132-33.

Department's counsel stated that he believed that peremptory challenges could only be used on jurors seated in the box. RP 134. He explained that he was "not aware that I was to use a peremptory on someone who had not been seated and that's why I – I looked at where things were and I said okay, I'm okay with that." RP 134. He further stated, "That person hadn't been called in and there was no reason to think that No. 20 would come in." RP 134. Palm objected to the trial court's decision to give an additional peremptory challenge to each party. RP 131.

C. The Department Challenged Palm's Friend, and Palm Challenged the Replacement Juror

The Department exercised the additional peremptory challenge to remove juror 20, and Palm exercised his additional peremptory to challenge juror 22, who had replaced juror 20. RP 129-30. The trial court

then gave both parties the opportunity to challenge the new alternate, but both parties declined. RP 130. The jury was then re-impaneled. RP 130. A unanimous jury affirmed the Board's decision. CP 455; RP (6/13/13) 10-12.

D. The Trial Court Denied Palm's Motion for a New Trial Because the Purpose of Allowing the Additional Peremptory Was To Give Both Parties a Fair Trial

After entry of judgment, Palm moved for a new trial, which the trial court denied. CP 390-403. The trial court entered a finding explaining that it allowed the additional peremptory challenges in order to afford both parties a fair trial:

> An apparent misunderstanding of local jury selection procedures resulted in this civil jury having been sworn at a time when Defendant's counsel believed that the Court was still accepting peremptory challenges. In order to afford both parties a fair trial, the Court deemed it appropriate to allow the Defendant to exercise its challenge and the Court further granted an additional peremptory challenge to each party.
>
> Defendant's counsel notified the Court of the misunderstanding immediately: no arguments had been made, no testimony had been taken, and the jury pool was still present. The Court determined that there was no actual or potential prejudice to either party, and that the right to exercise peremptory challenges was more important than the formality of the timing of the oath.
>
> The Court noted that it would have likely ruled differently had this been a criminal matter as with the administration of the oath Jeopardy would attach.

CP 403. Palm appealed to the Court of Appeals. CP 472-73.

E. The Court of Appeals Affirmed in an Unpublished Opinion

The Court of Appeals, Division One, affirmed in an unpublished opinion. *Palm v. Dep't of Labor & Indus.*, No. 71816-9-I, slip op. at 14 (July 13, 2015). The court held that the trial court did not abuse its discretion by allowing the Department to use a peremptory challenge after the initial jury had been sworn and impaneled. Slip op. at 3. The court observed that the trial court took responsibility for Department's counsel's misunderstanding of the jury selection process, which it detailed in writing. Slip op. at 3-4. The court concluded that Palm could not show prejudice because he had the opportunity to question the juror who joined the panel after his friend was struck and because he received an additional peremptory challenge. Slip op. at 4.

IV. ARGUMENT

This Court should decline review because the trial court properly exercised its discretion when it allowed both parties an additional peremptory challenge because of a misunderstanding of local jury selection procedures. Because the circumstances that led to this misunderstanding are unique and limited to this case, this case does not involve a matter of substantial public interest. The trial court accepted responsibility for not informing the parties of the local selection procedures, and it reasonably addressed this misunderstanding by allowing

an additional peremptory challenge to each party, a matter well within a trial court's discretion when handling any unusual event that might arise during jury selection.

A. This Case Does Not Involve a Matter of Substantial Public Interest Because the Misunderstanding During Jury Selection Involved Circumstances That Are Unlikely to Re-Occur

Trial courts must routinely address novel situations that arise during jury selection. Often, as in this case, these situations involve unique factual scenarios that are unlikely to be repeated. For that reason, trial courts have broad discretion over the jury selection process. *See State v. Tingdale*, 117 Wn.2d 595, 599, 817 P.2d 850 (1991); *Williamson*, 100 Wn. App. at 255. Here, the trial court failed to inform counsel of local jury selection procedures, and there is no local rule about these procedures that counsel could have referenced in advance of jury selection, which led to confusion about which jurors could be challenged. *See* RP 132-33. The trial court crafted a remedy to resolve that misunderstanding, allowing both parties to challenge an additional juror to ensure fairness to both parties. Because the misunderstanding is unique, fact-specific, and unlikely to re-occur, it does not present this court with a matter of substantial public interest.

Misunderstanding and confusion during the dynamics of jury selection—and the reasonable steps taken by a trial court to resolve

misunderstanding and confusion—must be viewed in context. Palm disregards context and instead asks this Court to enact a rigid, bright-line determination about post-impanelment peremptory challenges to be applied in every case, no matter the circumstances. *See* Pet. 1, 14-15, 18. But this case concerns only whether the trial court impaneled a fair and impartial jury in this particular case, which it did. Additionally, as explained below, neither the relevant statutes nor the case law supports Palm's dichotomy between pre- and post-impanelment peremptory challenges. His argument would rob trial courts of their discretion and judgment when excusing venire members during jury selection. *See Tingdale*, 117 Wn.2d at 599. The particular facts that led to the misunderstanding during jury selection here do not involve a matter of substantial public interest.

B. This Case Does Not Involve a Matter of Substantial Public Interest Because the Trial Court Complied With Jury Selection Statutes

1. The Trial Court Complied With RCW 4.44.210 and RCW 4.44.290, Which Do Not Prohibit the Exercise of Peremptory Challenges After Impanelment

No substantial public interest is presented in a case where the trial court complied with all relevant jury selection statutes, and where the trial court applied its remedy equally to both parties. Contrary to Palm's argument, the statutes governing the exercise of peremptory challenges

(RCW 4.44.210), and the removal of jurors after jury formation when they are unable to perform their duties (RCW 4.44.290) are silent on whether the trial court can allow additional peremptory challenges after impanelment. *See* Pet. 13-14, 18. Because neither statute limits the trial court's broad discretion during jury selection in the way Palm asserts, the trial court did not materially depart from these statutes when it allowed each party to exercise an additional peremptory challenge after impanelment. *See* Pet. 14-18. Because there was no material departure from any statute regarding jury selection in this case, Palm must show prejudice, which he cannot do. *See Tingdale*, 117 Wn.2d at 600.

RCW 4.44.210 governs only the procedure for exercising peremptory challenges but does not prohibit trial courts from allowing additional peremptory challenges after impanelment:

> The jurors having been examined as to their qualifications, first by the plaintiff and then by the defendant, and passed for cause, the peremptory challenges shall be conducted as follows, to wit:
>
> The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenges shall be exhausted. During this alternating process, if one of the parties declines to exercise a peremptory challenge, then that party may no longer peremptorily challenge any of the jurors in the group for which challenges are then being considered and may only peremptorily challenge any jurors later added to that group. A refusal to challenge by either party in the said order of

> alternation shall not prevent the adverse party from using the full number of challenges.

RCW 4.44.210.

This statute also does not apply here, as Palm implies, because Department's counsel did not intentionally decline to exercise a peremptory challenge against juror 20. *See* Pet. 1. Rather, as the trial court explained, Department's counsel intended to challenge juror 20 because of her responses during voir dire. RP 132-33. He did not challenge juror 20 with his third peremptory challenge only because he mistakenly believed that peremptory challenges could be used only on jurors seated in the box. RP 134. Once he believed that he had the opportunity to challenge juror 20, which was during the selection of alternates, he did so immediately. *See* RP 127.

The statute about removing jurors after jury formation when they are unable to perform their duties also does not prohibit trial courts from allowing additional peremptory challenges after impanelment. *See* RCW 4.44.290. Rather, that statute governs how a trial court should handle an occasion when a juror becomes unable to perform his or her duty after the jury is formed:

> If after the formation of the jury, and before verdict, a juror becomes unable to perform his or her duty, the court may discharge the juror. In that case, unless the parties agree to proceed with the other jurors: (1) An alternate juror may

> replace the discharged juror and the jury instructed to start their deliberations anew; (2) a new juror may be sworn and the trial begin anew; or (3) the jury may be discharged and a new jury then or afterwards formed.

RCW 4.44.290. This statute does not say that a juror may be replaced *only* if he or she is unable to perform his or her duty, as Palm contends. Pet. 14. Rather, it explains how a trial court should handle that particular situation.

When the trial court allowed each side an additional peremptory challenge, its exercise of discretion was consistent with RCW 4.44.210 and 4.44.290. Palm identifies no statute providing that a trial court may allow a party to exercise peremptory challenges only before impanelment, and there is none. The trial court's proper exercise of discretion is in conformity with these statutes and is not a matter of substantial public interest on that basis.

2. Because the Trial Court Complied With Jury Selection Statutes, Palm Must Show Prejudice, Which He Cannot Do

Because there was no material departure from any statute regarding jury selection, Palm must show that the trial court's decision to give an additional peremptory challenge to both parties prejudiced him. *See Tingdale*, 117 Wn.2d at 600. This Court presumes prejudice only if there has been a material departure from the jury selection statutes. *See id.*

Although he may have preferred to have his friend on the jury panel, a party does not "have the right to be tried by a particular juror or

jury." *Williamson*, 100 Wn. App. at 255. Additionally, the trial court gave Palm an additional peremptory challenge, which he exercised against the prospective juror who replaced juror 20. RP 129-30. The replacement juror was from the venire, which was still present in the courtroom, and Palm had the opportunity to examine that juror during voir dire. Although Palm repeatedly frames the issue as the Department's exercise of an "unused" peremptory challenge, the record shows that the trial court allowed both Palm and the Department an *additional* challenge. Pet. 1, 13; RP 133. This is not a case in which only one party was able to exercise an additional peremptory challenge.

Palm cites *Tingdale* for the standard that prejudice is presumed. Pet. 17-18. But the problem in *Tingdale* that led to the presumption was that the trial court interfered with the selection of the jury pool and violated the statutory requirement that jurors be randomly selected from the populace when it excused three potential jurors before voir dire based solely on the clerk's subjective knowledge that the jurors knew the defendant. 117 Wn.2d at 597-98, 600-02. The presumption of prejudice that applied in *Tingdale* does not apply here where the trial court did not violate any statutes or interfere with the randomness of the jury pool. The trial court's proper exercise of its discretion in this fact-specific case is not a matter of substantial public interest warranting this Court's review.

3. *Williamson* Allows the Exercise of Peremptory Challenges After Impanelment

Further, the Court of Appeals has explicitly held that a trial court has discretion to allow parties to exercise peremptory challenges after impanelment. *Williamson*, 100 Wn. App. at 250, 252. In a criminal case involving the serious charges of attempted murder and kidnapping, the jury had been sworn and the State's first witness had begun to testify when a juror informed the court that she knew the victim. *Williamson*, 100 Wn. App. at 250, 252. The trial court allowed the State to exercise an unused peremptory challenge to remove the juror, and the Court of Appeals held this was within the court's discretion, observing that neither RCW 4.44.210 nor the relevant superior court criminal rule "prohibits a peremptory challenge to an impaneled and sworn juror based on unforeseen circumstances." *Id.* at 250, 252, 254.

The trial court's remedy in this case complied with *Williamson*. The trial court accepted responsibility for the unforeseen confusion because it had not explained local jury selection procedures. *See* RP 132-33. It permitted the additional peremptory challenges immediately, before the jury pool was dismissed and before any argument or testimony was presented—much earlier than in *Williamson*, where the impaneled jury had already begun hearing testimony. *See* CP 403. And it allowed both

parties to exercise an additional peremptory challenge, unlike in *Williamson*, in which only the prosecution was allowed to exercise an unused peremptory challenge. *See* 100 Wn. App. at 250.

Williamson explicitly contradicts Palm's assertion that "after swearing in a jury, the trial court may only dismiss jurors for cause." Pet. 13; 100 Wn. App at 255. Palm makes this bald assertion without citing a single case in support. *See DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (a court may generally assume that where no authority is cited, counsel has found none after a diligent search).

Indeed, Palm concedes that *Williamson* authorizes the trial court's decision to allow both parties to exercise an additional peremptory challenge after impanelment. *See* Pet. 15. Neither of the foreign cases that he cites undermines *Williamson*'s holding. The California case turns entirely on a state statute reading, "[a] challenge to an individual juror may only be made before the jury is sworn." *People v. Cottle*, 46 Cal. Rptr. 3d 86, 138 P.3d 230, 231, 234 (2006) (citing Cal. Civ. Proc. § 226(a)). Our Legislature, in contrast, has imposed no such limitation on trial courts' broad discretion during jury selection. In the other case, the court disapproved a post-impanelment peremptory challenge six days into an eight-day trial. *U.S. v. Harbin*, 250 F.3d 532, 537 (7th Cir. 2006). The problem there was one of fundamental fairness because only one party

(the prosecution) was allowed to exercise a peremptory challenge, which gave "unilateral, discretionary control over the composition of the jury mid-trial" to the prosecution after having "significant opportunity to observe the demeanor of the juror" and to employ that knowledge in exercising the challenge. *Id.* at 547; *accord Jimenez v. City of Chicago*, 732 F.3d 710, 716 (7th Cir. 2013), *cert. denied sub nom. City of Chicago v. Jimenez*, 134 S. Ct. 1797 (2014).

Here, in stark contrast, the trial court treated the parties equally, giving both Palm and the Department an additional peremptory challenge. Palm, like the Department, exercised the additional peremptory challenge and thus benefitted from the court's remedy. This was done before any evidence was taken or arguments made, not days into the trial when the parties had time to observe the jurors' demeanor and use it to their strategic advantage.

Palm also suggests, incorrectly, that the 2003 amendment to RCW 4.44.210 undermines *Williamson* because it "clarified that parties waive their peremptories when they fail to challenge a juror currently among those to be seated." Pet. 16. But the same waiver rule applied before 2003 because the statute precluded peremptory challenges after a party had

accepted the panel except as to "talesmen."[3] *Williamson* cannot be distinguished on this basis.

A trial court has wide discretion in addressing peremptory challenges after impanelment. *See Williamson*, 100 Wn. App. at 250, 255. Without authority to support his position, Palm seeks to elevate the formality of the oath's timing over the parties' right to exercise peremptory challenges. The trial court reasonably rejected his unsupported and formalistic position because it wanted to ensure that the trial was fair for both sides. *See* CP 403. No matter of substantial public interest exists where the trial court acted reasonably by allowing an additional peremptory challenge to each party to ensure a fair trial.

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[3] Former RCW 4.44.210 (1881) provided:

> The jurors having been examined as to their qualifications, first by the plaintiff and then by the defendant, and passed for cause, the peremptory challenges shall be conducted as follows, to wit:
> The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenges shall be exhausted. The panel being filled and passed for cause, after said challenge shall have been made by either party, a refusal to challenge by either party in the said order of alternation, shall not defeat the adverse party of his full number of challenges, *but such refusal on the part of the plaintiff to exercise his challenge in proper turn, shall conclude him as to the jurors once accepted by him, and if his right be not exhausted, his further challenges shall be confined, in his proper turn, to talesmen only.*

(Emphasis added); Black's Law Dictionary 196 (9th ed. 2009) (defining "talesman" as "a person selected from among the bystanders in court to serve as a juror when the original jury panel has become deficient in number.").

V. CONCLUSION

The misunderstanding that occurred during jury selection because the trial court did not explain local jury selection procedures is fact-specific and not likely to occur again and is not a matter of substantial public interest. The trial court complied with the relevant statutes when it allowed both Palm and the Department to exercise an additional peremptory challenge in order to remedy the misunderstanding and afford both parties a fair trial. This Court should decline review.

RESPECTFULLY SUBMITTED this 14th day of October, 2015.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JOHN W. PALM, Petitioner, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department of Labor & Industries Answer to Petition for Review and this Certificate Service in the below-described manner:

via E-mail filing to:

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supreme@courts.wa.gov

via First Class United States Mail, Postage Prepaid to:

Philip J. Buri
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DATED this 14th day of October, 2015, Seattle, Washington.

JENNIFER A. CLARK
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Clark, Jennifer (ATG)
Cc: Weideman, Paul (ATG)
Subject: RE: 92086-9; John W. Palm v. DLI

Received on 10-14-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Clark, Jennifer (ATG) [mailto:JenniferC5@ATG.WA.GOV]
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Subject: 92086-9; John W. Palm v. DLI

RE: ***John W. Palm v. DLI***
Case Number: 92086-9

Dear Mr. Carpenter,
Please file the Department's Answer to Petition for Review regarding the above referenced matter.

Sincerely,

Jennifer A. Clark
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