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No. 96980-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE NINTH CIRCUIT
COURT OF APPEALS IN:

PHONSAVANH PHONGMANIVAN,

Petitioner-Appellant,

v.

RON HAYNES,

Respondent-Appellee.

PETITIONER-APPELLANT'S REPLY BRIEF
ON CERTIFIED QUESTION

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I. Introduction

The Washington Rules of Appellate Procedure, case law regarding certificates of finality in other kinds of cases, and the name of the certificate of finality itself demonstrate that Mr. Phongmanivan’s PRP case ceased pending or became final under state law when the certificate was issued. Respondent’s convoluted argument to the contrary attempts to carve out an exception to the usual rules for a narrow class of PRP proceedings where—unlike the majority of cases in the appellate courts—most petitioners are proceeding pro se. This proposed exception is both unwarranted and unwise, and this Court should reject it.

II. Argument Regarding Reformulation of the Certified Question

In calculating the federal limitations period whose tolling is at issue, Respondent concedes that Mr. Phongmanivan’s direct appeal “became final” for the purposes of the federal habeas statute on the date the time for filing a petition for certiorari expired, *see* Resp. Br. at 5, even though Washington law clearly provides, for the purpose of the PRP filing deadline, that a direct review case “bec[a]me[] final” on the date the mandate was issued. RCW 10.73.090(3)(b). It is evident from this context that the bare question of when a proceeding “became final” is not sufficient to provide a single answer to the Ninth Circuit’s certified

question. Rather, the Court should accept the opportunity to reformulate the question to add the following important additional context:

When did Mr. Phongmanivan’s PRP proceeding cease “pending” under state law, that is, how long was Washington’s “ordinary state collateral review process [] ‘in continuance’” and when did it reach “final resolution”? *See Carey v. Saffold*, 536 U.S. 214, 219–20 (2002) (defining the statutory term “pending” in 28 U.S.C. § 2244(d)(2)).

In addition, the proposed reformulation has the virtues of making it clear that this is solely an issue of state law, not federal law, and of not limiting the potential dates that a PRP might cease “pending” under state law.

III. Argument

A. Respondent Attempts to Read an Exception into the Rules of Appellate Procedure That Does Not Exist.

In his response brief, Respondent-Appellee attempts to carve out an exceedingly narrow exception to Washington’s rules for finality that otherwise apply across the board to a wide variety of cases. *See* RAP 12.7 (entitled “Finality of Decision”). The proposed exception would apply only when a) a chief judge for a court of appeals dismisses a personal restraint petition as frivolous under RAP 16.11(b) *and* b) this Court denies review by way of a commissioner decision *and* c) the petitioner files a motion to modify the commissioner’s decision.¹ *See* Resp. Br. at 1, 8–12.

¹ Notably, the proposed exception would *not* apply where a similarly situated petitioner filed a motion for discretionary review but did not file a

When this precise combination of events occurs, Respondent expects a pro se petitioner to scrutinize a separate Rule of Appellate Procedure entitled “Motion for Reconsideration of Decision Terminating Review” (which is not listed in the PRP rule enumerating other rules applicable to PRPs, *see* RAP 16.17, although the rule does discuss PRPs) to learn that because his or her petition was dismissed by one judge, rather than a panel of judges, because the frivolity decision on his or her petition allegedly did not “grant[] or deny[] a personal restraint petition on the merits,” and because a motion for reconsideration of the denial of a motion to modify is not permitted, *see* RAP 12.4(a), no further action can be taken on his or her case. This pro se petitioner is further expected to understand that, regardless of the issuance of a standard filing in Washington entitled a “certificate of finality” that signals the “finality of decision” in many other kinds of cases, *see* RAP 12.7, in fact his or her PRP proceeding ceased pending and became final some days or weeks previous—not when this Court denied review, exactly, but rather when this Court denied a motion to modify that denial of review. (This latter

motion to modify the commissioner’s decision denying review. Under Respondent’s proposed finality rule, this hypothetical petitioner *would* be able to take further action in this case after the decision denying review, and so the case would not become final upon the last court filing, but would need some further signal from the certificate of finality to indicate the proceeding’s conclusion.

deadline has been the subject of some inconsistency even in the argument of opposing counsel. *Cf.* Respondent’s Answering Br. at 5, No. 16-36018 (9th Cir. Aug. 27, 2018) (“Here, Phongmanivan’s state court proceeding ceased to be “pending,” and ceased to toll the statute of limitations, after the Washington Supreme Court denied review.”); *see also id.* at 8 (“[T]he state court collateral proceeding is no longer pending, and ceases to toll the statute of limitations, once the state’s highest court issues its order denying review.”).)

This proposed exception is needlessly complicated and finds no support in the Rules of Appellate Procedure. A certificate of finality has the same meaning in personal restraint petition proceedings as it does in other cases: “A certificate of finality is the written notification of the clerk of the appellate court to the trial court and the parties that the proceedings in the appellate court have come to an end.” RAP 16.15(e) (regarding personal restraint petitions); *see also* RAP 12.5(e) (“A Certificate of Finality is the written notification by the clerk of the appellate court to the trial court and to the parties of the completion of the proceeding in the appellate court when review is not accepted.”). And RAP 12.7, entitled Finality of Decision, attributes the exact same significance to “certificates of finality” issued as provided in Rule 16.15(e)—the certificates issued in personal restraint petitions—as it does to the issuance of mandates in

direct appeal cases, where proceedings are required by statute to become final when a mandate issues. RCW 10.73.090(3)(b); *see also State v. Fort*, 190 Wn. App. 202, 230, 360 P.3d 820, 834 (2015) (“The mandate alone precludes earlier finality.”).²

Respondent relies heavily on the section of RAP 16.15 that tells a court when it should *issue* a certificate of finality. *See* Resp. Br. at 13–14 (citing RAP 16.15(e)(1)–(2)). Rule 16.15 does not discuss finality at all. Rather, RAP 12.7, which does discuss finality, provides that the “finality of decision” occurs “upon *issuance* of a certificate of finality as provided in . . . rule 16.15[(e)].” RAP 12.7(a) (emphasis added). The fact that the time when the certificate should issue depends on a somewhat complicated calculus of what additional filings were available to a litigant given the procedural posture of the case simply emphasizes that the rule is directed to courts, not litigants. RAP 16.15(e)(1) (“The clerk of the Court of

² Other kinds of collateral proceedings, such as CrR 7.8 motions, become final when a mandate issues. *State v. Yates*, No. 35959-0-III, 2019 WL 2474652, at *1 (Wn. Ct. App. June 13, 2019) (unpublished) (“Our prior decision became final upon issuance of the mandate.”). Certified questions become final when certified, which happens “at the time the mandate would issue as provided in Rule 12.5.” RAP 16.16(g). And Washington courts have assumed that personal restraint petitions become final upon the issuance of the certificate of finality in many procedural postures. *See, e.g., State v. Jackson*, No. 33590–5–II, 2006 WL 2329480, at *2 (Wn. Ct. App. Aug. 11, 2006) (unpublished) (citing RAP 16.15(e)).

Appeals issues the certificate of finality . . .”); (e)(2) (“The clerk of the Supreme Court issues the certificate of finality. . .”). Petitioners—and federal courts analyzing the their federal habeas petitions—should not be tasked with figuring out exactly when it happened that they became unable to file further motions in their state cases, particularly when a separate rule specifically addressing the “finality of decision” provides for finality upon issuance of a “certificate of finality” or mandate, which are filed at the close of every case.

More importantly, Respondent’s argument that RAP 16.15(e)(1), as opposed to RAP 12.7, provides the date when the proceeding becomes final also contradicts Respondent’s *own position*. RAP 16.15(e)(1) states that issuance of the certificate of finality in cases with the procedural posture of Mr. Phongmanivan’s case should occur “upon the denial of the motion for discretionary review.” But Respondent is not (at the moment) even arguing that Mr. Phongmanivan’s case ceased pending when discretionary review was denied. *Cf.* Respondent’s Answering Br. at 5, 8, No. 16-36018 (9th Cir. Aug. 27, 2018); SER 381, 387 (discretionary review denied in PRP proceeding on December 3, 2015). Rather, Respondent is taking the position that Mr. Phongmanivan’s petition ceased pending upon denial of the *motion to modify* that denial of discretionary review, more than two months later. *See* SER 411 (motion to modify

commissioner's ruling denied February 10, 2016); Resp. Br. at 7, 11. Rule 16.15 provides no support for Respondent's argument.

Respondent's argument is also undermined by the fact that a certificate of finality can be recalled to correct a mistake or to remedy fraud, just as a mandate can be recalled. RAP 12.9. The ability to reopen a case by recalling a certificate of finality strongly implies that the certificate of finality also ended the case.

Respondent does not attempt to explain why the certificate of finality would have significance in some cases and would entirely lack significance in other cases. Although Respondent complains that "the Court need not decide abstract issues beyond the case, such as whether the petition is denied by a panel of judges, or by this Court in the first instance rather than by the Chief Judge," Resp. Br. at 8 n.2, in fact the consistency of finality rules is an important consideration for this Court in deciding whether to adopt the narrow exception proposed by Respondent in this case.

There is no basis in the Washington Rules of Appellate Procedure to assume that any particular procedural posture changes the ordinary means by which Washington courts signal that a proceeding has ended. Here, the date on which the certificate of finality was issued (or, alternatively, the date provided within the text of the certificate as the date

the operative “order” “became final”) provides the date on which the PRP ceased pending under state law.

B. Even If the Certificate of Finality Provides Notice of the Date of Finality, Rather Than Independently Effecting Finality, Mr. Phongmanivan Was Provided Notice of April 1, 2016, Finality.

Respondent concedes that, at minimum, the certificate of finality “provides notice of th[e] date” on which an appeal becomes final. Resp. Br. at 13. In Mr. Phongmanivan’s case, that notice informed him that his court of appeals order “became final” on April 1, 2016. ER 17. Mr. Phongmanivan’s case therefore became final or ceased pending no later than this date.

Mr. Phongmanivan does not dispute that outside Division 1 and possibly also this Court, the courts may use different dates in the text of certificates of finality, and Mr. Phongmanivan agrees this practice should be standardized in the future. But Mr. Phongmanivan was told that his own case became final on April 1, 2016, and he was entitled to rely on that date as the date his own state proceeding ceased pending.

C. *In re Lord* Is Instructive Because It Shows Why This Court Has Adopted Certificates of Finality in the Past and Sheds Light on Their Function in Washington Courts, but *State v. Dorosky* Is Not on Point.

Respondent spends much time distinguishing Mr. Phongmanivan’s case from *In re Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994), on the facts.

Resp. Br. at 15–18. Mr. Phongmanivan does not dispute that his is not a capital case and the procedural posture of his PRP was very different. Nonetheless, *In re Lord* shows that this Court has used certificates of finality—even when not required by the Rules of Appellate Procedure—to signal finality to other courts where further action needs to be taken to effectuate or respond to this Court’s order. The federal courts, too, are looking for a clear signal from the Washington appellate courts that a PRP case is no longer pending. Certificates of finality are well suited to play that role, just as they serve that purpose in the context of stays of proceedings, *see* Opening Br. at 9–10, or executions.

Respondent cites *State v. Dorosky*, 28 Wn. App. 128, 622 P.3d 402 (1981), to argue that cases become final in Washington prior to the issuance of the mandate. But *Dorosky* does not cite RAP 12.7 and is primarily an interpretation of RAP 7.2(e) (under the heading “Authority of Trial Court After Review Accepted”), a provision regarding a different time period that is not at issue here. 28 Wn. App. at 131. Again, this case merely points to the fact that “became final” can mean different things in different circumstances and a more specific certified question would help to clarify the issue.

IV. Conclusion

The Court should hold that Mr. Phongmanivan's personal restraint petition proceeding was "pending" in the Washington courts and did not reach "final resolution" until the certificate of finality issued.

DATED this 30th day of September, 2019.

s/ Ann K. Wagner
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CERTIFICATE OF SERVICE

I certify that on September 30, 2019, I electronically filed the foregoing Reply Brief using the Washington State Appellate Courts' Portal, which will serve the document on all registered parties of record. I further certify I have mailed the document to Phonsavanh Phongmanivan at Stafford Creek Corrections Center.

s/ Suzie Strait
Paralegal

FEDERAL PUBLIC DEFENDER

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