

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN COLBRY, on behalf of A.L. as the "Next Friend" of A.L. a minor, and STEPHANIE COLBRY, on behalf of A.L. as the "Next Friend" of A.L. a minor
-- PETITIONERS,

VS.

DIRECTOR NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,
---RESPONDENTS, et al.,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Is a minor child in custody for purposes of jurisdiction on a Petition for *Habeas Corpus* pursuant to 28 *U.S.C.* §2254 where the child is suffering a severe deprivation of liberty due to unlawful restraint and custody by the state under the guise of child protective services and akin to being placed in a state institution?
2. Can further restraints on liberty, such as institutionalization, which occur subsequent to the filing of the *Habeas Corpus* petition and while it is pending, be considered to satisfy the custody requirement of 28 *U.S.C.* §2254?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Brian Colbry, Petitioner
2. Stephanie Colbry, Petitioner
3. A.L., Minor Child
4. Lisa Von Pier, Respondent, in her official capacity as Director of the New Jersey Division of Child Protection & Permanency
5. Allison Blake, Respondent, in her official capacity as Commissioner of the New Jersey Department of Children and Families
6. Julie Marino, Respondent
7. Andrea D'Aleo, Respondent
8. Deborah Coulter, Respondent
9. Dorothy Rand, Respondent
10. Stephanie Restrepo, Respondent
11. Lisa Mastroianni, Respondent

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OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit, filed on February 9, 2018 denying Petitioners' request for a certificate of appealability of the dismissal of a Petition for *Habeas Corpus*, is an unpublished order and decision with a Westlaw citation of *Colbry v. Dir. New Jersey Div. of Child Prot. & Permanency*, No. 17-2966, 2018 WL 1305630 (3d Cir. Feb. 9, 2018), and is reprinted in the Appendix hereto at Appendix B, p. 2a. The order of the Third Circuit denying rehearing and rehearing *en banc* was filed on March 15, 2018 and is reprinted in the Appendix hereto at Appendix A, p. 1a. The Order and Opinion of the United States District Court for the District of New Jersey denying Petitioner a certificate of appealability of the dismissal of a Petition for *Habeas Corpus*, is an unpublished order and decision reprinted in the Appendix hereto at Appendixes C & D, pp. 2a-6a. The Order of the Third Circuit remanding the case to the District Court for a decision on appealability is an unpublished order reprinted in the Appendix hereto as Appendix E at p. 7a. The Order and Opinion of the District Court dismissing the Petition for Habeas Corpus *sua sponte* is an unpublished order and decision with a Westlaw citation of *Colbry v. Pier*, No. CV 17-003 (BRM), 2017 WL 639894 (D.N.J. Feb. 16, 2017), *reconsideration denied*, No. CV 17-003-BRM, 2017 WL 3535024 (D.N.J. Aug. 17, 2017), *certificate of appealability denied sub nom. Colbry v. Dir. New Jersey Div. of Child Prot. & Permanency*, No. 17-2966, 2018 WL 1305630 (3d Cir. Feb. 9, 2018) reprinted in the Appendix hereto as Appendixes H & I at pp. 20a-32a.

The Order and Opinion of the District Court denying Reconsideration of the dismissal of the Petition for Habeas Corpus is an unpublished order and decision with a Westlaw citation of *Colbry v. Pier*, No. CV 17-003-BRM, 2017 WL 3535024 (D.N.J. Aug. 17, 2017), certificate of appealability denied sub nom. *Colbry v. Dir. New Jersey Div. of Child Prot. & Permanency*, No. 17-2966, 2018 WL 1305630 (3d Cir. Feb. 9, 2018) reprinted in the Appendix hereto as Appendixes F & G at pp. 8a-19a.

JURISDICTION

The date on which the United States Court of Appeals for the Third Circuit denied rehearing was March 15, 2018, a copy of the order appears at Appendix A.

This matter involves federal questions under the United States Constitution and 28 *U.S.C.* §2254.

The jurisdiction of this Court is invoked under 28 *U.S.C.* §1254.

CONSTITUTIONAL, PROVISIONS, STATUTES AND POLICIES AT ISSUE

Article One, Section 9, Clause 2 of the Constitution for the United States of America

First Amendment to the Constitution for the United States of America

Fourth Amendment to the Constitution for the United States of America

***Habeas Corpus* jurisdiction pursuant to 28 *U.S.C.* §2254**

STATEMENT OF THE CASE

This appeal comes to the Supreme Court because A.L., a minor child in the custody of the state, is suffering a severe deprivation of liberty due to unlawful restraint and custody by the Respondents, who are motivated by their intent to prevent A.L. from exercising his rights of free speech and association under the First Amendment, and his right to be free from an unreasonable seizure under the Fourth Amendment, and the Third Circuit and District Court have refused to exercise jurisdiction over the *Habeas Corpus* Petition filed on his behalf based upon a misguided assertion that the state's custody of A.L. is akin to being at liberty in the custody of a foster parent, when in fact that custody is akin to placing A.L. in a state institution, and based upon the refusal to consider new evidence of deprivation of liberty which occurred after the date the Petition for *Habeas Corpus* was filed.

The Third Circuit's Decision is contrary to the decision of the Supreme Court of the United States in *Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 511, n.12 (1982). This appeal involves questions of exceptional importance, *i.e.*, whether a minor child is in custody for purposes of *Habeas Corpus* jurisdiction pursuant to 28 U.S.C. §2254 under the guise of child protective services where he is suffering a deprivation of liberty so severe that for two years the state has denied him communication with family and friends, subjected him to unnecessary and intrusive psychological and social "services" against his will and to his detriment, caused him to suffer multiple hospitalizations for his mental health, when he never

required such hospitalizations previously, when the custody requirement of 28 U.S.C. §2254 has been determined to be satisfied by much less severe restraints on liberty in the criminal law context, such as court ordered community service; and whether further restraints on liberty, such as institutionalization, which occur subsequent to the filing of the *Habeas Corpus* petition and while it is pending can be considered to satisfy the custody requirement of 28 U.S.C. §2254.

REASONS WHY CERTIORARI SHOULD BE GRANTED

- I. Settle Important Questions of Federal Law that have not been, but should be Settled by this Court, that *Habeas Corpus* Relief is Available for a Minor Child Deprived of Constitutional Liberty Akin to being held in an Institution, and that Federal Courts may Consider Evidence of Further Deprivation of Liberty which Takes Place after the filing date of the Petition for *Habeas Corpus* when Considering Jurisdiction**

"The jurisdiction of [the District] Court [was] invoked by [Petitioners] pursuant to 28 U.S.C. §1331 which confers original jurisdiction upon the Court on the grounds that the instant action for a Petition for Writ of Habeas Corpus arises under 28 U.S.C. §2254 and Article One, Section 9, Clause 2 of the Constitution for the United States of America [". . . at the absolute minimum,' the Suspension Clause protects the writ 'as

it existed in 1789” *See Boumediene v. Bush*, 553 U.S. 723, 815, 128 S. Ct. 2229, 2287, 171 L. Ed. 2d 41 (2008).”

On the date of the filing of the *Habeas Corpus* petition, A.L. was not in a foster home where he was “being at liberty in the custody of a foster parent pursuant to a court order”, but instead was subject to state directed restrictions on his liberty solely because he expressed, through speech, criticism of the “services” that the state had imposed upon him. *See Lehman v. Lycoming Cty. Children’s Servs. Agency*, 458 U.S. 502, 511, n.12 (1982) (“We express no view as to the availability of federal habeas when a child is actually confined in a state institution rather than being at liberty in the custody of a foster parent pursuant to a court order.”). The actions of the Respondents in depriving A.L. of his basic First Amendment Rights is akin to placing A.L. in a “statute institution” so that the state’s custody of A.L. satisfies the requirements of 28 U.S.C. §2254.

Because A.L. asserted that the Respondents are part of an “an elaborate system similar to ‘Big Brother’ in its’ ‘initiatives’” and “strongly expressed his disagreement with [Respondents] recommendations that he participate in “a medication consultation, . . . Social Thinking Skills Group and . . . peer socialization”, Respondents in turn unconstitutionally seized A.L., denied him communication with his family and friends, and subjected him to “unnecessary and intrusive psychological and social “services” imposed upon him by the [Respondents] against his will and to his detriment.” As a result, A.L. has “suffered multiple

hospitalizations for his mental health while under Respondents' custody, when he never required such hospitalizations" previously. These restrictions on liberty which have been placed upon A.L. are not at the direction of the "foster parents," but by the Respondents, and for unconstitutional retaliatory purposes.

Furthermore, this Court should consider the strongly reasoned dissent in *Lehman*, 458 U.S. 502 which outlines the common-law authority extended by the federal Writ of *Habeas Corpus*, and how it has traditionally applied to unlawful custody of children.

Justice Black, speaking for a unanimous Court in *Jones v. Cunningham*, 371 U.S. 236, 243, 83 S.Ct. 373, 377, 9 L.Ed.2d 285 (1963), observed that the federal writ of habeas corpus "is not now and never has been a static, narrow, formalistic remedy. . . .

Even a brief historical examination of common-law usages teaches two lessons: first, for centuries, the English and American common-law courts have had the undisputed *power* to issue writs of habeas corpus ordering the release of children from unlawful custody; and, second, those courts have exercised broad *discretion* in deciding whether or not to invoke that power in a given case. English common-law courts traditionally were authorized to order the release of minor children from unlawful custody. Relying on the English tradition, American state courts very early asserted their own power to

issue common-law habeas writs in child-custody matters . . .

The codification of the writ into federal law indicates no congressional intent to contract its common-law scope.

See Lehman, 458 U.S. at 516-20 (Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting) (emphasis added)(citations and footnotes omitted). As set forth *supra*, the level of restraints on liberty which currently exist within the system of child protective services and foster care as it currently exists in the State of New Jersey bears little resemblance to that which had been experienced in the United States in its history prior to the U.S. Supreme Court in the *Lehman* decision, and could not have been imagined by that Court. This Court, therefore, should be guided by the dissent in *Lehman* that the common-law purpose of the Writ of *Habeas Corpus* remains intact, that the Writ is not a static remedy, and that therefore this Court does have jurisdiction to issue the Writ sought by Petitioners for the benefit of A.L. This is demonstrated by the expansion of *Habeas Corpus* relief in subsequent cases where it was found, for example, that being on probation meets the "in custody" requirement for purposes of the habeas statute. *See Mabry v. Johnson*, 467 U.S. 504, 507 n. 3, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984).

The fact remains that A.L. was covertly placed into an "institution", as admitted, by the Respondents subsequent to the Petition for *Habeas Corpus* having

been filed in this case and while it was pending in the District Court. The Third Circuit Panel found that because A.L. was not in an "institution" as defined by the Respondents on the day the Petition was filed in this case, but was subsequently placed in one by the Respondents, means the custody requirement of 28 U.S.C. §2254 has not been met. But none of the cases cited by the Third Circuit Panel support this position. Instead, the cases cited admonish state actors for attempting to game the system, avoiding *Habeas Corpus* review by releasing the person in custody prior to completion of that review. To ensure due process, the Supreme Court fashioned a rule that jurisdiction for *Habeas Corpus* review is based on the status of custody on the date the petition was filed, so that release from that custody would not void jurisdiction. See 28 U.S.C. § 2254; *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998). Nowhere is it contemplated that the state could place the person in more restrictive custody and subject the person to more deprivations of liberty while the petition was pending, and that these new deprivations would not be subject to *Habeas Corpus* review. If the Third Circuit Panel's decision is not reversed, then its opinion will stand for the principal that a state may subject a person to increased deprivations of liberty while a *Habeas Corpus* petition is pending and retaliate against that person for filing such a petition by further depriving them of liberty, with impunity.

CONCLUSION

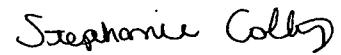
Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted under Rule 10 of the Rules of the Supreme Court of the United States.

Dated: June 13, 2018

Respectfully submitted,



Brian Colbry



Stephanie Colbry