Supreme Court No. 103922-1
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Dependency of: X.M.J., a Minor Child D.B.-K., Mother/Petitioner	Answer to Motion to Strike

Introduction

The Court of Appeals took final action in these consolidated cases when it issued its Opinion on January 30th, 2025. The mother filed her Petition for Review on Monday, March 3rd, 2025. The Petition was timely.

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The State now asks the Supreme Court to strike portions of the Petition, contending certain challenges are untimely. Under the State's argument, a litigant must immediately seek discretionary review of any interlocutory decisions while awaiting final disposition of a case in the Court of Appeals. This approach encourages piecemeal litigation and should be rejected.

In the alternative, the Supreme Court should waive any applicable provisions of the appellate rules and accept the entire Petition for filing.

Statement of Facts[1]

The mother, a member of the Cowlitz Indian Tribe, sought discretionary review of multiple trial

[1] Substantive facts are set forth in the Petition for Review.

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court decisions impacting her Indian family.[2] CP 34, 68. In consolidated cases, the mother raised 10 issues, most of which related to violations of the state and federal Indian Child Welfare Acts (ICWA and WICWA).[3] *See* Motion for Discretionary Review (filed 4/28/23) and Supplemental Motion for Discretionary Review (filed 6/26/23). While review was pending, the underlying dependency cases were dismissed.[4] CP 130.

After a commissioner of the Court of Appeals denied review, the mother and the Tribe sought modification. The Court of Appeals granted the motion

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[2] In this pleading, the terms "Indian family" and "Indian children" are used to mirror the language of statutes and cases. No disrespect is intended.

[3] The Cowlitz Indian Tribe also sought review. CP 53, 69.

[4] Tragically, D.B.-K.'s son passed away. Her daughter was returned to her care prior to dismissal.

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to modify, but only as to a single (non-ICWA) issue. *See* Order Granting Motion to Modify (entered 2/7/24). The appellate court accepted review of an order authorizing government social workers to intrude into the family home without a warrant.

After briefing was complete, the Court of Appeals issued an unpublished opinion dismissing the appeal as moot. Opinion, pp. 1, 6. The mother sought Supreme Court review, raising the Indian Child Welfare Act issues as well as the challenge to the court's order permitting warrantless intrusions into the family home.

The State has moved to have the Indian Child Welfare Act arguments stricken from the case.

Argument

The mother seeks review of Court of Appeals decisions in several consolidated cases. Rather than

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seeking interlocutory review of part of the case, the mother waited until Division III issued its decision terminating review before asking the Supreme Court to review all of the Court of Appeals' decisions.

The Supreme Court should decline the State's invitation to strike some of the issues from the mother's Petition. The approach urged by the State encourages piecemeal litigation, undermining the efficient use of judicial resources.

I. The mother appropriately waited until the Court of Appeals issued a decision terminating review before seeking review in the Supreme Court.

An appellate court's opinion qualifies as a "decision terminating review" if it is (1) filed after review is accepted, (2) "[t]erminates review unconditionally," and (3) is, *inter alia,* a "decision by the judges dismissing review." RAP 12.3(a).

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Appellate decisions that do not terminate review are "interlocutory decision[s]." RAP 12.3(b). The word "interlocutory" means "made during the progress of a legal action and *not final or definitive*." *Merriam-Webster.Com Dictionary* (2025) (emphasis added).[5] Interlocutory decisions are "'[p]rovisional; interim; temporary; not final.'" *Alwood v. Aukeen Dist. Court*, 94 Wn. App. 396, 400, 973 P.2d 12 (1999) (quoting *Black's Law Dictionary* (6th ed.1990)).

Here, the "final [and] definitive"[6] decision of the Court of Appeals came in the form of an unpublished Opinion filed January 30th, 2025. The Opinion was issued after review was accepted, and it "[t]erminate[d]

[5] Available at https://www.merriam-webster.com/dictionary/interlocutory (accessed 4/9/25).

[6] *Merriam-Webster.Com Dictionary.*

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review unconditionally." RAP 12.3(a)(2). The Opinion marked the Court of Appeals' completion of the case; it qualifies as a "decision terminating review" under RAP 12.3(a).[7]

The Supreme Court accepts review of a decision terminating review by granting a petition for review of such a decision. RAP 13.4(a). The petition must be filed within 30 days of the decision terminating review. RAP 13.4(a). Here, it is undisputed that the mother filed her Petition within 30 days of the court's Opinion.[8]

The Rules of Appellate Procedure do not explicitly address when to seek Supreme Court review when the

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[7] Before terminating review, the Court of Appeals issued several interlocutory decisions, including the Order Granting Motion to Modify. *See* Order (entered 2/7/24).

[8] Because the 30th day fell on a weekend, the deadline extended to the next business day. RAP 18.6(a).

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Court of Appeals disposes of issues through a combination of interlocutory decisions and decisions terminating review. However, it is apparent that the rules ordinarily contemplate a unitary request for Supreme Court review *after* the Court of Appeals issues its final decision disposing of all the issues in a case.[9] Nowhere is this made clearer than in RAP 13.5(d).

Under that rule, the Supreme Court's refusal to review an interlocutory decision "does not affect the right of a party to obtain later review of the Court of Appeals decision or the issues pertaining to that decision." RAP 13.5(d). This shows that interlocutory

[9] Of course, in exceptional circumstances, a party may seek discretionary review of interlocutory decisions before the Court of Appeals concludes its review of the case. In such circumstances, the party must meet the strict requirements of RAP 13.5.

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decisions may be challenged through "later review of the Court of Appeals decision," even if the Supreme Court previously declined to address them. RAP 13.5(d).

It follows that a party may forego immediate Supreme Court review of an interlocutory decision in favor of a challenge brought after the Court of Appeals has addressed *all* the issues in a case. Such an approach is consistent with the rules and furthers the efficient use of judicial resources.

A contrary interpretation would require litigants to seek discretionary review of every prejudicial interlocutory appellate decision, to preserve a challenge for later Supreme Court review. Rather than disposing of all issues in a case in a single proceeding, the Supreme Court would have to address interlocutory decisions as they arise, even if resolution of those issues

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could wait until the whole case is decided in the Court of Appeals. Furthermore, under RAP 13.5(d), a party could renew such challenges once the case is concluded in the Court of Appeals.

Here, the mother waited until the Court of Appeals disposed of all the issues in the case. After the court issued its decision terminating review, the mother filed a timely request for Supreme Court review of the court's interlocutory *and* final decisions. This is consistent with the procedure outlined in RAP 13.4 and RAP 13.5.

The Supreme Court should deny the Department's motion to strike.

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II. Alternatively, the Supreme Court should waive the deadline for review of the Court of Appeals' interlocutory decisions.

If, as the State contends, the mother should have immediately sought discretionary review of the Court of Appeals' interlocutory decision (without waiting for a final decision of all issues), the Supreme Court should nevertheless deny the Department's motion to strike. The court has the authority to waive application of the 30-day deadline in RAP 13.5, and should do so if necessary to allow review of all the issues raised by the mother.

The Rules of Appellate Procedure are to be "liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). Appellate courts can "waive or alter the provisions" of

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any rule "in order to serve the ends of justice." RAP 1.2(c); *see also* RAP 18.8(a).

There is a restriction set forth in RAP 18.8(c); however, that restriction should not bar an extension of time in this case. Under the rule, "[t]he appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file… a motion for discretionary review of a decision of the Court of Appeals." RAP 18.8(c).

The rule goes on to explain that "[t]he appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time." RAP 18.8(c). Here, principles of finality do not weigh in favor of the State's motion.

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First, the case became "final" outside the litigation when the underlying dependencies were dismissed in 2023. CP 130. The trial court's final disposition of the case will not be affected by this court's decision. Granting an extension will have no real-world impact on either the family or on the Department.[10]

Second, within the litigation, the Court of Appeals' interlocutory decisions should not be considered "final" until the court resolved the case through a decision terminating review in January of 2025. The mother's choice not to pursue piecemeal review is not an attempt to revisit a long-settled case.

[10] In addition, the Department has already included in its Answer argument on those issues it is asking the Supreme Court to strike from the Petition.

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By waiting until the appellate court made a final decision, the mother saved the Department and the Supreme Court the time and expense of a second Supreme Court proceeding. If the Supreme Court cannot consider the mother's Indian Child Welfare arguments absent an extension, it should grant the extension.

The circumstances are "extraordinary," and an extension is warranted to avoid "a gross miscarriage of justice." RAP 18.8(c). Across Washington, the Department's egregious failure to comply with ICWA and WICWA is ongoing. *See* Petition, p. 45. Instead of enforcing the law, trial courts continue to ratify the Department's actions. The result is that Native children face disproportionate removal, resulting in "great

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trauma." *In re J.M.W.*, 199 Wn.2d 837, 840, 514 P.3d 186 (2022).

The Supreme Court cannot undo the trauma inflicted on this family. However, it can protect other Native families from government abuse. The court should deny the State's motion to strike.

Certificate of Compliance

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 1655 words, as calculated by our word processing software.

Signed in Olympia, Washington on April 16, 2025.

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