No. 19-7650

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Danny A. Wing — PETITIONER
(Your Name)

vs.

State of Washington, Dept. of Children, Youth, and Families — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Washington State Court of Appeals, Division II
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Danny A. Wing
(Your Name)
DOC #326805 H1-B-47L
Stafford Creek Correction Center
191 Constantine Way
(Address)

Aberdeen, WA 98520
(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

1. In a termination of parental rights proceeding in a state that provides appeals as a matter of right from decisions terminating parental rights, does the State violate the Due Process Clause by failing to offer or provide a court-ordered domestic violence/anger management evaluation and any follow-up treatment to an indigent, incarcerated, legally blind parent with FASD facing termination of his parental rights where the parent is willing and able to engage in services?
2. In a termination proceeding in a state that provides court-appointed counsel to indigent parents facing termination of their parental rights in State-initiated actions, does the State violate the Due Process Clause when court-appointed counsel renders ineffective assistance of counsel to the indigent parent?
3. In a termination of parental rights proceeding, does a judicial officer violate the Due Process Clause when she (1) engages in independent ex parte investigation of a parent to the proceedings before her, (2) as a result of the fruits of that independent investigation, makes rulings adverse to the parent, and (3) refuses to recuse herself?
4. In a termination of parental rights proceedings in a state that provide court-appointed counsel to indigent parents facing termination of their parental rights in State-initiated actions at all stages of the proceeding, does a judicial officer violate the Due Process Clause when he fails to afford counsel to a parent at a hearing concerning a parent's *pro se* affidavit of prejudice against that judicial officer where the parent asks for counsel?
5. In a termination of parental rights proceeding, is Due Process violated where an appellate judicial officer expresses reluctance to reverse a case before the case is before him, refuses to disqualify himself when the case is later before him, and then finds no error justifying review?
6. In a termination of parental rights proceeding, does the State violate the Due Process

Clause where a parent is not allowed to supplement the record on appeal to establish his defense and his issues on appeal?

7. In a termination of parental rights proceedings, does the State violate the Fifth Amendment Due Process Clause by admitting and relying upon an invalid Judgment and Sentence to find that a parent will not be able to parent in the near future?

8. In dependency/termination proceedings, are a parent's liberty interests under the Fourteenth Amendment and due process rights under the Fifth and Fourteenth Amendments violated when judicial officers involved in the proceedings fail to adhere to the code of judicial conduct?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] 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:

Because this case involves children, the Washington State Courts used initials to identify the parties. The parties' full names are in the trial court pleadings and court documents filed in the Lewis County Superior Court of Washington State. Mr. D.W., therefore, refers to the parties by their initials.

Petitioner is D.W., the adoptive father of J.W. and the natural father of A.W. and D.W., Jr. Respondent is the State of Washington, Department of Children, Youth, and Families.

The biological mother of J.W., A.W., and D.W., Jr. voluntarily relinquished her parental rights.

RELATED CASES

1. In re Dependency of JW, AW, & DW, Lewis County Superior Court Cause Nos. 14-7-00377-0, 14-7-00378-8, 14-7-00379-6
2. In re D.W., J.W., and A.W., Lewis County Superior Court Cause Nos. 15-7-00409-0, 15-7-00410-3, 15-7-00411-1
3. In re the Guardianship of D.A.W., A.W., J.W., Lewis County Superior Court

Cause No. 17-7-00002-21, 17-7-00003-21, 17-7-00004-21, 17-7-00005-21, 17-7-00006-21, 17-7-00007-21, 17-7-00066-21, 17-7-00067-21, 17-7-00070-21

4. In re the Welfare of J.W., A.W., and D.W., Jr., Washington State Court of Appeals No. 50974-1-II (cons. With No. 50980-6-II and 50984-9-II)
5. In re the Welfare of J.W., A.W., and D.W., Jr., Washington State Supreme Court No. 95606-5-II
6. In re the Welfare of J.W., A.W., and D.W., Court of Appeals No. 51060-0-II (cons. With No. 51070-7-II and 51064-2-II)
7. In re the Dependency of J.W., A.W., & D.W., Washington State Supreme Court No. 97166-8.
8. In re the Dependency of J.W., A.W & D.W., Washington State Supreme Court No. 97740-3.
9. In re the Dependency of J.W., A.W., and D.W., Washington State Court of Appeals Nos. 51024-3-II (cons. With No. 51034-1-II and 51030-8-II)
10. In re the Dependency of J.W., A.W., and D.W., Washington State Supreme Court No. 95702-9
11. In the Matter of the Welfare of J.W., A.W., and D.W., Jr., Washington State Court of Appeals No. 50230-5-II (cons. With No. 50240-2-II and 50244-5-II)
12. In re the Dependency of J.W., A.W., and D.W., Jr., Washington State Supreme Court NO. 95706-1
13. In re the Guardianship of D.A.W., A.W., J.W., Washington State Supreme Court No. 51210-6-II
14. In re the Matter of the Welfare of J.W., A.W., and D.W., Jr., Washington State Court of Appeals, No. 51970-4-II (cons. With Nos. 51974-7-II and 51980-1-II)
15. In re the Dependency of J.W., A.W., and D.W., Washington State Supreme Court No. 97400-4
16. In re the Termination of Parental Rights of J.W., A.W., and D.W., Washington State Court of Appeals, No. 50710-2-II (cons. With Nos. 50714-5-II, 50720-0-II, 50724-2-II, 50730-7-II, 50734-0-II, 51210-6-II, 51214-9-II, 51220-3-II, 51224-6-II, 51230-1-II, and 51234-3-II)
17. In re the Termination of Parental Rights of J.W., A.W., and D.W., Washington State Supreme Court No. 97401-2

TABLE OF CONTENTS

INDEX TO APPENDICES

*Mr. D.W. attaches his briefs and the courts' relevant rulings. He expects the State will file its relevant briefing in its response to Mr. D.W.'s Petition, if any.

TABLE OF AUTHORITIES CITED

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix_____to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix_____to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[x] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The orders of the trial court, Court of Appeals, and Supreme Court appears at Appendix B, C, D, H, K, L to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was_____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date:_____, and a copy of the order denying rehearing appears at Appendix___.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____(date) on_____(date) in Application No.___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[x] For cases from **state courts**:

The date on which the highest state court decided my case was 4/11/2019.
A copy of that decision appears at Appendix A.

[x] A timely petition for rehearing was thereafter denied on the following date: 11/6/2019, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____(date) on_____(date) in Application No.___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Jurisdiction is proper because this Writ is filed within 90 days of the order denying rehearing in accordance with Rules 13.1 and 13.3. This Petition is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WASH. CONST. art. I, §3:

> **PERSONAL RIGHTS.** No person shall be deprived of life, liberty, or property, without due process of law.

Rev. Code of Wash. (RCW) 13.34.180:

> (1) A petition seeking termination of a parent and child relationship may be filed in juvenile court by any party to the dependency proceedings concerning that child. Such petition shall conform to the requirements of RCW **13.34.040**, shall be served upon the parties as provided in RCW **13.34.070**(8), and shall allege all of the following unless subsection (3) or (4) of this section applies:
>
> (a) That the child has been found to be a dependent child;
>
> (b) That the court has entered a dispositional order pursuant to RCW **13.34.130**;
>
> (c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency;
>
> (d) That the services ordered under RCW **13.34.136** have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;

(e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. A parent's failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided. In determining whether the conditions will be remedied the court may consider, but is not limited to, the following factors:

(i) Use of intoxicating or controlled substances so as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child, and documented unwillingness of the parent to receive and complete treatment or documented multiple failed treatment attempts;

(ii) Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future; or

(iii) Failure of the parent to have contact with the child for an extended period of time after the filing of the dependency petition if the parent was provided an opportunity to have a relationship with the child by the department or the court and received documented notice of the potential consequences of this failure, except that the actual inability of a parent to have visitation with the child including, but not limited to, mitigating circumstances such as a parent's current or prior incarceration or service in the military does not in and of itself constitute failure to have contact with the child; and

(f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home. If the parent is incarcerated, the court shall consider whether a parent maintains a meaningful role in his or her child's life based on factors identified in RCW **13.34.145**(5)(b); whether the department made reasonable efforts as defined in this chapter; and whether particular barriers existed as described in RCW **13.34.145**(5)(b) including, but not limited to, delays or barriers experienced in keeping the agency apprised of his or her location and in accessing visitation or other meaningful contact with the child.

(2) As evidence of rebuttal to any presumption established pursuant to subsection (1)(e) of this section, the court may consider the particular constraints of a parent's current or prior incarceration. Such evidence may include, but is not limited to, delays or barriers a parent may experience in keeping the agency apprised of his or her location and in accessing visitation or other meaningful contact with the child.

(3) In lieu of the allegations in subsection (1) of this section, the petition may allege that the child was found under such circumstances that the whereabouts of the child's parent are unknown and no person has acknowledged paternity or maternity and requested custody of the child within two months after the child was found.

(4) In lieu of the allegations in subsection (1)(b) through (f) of this section, the petition may allege that the parent has been convicted of:

(a) Murder in the first degree, murder in the second degree, or homicide by abuse as defined in chapter **9A.32** RCW against another child of the parent;

(b) Manslaughter in the first degree or manslaughter in the second degree, as defined in chapter **9A.32** RCW against another child of the parent;

(c) Attempting, conspiring, or soliciting another to commit one or more of the crimes listed in (a) or (b) of this subsection; or

(d) Assault in the first or second degree, as defined in chapter **9A.36** RCW, against the surviving child or another child of the parent.

(5) When a parent has been sentenced to a long-term incarceration and has maintained a meaningful role in the child's life considering the factors provided in RCW **13.34.145**(5)(b), and it is in the best interest of the child, the department should consider a permanent placement that allows the parent to maintain a relationship with his or her child, such as, but not limited to, a guardianship pursuant to chapter **13.36** RCW.

(6) Notice of rights shall be served upon the parent, guardian, or legal custodian with the petition and shall be in substantially the following form:

"NOTICE

A petition for termination of parental rights has been filed against you. You have important legal rights and you must take steps to protect your interests. This petition could result in permanent loss of your parental rights.

1. You have the right to a fact-finding hearing before a judge.

2. You have the right to have a lawyer represent you at the hearing. A lawyer can look at the files in your case, talk to the department of children, youth, and families or other agencies, tell you about the law, help you understand your rights, and help you at hearings. If you cannot afford a lawyer, the court will appoint one to represent you. To get a court-appointed lawyer you must contact: (explain local procedure) .

3. At the hearing, you have the right to speak on your own behalf, to introduce evidence, to examine witnesses, and to receive a decision based solely on the evidence presented to the judge.

You should be present at this hearing.

You may call (insert agency) for more information about your child. The agency's name and telephone number are (insert name and telephone number) ."

RCW 13.34.190:

(1) Except as provided in subsection (2) of this section, after hearings pursuant to RCW **13.34.110** or **13.34.130**, the court may enter an order terminating all parental rights to a child only if the court finds that:

(a)(i) The allegations contained in the petition as provided in RCW **13.34.180**(1) are established by clear, cogent, and convincing evidence; or

(ii) The provisions of RCW **13.34.180**(1) (a), (b), (e), and (f) are established beyond a reasonable doubt and if so, then RCW **13.34.180**(1) (c) and (d) may be waived. When an infant has been abandoned, as defined in RCW **13.34.030**, and the abandonment has been proved beyond a reasonable doubt, then RCW **13.34.180**(1) (c) and (d) may be waived; or

(iii) The allegation under *RCW **13.34.180**(2) is established beyond a reasonable doubt. In determining whether RCW **13.34.180**(1) (e) and (f) are established beyond a reasonable doubt, the court shall consider whether one or more of the aggravated circumstances listed in RCW **13.34.132** exist; or

(iv) The allegation under *RCW **13.34.180**(3) is established beyond a reasonable doubt; and

(b) Such an order is in the best interests of the child.

(2) The provisions of chapter **13.38** RCW must be followed in any proceeding under this chapter for termination of the parent-child relationship of an Indian child as defined in RCW **13.38.040**.

RCW 13.34.090:

(1) Any party has a right to be represented by an attorney in all proceedings under this chapter, to introduce evidence, to be heard in his or her own behalf, to examine witnesses, to receive a decision based solely on the evidence adduced at the hearing, and to an unbiased fact finder.

(2) At all stages of a proceeding in which a child is alleged to be dependent, the child's parent, guardian, or legal custodian has the right to be represented by counsel, and if indigent, to have counsel appointed for him or her by the court. Unless waived in court, counsel shall be provided to the child's parent, guardian, or legal custodian, if such person (a) has appeared in the proceeding or requested the court to appoint counsel and (b) is financially unable to obtain counsel because of indigency.

(3) If a party to an action under this chapter is represented by counsel, no order shall be provided to that party for his or her signature without prior notice and provision of the order to counsel.

(4) Copies of department or *supervising agency records to which parents have legal access pursuant to chapter **13.50** RCW shall be given to the child's parent, guardian, legal custodian, or his or her legal counsel, prior to any shelter care hearing and within fifteen days after the department or *supervising agency receives a written request for such records from the parent, guardian, legal custodian, or his or her legal counsel. These records shall be provided to the child's parents, guardian,

legal custodian, or legal counsel a reasonable period of time prior to the shelter care hearing in order to allow an opportunity to review the records prior to the hearing. These records shall be legible and shall be provided at no expense to the parents, guardian, legal custodian, or his or her counsel. When the records are served on legal counsel, legal counsel shall have the opportunity to review the records with the parents and shall review the records with the parents prior to the shelter care hearing.

STATEMENT OF THE CASE

Mr. D.W. is the father of three children subject to dependency proceedings beginning October 2014 after the death of an unrelated child in the family home. Exhibits 4-6. At a shelter care hearing on October 9, 2014, Court Commissioner Tracy Mitchell left the children in foster care and suspended all contact between Mr. D.W. and his children for at least three weeks. Exhibits 10-12.

Commissioner Mitchell entered agreed dependency orders on November 20, 2014, and continued to deny Mr. D.W. contact with his children until March 5, 2015. Exhibits 19-21, 28-30. Mr. D.W. was granted visits only after he agreed to plead guilty to criminal offenses related to the death of the unrelated child, J.H.-W. Exhibits 28-33, 86; *State v. Wing*, 197 Wn. App. 1083 at *1 (2017).

> THE COURT: All right. So I will find at this point as far as compliance and progress partial compliance by Mr. Wing in attempting to exercise his visits; no progress by -- no compliance, no progress by Ms. Wing, but she as far as visitation -- oh, and the department, I'm going to find the department not in compliance by not following the visitation order with Mr. Wing. I'm going to continue ordering the same visitation as previously ordered with Mr. Wing and also now applies to Ms. Wing.

RP (COA No. 51060-0-II) 37 (June 11, 2015)[1].

Commissioner Mitchell attended Mr. D.W.'s sentencing hearing. RP (12/17/2015) 16. She then expressed bias in favor of the children and against Mr. D.W. as a result of attending his sentencing hearing and making herself "familiar [with] the facts that were read into the case based upon the polygraphs and what Mr. [D.W.] pled to." Id. at 16. The **polygraphs** and Mr. D.W.'s plea were not part of the dependency record. She ordered a "goodbye phone call" and a 90-day suspension on all contact after the call "to see how

these children actually settle in without having a constant reminder of someone that killed someone in front of them." RP (12/17/2015) 13-18. Prior to this, the children had enjoyed one in-person visit with Mr. D.W. that showed no safety concerns. *Petitioner D.W.'s Motion to Supplement the Record – RAP 9.10/9.11*, Appendix 11 (visitation photos); RP (11/20/2014) 23 (children's acted within "normal limits").

Mr. D.W. unsuccessfully moved to recuse Commissioner Mitchell for judicial misconduct. CP 420-26, 1144. On February 28, 2017, Mr. D.W.'s guilty plea was deemed involuntary and vacated. *Wing*, 197 Wn. App. 1083 at *1; RP (7/10/2017) 190.

The Department petitioned to terminate Mr. D.W.'s parental rights in October 2015, alleging in part it had offered or provided all court-ordered services. CP 1-3.

Mr. D.W. filed an Affidavit of Prejudice against Judge James W. Lawler in the dependency and termination proceedings on October 27, 2016. CP 36-38, 469, 562-63. Even though he notified Judge Lawler of the Affidavit at a hearing on October 21, 2016, before any discretionary ruling Judge Lawler declined to acknowledge it. CP 307-11; RP (10/21/2016) 12; RP (06/15/2017) 1; RP (7/10/2017) 44; RP (7/11/2017) 337; RP (7/12/2017) 527; RP (7/13/2017) 697; RP (7/14/2017) 886; RP (7/17/2017) 1008.

The Department purportedly served multiple ER 904 Notices upon Mr. D.W.'s court-appointed counsel. CP 106, 479-80, 815-19. Counsel did not timely respond to the notices, and Judge Lawler denied Mr. D.W.'s motion to extend the time to respond them. Id. at 72.

On January 5, 2017, Mr. Wing petitioned to appoint his aunt as guardian for his children. CP (COA No. 51210-6) 188-89, 249-57, 259-67, 267-77. Court-appointed Attorney Pier Petersen had told the trial court: "I will also be sure that next week that the

[1] [1] Mr. D.W. moves this Court to take judicial notice of the record in COA No. 51060-0-II.

other parties get served with the [guardianship] paperwork." RP (2/1/2017) 21. But she did not serve the other parties. RP (2/15/2017) 55. The court dismissed the guardianship petitions for lack of service. RP (2/15/2017) 49. This omission and many others by Attorney Petersen and Mr. D.W.'s other trial attorneys were documented by Mr. D.W. CP (COA No. 50710-2) 677-92, 713-28, 896-904.

Mr. D.W.'s termination trial began July 10, 2017. RP (07/10/2017) 120. The Court granted the Department's motion to admit Exhibits 1-103 and 105-119, including Mr. D.W.'s overturned Judgment and Sentence and graphic photos of the deceased. RP 178. The investigating social worker had not before seen or relied on the photographs of the deceased. RP 178.

Regarding proof the provision of court-ordered services, no social worker offered or provided Mr. D.W. access to services even though he requested them. RP 283-86, 288; CP 189-207. Social workers admitted to failing in their duties. See CP 189-207. Social worker Roni Jensen admitted she offered Mr. D.W. only a UA. RP (7/10/2017) 163. Social worker Juli Jager admitted, "The only service that I was able to refer him to was the psychological evaluation while he was incarcerated." RP 454. Jager did not call any local providers for domestic violence or anger management evaluations. RP 467. Her testimony confirmed the Department did not actually offer or provide services:

> Q How did you offer these services to him?
> A Well, we had court orders and I would also summarize his services in a letter every month.

RP (7/11/2017) 408 (emphasis added). Social worker Jager emailed Corrections Counselor Mark Hill only to see if anger management and drug and alcohol evaluations were available at the penitentiary. RP 409, 415, 417. Deltha Hudson, another social worker assigned to work on Mr. D.W.'s case, "did not make any service referrals for him." RP

712. She had no contact with Mr. D.W. while she was assigned to the case. RP 713. She made no effort to find services available in the community to offer to Mr. D.W. RP 714. And she was not aware of any Department resources to find services to offer to incarcerated parents. RP 714-15.

Social worker Schuttie made no referrals for Mr. D.W. RP 863. He contacted no local community resources. RP 871. Even though he had a list of local resources, he did not consult it. RP 871. According to Schuttie, the Department social workers' best efforts to provide services to an incarcerated parent are limited to contacting the classification counselor at the correctional facility. RP (7/13/2017) 872-73. Social worker Schuttie had no knowledge of whether Lewis County Jail offered services. RP 832. He had never brought someone into the jail to do an evaluation. RP 832. And he did not think Mr. D.W. completed any services while in Lewis County Jail. RP 832. Services could have been provided at Lewis County Jail according to the testimony of Lewis County Jail's Sergeant Ron Anderson and mental health service provider, Michael Blankenship. RP 962-68, 991-93. The Department did nothing for 10 months while Mr. D.W. was in Lewis County Jail; this was the case even though Mr. D.W. asked for a parenting coach in light of his and his children's disabilities. CP 189-207.

After trial, Judge Lawler found the Department had offered or provided all court-ordered services; no services were denied; and no additional services could remedy Mr. D.W.'s parental deficiencies. He terminated Mr. D.W.'s parental rights and denied his guardianship petitions. CP 307-12. The Washington State Court of Appeals, Division II, affirmed on the merits, and the Washington State Supreme Court denied discretionary review.

REASONS FOR GRANTING THE PETITION

This case presents four important questions of Federal constitutional law concerning the State's handling of parental-rights termination cases. Nearly a century ago, this Court held that the Due Process Clause protects the right of parents to "establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Since then, this Court consistently has recognized the primacy of the parent-child relationship - and has cast a skeptical eye on government attempts to burden it. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Parham v. J.R.*, 442 U.S. 584, 602 (1979). "[T]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting). Even justices who do not view parental rights as constitutionally protected concede parental rights are among the "unalienable Rights" the Declaration of Independence states are bestowed on all Americans by "their Creator." *See Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).

The first question in this case is whether terminating a parent's rights despite the State's failure to offer or provide a court-ordered service to a willing parent violates the Due Process Clause?

The Court of Appeals' decision upholding the superior court's orders terminating Mr. D.W.'s parental rights even though the Department failed to affirmatively offer or provide Mr. D.W. all court-ordered services conflicts with Washington's case law[2] and Constitution[3] and the Fifth and Fourteenth Amendments to the United States Constitution. U.S. Const.

---

[2] *Matter of K.M.M.*, 186 Wn.2d 466, 379 P.3d 75 (2016); *In re Parental Rights to B.P.*, 186 Wn.2d 292, 376 P.3d 350 (2016); *In re Hall*, 99 Wn.2d 842, 664 P.2d 1245 (1983); *In re Dependency of H.W.*, 92 Wn. App. 420, 961 P.2d 963 (1998).

[3] WASH. CONST. art. I, §3.

amends. V, XIV.

A parent has a fundamental constitutional right to the care, custody, and control of his child. *In re the Matter of K.J.B.*, 187 Wn.2d 592, 597, 387 P.3d 1072 (2017). That right cannot be abridged without due process of law. *In re the Welfare of Key*, 119 Wn.2d 600, 609, 836 P.2d 200 (1992). The Due Process Clause of the Fourteenth Amendment protects a parent's fundamental rights. *Troxel*, 530 U.S. 57, 65-6. "When the state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Santosky*, 455 U.S. 745, 754.

RCW 13.34 establishes a two-step procedure for terminating parental rights. K.M.M., 186 Wn.2d at 478. The first step requires the Department to prove by clear, cogent, and convincing evidence that it has satisfied the six statutory elements of RCW 13.34.180(1)(a)-(f) and that the parent is currently unfit. *Id.* at 478-79. One of the six statutory elements the Department must prove is that "the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided[.]" RCW 13.34.180(1)(d). If the Department fails to prove even one of the six statutory elements to terminate parental rights, the Department's termination petition must be dismissed. *H.W.*, 92 Wn. App. at 429-30.

Here, the Department failed to affirmatively offer or provide Mr. D.W. court-ordered parenting classes, chemical dependency evaluation or treatment, and anger management evaluation or treatment. The Department was required to affirmatively offer or provide the ordered services. *Hall*, 99 Wn.2d 842, 850. At the very least, it had to provide a referral list of agencies that offer the services ordered. *Id.* "[T]he responsibility for offering or providing services belongs to the Department, and the Department cannot just point to the efforts of others if its own efforts might have succeeded where the others did not." *In re Dependency of D.A.*, 124 Wn. App. 644, 656, 102 P.3d 847 (2004). "[A] service cannot be futile when the

Department has never even offered it." K.M.M. 186 Wn.2d at 499 (Fairhurst, J., concurring).

The Department did not offer or provide court-ordered parenting classes, an anger management evaluation, or a chemical dependency evaluation. The Department pointed to the efforts of the Department of Corrections to provide services for Mr. D.W., maintained that it is dependent on prison staff and resources to provide services, and expressed a lack of control over when an incarcerated individual can receive a chemical dependency evaluation. CP 1274. However, the Department failed to offer Mr. D.W. services even before he went into the Department of Corrections' custody even though services could have been provided at Lewis County Jail according to the testimony of Lewis County Jail's Sergeant Ron Anderson and mental health service provider, Michael Blankenship. RP 962-68, 991-93. The Department's delay in offering or failure to offer court-ordered services coupled with Commissioner's Mitchell's ongoing refusal to allow any contact between Mr. D.W. and his children ensured the breakdown and termination of the parent-child relationship in this case in violation of the Due Process clause. CP 189-207; RP (12/17/2015) 13-18.

No social worker provided a referral list to Mr. D.W.; instead, the letters the social workers sent to Mr. D.W. and the Department of Corrections merely referenced the list of court-ordered services required and asked Mr. D.W. or the detention facility staff if the facility offered the services and to let the Department know what services Mr. D.W. found and participated in. See Exhibits 87-100. The Department's passive requests and attempt to improperly delegate its duty to the Department of Corrections and Mr. D.W. were not substantial proof that the Department affirmatively offered or provided court-ordered services.

The Department's correspondence and social workers' testimonies fail to show the Department offered or provided the court-ordered services or made any effort to locate court-

ordered services in the local community that could be provided to Mr. D.W. while he was in custody, including at Lewis County Jail. See RP 416, 464:21-465:5, 465, 467, 467:8-10, 731:23-25, 734:10-24, 962-68, 991-97.

The Court of Appeals' decision to affirm the termination of Mr. D.W.'s parental rights also conflicts with *In re Parental Rights to B.P.*, 186 Wn.2d 292, 316 n.5, 376 P.3d 350 (2016). In B.P., this Court's reversed a termination order under RCW 13.34.180(1)(d) for the Department's failure to provide attachment and bonding services, noting that such services would not be futile where the parent had "accepted every offer of services and did exceptionally well" in the limited services that the Department did provide. *Id.* The Court of Appeals in *H.W.* also reversed the termination of parental rights where the record lacked evidence "that DSHS even knew what services were available, much less offered" in a case where parent-child contact was prohibited by the dependency court. 92 Wn. App. at 429.

Terminating Mr. D.W.'s rights despite the State's failure to offer or provide a court-ordered service to a willing parent violates the Due Process Clause and justifies issuance of a Writ of Certiorari by this Court.

The second question is whether failure to appoint counsel for an indigent parent at a critical stage of the proceedings, pursuant to the Washington Statute assuring parents the right to counsel at all stages of termination proceedings, violates the Due Process Clause?

The trial court denied Mr. D.W. Due Process by holding a critical hearing on Mr. D.W.'s affidavit of prejudice against Judge Lawler without affording Mr. D.W. legal representation. A parent has a right to be represented by an attorney in "all proceedings" under RCW 13.34. RCW 13.34.090(1). "All proceedings" encompass dependency guardianship proceedings. See RCW 13.34.145(12)-(16); see also RCW 13.36.040(1).

Mr. D.W. filed an affidavit of prejudice against the trial court judge who ultimately

presided over Mr. D.W.'s termination trial and terminated Mr. D.W.'s parental rights. Mr. D.W. was seeking a new court-appointed attorney from the trial court at a status conference. At the conference, Mr. D.W. notified the judge that he also was filing an affidavit of prejudice against him; however, the judge refused to acknowledge the affidavit of prejudice and made what the judge considered to be a discretionary ruling (striking a trial date) so that he could not be removed from the case. Mr. D.W.'s lack of legal representation at this critical stage of the proceedings gravely prejudiced Mr. D.W. The judge he sought to remove declined to acknowledge his removal, taking unfair advantage of Mr. D.W.'s lapse in legal representation despite his pending request for counsel. That judge ultimately entered the final orders terminating Mr. D.W.'s parental rights. The trial court's failure to afford counsel to Mr. D.W. at this critical stage of the proceedings violates the Due Process Clause.

The third question is whether counsel who is appointed to an indigent parent pursuant to the Washington Statute assuring the right to counsel to parents in termination actions and who renders ineffective assistance to the indigent parent violates the Due Process Clause?

In Washington, a parent has a due process right to be represented by an attorney in "all proceedings." RCW 13.34.090(2). That parent also enjoys a due process right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *In re S.M.H.*, 128 Wn. App. 45, 61, 115 P.3d 990 (2005) (applying *Strickland* test to ineffective assistance of counsel issue).

Under the Strickland standard, the party alleging ineffective assistance must show not only that counsel's representation was deficient, but also that the ineffective representation prejudiced the party. *S.M.H.*, 128 Wn. App. 45, 61, 115 P.3d 990 (2005) (citing *Strickland*, 466 U.S. 668). "Counsel's performance is deficient if it falls 'below an objective standard of reasonableness based on consideration of all of the circumstances.'" *Id.* (quoting *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). A party is prejudiced when there is a

reasonable possibility that the outcome of the case would have been different if not for the deficient representation. *S.M.H.*, 128 Wn. App. at 61. Mr. D.W. received ineffective assistance of counsel.

a. Failure to Investigate and Be Familiar With Mr. D.W.'s Physical and Mental Health Issues.

The Department had the burden of proving that the children had been found dependent and that a disposition order had been entered pursuant to RCW 13.34.130. RCW 13.34.180(1)(a). Mr. D.W.'s court-appointed dependency attorney, Brian Gerhart, rendered ineffective assistance by failing to investigate and failing to be familiar with Mr. D.W.'s physical and mental health issues.

SID STANDARD 14.1(F) provides:

> In order to assure that indigent parents receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services shall meet the following minimum professional qualifications:
>
> . . .
>
> F. Be familiar with mental health issues and be able to identify the need to obtain expert services

Attorney Gerhart was aware of Mr. D.W.'s physical and mental health diagnoses (FASD[4], legal blindness), yet he did no investigation into D.W.'s life history or diagnoses. In fact, he placed two documents before Mr. Wing. Mr. Wing had no knowledge that one of those two documents was a declaration agreeing to dependency and waiving his right to a dependency fact-finding hearing. His attorney never read the documents to him. Appendix N. Throughout these proceedings, all of Mr. D.W.'s court-appointed lawyers had an obligation to investigate Mr. D.W.'s background and mental health diagnoses thoroughly,

[4] QEEG brain mapping and forensic testing have been done, refuting the State's expert testimony that Mr. D.W. has antisocial personality disorder and the trial court's findings theat he is a sociopath with no active conscience and will not change. Findings of Fact 2.7, 2.8, 2.14(5). *See Reports of Drs. Richard Adler and Natalie Brown, Ph.D.*, Lewis County Superior Court Cause No. 14-1-00634-3.

but they failed to do so. Not one of the attorneys who failed to investigate Mr. D.W.'s background and diagnoses ever explained or provided a strategic reason for their failure to do so. The failure those court-appoint attorneys to investigate Mr. D.W.'s background and mental health diagnoses prejudiced Mr. D.W. because the termination proceedings were founded upon certain criminal acts allegedly committed by Mr. D.W. But "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penury v. Lynaugh*, 492 U.S. 302, 319,109 S. Ct. 2947,106 L.Ed.2d 256 (1989), *abrogated on other grounds by Atkins v. Virginia*,536 U.S. 304,122 S. Ct.2242, 153 L. Ed.2d 335 (2002).

In evaluating the reasonableness of the investigation, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further". *Wiggins v. Smith*, 539 U.S. 510,123 S. Ct 2527,156 L.Ed.2d 471(2003) (Decision of counsel not to expand their investigation of petitioner's life history for mitigating evidence for penalty phase fell short of prevailing professional standards as required to support claim of ineffective assistance). Failure to investigate a client's organic brain damage or other mental impairments may constitute ineffective assistance of counsel. *See, e.g., Hendricks v. Calderon*, 70 F.3d 1032, 1043-44 (9th Cir.1995), *Evans v. Lewis*, 855 F.2d 631,637-38 (9th Cir.1988). Fetal alcohol spectrum disorder is organic brain damage. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 376, 125 S. Ct. 2456, 2459, 162 L. Ed. 2d 360 (2005).

Attorneys have a duty to make a reasonable investigation such that they are able to make informed decisions about how best to represent their clients. *Strickland*, 466 U.S. at 691; *Sanders v. Rattelle*, 21 F.3d 1446,1456 (9th Cir. 1994). Thus, Courts have found

counsel ineffective where, like counsel in this case, counsel neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so. *Sanders*, 21 F.3d at 1456. Also see *Bean v. Calderon*, 163 F.3d 1074 (9th Cir. 1998); *Matter of Pers. Restraint of Lloyd*, 123 Wn.2d 296, 868 P.2d 835 (1994).

None of Mr. D.W.'s court-appointed trial counsel investigated or became familiar with Mr. D.W.'s visual impairment (legal blindness) or FASD. This ineffective assistance of counsel prejudiced Mr. D.W. His counsel sought no expert services for his legal blindness and mental health issues. Mr. D.W. moved to supplement the record on appeal with evidence of his disabilities and organic brain damage; however, the appellate courts denied his requests, further exacerbating the prejudice caused by his court-appointed trial counsels' failure to investigate.

b. Failure to advise Mr. D.W. and challenge the Dependency and Disposition Orders.

Mr. D.W.'s court-appointed dependency attorney, Brian Gerhart, rendered ineffective assistance by telling Mr. D.W. to sign Dependency and Disposition orders without accommodation for Mr. D.W.'s visual and mental impairments. Mr. D.W. had told Attorney Gerhart that he did not agree to dependency and that he had family members who could take custody of his children. CP (COA No. 51060-0) 681-82, 937. However, Mr. D.W. was induced into capitulating to a stipulated dependency finding after Attorney Gerhart misrepresented to Mr. D.W. that it did not matter if relatives were available to take custody of his children (through guardianship) and that, at a contested dependency fact-finding hearing, Mr. D.W. could not invoke his Fifth Amendment right against self-incrimination if the Department forced him to testify and asked him about the facts underlying the criminal charges against him. CP (COA No. 51060-0) 681-82, 937. Relying upon counsel's misrepresentations and at his direction, Mr. D.W. agreed to the dependency finding based

upon the facts alleged in the Department's Petition instead of declining to admit the Department's allegations like he did at the shelter care hearing. Exhibits 19-21.

Mr. D.W. was not notified of all of his rights even though a dependency finding carries far more serious consequences than a shelter care finding. CP (COA Cause No. 51060-0-II) 937. Despite a contrary written representation by Attorney Gerhart that he had read the parent's rights to the legally blind Mr. D.W. who suffers from FASD, even Attorney Gerhart admitted in open court that he only "went through Mr. [D.W.]'s right to a contested hearing on the fact-finding and his right to have an attorney present at all stages." RP (11/20/2014) 24. Mr. D.W.'s subsequent court-appointed trial counsel, failed to challenge the validity of the Dependency and Disposition Orders admitted at trial, despite knowing Mr. D.W. signed them without accommodations for his visual and mental impairments. Exhibits 19-21. Mr. D.W.'s counsel led him to believe he was signing a court order when he was actually signing a waiver of his right to a dependency fact-finding hearing. Appendix N.

The trial court record shows Mr. D.W.'s stipulated to dependency orders. This stipulation was not knowing or voluntary because they were made in reliance upon incorrect advice provided to Mr. D.W. by Attorney Gerhart. Records showed that Mr. D.W. suffers from Fetal Alcohol Syndrome. "[A]dults with FAS are more likely to give false confessions just to please the police" and the courts. Akikur Mohammad, M.D., The Anatomy of Addiction 201 (2016); see also "Fetal Alcohol Spectrum Disorders (FASD): What You Need to Know to Help Your Clients", American Bar Association, Section of Litigation, and the ABA Center for Continuing Legal Education 353 (2012). This tends to explain Mr. D.W.'s unknowing and involuntary capitulation to "agreed" dependency and disposition orders.

No strategic reason justifies trial counsel's failure to challenge or object to these orders, which were central to two necessary elements to terminating Mr. D.W.'s parental

rights. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Doing nothing only ensured that the Department would satisfy the first two elements required to terminate Mr. D.W.'s parental rights, unopposed. Had Mr. D.W.'s trial counsel made themselves familiar with Mr. D.W.'s physical and mental health issues, provided for his needs, and offered evidence raising questions as to the validity of the orders in light of Mr. D.W.'s FAS, visual impairment, and other relevant circumstances, there is a reasonable possibility that the Dependency and Disposition Orders would have been considered invalid because Mr. D.W.'s stipulations were not knowing or voluntary. Consequently, the Department would have failed to satisfy two elements necessary to terminate Mr. D.W.'s parental rights.

c. Failure to Object to State's ER 904 Notice.

Court-appointed counsel Pier Petersen rendered ineffective assistance of counsel by failing to respond to the Department's ER 904 Notice. Many of the exhibits in the Department's Notice did not qualify for admission under ER 904 and were objectionable on grounds that the documents contained hearsay, lacked foundation, and did not qualify for admission under ER 904. Additionally, Ms. Petersen failed to object to Mr. D.W.'s pre-polygraph interrogation statements to a detective, which were inadmissible under *State v. Renfro*, which requires not only a stipulation of the parties but also requires that counsel for both parties and the defendant sign a written stipulation to the admission of the polygraph interrogation at trial, that notwithstanding the stipulation to admissibility, the admissibility of polygraph interrogation is subject to the trial judge's discretion, the opposing party has the right to cross-examine the examiner, and the trier of fact must be instructed that the examiner's testimony does not prove or disprove any material fact and that the trier of fact must determine what weight and effect such testimony should be given. *State v. Renfro*, 96 Wn.2d 902, 906-07, 639 P.2d 737 (1982); *State v. Ross*, 7 Wn. App. 62, 497 P.2d 1543, 53

Am. L. Rev.3d 997 (1972) (drawing on *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962)). The *Renfro* factors were not satisfied with regard to Mr. D.W.'s pre-polygraph interrogation. Nevertheless, the Department used Mr. D.W.'s pre-polygraph interrogation results at trial for its persuasive value without an evidentiary hearing in violation of *Brown v. Darcy*, 552 Fed.Appx. 730 (2014) (Exhibit 117), as well as highly prejudicial autopsy photographs (Exhibit 106), and Mr. D.W.'s invalid Lewis County Judgment and Sentence (Exhibit 79). Mr. D.W.'s judgment and sentence was deemed to be facially invalid in the appeal of Mr. D.W.'s criminal matter; it was not reliable proof of Mr. D.W.'s ability or availability to parent. *See, e.g., State v. Juarez*, 26 S.W.3d 346, 355 (Mo. Ct. App. 2000), *as modified* (Aug. 29, 2000) (withdrawn plea cannot be used at a subsequent *trial*). The trial court violated the Fifth Amendment by admitting Mr. D.W.'s invalid Judgment and Sentence and by relying on the exhibit in support of its finding that Mr. D.W. would not be able to parent in the near future – an essential element to terminating Mr. D.W.'s parental rights. These exhibits were inadmissible, invalid, prejudicial, graphic, and used to attack Mr. D.W.'s availability, credibility, and fitness to parent his own children.

Under the circumstances, failure to timely object to the Department's exhibits as argued here and as set forth in Mr. D.W.'s ER 904 objection (CP 960-65) constituted deficient performance. The prejudice is self-evident. There can be no dispute that the trial court (as fact finder) used the Department's prejudicial, documentary evidence concerning the deceased non-relative minor to conclude that Mr. D.W. was unfit to parent his own children. There is a reasonable possibility that these highly prejudicial exhibits would have been excluded if trial counsel had objected. Without that evidence, a different result was also reasonably possible in light of the exhibits and testimony offered by Mr. D.W., which shows his children had a happy, healthy upbringing for many years. Exhibit 65, 231, 233, 236; RP 772-97, 817-22,

975-78, 982-87. Furthermore, Mr. D.W. made numerous efforts to preserve his parental rights and remedy his deficiencies. CP 146-207, 234-417, 694-728. Mr. D.W.'s pro se Personal Restraint Petition, which was trial exhibit 261, also shows Mr. D.W.'s attorney-client phone calls were surreptitiously monitored during his incarceration, depriving him of his Due Process rights and his right to effective assistance counsel in his guardianship and termination proceedings. *Petitioner D.W.'s Motion to Supplement the Record – RAP 9.10/9.11*, Appendices 2 and 3.[5]

There was no conceivable purpose for Mr. D.W.'s attorney's failure to object to at least some of the exhibits on the Department's ER 904 notice. Where the reviewing court recognizes no conceivable purpose counsel's failure to object to evidence central to the Department's case is not a legitimate strategy but rather is "incompetence of counsel justifying reversal." *Madison*, 53 Wn. App. at 763. By failing to object within the 14-day deadline, Attorney Petersen waived Mr. D.W.'s substantive objections to all of the Department's ER 904 exhibits. The 14-day deadline for bringing objections to the admission of documents prescribed by ER 904 relates not only to authentication but to all evidentiary objections; generally, substantive objections are waived if not made within the time provided. *Miller v. Arctic Alaska Fisheries Corp.*, 83 Wn. App. at 255, 261, 921 P.2d 585 (1996), *reversed on other grounds by Miller v. Arctic Alaska Fisheries Corp.*, 133 WN.2d

[5] Additionally, Mr. D.W. moves the Court to take judicial notice of the following filings in Lewis County Superior Court Cause No. 14-1-000634-3: Defendant's Motion for Relief from Judgment pursuant to CrR 7.8(b) and supporting Memorandum of Authorities RE: Monitoring of Inmate Phone Calls/Legal Materials at index of appendices (Docket No. 11); Declaration of Hailey Landrus (Docket No. 8); Jail Phone Activity Log re: Landrus/Taylor declarations (pages 193-217, 221-223), Defendant's Reply Briefing and supporting Memorandum of Authorities at Appendix No. 2, Declaration of Hailey Landrus)bates stamped pages 005-006 and 007-008). These records show that, during the termination trial, Mr. D.W.'s appellate counsel on appeals from the denial of summary judgement in the termination of parental rights proceedings (Lewis County Superior Court Cause Nos. 15-7-004909-0,15-7-00410-3,15-7-00411-1), intercepted calls to appellate counsel Landrus were listened to by detective James McGinty, who was also a witness for the State days after the intercepted phone call where Mr. D.W. discussed strategies regarding staying the trial court proceedings as well as past confidential case strategy information and instructions to Ms. Landrus to forward to trial counsel Christopher Desmond.

250, 944 P.2d 1005 (1997).

d. Failure to Serve Guardianship Petition

Mr. D.W.'s attorney, Pier Petersen, rendered ineffective assistance of counsel by failing to have Ms. B.W. and the Guardian ad Litem personally served with Mr. D.W.'s Guardianship Petition and Summons.

The Legislature has stated that "guardianship is an appropriate permanent plan for a child who has been found to be dependent under chapter 13.34 RCW." RCW 13.36.010. "Any party to a dependency proceeding under chapter 13.34 RCW may request a guardianship be established for a dependent child by filing a petition in juvenile court under [RCW 13.36]." RCW 13.36.030(1). "[A]ll parties to the dependency and the proposed guardian must receive adequate notice of all proceedings [of a RCW 13.36 guardianship]." *Id.* Indeed, guardianship was the primary plan for permanency for Mr. D.W.'s children prior to the filing of the State's termination petition. Ex. 45

Mr. D.W.'s guardianship petitions, which he filed on January 5, 2017, along with Summons, Notices, and Declarations of Proposed Guardian, were dismissed for "lack of service" without proper notice to Mr. D.W. CP (COA No. 51210-6) 127. A

Attorney Petersen volunteered to serve all parties; however, she openly admitted that she had failed to do so and failed to give any strategic reason for failing to do so. Her omissions fell below an objective standard of reasonableness and prejudiced Mr. D.W. because his petitions were dismissed for defective service - a direct result of her failure to follow through with her promise to serve the opposing parties. Moreover, the failure of court-appointed counsel, Matt Kuehnl, to respond to Mr. D.W.'s proposed guardian's telephone calls regarding her interest in obtaining custody of the children substantially delayed Mr. D.W.'s efforts in pursuit of guardianship. RP 785.

e. Additional Instances of Ineffective Assistance of Counsel

On March 8, 2016, Mr. D.W.'s first attorney, Brian Gerhart, withdrew and was replaced by Attorney Matthew Kuehnl. CP 78. Attorney Gerhart had failed to conduct discovery despite promising to do so. CP 153-54. He had also failed to investigate the facts of Mr. D.W's case, file substantive motions, and advise Mr. D.W. that his parental rights could be terminated for pleading guilty to manslaughter. CP 159. Instead, Mr. D.W. was assured that such a plea would not affect his parental rights. CP 159.

Mr. D.W. was not aware of Attorney Kuehnl's appointment as counsel until April 1, 2016. CP 172, 177. He sent Attorney Kuenhl letters on April 1 and April 25, asking for, among other things, discovery, a defense strategy, copies of the dependency and termination records, contact with his children, and attention to his rights and mental health. CP 176-80, 183-84. Mr. D.W. received no written response to his letters. CP 165-66. But in a telephone conversation, Attorney Kuenhl said he had not received discovery, did not know why written orders had not been entered, refused to request Mr. D.W.'s telephonic appearance at an upcoming hearing, and had no defense strategy. CP 183-84.

In September 2016, Attorney Kuehnl withdrew and was replaced by Attorney Ronnie Soriano, Jr. CP 219. Mr. D.W. sent Attorney Soriano six letters between July 10, 2016, and October 31, 2016, but Attorney Soriano did not respond in writing to any of them. CP 694-712. Mr. D.W. requested issuance of discovery, reinstated visits with his children, a motion to vacate the dependency orders based on Attorney Gerhart's ineffective assistance, and a motion to dismiss the Department's petition to terminate his parental rights, among other action. *Id.* In addition, he advised Mr. D.W. to send and Mr. D.W. did send Angel Tree Christmas presents for the children; the State thereafter relied upon these Angel Tree gifts to argue that Mr. D.W. violated court orders by having contact with the children. *Petitioner*

*D.W.'s Motion to Supplement the Record – RAP 9.10/9.*11, Ex. 4 (Declaration of Claire Close), Ex. 5 (Declaration of Ronnie Soriano, Jr., Esq.). Attorney Soriano withdrew as counsel on September 14, 2016.

Attorney Pier Petersen was appointed to represent Mr. D.W. on November 3, 2016. CP 477. Among other requested actions, Mr. D.W. asked Attorney Petersen to move to recuse Commissioner Mitchell for bias and to vacate the dependency orders because Attorney Gerhart had misadvised him about his rights. CP 713-28. Per Attorney Petersen's request, Mr. D.W. filed a declaration in support of his anticipated motion to vacate the dependency orders on December 1, 2016. CP 504-05. Despite stating that she expected to file the motion to vacate shortly after December 5, Attorney Petersen never filed the motion. CP 724.

Mr. D.W. also asked Attorney Petersen to file guardianship petitions for his aunt. CP 713-28. Although she had acknowledged his request to pursue guardianship, as of December 14, 2016, she had not provided him with guardianship petition forms. CP 724. He also asked her to provide a copy of his client file, object to the Department's trial exhibits and engage in discovery. CP 727.

At a February 1, 2017, hearing, Attorney Petersen stated in open court that the other parties would be served with the first set of guardianship petitions. CP 806. As explained above, she failed to do so. Attorney Petersen withdrew on March 1, 2017. CP 879-80.

Over Mr. D.W.'s objection and motion for counsel, Judge Lawler held a hearing regarding his motion for finding ineffective assistance of counsel contrary to RCW. Mr. D.W. was also denied counsel on his initial guardianship petitions, despite moving for counsel. The trial court then dismissed the petition without counsel.

In summary, the record shows Mr. D.W. repeatedly sought assistance from his

attorneys, who failed to render effective assistance if they rendered assistance at al. CP 146-63, 164-88, 694-712, 713-28.

As a parent subject to proceedings brought to terminate his parental rights, Mr. D.W. had a right to make his defense, i.e., to decide, within limits the type of defense he wishes to mount. *See Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983). The due process right to fundamental fairness is a right guaranteed by the Fourteenth Amendment. *State v. Lively*, 130 Wn.2d 1, 18–19, 921 P.2d 1035 (1996).

RPC 1.2(a) provides: "A lawyer shall abide by a client's decisions concerning the objectives of representation and as required by rule 1.4, shall consult with the client as to the means by which they are to be presumed." RPC 1.4(a)(1), (2), (3) provides: "a lawyer shall: promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in rule 1.0A(e), is required by these rules (2) reasonably consult with a client about means by which the clients objectives are to be accomplished (3) keep the client reasonably informed about the status of the matter." RPC 1.16(a)(1), (3): provides "a lawyer shall not represent a client if (1) the representation will result in violation of the rules of professional conduct or other law or (3) the lawyer is discharged. In further support, see: RPC 1.4(a)(1), (2); RPC 1.0A(e), RPC 1.2(a); RPC 1.16(a)(1). Reasonable communication between the lawyer and the client is necessary for the client to effectively participate in the representation and exercise his right to control his defense. RPC 1.4.

Mr. D.W. tried to asserted his defense, but his court-appointed attorney would first go silent and then withdraw. His attorneys had a duty under the rules of professional conduct and the United State and Washington State constitutions to reasonably communicate with and obtain informed consent from Mr. D.W. Mr. D.W. had a right to assist in and control his

defense. Clearly, Mr. D.W.'s court-appointed trial counsel abandoned their obligations to communicate and obtain Mr. D.W.'s informed consent and instead appeared at hearings and made concessions of which Mr. D.W. was not included, consulted, or aware. CP 146-207, 694-728.

A complete breakdown in communication between the attorney and the defendant establish good cause to warrant substitution of counsel. *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). The trial court's appointment of new counsel after previous counsel withdrew is proof of not only good cause to substitute counsel but also the ineffective assistance offered by withdrawing counsel. The right to assistance of counsel is the bedrock of a particular kind of relationship with counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145–46, 126 S. Ct. 2557, 2561–62, 165 L. Ed. 2d 409 (2006). The purpose of the attorney-client privilege is inextricably linked to the very integrity and accuracy of the fact-finding process itself. *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978). Predicated upon the breakdown in communication between Mr. D.W. and his court-appointed trial counsel, the termination of Mr. D.W.'s parental rights is unconstitutional because he was prevented from assisting in the conduct of his defense and concomitantly prevented from securing effective assistance of counsel. *United States v. Gotti*, 755 F. Supp. 1159, 1161 (E.D.N.Y. 1991). The violation of a constitutional right is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

The fourth question is whether a judicial officer's engagement in an ex-parte investigation of Mr. D.W.'s case and subsequent refusal to recuse herself violates the Due Process Clause?

Mr. D.W.'s motion to recuse Commissioner Mitchell was based upon her own statements at a December 17, 2015, hearing that she had conducted an ex parte investigation

into Mr. D.W.'s RCW 13.34 cases by attending his criminal sentencing hearing and then denied Mr. D.W. visits with his children. CJC 2.9(c) states: "A judge shall not investigate facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law." Due process, the appearance of fairness, and the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned. *Wolfkill Feed and Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 14 P.3d 877 (2000).

Because the superior court commissioner openly violated the code of judicial conduct and ruled against Mr. D.W. as a result of that violation, her recusal was required. *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355, 13 A.D.D. 107, 5 A.D. Cas. (BNA) 232, 104 Ed. Law Rep. 883 (1995), amended, 5 A.D. Cas. (BNA) 454, 1996 WL 137107 (Wash. 1996) (Recusal was required for judge's violation of rule prohibiting judge's initiation or consideration of ex parte communications, which occurred when he directed legal extern to contact physicians charged with monitoring physician's chemical dependency for information about monitoring process, in physician's action against hospital arising from termination of employment; reasonable person might question judge's impartiality, since he might have inadvertently obtained information critical to central issue on remand); *In re Disciplinary Proceedings Against Sanders*, 159 Wn.2d 517, 145 P.3d 1208 (2006).

The superior court commissioner ensured the break-down of the parent-child relationship and eventual termination of parental rights by refusing to recuse herself and by continually denying contact between Mr. D.W. and his children, frustrating and burdening Mr. D.W.'s ongoing efforts to maintain a meaningful and positive role as a parent in his children's lives through gifts and visitation and in light of the existence of exculpatory

evidence of Mr. D.W.'s lack of involvement in the death of the deceased. CP 234-417, 774-75; see RCW 13.34.180(1)(e), (f) (regarding failure of parent-child contact and continuation of parent-child relationship). At a shelter care review hearing on October 30, 2014, before Judge Nelson Hunt, the trial court permitted just one supervised visit between Mr. D.W. and his children. Exhibits 13-15. That supervised visit occurred and caused the Department no concern for the children. *See* Report of Proceedings (RP) (11/20/2014) 23[6] (according to Department attorney, Lauren Roddy, after the visit, "they[, the children,] seemed to be within the normal limits of children in similar circumstances").

The fifth question is whether Due Process is violated where an appellate judicial officer expresses reluctance to reverse a case before the case is before him, refuses to disqualify himself when the case is later before him, and then finds no error justifying review?

Mr. D.W. filed multiple appeals from orders entered in his dependency and termination proceedings. Those appeals were at various stages of the appellate process over the last several years. In 2019, Mr. D.W. moved the Supreme Court for discretionary review of an interlocutory Court of Appeals order supplementing the record in Supreme Court Cause No. 97166-8. In denying Mr. D.W.'s motion for discretionary review, Commissioner Johnston made the following gratuitous statement concerning an issue pending at the Court of Appeals but not before Commissioner Johnston:

> More generally, D.W.'s motion for discretionary review touches on whether an effective remedy is available when the dependency order preceding an order terminating parental rights is allegedly procedurally defective, particularly where, as here, considerable time has passed since entry of the dependency order and the termination order. . . . It is therefore difficult to visualize the court requiring the entire termination and dependency proceedings to be unspooled and restarted years after the dependency petition was filed, particularly in light of the children's current residential status and D.W.'s lengthy incarceration. See K.N.J., 171 Wn.2d at 584 (seeing no reason to disrupt permanency for the

[6] Mr. D.W. moves this Court to take judicial notice of the record in COA No. 51060-0-II and Washington State Supreme Court Cause No. 97166-8.

> concerned child). In any event, this weighty consideration goes to the heart of the mootness question the Court of Appeals will decide on the merits.

Ruling Denying Review, Sup. Ct. No. 97166-8, at 7-8. After Mr. D.W. moved for discretionary review of the Court of Appeals' decisions affirming the termination of his parental rights, the denial of his guardianship petitions, and the denial of entry of an order on Mr. D.W.'s motion for ineffective assistance of counsel, he sought Commissioner Johnston's disqualification, but his motion was denied.

According to *State v. Carlson*, "when a party or counsel has a reasonable and justifiable concern that a judge will be biased or unfair[,] he has an obligation to move as promptly as possible to request that the judge recuse [himself] so as to minimize any disruption or delay in the appellate process." *State v. Carlson*, 66 Wn. App. 909, 917, 833 P.2d 463 (1992).

Canon 2.11(A)(1) of the Code of Judicial Conduct (CJC) states:

> (A) A judge shall disqualify himself . . . in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
> (1) The judge has a personal bias or prejudice concern a party . . . or personal knowledge of facts that are in dispute in the proceeding.

CJC 2.2 states, "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." *See* CJC 1.1. Comment 1 to this rule states, "To ensure impartiality and fairness to all parties, a judge must be objective and open-minded." CJC 2.2.

In Commissioner Johnston's ruling on Mr. D.W.'s motion for discretionary review of the Court of Appeals' interlocutory order to supplement the record in Case No. 97166-8, he expressed a lack of objectivity as well as bias against Mr. D.W. when he addressed an issue that was not before him at that time, commenting that it is "difficult to visualize"

"unspool[ing] and restart[ing]" "the entire termination and dependency proceedings" "years after the dependency petition was filed." Sup. Ct. No. 97166-8, Ruling Denying Review at 8. Commissioner Johnston's comment suggested he may not be objective or open-minded and appears to be partial to the children, having share his pre-determined perception of the ultimate outcome of Mr. D.W.'s case. Indeed, it foreshadowed the Commissioner's ultimate ruling denying review of Mr. D.W. motion for discretionary review on the termination of parental rights and guardianship matter. Because Commissioner Johnston's impartiality was reasonably questioned and Mr. D.W. is justifiably concerned that the Commissioner would be biased and unfair, Commissioner Johnston should have been disqualified from considering and/or ruling upon any of Mr. D.W.'s motions for discretionary review arising from COA Nos. 50710-2-II (Consol.), 51210-6-II (Consol.), and 51970-4-II (Consol.). The failure to disqualify him violates Due Process, which ensures fair processes and impartial judicial officers.

The sixth question is whether the refusing to allow a parent to supplement the record on appeal from the termination of the parent's rights violates Due Process?

The right to present evidence in one's own defense is a fundamental element of due process of law under the Fourteenth Amendment. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). RAP 9.10 permits the transmittal of additional clerk's papers and exhibits to allow a decision on the merits of the issues presented for review. Additionally, RAP 9.11 allows a state appellate court to take additional evidence if, among other factors, additional proof of facts would fairly resolve the issues on review, and if additional evidence would probably change the decision:

> The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the

> additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

Any of the requirements of this rule may be waived to preserve the ends of justice. *Mission Ins. Co. v. Guarantee Ins. Co.*, 37 Wn. App. 695, 702, 683 P.2d 215 (1984).

Mr. D.W. raised multiple issues of ineffective assistance of counsel. The Declarations of Claire Close and Ronnie Soriano and multiple other records were needed to demonstrate and fairly resolve Mr. D.W.'s ineffective assistance of counsel claims.

Mr. D.W. challenged the denial of summary judgment and the trial court's findings that the Department offered or provided court-ordered services. Mr. D.W. also challenged the termination of his parental rights, in part, on the ground that the Department violated his due process rights by failing to timely and properly respond to Mr. D.W.'s Public Records Act requests, which should have been produced in time for trial.

The documents he sought to add to the appellate record were all necessary to resolve whether the Department offered or provided all court-ordered services and whether the Department, by its delays, violated Mr. D.W.'s due process rights. Mr. D.W.'s eye records, Chapter 10 Fetal Alcohol Syndrome: Real and Preventable from The Anatomy of Addiction by Akikur Mohammad, MD, and the American Bar Association Resolution and Report dated August 6-7, 2012, are all necessary to fairly resolve whether Mr. D.W. received ineffective assistance of counsel. Mr. D.W.'s eye records show he has suffered from debilitating visual impairment since at least 1990 to throughout these proceedings. Chapter 10 from Dr. Mohammad's book, shows how and why FAS individuals have a critical need for competent legal counsel in legal proceedings and the American Bar Association's and Lewis County

Superior Court's commitment to individuals with FAS involved in the court system.

Mr. D.W. challenged the trial court's findings that Mr. D.W.'s mental health condition makes him currently unfit to parent and the trial court's decision to draw negative inferences from the assertion of his Fifth Amendment right to remain silent at trial when his criminal convictions were reversed as involuntary, his "confession" did not pass a polygraph examination, and Mr. D.W. suffers from fetal alcohol syndrome. He also challenged the trial court's findings that the continuation of the parent-child relationship is against the children's best interests and diminished his children's prospects for early integration into a stable and permanent home, and that Mr. D.W. attempted to maintain a meaningful role in his children's lives even if it violated court orders.

Mr. D.W.'s Social Security Administration Office of Disability Adjudication and Review Decision, primarily at Page 7, was necessary to show that Mr. D.W. was diagnosed with fetal alcohol syndrome but, despite any mental health diagnoses, was capable of parenting. (Commissioner Bearse's ruling dated December 11, 2018, acknowledges that the record in COA No. 51060-0-II shows Mr. D.W. has been diagnosed with FAS.) The photographs of his supervised visit with his children were necessary to demonstrate that he had a positive relationship with his children and that continuing the parent-child relationship was in the children's best interests. The Soriano and Close declarations were necessary to resolve the challenge to the trial court's ruling that Mr. D.W. maintained contact with his children in violation of court orders.

Mr. D.W. challenged the trial court's finding that there is little likelihood that conditions will be remedied so the children can be returned to him in the near future and that he was not in a position to parent his children now or in the near future. Mr. D.W.'s Personal Restraint Petition filings and CrR 7.8 filings and Motion for Full Resentencing were

necessary for the Court to review in resolving whether Mr. D.W.'s conditions would be remedied in the near future.

Mr. D.W. also asserted that Commissioner Tracy Mitchell erred by failing to recuse herself for judicial misconduct. The Declaration of Jesse Wheeler was necessary to resolve this issue.

The Court of Appeals could not fairly resolve the issues before and Mr. D.W. could not present a proper defense without the evidence offered in his Motion to Supplement the Record.

It was equitable to excuse Mr. D.W.'s failure to present the evidence to the trial court because his prior court-appointed attorneys were ineffective and did not produce the documents despite request and many documents were not available until after trial and entry of final orders. Granting a new trial for purposes of taking additional evidence was unnecessarily expensive in light of the fact that final orders had been entered.

It was inequitable to decide Mr. D.W.'s appeal solely on the evidence taken at the trial court. The only equitable remedy available was to allow Mr. D.W. to supplement the record so he can fully develop his arguments on appeal. The Court of Appeals' refusal to supplement the record precluded Mr. D.W. from establishing a defense, violating his Due Process rights.

The seventh question is whether, in the context of dependency/termination proceedings, a parent's liberty interests under the Fourteenth Amendment and due process rights under the Fifth and Fourteenth Amendments are violated where judicial officers involved in the proceedings fail to adhere to the code of judicial conduct?

When the judiciary regulates its actions, such as through the promulgation of Washington state's Code of Judicial Conduct, enforced by the Commission on Judicial Conduct (RCW 2.64, et seq.), those rules and regulations limiting judicial conduct must be observed, invoking due process where none otherwise constitutionally exists. *See Carlo v.*

City of Chino, 105 F.3d 493 (9th Cir. 1997). The Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of Due Process Clause of the Fourteenth Amendment." *Vitek v.Jones*, 445 U.S. 480, 488, 100 S. Ct. 1254, 63 L.Ed.2d 552 (1980). Thus, the code of judicial conduct, enforced under chapter 2.64 RCW, is binding and creates duties of judicial officers. *See Gregoire v. City of Oak Harbor*, 170 Wn. 2d 628, 635, 244 P.3d 924 (2010) (jailers owe inmates an affirmative duty which arises out of the special relationship that results when a custodian has complete control over a prisoner deprived of liberty). This special relationship can also be likened to the relationship and trust a respondent parent should expect to receive from a just judge because of the belief that the judge will adhere to the guiding principles of the Code of Judicial Conduct.

Procedural due process prohibits the state from depriving an individual of protected liberty interests without appropriate procedural safeguards. *State v. Lyons*, 199 Wn. App. 235, 240, 399 P.3d 557 (2017). A liberty interest protected by the Fourteenth Amendment may arise from either two sources: due process or state law. *In re the Matter of Cashaw*, 123 Wn.2d 138, 155, 866 P.2d 8 (1994) (citing *Hewitt v. Helms*, 495 U.S. 460, 466, 103 S. Ct. 864, 868, 74 L.Ed.2d 675 (1983)). State statutes, regulations and policies may create liberty interests where none would otherwise exist. *Id.* Procedural rules do not create liberty interests only substantive law does. *Cashaw*, 123 Wn.2d at 145. Mandatory language in a state law or regulation that controls official decision-making creates a liberty interest where the specific directives of a law or regulation provide that, if the regulation's substantive predicates are present, a particular outcome must follow. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 463, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). The *Hewitt/Thompson* framework applies to pretrial detainees such as Mr. Wing, who was held at

the Lewis County Jail Pretrial and throughout his parental rights termination trial. *Valdez v. Rosenbaum*, 303 F.3d 1039, 1044 (2002). The CJC standards were enacted pursuant to a delegation of legislative authority, therefore they have the force of law. *See* CJC 1.1 terminology ("A judge shall comply with the law, including the Code of Judicial Conduct"); *Mills v. W. Washington Univ.*, 170 Wn.2d 903, 910, 246 P.3d 1254 (2011). Given the above, the controlling language within CJC 1.1, 2.11 , and 2.2 amounts to a state-created liberty interest. *Carlo*, 105 F.3d at 495 (finding a liberty interest where a controlling regulation stated that arrestees shall be given three calls upon intake). Use of mandatory language was held to create a Fourteenth Amendment protected right to those inmate calls. By analogy, the CJC's controlling language requires that "[a] judge **shall** comply with the law, including the Code of Judicial Conduct" (CJC 1.1), "[a] judge **shall** disqualify himself or herself in any proceedings in which the judge's impartiality might reasonably be questioned" (CJC 2.11), and "[a] judge **shall** uphold and apply the law, and **shall** perform all duties of judicial office fairly and impartially" (CJC 2.2). Accordingly, Commissioner Mitchell, Judge Lawler, and all other judicial officers involved in Mr. D.W.'s proceedings must adhere and apply the CJC's even though the courts are operated at the discretion of the judges and its staff. They, nevertheless, owe ongoing duties to the public, including Mr. D.W. The CJCs were never rescinded or amended at the time Mr. D.W.'s pretrial and trial proceedings. The CJC's, specifically CJC 1.1, was and remains the law of Washington State and Lewis County Superior Court at all times related to Mr. D.W.'s proceedings. The judicial officers' failures to follow the CJC's when handling Mr. D.W.'s cases, as described above, contravene the CJC's. The CJC's where not preempted by state law, nor can they be preempted by a judicial officer's failure to adhere to their mandatory standards. *See, e.g., In the re Talley*, 172 Wn.2d 642, 650, 260 P.3d 868 (2011) (county jail policy regarding early release must

comply with statute). It is a fundamental concept that the legislative branch passes laws whereas the executive branch such as the judges and commissioners of superior courts throughout the state of Washington enforce, apply the laws. *State v. Ramos*, 149 Wn. App. 266, 270, 202 P.3d 383 (2009) (citing U.S. Const. arts. I,II and III (defining legislative, executive and judicial branches) Wash. Const. arts. II,III and IV (establishing the legislative department, the executive and judiciary)). The judicial officers involved in Mr. D.W.'s proceedings were not delegated the authority to amend or not follow the long-standing requirements within the CJCs. *See, e.g. Ramos*, 149 Wn. App. at 270.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. 137, 163, 2 L. Ed. 60 (1803). "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Id.* at 147. The errors and injuries to Mr. D.W.'s rights demonstrated above, either independently, or cumulatively, must have redress and remedy.

Issuance of a writ is necessary here to stop the pattern of practice engaged in by Washington courts in dependency and termination proceedings to deny a parent due process where the dependency/termination proceedings arise from criminal charges and incarceration. Due process violations will continue if not addressed. The posture of this case is not like a case where due process is afforded. The record here demonstrates violations by attorneys and judges that are simply ignored. These errors need to be checked or they will continue at the expense of parents' fundamental constitutional right to the care, custody and control of their children.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

Mr. D.W., Petitioner

Date: _____

Mr. D.W., Petitioner

Date: 2/3/2020