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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

JOHN MARK CROWDER,

Respondent.

No. 94042-8

OPPOSITION TO STATE'S
MOTION FOR EXTENSION OF
TIME FOR FILING PETITION FOR
REVIEW TO DATE OF RECEIPT

1. PERSON FILING THE MOTION

This opposition is filed by Andrea Burkhardt and Burkhardt & Burkhardt, PLLC, attorneys of record for the Appellant, John Crowder, in response to the motion filed by the State of Washington.

2. RELIEF REQUESTED

Crowder respectfully requests that the court DENY the State's motion to extend time to file its petition for review.

3. REFERENCE TO RECORD

The factual basis is set forth in the State's motion and in the record and files herein. The petition was due on January 3, 2017. The State did not file its petition before the close of business, and as a result, the petition was filed on January 4, 2017.



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1 **4. GROUNDS FOR RELIEF REQUESTED**

2 RAP 13.4(a) requires a party seeking discretionary review to file its petition in the
3 court of appeals within thirty (30) days after the decision is filed. RAP 18.6(c) provides
4 that petitions for review are timely filed only when they are received by the appellate
5 court by the filing deadline. The Supreme Court

6 will only in extraordinary circumstances and to prevent a gross
7 miscarriage of justice extend the time within which a party must file . . . a
8 petition for review The appellate court will ordinarily hold that the
9 desirability of finality of decisions outweighs the privilege of a litigant to
obtain an extension of time under this section.

10 RAP 18.8(b). The test is applied rigorously, resulting in few instances in which the court
11 has been satisfied that extraordinary circumstances exist, and that failure to excuse the
12 delay will result in a gross miscarriage of justice. *State v. Moon*, 130 Wn. App. 256,
13 260, 122 P.3d 192 (2005).

14 Workloads and office management problems do not constitute extraordinary
15 circumstances warranting late filings. *See, e.g., Beckman ex rel. Beckman v. DSHS*,
16 102 Wn. App. 384, 11 P.3d 313 (2000) (lack of reasonable procedure for calendaring
17 hearings and coordination to catch administrative errors did not constitute extraordinary
18 circumstances); *Reichelt v. Raymark Industries, Inc.*, 52 Wn. App. 763, 764 P.2d 653
19 (1998) (firm's workload and staffing shortage did not constitute extraordinary
20 circumstances); *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 368,
21 849 P.2d 1225 (1993) (dismissing untimely appeal due to miscalculation of filing
22 deadline). "Negligence, or the lack of 'reasonable diligence,' does not amount to
23 'extraordinary circumstances.'" *Beckman*, 102 Wn. App. at 695 (*citing Shumway v.*
24 *Payne*, 136 Wn.2d 383, 964 P.2d 349 (1998)). Instead, only when the petitioning party
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1 acts with reasonable diligence but fails to timely seek review due to excusable error or
2 circumstances beyond the party's control will extraordinary circumstances be found.

3 *Shumway*, 136 Wn.2d at 395.

4 Here, the reasons proffered by the State in explanation for the late filing are
5 similar to those described in *Reichelt*. In *Reichelt*, the appellant argued that its loss of
6 one of two trial attorneys between the trial and the appeal deadline, as well as the
7 appellate attorney's unusually heavy workload, warranted the filing of the notice of
8 appeal ten days after the deadline. 52 Wn. App. at 764. As in this case, the *Reichelt*
9 appellants emphasized the lack of prejudice to the respondent due to the short length of
10 the delay. *Id.* at 766. Rejecting this argument, the court observed, "RAP 18.8(b),
11 however, does not turn on prejudice to the responding party. If it did, there would rarely
12 be a denial of a motion to extend time." *Id.* Consequently, the court denied the motion
13 to extend time.
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16 As in *Reichelt*, the State cites circumstances that are foreseeable and within its
17 control that affected its schedule management. Demanding caseloads are ubiquitous in
18 criminal practice; holidays, vacations, and inclement weather in December are ordinary
19 and predictable conflicts that attorneys must work around. No explanation is proffered
20 as to why another prosecuting attorney could not assist in timely completing the petition,
21 or in easing the workload of the assigned prosecutor to permit adequate time to timely
22 complete and file the petition. These schedule management issues amount to simple
23 negligence, not extraordinary circumstances excusing the State's noncompliance with
24 the filing deadline.
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1 Moreover, dismissing the State's petition as untimely will not result in a gross
2 miscarriage of justice, since the petition seeks only error correction and does not show
3 that the application of accepted standards of proof of the identity of a controlled
4 substance in this case warrants review under any provision of RAP 13.4(b). See
5 Answer to Petition for Review, filed contemporaneously herewith. Where relief would
6 be inappropriate in any event, denial of an untimely petition for review does not
7 constitute a gross miscarriage of justice. See, e.g., *Moon*, 130 Wn. App. at 261.

9 For the foregoing reasons, the State has failed to show sufficient grounds to
10 warrant relief from the late filing under RAP 18.8(b). Accordingly, the motion to extend
11 time to file the petition for review should be denied.

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13 Respectfully submitted this 10 day of February, 2017.

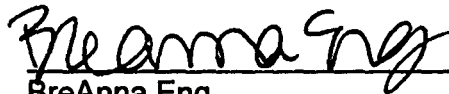
14
15 

16 Andrea Burkhardt, WSBA #38519
17 Attorney for Respondent John Crowder

1 **CERTIFICATE OF MAILING**

2 I certify under penalty of perjury under the laws of the State of
3 Washington, that on the 16~~th~~ day of February, 2017, I mailed by regular mail, with
4 postage thereon prepaid, a copy of the foregoing Opposition to State's Motion for
5 Extension of Time for Filing Petition for Review to Date of Receipt to the
6 following:

7 Andrew Kelvin Miller
8 Prosecuting Attorney
9 Benton County
10 7122 W. Okanogan Pl Bldg A
11 Kennewick, WA 99336-2359

12 

13 BreAnna Eng
14 Signed this 16~~th~~ day of February, 2017,
15 at Walla Walla, WA

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Attached are the following documents for filing:

- Opposition to State's Motion for Extension of Time for Filing Petition for Review to Date of Receipt; and
- Answer to State's Petition for Review.

Case Name: State of Washington v. John Mark Crowder

Case #: 94042-8

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