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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CERTIFICATION FROM THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT:

PHONSAVANH PHONGMANIVAN,

Petitioner-Appellant,

v.

RON HAYNES,

Respondent-Appellee.

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**BRIEF OF RESPONDENT ON CERTIFIED QUESTION**

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**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. CERTIFIED QUESTION.....3

III. STATEMENT OF THE CASE .....5

    A. State Court Procedural History .....5

    B. Federal Court Procedural History .....6

IV. STANDARD OF REVIEW.....8

V. ARGUMENT .....8

    A. The Denial of Phongmanivan’s Personal Restraint  
    Petition Became Final upon Entry of This Court’s Order  
    Denying the Motion to Modify the Commissioner’s  
    Ruling Denying Review.....8

    B. The Rules of Appellate Procedure Do not Make the  
    Certificate of Finality a Factor in Determining When the  
    Denial of the Personal Restraint Petition Becomes Final .....13

    C. The Court’s Decision Concerning a Stay of Execution in  
    a Capital Case Does Not Alter the Finality of the Order  
    Denying a Petition in a Non-Capital Case .....15

    D. Historical Practice Confirms that the Denial of  
    Phongmanivan’s Personal Restraint Petition Became  
    Final Upon Denial of the Motion to Modify.....19

VI. CONCLUSION .....24

VII. APPENDIX

## TABLE OF AUTHORITIES

### Cases

<i>Allen v. Dameron</i> , 187 Wn.2d 692, 389 P.3d 487 (2017).....	3, 8
<i>Carey v. Saffold</i> , 536 U.S. 214, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002).....	3, 4
<i>Gladding v. Dep’t of Soc. &amp; Health Servs.</i> , 33 Wn. App. 728, 656 P.2d 1140 (1983).....	11
<i>Hemmerle v. Schriro</i> , 495 F.3d 1069 (9th Cir. 2007) .....	7
<i>In re Hicks</i> , 2016 WL 2967735 (2016).....	10
<i>In re Lord</i> , 123 Wn.2d 737, 870 P.2d 964 (1994).....	9, 15, 16, 17
<i>In re Riley</i> , 122 Wn.2d 772, 863 P.2d 554 (1993).....	10
<i>Lawrence v. Florida</i> , 549 U.S. 327, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007).....	4
<i>State v. Dorosky</i> , 28 Wn. App. 128, 622 P.2d 402 (1981).....	18
<i>State v. Gregory</i> , 192 Wn.2d 1, 427 P.3d 621 (2018).....	17
<i>White v. Klitzkie</i> , 281 F.3d 920 (9th Cir. 2002) .....	7
<i>Wixom v. Washington</i> , 264 F.3d 894 (9th Cir. 2001) .....	18

**Statutes**

28 U.S.C. § 2244(d)(1)(A)..... 5

28 U.S.C. § 2244(d)(2) ..... passim

RCW 2.60.020 ..... 3, 8

RCW 2.60.030(2)..... 8

**Rules**

RAP 12.3(a) ..... 9

RAP 12.4(a) ..... passim

RAP 12.5(a) ..... 18

RAP 12.7..... 12

RAP 12.7(a) ..... 1, 12

RAP 13.5A..... 11

RAP 16.1..... 11

RAP 16.11..... 9

RAP 16.11(b) ..... passim

RAP 16.13..... 9

RAP 16.14..... 19

RAP 16.14(c) ..... 1, 5, 10, 11

RAP 16.15..... 24

RAP 16.15(e) ..... 13, 22

RAP 16.15(e)(1)(a) ..... 2, 14

RAP 16.15(e)(1)(b).....	2
RAP 16.15(e)(1)(c).....	passim
RAP 16.15(e)(2).....	13, 14
RAP 16.24(e).....	17
RAP 16.3(c).....	8, 9
RAP 16.5(a).....	8
RAP 16.5(c).....	9
RAP 17.2(a).....	11
RAP 17.7.....	6
RAP 7.2(e).....	18

## I. INTRODUCTION

The Ninth Circuit has asked this Court to determine whether Phongmanivan’s personal restraint petition proceeding was “final” when this Court denied the motion to modify the Commissioner’s ruling denying review, or when the Court of Appeals later issued a certificate of finality. The petition became final—or in other words, the petition ceased to be pending—when this Court denied the motion to modify.

Under the Rules of Appellate Procedure, the denial of the motion to modify was the last decision any Washington court could make to resolve the petition. Once the Acting Chief Judge dismissed the petition as frivolous under RAP 16.11(b), the Court of Appeals lost power to modify that order. RAP 12.4(a) does not authorize reconsideration of the Acting Chief Judge’s order dismissing the petition. Rather, RAP 16.14(c) provides for review of the order only by way of a motion for discretionary review to this Court. Similarly, once this Court denied the motion to modify the Commissioner’s ruling denying review, RAP 12.4(a) does not authorize reconsideration of this Court’s order. The order denying the motion to modify became final upon entry. The general language of RAP 12.7(a), that the Court of Appeals loses power to modify a decision upon issuance of the certificate of finality, does not alter this conclusion because the Court of Appeals had already lost power to amend the Acting Chief Judge’s order dismissing the petition.

Once this Court denied the motion to modify the Commissioner's ruling denying review, the personal restraint petition was no longer subject to decision. No state court could grant relief on the dismissed petition. At that point, the petition had reached final resolution.

RAP 16.15(e)(1)(c) recognizes this conclusion. The rule requires the clerk to issue the certificate of finality immediately upon denial of the motion for discretionary review. Unlike RAP 16.15(e)(1)(a) and (e)(1)(b), which delay issuance of the certificate to allow time for seeking further review, the timeframe in (e)(1)(c) recognizes that no further review is available, and the certificate should be issued immediately upon denial of the motion to modify the Commissioner's ruling denying review. The rule recognizes that no court will take further action on the petition.

Here, Division I incorrectly delayed the issuance of the certificate of finality, and incorrectly designated the matter as final on the date the clerk issued the certificate, rather than the date this Court denied the motion to modify. The certificate is merely a ministerial notification that the matter is already final, as Divisions II and III correctly recognize when they designate matters as final on the date of this Court's decision, not on the date the clerk issues the certificate. This Court should hold that Division I's practice of designating the matter as final on the date the clerk issues a certificate is incorrect and contrary to RAP 16.15(e)(1)(c).

## II. CERTIFIED QUESTION

The United States Court of Appeals for the Ninth Circuit certified the following question to this Court pursuant to RCW 2.60.020:

Is the denial of a personal restraint petition final when the Washington Supreme Court denies a motion to modify an order of its Commissioner denying discretionary review of the state appellate court's denial, or is the denial not final until the Clerk of the Washington Court of Appeals issues a certificate of finality as required by Rule 16.15(e)(1)(c) of the Rules of Appellate Procedure?

Order, No. 16-36018 (9th Cir. Mar. 19, 2019), at 7.

Phongmanivan suggests that the Court should reformulate the certified question to ask not when the denial of the personal restraint petition became final, but when the personal restraint petition ceased to be “pending” in state court, citing 28 U.S.C. § 2244(d)(2). Brief, at 2-3. The Court is authorized to reformulate the certified question. *Allen v. Dameron*, 187 Wn.2d 692, 701, 389 P.3d 487 (2017). However, the suggested reformulation is a distinction with no difference. Whether the Court asks when the denial of the petition becomes “final,” or when the petition ceased to be “pending,” the answer is the same—the date this Court denies the motion to modify.

The United States Supreme Court has interpreted “pending” to mean the petition has not yet reached “final resolution” in the state courts. *Carey v. Saffold*, 536 U.S. 214, 219-20, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002)

(interpreting 28 U.S.C. § 2244(d)(2)). Construing the word “pending” consistent with its dictionary definition, the Supreme Court determined that “pending” in the statute means “in continuance” and “not yet decided.” *Id.* at 219; *compare* Black’s Law Dictionary (11th ed. 2019) (“pending” means “[r]emaining undecided; awaiting decision <a pending case>”). In *Lawrence v. Florida*, 549 U.S. 327, 332, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007), the Supreme Court reaffirmed that a state court petition is no longer pending for purposes of 28 U.S.C. § 2244(d)(2) “when the state courts have finally resolved an application for state postconviction relief.” In short, the issue is when did the denial of the personal restraint petition “achieve[] final resolution through the State’s post-conviction procedures.” *Carey*, 536 U.S. at 219-20.

Thus, it does not matter whether this Court considers when the denial of the personal restraint petition became “final,” or considers when the personal restraint petition has reached “final resolution” so as to no longer be “pending.” The answer to either question is the same. As shown below, the dismissal of the personal restraint petition becomes final, and the petition is no longer pending, on the date when this Court denies the motion to modify the ruling denying review.

### **III. STATEMENT OF THE CASE**

#### **A. State Court Procedural History**

This Court denied review on direct appeal on December 11, 2013. CP 49, at 6. Phongmanivan did not file a petition for writ of certiorari by March 11, 2014, and the judgment and sentence became final for purposes of the federal statute of limitations on that date. The one-year limitations period then began to run. 28 U.S.C. § 2244(d)(1)(A). On February 4, 2015, after 330 days had passed, Phongmanivan filed a personal restraint petition in the Court of Appeals, Division I. CP 49, at 7. The personal restraint petition tolled the statute of limitations while the petition remained “pending” in state court. 28 U.S.C. § 2244(d)(2).

The Acting Chief Judge of Division I dismissed the petition as frivolous under RAP 16.11(b). CP 49, at 14. The Rules of Appellate Procedure did not authorize a motion for reconsideration from the order dismissing the personal restraint petition. Rather, the order was “subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in rule 13.5A.” *See* RAP 16.14(c). Phongmanivan, therefore, filed a motion for discretionary review. CP 49, at 14-15. The Supreme Court Commissioner issued a ruling denying review on December 3, 2015. CP 49, at 2.

The Commissioner's ruling in turn could be reviewed by this Court only by means of a motion to modify. RAP 17.7. Phongmanivan filed a motion to modify the Commissioner's ruling. CP 49, at 2. This Court denied the motion to modify on February 10, 2016. CP 49, at 2. Under the Rules of Appellate Procedure, and this Court's historical application of the rules, the order denying the motion to modify was not subject to further review. This Court would not reconsider the order, and the Court's Clerk would place any such motion for reconsideration in the file without further action. The denial of the personal restraint petition therefore became final as of February 10, 2016. The court rules required the Clerk of the Court of Appeals to issue a certificate of finality immediately upon this Court's denial. RAP 16.15(e)(1)(c). The Clerk did not issue the certificate until April 1, 2016. CP 49, at 2. The certificate of finality stated that the order dismissing the personal restraint petition did not become final until April 1, 2016, the date on which the certificate finally issued, rather than February 10, 2016, the date on which this Court ended appellate review. *Id.*

**B. Federal Court Procedural History**

Phongmanivan filed his federal habeas petition on April 9, 2016. CP 49, at 3. The State argued that the federal petition was untimely under the statute of limitations because, not counting the days the personal restraint petition was pending in state court, Phongmanivan filed the petition more

than 365 days after the judgment and sentence became final. Citing established Ninth Circuit precedent, *White v. Klitzkie*, 281 F.3d 920 (9th Cir. 2002), and *Hemmerle v. Schriro*, 495 F.3d 1069 (9th Cir. 2007), the State argued that the limitations period began to run again once this Court denied the motion to modify on February 10, 2016.<sup>1</sup> The remaining days on the limitations period then ran before Phongmanivan filed his petition, making his petition untimely under the statute of limitations. Phongmanivan argued that the statute of limitations continued tolling until the Court of Appeals issued the certificate of finality, 51 days after this Court's order, rendering his petition timely under the statute of limitations.

The district court denied the petition under the statute of limitations. Phongmanivan appealed. The Ninth Circuit determined that the proper application of the statute of limitations depended upon when the limitations period tolled under 28 U.S.C. § 2244(d)(2), and the answer to that question in turn depends upon when the denial of the personal restraint petition became final under Washington law. The Ninth Circuit therefore certified to this Court the question of whether the denial of the personal restraint

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<sup>1</sup> In *Hemmerle* and *Klitzkie*, the Ninth Circuit held that the denial of a state collateral challenge became final, and ceased to be pending, when there was nothing left to be determined by the state's highest court. *See, e.g., Hemmerle*, 495 F.3d at 1077 n.7 (holding that Hemmerle's collateral attack was no longer "pending" once the Arizona Supreme Court denied review, because at that point, "there was nothing left to be determined" under Arizona law); *Klitzkie*, 281 F.3d at 923-24 (holding that the collateral proceeding was final, and no longer pending, on the date when the Guam Supreme Court denied the petition, not weeks later when the mandate issued).

petition became final upon issuance of this Court’s order denying the motion to modify the Commissioner’s ruling denying review, or upon the issuance of the certificate of finality.

#### **IV. STANDARD OF REVIEW**

Certified questions accepted for review under RCW 2.60.020 are questions of law, which the Court determines *de novo*. *Allen v. Dameron*, 187 Wn.2d 692, 701, 389 P.3d 487 (2017). When reviewing the legal issues, the Court considers them “not in the abstract but based on the certified record provided by the federal court.” *Id.*; RCW 2.60.030(2).<sup>2</sup>

#### **V. ARGUMENT**

##### **A. The Denial of Phongmanivan’s Personal Restraint Petition Became Final upon Entry of This Court’s Order Denying the Motion to Modify the Commissioner’s Ruling Denying Review**

This certified question case involves a personal restraint petition dismissed as frivolous by the Acting Chief Judge of Division I under RAP 16.11(b). A personal restraint petition is an original proceeding. RAP 16.3(c). The petitioner should usually file the personal restraint petition in the Court of Appeals, rather than in this Court. RAP 16.5(a). If the petitioner files the personal restraint petition in this Court, the Court will ordinarily transfer the petition to the Court of Appeals for initial consideration. RAP

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<sup>2</sup> Accordingly, the Court need not decide abstract issues beyond the case, such as whether the date of finality may be different in cases where the petition is denied by a panel of judges, or by this Court in the first instance rather than by the Chief Judge.

16.3(c); RAP 16.5(c). The Chief Judge of the Court of Appeals will then determine whether to dismiss the petition as frivolous, refer the petition to a panel of judges, or remand to the superior court for a reference hearing. RAP 16.11.

Here, the Acting Chief Judge dismissed the personal restraint petition as frivolous under RAP 16.11(b). The order dismissing the petition was not a “decision terminating review” because the petition was an original action, and not the direct review of a lower court opinion. RAP 12.3(a) (defining a “decision terminating review”); *In re Lord*, 123 Wn.2d 737, 739, 870 P.2d 964 (1994) (recognizing that a personal restraint petition is an interlocutory decision, and that RAP 16.14(c) limits the Court’s review of a Court of Appeals decision on a personal restraint petition). In addition, the order of dismissal was not an opinion by a panel of judges deciding the petition on the merits, because the Acting Chief Judge had dismissed the petition as frivolous. RAP 16.11 (distinguishing a decision dismissing a personal restraint petition by the Chief Judge from an opinion by a panel of judges to grant or deny a petition); RAP 16.13 (same).

Since the Acting Chief Judge’s order was neither a “decision terminating review,” nor a decision by a panel of judges, Phongmanivan could not file a motion for reconsideration. RAP 12.4(a) (“A party may file a motion for reconsideration only of a decision by the judges (1) terminating

review, or (2) granting or denying a personal restraint petition on the merits.”); *In re Hicks*, 2016 WL 2967735 (2016) (unpublished) (“Because the Rules of Appellate procedure do not permit motions for reconsideration of such orders, the motion will be placed in the file without further action. *See* RAP 12.4(a). The appropriate mechanism for review of the Acting Chief Judge’s order of dismissal is by discretionary review in the Supreme Court. *See* RAP 16.14(c).”). If Phongmanivan had filed a motion for reconsideration, the Court of Appeals would have either placed the motion in the file without action as in *Hicks, supra*, or transferred the motion to this Court for consideration as a motion for discretionary review. RAP 16.14(c); *In re Riley*, 122 Wn.2d 772, 778-79, 863 P.2d 554, 557-58(1993) (Court of Appeals transferred motion for reconsideration of the order dismissing the petition to this Court as a motion for discretionary review); *see also* Appendix, Exhibit 1, Letter from this Court’s Deputy Clerk, *In re Hill*, August 15, 2019 (explaining that the motion for reconsideration of the Chief Judge’s order would be considered a motion for discretionary review, that such an order is not subject for reconsideration and the only review can be requested in this Court).

Once the Acting Chief Judge dismissed the personal restraint petition, the Court of Appeals lacked authority under RAP 12.4(a) to reconsider the order. In short, the Court of Appeals could take no further

action to grant the personal restraint petition once the Acting Chief Judge had dismissed the petition as frivolous under RAP 16.11(b).

Phongmanivan could seek further review of the order dismissing the personal restraint petition only “by a motion for discretionary review on the terms and in the manner provided in rule 13.5A.” RAP 16.14(c). Phongmanivan did so. He filed a motion for discretionary review, and the Commissioner of this Court denied review. RAP 17.2(a). After the Commissioner denied review, the only remaining option for review was for Phongmanivan to file a motion to modify the Commissioner’s ruling, which he also did. RAP 16.1. This Court denied the motion to modify.

Once this Court denies the motion to modify the Commissioner’s ruling, the Rules of Appellate Procedure do not authorize any further action to reconsider the decision. The court rule expressly provides, “A party may not file a motion for reconsideration of an order refusing to modify a ruling by the commissioner or clerk, nor may a party file a motion for reconsideration of a Supreme Court order denying a petition for review.” RAP 12.4(a); *see also Gladding v. Dep’t of Soc. & Health Servs.*, 33 Wn. App. 728, 730, 656 P.2d 1140 (1983) (recognizing the rules do not authorize a motion to reconsider a decision denying a motion to modify). In short, the decision of this Court to deny the motion to modify the Commissioner’s ruling denying review became final upon issuance of the order. Once this

Court denied the motion to modify, no court could take action to grant relief on the petition. The petition had reached final resolution.

Phongmanivan relies on the general language in RAP 12.7 to argue that the Court of Appeals must have retained power to amend the order dismissing the personal restraint petition. *See* RAP 12.7(a) (the court “loses the power to change or modify its decision . . . upon issuance of a certificate of finality. . . .”). However, this language assumes the court has not already lost power to amend its decision under a different court rule.

Since RAP 12.4(a) does not allow for reconsideration of the Acting Chief Judge’s order dismissing the personal restraint petition as frivolous under RAP 16.11(b), the Court of Appeals had lost power to reconsider or alter the order dismissing the petition as soon as the Acting Chief Judge entered the order. The Court of Appeals lost power to alter the order dismissing the petition long before the issuance of the certificate of finality. RAP 12.7(a) did not authorize the Court of Appeals to amend the Acting Chief Judge’s order before or after this Court denied the motion to modify.

Once this Court denied the motion to modify, no state court could grant relief on the personal restraint petition. The petition had reached final resolution in the state courts. The dismissal of the personal restraint petition was final, and no longer pending for purposes of 28 U.S.C. § 2244(d)(2), as of the date of the order denying the motion to modify.

**B. The Rules of Appellate Procedure Do not Make the Certificate of Finality a Factor in Determining When the Denial of the Personal Restraint Petition Becomes Final**

Phongmanivan relies heavily on the name of the document, “certificate of finality,” to argue that its issuance must signify the finality of a case. However, despite its name, the certificate of finality has no special talisman carrying power to end judicial proceedings. Rather, the certificate is simply a ministerial document issued by the Clerk to signify to the parties and others that the proceedings in the appellate courts have already ended. The certificate of finality does not determine the date on which an appeal becomes final—it provides notice of that date.

RAP 16.15(e) specifies various timeframes when the certificate of finality issues in a personal restraint petition proceeding. These timeframes recognize when a matter becomes final.

For example, if this Court accepts review, RAP 16.15(e)(2) directs the Clerk to issue the certificate of finality upon expiration either of the time to file a motion for reconsideration of the Court’s opinion, or upon entry of the order denying a timely filed motion for reconsideration. The timeframe in this rule recognizes that the matter becomes final once the time for filing a motion for reconsideration has expired, or once the Court has denied a timely filed motion for reconsideration. The finality of the matter does not extend simply due to a delay in issuing the certificate of finality.

Similarly, RAP 16.15(e)(1)(a) directs the Clerk to issue a certificate of finality thirty days after the date of the order denying the petition, unless the petitioner files a timely motion for discretionary review. The timeframe in this rule recognizes that, in cases where the petitioner does not seek discretionary review, the order denying the personal restraint petition becomes final once the time for filing a motion discretionary has expired. Again, the finality of the matter is not postponed simply because the clerk may be delayed in issuing the certificate of finality.

Relevant here, the rule directs the Clerk of the Court of Appeals to issue the certificate of finality “upon denial of the motion for discretionary review” by this Court. RAP 16.15(e)(1)(c). Unlike RAP 16.15(e)(2) and RAP 16.15(e)(1)(a), which provide for later issuance of the certificate in recognition that the decisions in those provisions are not immediately final, RAP 16.15(e)(1)(c) does not provide for any extra time to issue the certificate of finality. Rather, RAP 16.15(e)(1)(c) recognizes the matter is final upon this Court’s denial of the motion to modify the Commissioner’s ruling denying review. Since no further action may be taken to grant the personal restraint petition, RAP 16.15(e)(1)(c) directs the Clerk to issue the certificate of finality immediately because the action has reached final resolution. A delay by the Clerk in issuing the certificate of finality does not postpone the finality of the matter.

**C. The Court’s Decision Concerning a Stay of Execution in a Capital Case Does Not Alter the Finality of the Order Denying a Petition in a Non-Capital Case**

Phongmanivan relies heavily on this Court’s decision in *In re Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994), to argue that the denial of his personal restraint petition was not final until the certificate of finality had been issued. But the Court’s decision concerning the stay of execution in Lord’s capital case does not alter the finality timing of a non-capital case.

In *Lord*, after affirming the conviction and sentence of death on direct appeal, this Court granted Lord a stay of execution in order to file a personal restraint petition. *Lord*, 123 Wn.2d at 738. This Court subsequently denied the personal restraint petition, rejecting Lord’s challenges to his conviction and sentence. The Court’s opinion denying the petition, however, did not expressly lift the stay of execution. *Id.* at 738. The parties obviously disputed whether the stay remained in effect, so the prosecution sought clarification, arguing that the opinion denying the personal restraint petition necessarily vacated the stay. *Id.* at 738-39. The prosecution argued that the then-existing Rules of Appellate Procedure did not require a mandate or a certificate of finality because the personal restraint petition was an “interlocutory proceeding,” and that a mandate or certificate therefore was not required to lift the stay. *Id.* at 738-39 & n.1.

The Court agreed with the prosecution that the rules did not require a mandate or certificate of finality in that case, but the Court also determined that the lifting of the stay of execution required an order separate from the issuance of the decision. *Lord*, 123 Wn.2d at 740. First, the Court recognized that (unlike the case here) the opinion denying the personal restraint petition was not immediately final because Lord could file a motion for reconsideration. *Id.* at 739-40. Since Lord had twenty days to move for reconsideration, the opinion was not final until that time expired, so the stay of execution could not have lifted upon issuance of the opinion. *Id.* Second, and more importantly, the Court determined that the stay of execution did not automatically lift with entry of the Court’s opinion denying the petition because the stay did not automatically issue with the filing of the petition. *Id.* at 740. Rather, the Court determined that because the Court had to enter a separate order to impose the stay of execution, the Court also had to enter a separate order to lift the stay of execution. *Id.*<sup>3</sup>

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<sup>3</sup> The Court explained, “Entry of the stay is not automatic upon the filing of a PRP; rather, it must be separately applied for and is granted ‘to insure effective and equitable review.’” *Lord*, 123 Wn.2d at 740 (citing RAP 8.3). “Just as this court entered an order staying the execution for the filing of a PRP, this court will also have to enter an order specifically lifting the stay. Such an order is not inherent in the denial of a PRP, and must be entered separately.” *Lord*, 123 Wn.2d at 740. The Court ruled that it would continue to follow its existing practice of lifting the stay after the time for filing a motion for reconsideration had expired, or if the petitioner files a timely motion, after the Court denies the motion for reconsideration. *Id.*<sup>3</sup> Importantly, *Lord* never held that the certificate of finality affects the finality of a decision. In fact, since the court rules existing at the time did not even require a certificate of finality, the *Lord* decision could not have held that the certificate determines the finality of the Court’s decision.

Contrary to Phongmanivan's argument, *Lord* actually supports the State's position that the order dismissing the personal restraint petition became final upon entry of the Court's order denying the motion to modify. *Lord* recognized that the finality of the opinion did not rest upon the issuance of a mandate or certificate of finality. Rather, the finality of the opinion rested upon the time provided by the Rules of Appellate Procedure for filing a motion for reconsideration of the opinion. The decision denying Lord's personal restraint petition was not final for twenty days because Lord could file a motion for reconsideration during the 20-day time period. After that 20-day time period expired, the opinion became final, even though no mandate or certificate would necessarily issue.

Here, as discussed above, Phongmanivan could not file a motion for reconsideration because no party may move for reconsideration of an order denying a motion to modify. RAP 12.4(a). Consistent with *Lord*, finality is determined by the timing of the Court's order denying the motion to modify the Commissioner's ruling denying review. Since that order was the final ruling in the case, the dismissal of the petition became final upon entry on that order, not upon issuance of the certificate of finality.

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Subsequent to *Lord*, the Court adopted RAP 16.24(e), which provides for a stay of execution to dissolve immediately upon issuance of the certificate of finality. This rule obviously applies only to capital cases, and in light of *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018), no longer has any effect since capital cases no longer exist in Washington.

Case law discussing the role of the mandate supports Respondent's position. Like a certificate of finality, the mandate is a ministerial document that serves as "written notification ... of an appellate court decision terminating review." RAP 12.5(a). The mandate itself is not the decision terminating review; it is notice that the court already terminated review. *State v. Dorosky*, 28 Wn. App. 128, 131-32, 622 P.2d 402 (1981).

In *Dorosky*, the Court of Appeals determined whether finality of the appellate matter was delayed until issuance of the mandate for purposes of RAP 7.2(e). *Dorosky*, 28 Wn. App. at 131. RAP 7.2(e) authorizes a trial court to modify an appealed order in limited circumstances, but the court concluded the rule contemplates that a party must file the motion before the appellate court has decided the appeal. *Id.* The Court of Appeals concluded that the Commissioner's dismissal of Dorosky's appeal became final when the 10-day time for objecting to the dismissal had expired. *Id.* "After that date, appeal was no longer pending in the Court of Appeals." *Id.* The Court of Appeals concluded that the subsequent issuance of the mandate served as notice of the Commissioner's decision to terminate review, but the review had already terminated and the matter became final before the issuance of the mandate. *Id.* at 131-32; *see also Wixom v. Washington*, 264 F.3d 894, 897-98 (9th Cir. 2001) (noting that, under Washington rules, "a mandate is not a decision terminating review").

**D. Historical Practice Confirms that the Denial of Phongmanivan's Personal Restraint Petition Became Final Upon Denial of the Motion to Modify**

The historical practice of this Court and the Court of Appeals Divisions II and III confirms the State's position on when an order dismissing a personal restraint petition becomes final.

For example, in the case of *In re of Lawson*, Cause No. 94663-9, the Acting Chief Judge of Division II had denied the personal restraint petition as frivolous under RAP 16.11(b). Appendix, Exhibit 2, Order Dismissing Petition, *In re of Lawson*, Cause No. 94663-9. Under RAP 16.14, the Court of Appeals lost power to amend the order, and Lawson could seek review only by filing a motion for discretionary review to this Court. Accordingly, when Lawson filed a motion for reconsideration, the Court of Appeals and this Court treated the motion as one for discretionary review. After this Court denied review, the Clerk issued a certificate of finality. The certificate properly indicated that the order dismissing the personal restraint petition became final on February 7, 2018, the date on which this Court issued its order denying the motion to modify the Commissioner's ruling denying review, not the date when the certificate of finality was issued at a later date. Appendix, Exhibit 3, Certificate of Finality, *In re Pers. Restraint of Lawson*, Washington Court of Appeals Cause No. 50073-6-II.

A month later, when Lawson again tried to seek review by this Court, the Deputy Clerk sent Lawson a letter explaining why the Court would not act on his petition for review:

On February 7, 2018, the Court denied your motion to modify. On that date, your case was closed. . . . There is no further review available in state courts.

Appendix, Exhibit 4, March 6, 2018 Letter from the Court's Deputy Clerk to Lawson. The Deputy Clerk correctly informed Lawson that the personal restraint petition proceedings had ended on February 7, 2018, the date this Court denied the motion to modify, rather than February 20, 2018, the date of the certificate of finality.

Similarly, in the case of *In re Bartz*, Cause No. 92727-8, and the case of *In re Chith*, Cause No. 94980-8, the letters from the Clerk correctly informed the petitioners that the matters became final on the date this Court issued orders denying the motion to modify the Commissioner's ruling, not on the date a certificate of finality issued. Appendix, Exhibit 5, December 22, 2016 Letter from the Court's Deputy Clerk to Bartz; Appendix, Exhibit 6, March 30, 2018 Letter from the Court's Clerk to Chith.

Phongmanivan argues that the Court should accept either the date of issuance of the certificate of finality, or the date listed as the date of finality in the certificate of finality, as the date the order dismissing a personal

restraint petition became final. But Phongmanivan's proposal would lead to inconsistent dates of finality.

A review of cases from Divisions II and III shows the Clerks of those courts, regardless of the date when the Clerk issues the certificate of finality, correctly state in the certificate of finality that that the decisions denying the personal restraint petition became final on the date that this Court denied the motion to modify the Commissioner's ruling denying review (or the date the time for filing a motion to modify had expired). *See* Appendix, Exhibit 7, Order, *In re Pers. Restraint of Lawson*, Supreme Court Cause No. 94663-9 (indicating matter became final upon date of order denying motion to modify); Appendix, Exhibit 3 (same). Appendix, Exhibit 8, Order, *In re Pers. Restraint of Chith*, Supreme Court Cause No. 94980-8; Appendix, Exhibit 9, Certificate of Finality, *In re Pers. Restraint of Chith*, Washington Court of Appeals Cause No. 49959-2-II (same); Appendix, Exhibit 10, Order, *In re Pers. Restraint of Bartz*, Supreme Court Cause No. 92727-8; Appendix, Exhibit 11, Certificate of Finality, *In re Pers. Restraint of Bartz*, Washington Court of Appeals Cause No. 33687-5-III (same). The Clerks of Divisions II and III do not list the date of finality as the date the certificate of finality actually issued.

In Division I, however, the certificates of finality incorrectly state that the decision denying the personal restraint petition became final on the

date the certificate of finality was issued. For example, in *In re Njonge*, this Court denied Njonge's motion to modify the Commissioner's ruling on June 28, 2017. Appendix, Exhibit 12, Order, *In re Pers. Restraint of Njonge*, Supreme Court Cause No. 93546-7. When the Clerk of Division I issued the certificate of finality on August 11, 2017, the certificate of finality stated that the date of finality was August 11, 2017. Appendix, Exhibit 13, Certificate of Finality, *In re Pers. Restraint of Njonge*, Washington Court of Appeals Cause No. 74682-1-I. Similarly, in *In re Wilson*, this Court denied Wilson's motion to modify the Commissioner's ruling on November 4, 2015. Appendix, Exhibit 14, Order, *In re Pers. Restraint of Wilson*, Supreme Court Cause No. 90835-4. When Division I issued the certificate of finality on December 18, 2015, the certificate said the case became final on December 18, 2015. Appendix, Exhibit 15, Certificate of Finality, *In re Pers. Restraint of Wilson*, Washington Court of Appeals Cause No. 72471-1-I.

Not only does Division I fail to comply with RAP 16.15(e)'s directive to immediately issue the certificate of finality, the Clerk compounds the error by placing the wrong date of finality in the certificate. Accepting Phongmanivan's argument that finality occurs either upon the date of the issuance of the certificate of finality, or the date of finality listed in the certificate, will lead to disparate results depending upon whether the

personal restraint petition originated in Division I, or Divisions II and III. Under Phongmanivan’s argument, the personal restraint petition proceeding in cases in Division I will not become final, and may remain “pending” for months after this Court has issued the order denying a motion to modify the Commissioner’s ruling denying review.

Moreover, Division I has not been consistent in when it issues certificates of finality. In *In re Pers. Restraint of Silva*, for example, this Court denied discretionary review on March 2, 2016, but the certificate of finality stated that the decision was not final until April 1, 2016, approximately one month later. Appendix, Exhibit 22, Order, *In re Pers. Restraint of Silva*, Supreme Court Cause 91911-9; Exhibit 23, Certificate of Finality, *In re Pers. Restraint of Silva*, Washington Court of Appeals Cause No. 72678-1-I. In *In re Pers. Restraint of Weed*, Cause No. 74541-7-I, this Court denied the motion for discretionary review on March 21, 2017, but the certificate of finality stated that decision did not become final until June 23, 2017, three months later. Appendix, Exhibit 24, Ruling Denying Review, *In re Pers. Of Weed*, Supreme Court Cause No. 93574-2; Exhibit 25, Certificate of Finality, *In re Pers. Restraint of Weed*, Washington Court of Appeals Cause No. 74541-7-I.<sup>4</sup>

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<sup>4</sup> These examples are representative. There are many more. See, e.g., Appendix, Exhibit 16, *In re Blackwell*, Cause No. 68966-5-I/89268-7, November 8, 2013 letter from this Court clerk dismissing the case as abandoned, and Exhibit 17, Certificate of Finality,

The practice of Divisions II and III complies with RAP 16.15 because it recognizes the personal restraint petition proceeding becomes final upon this Court denying the motion to modify the ruling denying review, rather than the arbitrary date when the Clerk eventually issues the certificate of finality weeks or months later. Relying on the date of issuance of the certificate of finality, where the certificate does not actually issue immediately upon denial of discretionary review, is inconsistent with RAP 16.15(e)(1)(c). This Court should hold that Division I's practice of designating the matter as final on the date the clerk issues a certificate (which can be weeks or months after this Court denies a motion for discretionary review) is incorrect and contrary to RAP 16.15(e)(1)(c).

## VI. CONCLUSION

For the reasons above, this Court should conclude that after its denial of the motion to modify there was nothing left to decide by any state court, including the Court of Appeals. The Court should hold that

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*In re Pers. Restraint of Blackwell*, Washington Court of Appeals Cause No. 68966-5-I (this Court dismissed the petition as abandoned on November 8, 2013, the COF states the Court of Appeals order became final on February 7, 2014, three months after the last decision of the Court in this case); Exhibit 18, Order Dismissing Petition, *In re Madsen*, Supreme Court Cause No. 88428-5; Exhibit 19, Certificate of Finality, *In re Pers. Restraint of Madsen*, Washington Court of Appeals Cause No. 73677-9-I (this Court issued its decision on June 1, 2015, the COF states the Court of Appeals' order was final on January 15, 2016, eight months after the last decision of the Court in this case (it erroneously states 2015)); Exhibit 20, Ruling Denying Review, *In re Pers. Restraint of Sandberg*, Supreme Court Cause No. 88743-8; Exhibit 21, Certificate of Finality, *In re Pers. Restraint of Sandberg*, Washington Court of Appeals Cause No. 68784-1-I (this Court denied the motion for discretionary review on November 26, 2013, COF states the Court of Appeals decision was final on February 5, 2014, two and a half months after the last Court's decision in this case).

Phongmanivan's personal restraint petition was final, or no longer pending, when this Court denied his motion to modify on February 10, 2016.

RESPECTFULLY SUBMITTED this 29th day of August, 2019.

ROBERT W. FERGUSON  
Attorney General

s/ Alex Kostin  
ALEX KOSTIN, WSBA #29115  
Assistant Attorney General  
Corrections Division  
PO Box 40116  
Olympia WA 98504-0116  
(360) 586-1445  
Alex.Kostin@atg.wa.gov

**CERTIFICATE OF SERVICE**

I certify that on the date below I caused to be electronically filed the BRIEF OF RESPONDENT ON CERTIFIED QUESTION with the Clerk of the Court using the electronic filing system which will serve the following electronic filing participant:

ANN K. WAGNER  
ASSISTANT PUBLIC DEFENDER  
FEDERAL PUBLIC DEFENDER  
1601 FIFTH AVENUE, SUITE 700  
SEATTLE WA 98101

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

EXECUTED this 29th day of August, 2019, at Olympia, Washington.

s/ Amy Jones  
AMY JONES  
Legal Assistant 3  
Corrections Division  
PO Box 40116  
Olympia WA 98504-0116  
(360) 586-1445  
Amy.Jones@atg.wa.gov

# APPENDIX

# EXHIBIT 1

# THE SUPREME COURT

STATE OF WASHINGTON

SUSAN L. CARLSON  
SUPREME COURT CLERK

ERIN L. LENNON  
DEPUTY CLERK/  
CHIEF STAFF ATTORNEY



TEMPLE OF JUSTICE  
P.O. BOX 40929  
OLYMPIA, WA 98504-0929

(360) 357-2077  
e-mail: [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)  
[www.courts.wa.gov](http://www.courts.wa.gov)

August 15, 2019

## LETTER SENT BY E-MAIL

Robert Jesse Hill (**sent by U. S. mail only**)  
c/o Thurston County Jail  
2000 Lakeridge Drive SW  
Olympia, WA 98502

Hon. Derek Byrne, Clerk  
Court of Appeals, Division II  
950 Broadway  
Suite 300, MS TB-06  
Tacoma, WA 98402-4454

Timothy Norman Lang  
Office of the Attorney General  
1125 Washington Street SE  
Olympia, WA 98501-2283

Re: Supreme Court No. 97465-9 - Personal Restraint Petition of Robert Jesse Hill  
Court of Appeals No. 53016-3-II

Clerk, Counsel and Mr. Hill:

The Petitioner's "MOTION FOR RECONSIDERATION", which seeks review of the Court of Appeals order that dismissed his personal restraint petition in the above referenced cause number, was forwarded to this Court from the Court of Appeals and received on August 15, 2019. The Petitioner's "MOTION FOR ORDER FINDING DOC IN CONTEMPT", was also received. The case has been assigned the above referenced Supreme Court cause number.

The "MOTION FOR RECONSIDERATION" will be considered a motion for discretionary review because additional review in the matter is only available through the use of a motion for discretionary review.<sup>1</sup>

Pursuant to RAP 17.4(e), the Respondent "may" submit an answer to the motions. If the Respondent wishes to submit an answer to the motions, the answer should be served and filed by September 16, 2019. Any reply to the answer should be served and filed by October 16, 2019. The matter will be submitted to the Court Commissioner for consideration upon the receipt of the answer and reply, or the expiration of the due dates for filing the same. The motion for order

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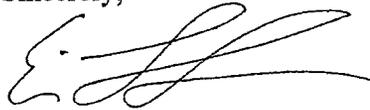
<sup>1</sup> The order of the Chief Judge of the Court of Appeals is not subject to reconsideration because it was only the action of one judge; see RAP 12.4(a). Therefore, additional review of the order may only be requested of this Court and the request must be in the form of a motion for discretionary review. See RAP 16.14(c).

Page 2  
No. 97465-9  
August 15, 2019

finding DOC in contempt will be considered by the Commissioner at the same time that he considers the motion for discretionary review.

The parties are referred to the provisions of General Rule 31(e) regarding the requirement to omit certain personal identifiers from all documents filed in this court. This rule provides that parties "shall not include, and if present shall redact" social security numbers, financial account numbers and driver's license numbers. As indicated in the rule, the responsibility for redacting the personal identifiers rests solely with counsel and the parties. The Clerk's Office does not review documents for compliance with the rule. Because briefs and other documents in cases that are not sealed may be made available to the public on the court's internet website, or viewed in our office, it is imperative that such personal identifiers not be included in filed documents.

Sincerely,

A handwritten signature in black ink, appearing to read "Erin L. Lennon", with a stylized flourish at the end.

Erin L. Lennon  
Supreme Court Deputy Clerk

ELL:bw

# EXHIBIT 2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FILED  
COURT OF APPEALS  
DIVISION II  
MAY -9 PM 12:53  
STATE OF WASHINGTON  
BY: [Signature] DEPUTY

In the Matter of the Personal Restraint of:  
GEOFFREY ROBERT LAWSON,  
Petitioner.

No. 50073-6-II

ORDER DISMISSING PETITION

Geoffrey Lawson seeks relief from personal restraint imposed following his 2013 convictions for one count of first degree burglary, two counts of second degree burglary, two counts of attempted voyeurism and one count of voyeurism.<sup>1</sup> All these crimes occurred while Lawson, a man, was in bathrooms designated for women in Harrison Hospital or a Barnes and Noble store.

As to the burglary convictions, Lawson argues that: (1) they are non-existent crimes; (2) the information charging him with those crimes was defective; (3) the jury instructions defining burglary were erroneous; (4) the convictions violate the Fourteenth Amendment to the United States Constitution and article 1, section 12 and article 31, section 1, of the Washington State Constitution; (5) the burglary statutes are unconstitutionally overbroad and vague as applied; (6) the trial court prevented him from arguing self-defense; (7) the prosecutor engaged in misconduct by charging non-existent crimes; and (8) he is actually innocent of burglary. Each of these arguments rests on his

<sup>1</sup> The United States Supreme Court denied Lawson's petition for a writ of certiorari from his direct appeal on February 29, 2016, making his February 24, 2017 petition timely filed. RCW 10.73.090(1)(c).

50073-6-II

assertion that the Washington Law Against Discrimination, chapter 49.60 RCW, confers upon him “an absolute unrestricted statutory right, invitation, license and privilege to enter and remain in any place of public resort, accommodation, assemblage or amusement, including but not limited to, hospitals, bookstores, and public restrooms sans any specific gender requirements.” Petition at 5. But he fails to demonstrate any such right of a person to enter or remain in a restroom, in a facility open to the public, designated for the opposite gender. Thus, his challenges to his burglary convictions fail.

As to his voyeurism convictions, Lawson argues that: (1) the voyeurism statute is unconstitutionally overbroad and vague as applied; (2) the convictions violate the First and Fourteenth Amendments to the United States Constitution and article 1, sections 3, 5 and 12 and article 31, section 1, of the Washington State Constitution; (3) the prosecutor engaged in misconduct by charging him under an overbroad and vague statute; and (4) he is actually innocent of voyeurism. As to the overbreadth and vagueness arguments, he fails to demonstrate that the terms “viewed” and “place where one has a reasonable expectation of privacy” render the voyeurism statute unconstitutionally vague or overbroad. And his other arguments rest on his claimed right of a person to enter or remain in a restroom, in a facility open to the public, designated for the opposite gender, which right is rejected above.

Finally, Lawson argues that he was selectively prosecuted because of being a man entering and remaining in a restroom designated for women, of having been wearing large women’s shoes and pantyhose at the time of the crimes, and of being non-white. But his

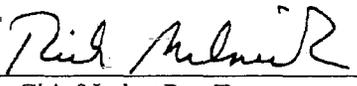
50073-6-II

anecdotes about other situations and people are not sufficient to demonstrate selective prosecution.<sup>2</sup>

Lawson fails to demonstrate grounds for relief from restraint. Accordingly, it is hereby

ORDERED that Lawson's petition is dismissed under RAP 16.11(b).

DATED this 9<sup>th</sup> day of May, 2017.

  
Acting Chief Judge Pro Tempore

cc: Geoffrey R. Lawson  
Kitsap County Prosecuting Attorney  
Kitsap County Clerk  
County Cause No. 12-1-00713-4

---

<sup>2</sup> Lawson also asserts ineffective assistance of counsel (notwithstanding the fact that he elected to represent himself at trial), but does not present any argument in support of that assertion, save a reference to his earlier Statement of Additional Grounds. That is not a permissible means of presenting argument in a personal restraint petition.

# EXHIBIT 3

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

In re the Personal Restraint Petition of:

GEOFFREY R. LAWSON,

Petitioner.

No. 50073-6-II

CERTIFICATE OF FINALITY

Kitsap County

Superior Court No. 12-1-00713-4

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington in and for Kitsap County.

This is to certify that the decision of the Court of Appeals of the State of Washington, Division II, filed on May 9, 2017, became final on February 7, 2018.



**IN TESTIMONY WHEREOF**, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 20<sup>th</sup> day of February 2018.

  
Derek M. Byrne  
Clerk of the Court of Appeals,  
State of Washington, Division II

Geoffrey Lawson  
#334928  
Airway Heights Corrections Center  
P.O. Box 2049  
Airway Heights,, WA 99001-2049

**EXHIBIT 4**

OB/bw 2

THE SUPREME COURT  
STATE OF WASHINGTON

SUSAN L. CARLSON  
SUPREME COURT CLERK

ERIN L. LENNON  
DEPUTY CLERK/  
CHIEF STAFF ATTORNEY



March 6, 2018

TEMPLE OF JUSTICE  
P.O. BOX 40929  
OLYMPIA, WA 98504-0929

(360) 357-2077  
e-mail: supreme@courts.wa.gov  
www.courts.wa.gov

Geoffrey Lawson  
#334928  
Airway Heights Corrections Center  
P.O. Box 2049  
Airway Heights, WA 99001-2049

Re: Supreme Court No. 94663-9 - Personal Restraint Petition of Geoffrey Lawson  
Court of Appeals No. 50073-6-II

Mr. Lawson:

On March 5, 2018, the Court received your "Motion for Extension of Time to File Petition for Review." In your motion, you request a 90-day extension of time to file a petition for review of Court of Appeals No. 50073-6-II.

You have already sought review of Court of Appeals No. 50073-6-II. You filed a motion for reconsideration of Court of Appeals No. 50073-6-II. It was treated as a motion for discretionary review because the only additional review of the case that was available was a motion for discretionary review. The case was assigned No. 94663-9. The Supreme Court Commissioner denied review on September 5, 2017. You filed a motion to modify that decision on December 12, 2017. On February 7, 2018, the Court denied your motion to modify. On that date, your case was closed.

A petition for review may only be used to seek review of a decision by the Court of Appeals. In this case, the Supreme Court has denied review. There is no further review available in state courts. Your motion will be placed in the closed file with no action taken.

Sincerely,

Erin L. Lennon  
Supreme Court Deputy Clerk

ELL:bw

# EXHIBIT 5

THE SUPREME COURT  
STATE OF WASHINGTON

SUSAN L. CARLSON  
SUPREME COURT CLERK

ERIN L. LENNON  
DEPUTY CLERK/  
CHIEF STAFF ATTORNEY



TEMPLE OF JUSTICE  
P.O. BOX 40929  
OLYMPIA, WA 98504-0929

(360) 357-2077  
e-mail: [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)  
[www.courts.wa.gov](http://www.courts.wa.gov)

December 22, 2016

George Dean Bartz  
1677 Spencer Road  
Salkum, WA 98582

Timothy Norman Lang (sent by e-mail only)  
Alex A. Kostin  
Office of the Attorney General,  
Criminal Justice Division  
P.O. Box 40116  
Olympia, WA 98504-0116

Re: Supreme Court No. 92727-8 - Personal Restraint Petition of George Dean Bartz  
Court of Appeals No. 33687-5-III

Counsel and Mr. Bartz:

The Petitioner's "MOTION FOR RECONSIDERATION", which seeks reconsideration of this Court's order dated December 7, 2016, that denied a motion to modify the Commissioner's ruling, was received on December 21, 2016.

The Rules of Appellate Procedure (RAP) provide that "a party may not file a motion for reconsideration of an order refusing to modify a ruling by the commissioner." Since this order refused to modify a ruling by the Commissioner, no motion for reconsideration may be filed. Accordingly, although the pleading has been placed in the closed file, this Court can take no further action on it.

The Petitioner also appears to request the Court's reasoning regarding its decision. The Court does not give reasons regarding granting or denying review, but I note that the Commissioner's ruling does contain such reasoning.

Sincerely,

A handwritten signature in black ink, appearing to read "Erin L. Lennon".

Erin L. Lennon  
Supreme Court Deputy Clerk

ELL:kms

# EXHIBIT 6

THE SUPREME COURT  
STATE OF WASHINGTON

SUSAN L. CARLSON  
SUPREME COURT CLERK

ERIN L. LENNON  
DEPUTY CLERK/  
CHIEF STAFF ATTORNEY



TEMPLE OF JUSTICE  
P.O. BOX 40929  
OLYMPIA, WA 98504-0929

(360) 357-2077  
e-mail: supreme@courts.wa.gov  
www.courts.wa.gov

March 30, 2018

Sopheap Chith  
#374950  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

James S. Schacht (sent by e-mail only)  
Pierce County Prosecutor's Office  
930 Tacoma Avenue S., Room 946  
Tacoma, WA 98402-2102

Re: Supreme Court No. 94980-8 - Personal Restraint Petition of Sopheap Chith  
Court of Appeals No. 49959-2-II

Counsel and Mr. Chith:

The Court received the Petitioner's "MOTION TO MODIFY COMMISSIONER'S RULING EN BANC REVIEW" on March 29, 2018. The motion seeks consideration of the Petitioner's motion to modify by the en banc court.

The Petitioner's motion to modify was denied by a Department of the Court in an order filed on March 7, 2018. A "Department" of the Court consists of five justices. All five justices agreed to the entry of the order denying the motion to modify. Therefore, a majority of the Court (i.e., five of the nine justices) have already decided to deny the motion to modify. In addition, the Rules of Appellate Procedure do not allow for further review of the denial of a motion to modify by the en banc court. Accordingly, the motion will be placed in the closed file without action.

Sincerely;

A handwritten signature in cursive script that reads "Susan L. Carlson".

Susan L. Carlson  
Supreme Court Clerk

SLC:bw

# EXHIBIT 7

03

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2/7/2018  
BY SUSAN L. CARLSON  
CLERK

# THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of	)	No. 94663-9
	)	
GEOFFREY LAWSON,	)	<b>ORDER</b>
	)	
Petitioner.	)	Court of Appeals
	)	No. 50073-6-II
	)	

Department II of the Court, composed of Chief Justice Fairhurst and Justices Madsen, Stephens, González and Yu, considered this matter at its February 6, 2018, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's motion to modify the Commissioner's ruling and the Petitioner's "Motion Requesting Remaining Transcription of Report of Proceedings and Eight Foot Billboard Used at Trial in Support of Petitioner's Motion to Modify Ruling" are both denied.

DATED at Olympia, Washington, this 7<sup>th</sup> day of February, 2018.

For the Court

Fairhurst, C.J.  
CHIEF JUSTICE

# EXHIBIT 8

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
3/7/2018  
BY SUSAN L. CARLSON  
CLERK

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of )

SOPHEAP CHITH, )

Petitioner. )

No. 94980-8

**ORDER**

Court of Appeals

No. 49959-2-II

Department II of the Court, composed of Chief Justice Fairhurst and Justices Madsen, Stephens, González and Yu, considered this matter at its March 6, 2018, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's motion to modify the Commissioner's ruling is denied.

DATED at Olympia, Washington, this 7th day of March, 2018.

For the Court

Fairhurst, C.J.  
CHIEF JUSTICE

EXHIBIT 27

EXHIBIT 8

# EXHIBIT 9

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the  
Personal Restraint Petition of  
  
SOPHEAP CHITH,  
  
Petitioner.

No. 49959-2-II

CERTIFICATE OF FINALITY

Pierce County

Superior Court No. 13-1-00554-1

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and  
for Pierce County.

This is to certify that the decision of the Court of Appeals of the State of Washington,  
Division II, filed on August 23, 2017, became final on March 7, 2018.



IN TESTIMONY WHEREOF, I have hereunto set my  
hand and affixed the seal of said Court at Tacoma, this  
28th day of March, 2018.

  
Derek M. Byrne  
Clerk of the Court of Appeals,  
State of Washington, Division II

James S. Schacht  
Deputy Prosecuting Attorney  
930 Tacoma Ave S Rm 946  
Tacoma, WA 98402-2102  
jschach@co.pierce.wa.us

Sopheap Chith  
DOC#374950  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen,, WA 98520

EXHIBIT 30  
EXHIBIT 9

**EXHIBIT 10**

# THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of	)	No. 92727-8
	)	
GEORGE DEAN BARTZ,	)	<b>ORDER</b>
	)	
Petitioner.	)	Court of Appeals
	)	No. 33687-5-III
	)	

---

Department I of the Court, composed of Chief Justice Madsen and Justices Johnson, Fairhurst, Wiggins, and Gordon McCloud, considered this matter at its December 6, 2016, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify the Commissioner's Ruling is denied.

DATED at Olympia, Washington, this 7<sup>th</sup> day of December, 2016.

For the Court

  
CHIEF JUSTICE

# EXHIBIT 11

**FILED**

DEC 14 2016

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

In the Matter of the Application  
for Relief From Personal Restraint  
of:

GEORGE DEAN BARTZ,

Petitioner.

**CERTIFICATE OF FINALITY**

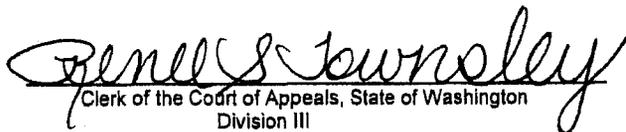
No. 33687-5-III

Spokane County No. 00-1-02031-8

The State of Washington to: The Superior Court of the State of Washington,  
in and for **Spokane** County

This is to certify that the Order Dismissing Personal Restraint Petition of the Court of Appeals of  
the State of Washington, Division III, filed on **December 17, 2015** became final on **December 7,**  
**2016.**

In testimony whereof, I have hereunto set my hand and affixed the seal  
of said Court at Spokane, this 14th day of December, 2016.

  
Clerk of the Court of Appeals, State of Washington  
Division III

cc: George Dean Bartz  
Timothy N. Lang  
Alex A. Kostin

EXHIBIT 11

# EXHIBIT 12

FILED  
JUN 28 2017  
WASHINGTON STATE  
SUPREME COURT

DB

# THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of	)	No. 93546-7
	)	
JOSEPH NJUGUNA NJONGE,	)	<b>ORDER</b>
	)	
Petitioner.	)	Court of Appeals
	)	No. 74682-1-I
	)	

Department II of the Court, composed of Chief Justice Fairhurst and Justices Madsen, Stephens, González and Yu, considered this matter at its June 27, 2017, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's motion to modify the Commissioner's ruling is denied.

DATED at Olympia, Washington, this 28<sup>th</sup> day of June, 2017.

For the Court

Fairhurst, CJ.  
CHIEF JUSTICE

EXHIBIT 30

EXHIBIT 12

**EXHIBIT 13**

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

IN THE MATTER OF THE )  
PERSONAL RESTRAINT OF: )

JOSEPH NJUGUNA NJONGE, )

Petitioner. )  
\_\_\_\_\_ )

No. 74682-1-I

CERTIFICATE OF FINALITY

King County

Superior Court No. 08-1-03125-6 KNT

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington in  
and for King County.

This is to certify that the order of the Court of Appeals of the State of Washington,  
Division I, filed on August 22, 2016, became final on August 11, 2017. A ruling denying a  
motion for discretionary review was entered in the Supreme Court on April 5, 2017. An  
order denying motion to modify was entered in the Supreme Court on June 28, 2017.

c: Joseph Njuguna Njonge  
Donna Lynn Wise - KCDPA  
King Co Pros/App Unit Supervisor



IN TESTIMONY WHEREOF, I  
have hereunto set my hand  
and affixed the seal of  
said Court at Seattle, this 11th  
day of August, 2017.

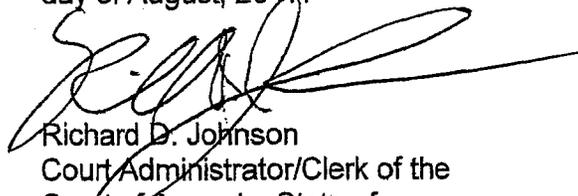
  
Richard D. Johnson  
Court Administrator/Clerk of the  
Court of Appeals, State of  
Washington Division I

EXHIBIT 31

EXHIBIT 13

**EXHIBIT 14**

Filed  
Washington State Supreme Court

NOV - 4 2015 *MT*

Ronald R. Carpenter  
Clerk

*Elm*

# THE SUPREME COURT OF WASHINGTON

In the Personal Restraint of )  
GERALD WAYNE WILSON, )  
Petitioner. )

NO. 90835-4

## ORDER

C/A NO. 72471-1-I

Department II of the Court, composed of Chief Justice Madsen and Justices Owens, Stephens, González and Yu, considered this matter at its November 3, 2015, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify the Commissioner's Ruling is denied.

DATED at Olympia, Washington this 4<sup>th</sup> day of November, 2015.

For the Court

*Madsen, C.J.*  
CHIEF JUSTICE

25/113

EXHIBIT 13

EXHIBIT 14

# EXHIBIT 15



**EXHIBIT 16**

**THE SUPREME COURT**  
STATE OF WASHINGTON

RONALD R. CARPENTER  
SUPREME COURT CLERK

SUSAN L. CARLSON  
DEPUTY CLERK / CHIEF STAFF ATTORNEY



TEMPLE OF JUSTICE  
P.O. BOX 40929  
OLYMPIA, WA 98504-0929

(360) 357-2077  
e-mail: [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)  
[www.courts.wa.gov](http://www.courts.wa.gov)

November 8, 2013

Spencer T. Blackwell  
1115 NW 92nd Street  
Seattle, WA 98117

Timothy N. Lang (sent by e-mail only)  
Office of the Attorney General  
P.O. Box 40116  
Olympia, WA 98504-0116

Hon. Richard Johnson, Clerk  
Division I, Court of Appeals  
One Union Square  
600 University Street  
Seattle, WA 98101

Re: Supreme Court No. 89268-7 - In re the Personal Restraint Petition of Spencer T.  
Blackwell  
Court of Appeals No. 68966-5-I

Clerk, Counsel and Mr. Blackwell:

A Clerk's motion to dismiss this case as abandoned was considered on my Deputy Clerk's November 7, 2013, Motion Calendar. In regards to the motion, the following ruling is entered:

**This case, Supreme Court No. 89268-7, is hereby dismissed as abandoned.**

Sincerely,

Susan L. Carlson  
Supreme Court Deputy Clerk

SLC:alb



EXHIBIT 16

**EXHIBIT 17**



**EXHIBIT 18**

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of	)	
	)	NO. 88428-5
KURT MADSEN,	)	
	)	<b>ORDER</b>
Petitioner.	)	
	)	
_____	)	

Department I of the Court, composed of Chief Justice Madsen and Justices Johnson, Fairhurst, Wiggins, and Gordon McCloud, considered this matter at its June 2, 2015, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to waive page limit is granted, and that the Petitioner's Motion to Recall Certificate of Finality, Motion to Est. 13 to 6-15-15, and Motion to Challenge Lack of Trial Court Jurisdiction are all denied.

DATED at Olympia, Washington this 3<sup>rd</sup> day of June, 2015.

For the Court

Madsen, C.J.  
 CHIEF JUSTICE

**EXHIBIT 19**

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

IN THE MATTER OF THE  
PERSONAL RESTRAINT OF:

KURT RANDALL MADSEN,

Petitioner.

)  
) No. 73677-9-1  
)  
) CERTIFICATE OF FINALITY  
)  
) King County  
)  
) Superior Court No. 11-1-10408-3 KNT  
)  
)

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington in  
and for King County.

This is to certify that the order of the Court of Appeals of the State of Washington,  
Division I, filed on November 23, 2015, became final on January 15, 2016.

c: Kurt Madsen



IN TESTIMONY WHEREOF, I  
have hereunto set my hand  
and affixed the seal of  
said Court at Seattle, this 15th  
day of January, 2015.

A handwritten signature in black ink, appearing to read "Richard D. Johnson", is written over the typed name.

Richard D. Johnson  
Court Administrator/Clerk of the  
Court of Appeals, State of  
Washington Division I

# EXHIBIT 20

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED  
2013 MAR 26 A 9 21  
BY ROMAN...  
CLERK

In the Matter of the Personal Restraint of:  
JASON W. SANDBERG,  
Petitioner.

NO. 88743-8

RULING DENYING REVIEW

Jason Sandberg was serving community custody for his 2009 conviction for failing to register as a sex offender when in November 2010 he made several telephone calls to a Kent Police Department employee, threatening to rape and kill her. The next day Mr. Sandberg accosted a maid at the motel where he was residing and tried to force her into his room. In December 2010 the Department of Corrections held a community custody violation hearing and imposed 360 days of confinement as a sanction. The sanction was affirmed on administrative appeal in January 2011. Mr. Sandberg completed the confinement on July 13, 2011.

Meanwhile, the State charged Mr. Sandberg in King County Superior Court with felony telephone harassment committed with sexual motivation, and the city of Kent charged him in municipal court with fourth degree assault and attempted unlawful harassment in relation to the motel incident. In October 2011 Mr. Sandberg pleaded guilty in superior court to felony telephone harassment in return for dismissal of the sexual motivation allegation. He agreed to an exceptional sentence of 24 months, which was considerably shorter than the potential sentence he faced with the sexual motivation allegation. The telephone harassment sentence was imposed concurrently with the sentences imposed after Mr. Sandberg was found guilty in Kent Municipal Court jury of fourth degree assault and attempted harassment.

679/28

EXHIBIT 20

Mr. Sandberg subsequently filed a personal restraint petition in Division One of the Court of Appeals, challenging his superior court judgment and sentence. The acting chief judge dismissed the petition, and now Mr. Sandberg seeks this court's discretionary review. RAP 16.14(c); RAP 13.5A(a)(1).

Mr. Sandberg argues that his guilty plea is involuntary because he did not understand that his telephone harassment sentence would run consecutively to the Department of Corrections sanction. But the plea agreement plainly stated that the harassment sentence would run concurrently only with the municipal court matter and would run consecutively to any sentences not mentioned in the agreement. And the community custody sanction was not a direct consequence of Mr. Sandberg's guilty plea because the sanction was imposed in a collateral proceeding based on Mr. Sandberg's previous conviction for failing to register as a sex offender. Because the sanction was served as a continuing consequence of Mr. Sandberg's conviction for failure to register, he could be punished separately for the telephone harassment giving rise to the sanction. *See State v. Grant*, 83 Wn. App. 98, 110-111, 920 P.2d 609 (1996). Furthermore, Mr. Sandberg does not explain how he could have misunderstood that his sentence on his guilty plea would be served consecutively to his sanction when he had already completed his sanction by the time he pleaded guilty. In these circumstances, Mr. Sandberg does not show that his plea was unknowing or involuntary due to lack of knowledge of the direct consequences of his plea. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

Mr. Sandberg further contends that defense counsel was ineffective in not apprising him of the consecutive nature of the community custody sanction and his telephone harassment sentence. A defendant asserting ineffective assistance of counsel must show both deficient performance and prejudice arising from that deficiency. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672-73, 101 P.3d 1 (2004). To specifically establish prejudice arising from counsel's deficient representation in

plea negotiations, the petitioner must show that, but for the deficiency, he would have elected to go to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993).

Assuming counsel should have informed Mr. Sandberg that the telephone harassment sentence would be served consecutively to the community custody violation sanction and failed to do so (an issue I need not decide), Mr. Sandberg does not show that there is a reasonable probability that but for the deficiency he would have rejected the plea offer. He faced a significantly harsher sentence if he did not plead guilty to the amended telephone harassment charge without the sexual motivation allegation. Mr. Sandberg's bald assertions that he would not have accepted the plea deal if he knew that he was to serve the harassment sentence consecutive to the community custody sanction is insufficient to justify collateral relief. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

Finally, Mr. Sandberg contends that running the telephone harassment sentence consecutively to the community custody violation sanction violates Department of Corrections policies. But as discussed, Mr. Sandberg completed the sanction more than three months before he was convicted of felony telephone harassment. Mr. Sandberg fails to identify a department policy barring criminal prosecution for acts that result in community custody violation sanctions. *See Grant*, 83 Wn. App. at 110-111.

The motion for discretionary review is denied.

  
ACTING COMMISSIONER

November 26, 2013

# EXHIBIT 21



# EXHIBIT 22

# THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of )

NO. 91911-9

MATTHEW GARRETT SILVA, )

**ORDER**

Petitioner. )

C/A NO. 72678-1-I  
(consol. w/ 72878-4-I and  
72970-5-I)

Department I of the Court, composed of Chief Justice Madsen and Justices Johnson, Fairhurst, Wiggins, and Gordon-McCloud, considered this matter at its March 1, 2016, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion for Discretionary Review is denied and all other pending motions are denied.

DATED at Olympia, Washington this 2<sup>nd</sup> day of March, 2016.

For the Court

  
CHIEF JUSTICE

# EXHIBIT 23

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

IN THE MATTER OF THE  
PERSONAL RESTRAINT OF:

MATTHEW GARRETT SILVA,  
  
Petitioner.

)  
) No. 72678-1-I  
) Consolidated with 72878-4-I  
) 72970-5-I  
)  
) CERTIFICATE OF FINALITY  
)  
) King County  
)  
) Superior Court No. 04-1-12167-8 KNT  
)

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington in  
and for King County.

This is to certify that the order of the Court of Appeals of the State of Washington,  
Division I, filed on June 8, 2015, became final on April 1, 2016. An order denying a  
motion for discretionary review and all other pending motions was entered in the  
Supreme Court on March 2, 2016.

c: Matthew Silva  
Alex Kostin



**IN TESTIMONY WHEREOF, I**  
have hereunto set my hand  
and affixed the seal of  
said Court at Seattle, this 1st  
day of April, 2016.

A handwritten signature in black ink, appearing to read "Richard D. Johnson", is written over the typed name.

Richard D. Johnson  
Court Administrator/Clerk of the  
Court of Appeals, State of  
Washington Division I

# EXHIBIT 24

FILED  
MAR 21 2017  
WASHINGTON STATE  
SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:

ROBERT WAYNE WEED,  
Petitioner.

NO. 93574-2  
RULING DENYING REVIEW

Robert Weed was serving a sentence with the Department of Corrections when he filed a personal restraint petition in Division One of the Court of Appeals arguing that the department had miscalculated his presentence jail credits and therefore had miscalculated his projected release date. He meanwhile was released from prison without supervision in February 2016. As a result, the acting chief judge dismissed Mr. Weed's petition as moot. Mr. Weed now seeks this court's discretionary review. RAP 16.14(c).<sup>1</sup>

To obtain this court's review, Mr. Weed must show that the acting chief judge's decision conflicts with a decision of this court or with another Court of

---

<sup>1</sup> Mr. Weed has filed additional pleadings along with two motions to amend and supplement his motion for discretionary review. But he filed these supplemental pleadings beyond the 30-day limit for filing a motion for discretionary review. *See* RAP 13.5(a). And to accept them as supplements to his original motion for discretionary review would cause that motion to exceed the 20-page limit (his original motion was 20 pages). *See* RAP 13.5(c). Mr. Weed offers no persuasive reason for extending the time limit or exceeding the page limit. The motions to amend and supplement the motion for discretionary review are therefore denied.

749/52

EXHIBIT 24

Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(1), (b). He does not make this showing. He urges that the method by which the department calculates jail credit is flawed, and that therefore this matter affects all inmates, suggesting that for this reason the issue should be addressed despite being moot as to him. But as the acting chief judge observed, the relief available by personal restraint petition is limited to relief from the *petitioner's* unlawful restraint. RAP 16.4(a). A personal restraint petition is not an appropriate means by which to pass generally on the lawfulness of a Department of Corrections practice if the petitioner is not currently restrained as a result of that practice. Mr. Weed thus demonstrates no error in the acting chief judge's decision, nor does he show that he is raising an issue as it affects him that is of substantial public interest or of sufficient constitutional significance to merit this court's review.

The motion for discretionary review is denied.

  
DEPUTY COMMISSIONER

March 21<sup>st</sup>, 2017

# EXHIBIT 25



**CORRECTIONS DIVISION ATTORNEY GENERAL'S OFFICE**

**August 29, 2019 - 12:37 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 96980-9  
**Appellate Court Case Title:** Phonsavanh Phongmanivan v. Ron Haynes

**The following documents have been uploaded:**

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Briefs - Respondents  
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**A copy of the uploaded files will be sent to:**

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- charlotte\_ponikvar@fd.org

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**Filing on Behalf of:** Alex A Kostin - Email: Alexk@atg.wa.gov (Alternate Email: )

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Olympia, WA, 98104-0116  
Phone: (360) 586-1445

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