

No. \_\_\_\_\_

**20-6064**

IN THE

SUPREME COURT OF THE UNITED STATES

Alan Smith

(Your Name)

— PETITIONER

**ORIGINAL**

vs.

Mary Kathleen Webber, et al

— RESPONDENT(S)

**FILED**

**OCT 07 2020**

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

The Court of Appeals of the State of Washington

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Alan Justin Smith #381201

(Your Name)

IB-01 PO Box 769

(Address)

Connell, WA 99326-079

(City, State, Zip Code)

N/A

(Phone Number)

## QUESTION(S) PRESENTED

1. Whether the incommunicado detention of my natural custodial children for over four months at the behest of Bothell Police Department, because I was a person of interest in its criminal investigation and without evidence to support a claim of unfit parenting or other just cause, shocks the Court's conscience - constituting substantive due process coercion under the standard elaborated in Yuan v. Rivera, 48 F. Supp. 2d 335, 344, 347 (SDNY 1999) and Chavez v. Martinez, 538 U.S. 760, 773-75, 781-82 (concurrency by Justice Scalia), 797 (Concurrence by Justices Kennedy, Stevens & Ginsberg), 155 L Ed 2d 984, 123 S Ct 1994 (2003); Where Detective Chissus urged "Help us clear your name. Don't you care about your kids? Amends 6, 14; WA Const. Art. I §§3, 22; WA RCW 7.36.010, 020, 140

The Court of Appeals dismissed my petition as frivolous after the State conceded my claims under state procedure CR 8(d)

2. Whether I am entitled pursuant to 18 USC §3143(b), pending disposition on certiorari and WA RCW 7.36.250, in consideration of extraordinary circumstances under §3145 (c) to release on my own recognizance; where the State conceded denial of counsel of choice, implementation of demand-waiver doctrine, insufficiency of evidence to convict, that I was not actually involved in the violent crime for which I was convicted (in light of exculpatory forensic evidence), and that police failed to establish reasonable probable cause for my arrest and arraignment? Amends 4, 5, 6, 14; WA Const Art 1 §§ 3, 7, 22; WA CrR 8.3(b); WA & RCW 7.36.220; WA ~~CR 8.3~~ RAP 8.3, 16.15(b) substantive due process controls

3. Whether I am entitled to expedited relief from ongoing deprivations of my custodial rights pursuant to WA RCW 26.27.071, .471(3)&(4), .491(1); where my sole contact with my children is through letters restricted to monthly, and I am not permitted to know their actual address; where the State conceded that its officials wrongfully removed and retained my children in violation of my re-exact right of custody, constituting wrongful removal and retention in violation of the Hague Child Abduction ~~Treaty~~ Convention? Amend 14; 1996 Hague Convention; UCCJEA (WA RCW ch 26.27 (substantive due process controls) concurrent to release

4. Whether I am entitled to equitable restitution<sup>v</sup> according to Yuan v Rivera, 48 F. Supp.2d at 346 for abuse of process, for which I applied pursuant to Davis v. Cox, 183 Wn.2d 289, 292-93, 351 P.3d 862 (2015) and WA RCW 26.27.491(2)? Amend 14 - substantive due process

## LIST OF PARTIES

[ ] 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:

Mary Kathleen Webber  
Snohomish County Prosecuting Attorney  
Mission Building, 1st Floor  
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for State of  
Washington

Appointed guardian,  
Kristin Heutschel  
Langermarkstrasse 9  
82166 Graefelfing  
Germany  
(to my knowledge)

} for

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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.

☒ 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,  
☒ is unpublished.

The opinion of the Supreme Court of Washington court appears at Appendix G to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ 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).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 04/03/2020.  
A copy of that decision appears at Appendix G.

☒ A timely petition for rehearing was thereafter denied on the following date: July 8, 2020, and a copy of the order denying rehearing appears at Appendix H.

☐ 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).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In the Constitution of the United States,

Amendment 4 Unreasonable searches and seizures

Amendment 5 (Due process clause)

Amendment 6 Rights of the accused (right to speedy trial, confrontation clause, and Assistance of Counsel)

Amendment 14

Sec. 1. (Due Process Clause)

Sec. 5. (Power of Congress to enforce)

Treaties,

Convention on the Civil Aspects of International Child

Abduction, Done at the Hague, October <sup>25</sup>~~19~~, 1980

(a.k.a. Hague Child Abduction Convention)

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (a.k.a. 1996 Hague Convention), Done at the Hague 19 October 1996

Federal Statutes

18 USC §242 Deprivation of rights under color of law

18 USC §3142(f)(1)(A) crime of violence

18 USC §3143(b) Release or detention pending appeal by the defendant

18 USC §3145(c) Appeal from a release or detention order (exceptional reasons provision)

## Federal Statutes (continued)

22 USC, Chapter 97, International Child Abduction Remedies

§ 9001. Findings and declarations

§ 9002. Definitions

§ 9009. Office of Children's Issues

22 USC, Chapter 98, International Child Abduction Prevention and Return

§ 9101. Definitions

§ 9121. Response to international child abductions

§ 9122. Actions by the Secretary of State in response to patterns of noncompliance in cases of international child abductions

R. Fed. Civil 65 Injunctions and Restraining Orders

## Statutes of the State of Washington

RCW Ch. 7.36 Habeas Corpus • RCW 4.84.185

• RCW 26.19.080

RCW Ch. 26.27 Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

RCW Ch. 4.100 Wrongly Convicted Persons

RCW 49.60.180 Unfair Practices of employers

## State Court Procedures

CR 8 General Rules of Pleading

CR 15 Amended and Supplemental Pleadings

CR 65 Injunctions

CrR 3.3 Time for Trial

CrR 8.3 Dismissal

RAP 8.3 Appellate Court Orders Needed for Effective Review

RAP 10.10 Statement of Additional Grounds for Review

RAP 12.4 Motions for Reconsideration of Decision Terminating Review

→ RAP 13.15A Motions for Discretionary Review

RAP 13.7 Proceedings After Acceptance of Review

RAP Chapter 16

RAP 17.1, 17.4, 17.3 Motions

RAP 17.7 Motion to Modify

• RAP 13.4 Discretionary Review of Decision Terminating Review

RAP 18.8 (b) "gross miscarriage of justice" provision

## Rules of Professional Conduct

RPC 3.6 Trial Publicity

RPC 3.8 Special Responsibilities of a prosecutor

## STATEMENT OF THE CASE

The basic facts of the case are set forth in Appendix ~~K~~<sup>J</sup> - Recitation of Undisputed Facts.

On June 8, 2016 I filed the instance habeas petition in the Supreme Court of Washington. Appendix K. I noted that my motion for substitution in my direct appeal was disregarded after I ~~moved for substitution~~ showed that appellate counsel was prejudicially ineffective, in that he failed to bring forth a valid claim of insufficiency of evidence to convict under the Fourteenth Amendment standard. I requested stay of the direct appeal and the proceeding to make guardianship permanent (Appendix F).

The Supreme Court recharacterized my habeas petition as a personal restraint petition, and the prp was stayed pending outcome of my direct appeal. Orders enclosed in Appendix A. The court called for a State answer, not including the State attorney (only the County Prosecutor was asked for a response). Appendix A. I amended my prp as of right with additional claims, and I filed motions to add respondents and provide provisional relief. There was no answer, although my timely amendment was accepted in the Order of Dismissal, Appendix A.

I filed a motion for discretionary review and an amended motion for discretionary review. The Prosecutor answered the first motion with a one-page letter, stating

that the State relies on the reasoning of the Court of Appeals and would not file an answer to my allegations. Appendix K, 9/22/2019. I filed a motion for order directing State Respondents to Admit or Deny Substantive Allegations with Motion for Leave to File and Serve. The County contested only the Motion for leave to File and Serve, not contesting my claims - including gross miscarriage of justice under RAP 18.8(b) for conviction of the wrong defendant. Appendix K. My amended motion for discretionary review was accepted, ~~but the~~ (Appendix K), but the Motion directing the State to respond and motion for leave to file and serve were denied, because the relief due would be barred (by res judicata as urged by the Prosecutor) because relief would disturb the judgments at trial and on direct appeal. Appendix G, 4/22/2020, Order Denying Review (Commissioner's Ruling). I filed a timely Motion to Modify pursuant to RAP 17.7 and an ex parte petition for speedy relief pursuant to RAP 16.15(b) and the Uniform Child Custody Jurisdiction and Enforcement Act (RCW Ch 26.27).

On July 8, 2020, the panel of judges denied my motion to modify and the petition for speedy relief without comment. RAP 12.4(a) bars a motion for reconsideration of the decision to deny a motion to modify. Thus I believe that my motion to modify served the function of a motion for reconsideration - to ensure full exhaustion of claims had not been reached by the previous decisions.

## Reasons to Grant the Petition

1. The State conceded my claim of substantive due process coercion under the shocks-the-conscience standard as applied in Chi Chao Yuan v. Rivera (Yuan v. Rivera), 48 F. Supp. 2d 335, 344, 347 (SDNY 1999). ¶ Wash. CR 8(d).

The [petitioner]'s procedural and substantive due process claims derive from the liberty interest implicated whenever the state intrudes upon "the most essential and basic aspect of familial privacy -- the right of the family to remain together without the coercive interference of the awesome power of the State." Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977); see also Jeyner v. Dumpson, 712 F.2d 770, 777-78 (2d Cir. 1983). Yuan v. Rivera, 48 F. Supp. 2d at 344. Here, [state officials] separated [myself and my] children for [over] 3 months, from [February 12 until July 19, 2013 without notice of a criminal charge]. A separation this long constitutes significant infringement upon [our] right to live together. Id., 48 F. Supp. 2d at 347.

Whether compelling reasons exist for this Court to exercise the Court's discretionary jurisdiction?

Here, as in Lynum v. Illinois, 372 U.S. 28, 83 S.Ct. 917, 9 L.Ed. 2d 422 (1963)]... the petitioner... had "no reason not to believe that the police had ample power to carry out their threats" 372 U.S. at 534, to continue, for a much longer period if need be, the incommunicado detention-as in fact was actually done.... We cannot blind ourselves to what experience unmistakably teaches: that, even apart from the express threat, the basic techniques present here-the secret and incommunicado detention and interrogation-are devices adapted and used to extort confessions from suspects....

It is well settled that the duty of constitutional adjudication upon this Court requires that the question whether the Due Process Clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of an independent determination here.... [W]e cannot avoid our responsibilities.... Haynes v. Washington, 373 US 503, 514-515, 83 S Ct 1336, 10 L Ed 2d 513 (1963). (emphasis added)

My family attorney, Brook Andrew Goddard, withdrew after the Shelter Care hearing of Feb. 14, in deference to appointed counsel, abc Law Group. Appointed counsel refused to discuss with me whether I had any viable constitutional claims and never raised any. Nor did the juvenile court intervene sua sponte. The State conceded that coercive misconduct of appointed counsels, including criminal defense counsels, contributed to an "outrageous due process violation" under the five-factor analysis in State v. Lively, 130 Wn.2d 1, 24-26, 921 P.2d 1035 (1996) under Wash. Const. art. 1 § 3, <sup>Amend 6</sup> as I argued in the opening brief to my amended personal restraint petition, pp. 12-17. Thus, I had "no reason not to believe that the police had ample power to carry out their threats." The State also conceded my claim that the misconduct was prejudicial to my right to a fair trial, thereby warranting dismissal with prejudice pursuant to Wash. CrR 8.3(b) of the subject criminal charge. Opening brief at 17. See also Montgomery v. Louisiana, 135 L Ed 2d 599, 617, 577 US \_\_\_, 136 S Ct \_\_ (2015) ("[N]o resources marshalled by the a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose." Thus, 'State's weighty interests in ensuring the finality of convictions and sentences' are of no moment.). See also State v. Pierce, 2016 Wash. App. LEXIS 2960, ¶ 44 (unpublished) ("Due process claims are a subcategory of government misconduct under CrR 8.3(b) .... A due process violation merits dismissal of charges under CrR

8.3(b) if the government misconduct is 'so shocking that it violates fundamental fairness. ... But dismissal is appropriate only in the most egregious of cases, 'involving 'outrageous' conduct.' (County of Sacramento v. Lewis, 523 US 833, 846, 847 n8, 118 SCt 1708, 140 L Ed 2d 1043 (1998) (denoting 'most egregious' and 'outrageous' conduct as integral to the shocks-the-conscience standard))

Where official misconduct violated clearly-established law of the Ninth Circuit (as argued below), I have viable claims under civil rights statutes:

As explained in the Reports supporting §1988 civil rights statutes vindicate public policies "of the highest priority," S. Rep. No. 94-1011, p 3 (1976) (quoting Newman v. Pigge Park Enterprises, Inc., 390 US 400, 402, 19 L Ed 2d 1263, 88 SCt 964 (1968) (per curiam)), yet "depend heavily upon private enforcement," S. Rep. No. 94-1011, at 2. Persons who bring meritorious civil rights claims in this right serve as "private attorneys general." Id., at 5. H. R. Rep. No. 94-1558, p 2 (1976). Such suitors, Congress recognized, often "cannot afford legal counsel." Id., at 1. They therefore experience "severe hardship" under the "American Rule." Id., at 2. Congress enacted §1988 to ensure that nonaffluent plaintiffs would have "effective access" to the Nation's courts to enforce civil rights laws. Id., at 1. Buckhannon v. West VA Dept of Health and Human Resources, 149 L Ed 2d 855, 882-83, 532 US 598, 635-36, 121 SCt 1835 (2001) (emphasis added)

Private attorneys are at present unwilling to take up my cause, as the conviction, though unconstitutional, bars my civil rights statutory causes of action. In the view of the attorneys who specialize in civil rights litigation, there is thus no prospect of payment. Notwithstanding the possibility of a future civil rights suit, I am due substantial restitution as addressed in Question 4. Thus,

in pursuing this petition I act as a "private attorney general," in order to release the bar to my civil rights claim and to obtain restitution due for abuse of process, in furtherance of "public policies" of the highest priority." Official misconduct violated the clearly-established law of the Ninth Circuit. Wallis ex Rel Spencer rel Spencer (Wallis v Spencer), 202 F.3d 1126, 1134, 1136 (9th Cir. 2000) (unlawful detention of children of about 2.5 months - from 9/22/1991 to 12/6/1991 - implicated substantive due process); Id., 202 F.3d at 1142 n14 (State had no legitimate interest to justify seizing my children where it lacked a warrant or exigent circumstances); Id., 202 F.3d at 1137 n8 (the same legal standard applies in evaluating Fourth and Fourteenth Amendment claims for the removal of children); Green v. Camreta, 588 F.3d 1011 (9th Cir. 2009) (State officials violated the Fourth Amendment by seizing child without warrant, parental permission, or exigent circumstances from school and conducting forensic interview for law enforcement purpose), aff'd 179 L Ed 2d 1118, 1133 563 US 692, 131 S Ct 2020 (2011) ("With the law thus clearly established, officials who conduct this kind of interview will not receive immunity in the Ninth Circuit.") State officials seized my children: Noelani from Shelton View Elementary and Felix from Little Bears Daycare, respectively. The Dependency Petition, filed 13 Feb. 2013, <sup>Appendix E</sup> reports at p. 4, "A forensic interview was conducted with Noelani Smith. The child had no information about the deceased female." The Petition puts forth a bare claim of "no parent" on p. 3, which - if true - would have comprised "circumstances which constitute a danger of substantial damage to the child's psychological or physical development." However, it was not true, as I was nominally until my first arrest in June. There was no testimony to support a claim of exigent circumstances, such that the claim could not sustain the "reasonable evidence" standard in Wallis, 202

F.3d at 1142 n 14 ("As the Third Circuit recently held, a state has no interest whatever in protecting children from parents unless it has some reasonable evidence that the parent is unfit and the child is in imminent danger.")

Finally, the Washington Court's refusal to consider my claim on habeas has been repudiated in Lehman v Lycoming County Children's Services,

state utilization of habeas to test the legal custody of a child is part of the fabric of its reserved jurisdiction over child custody matters. If a habeas remedy were not provided, some other procedure would be needed to effectuate the state's substantive interest in these relationships. It is purely a matter of procedural detail whether the matter is called 'habeas' or something else. ~~Lehman~~ Id., 458 US 507, 515, 73 LEd 2d 928, 102 S Ct 3231 (1982)\*

Whether the Washington court's dismissal of my petition as frivolous on State law ground was erroneous? RAP 16.11(b)

The commissioner's ruling disregarded my federal constitutional claims, ~~and~~ argued that my petition was not viable under semantically similar, nonconstitutional grounds and applied strict res judicata as the basis for denying access to collateral substantive relief.

[S]tate collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution. If a state collateral proceeding is open to a claim controlled by federal law, the state court has a duty to grant the relief that federal law requires. ... Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge. Montgomery v. Louisiana, *supra*.

The trial judge admitted the accusation of Mr. Morris, whose statement lacked the basis of knowledge needed to justify a Terry Stop, as a "confession" under the state's civil priest-

penitent rule. Order Denying Review, April 3, 2020 at 4, Appendix A. Cf. State v. Howerton, 187 Wn. App. 357, 368-69, 348 P.3d 781 (2015) ("Police may not assume that an informant was an eye-witness....

[T]he informant's bare conclusion of criminal activity unsupported by any factual foundation [that is, personal knowledge] is insufficient to support an investigatory stop."). The trial court found that "All of the [circumstantial] evidence must be considered in light of Mr. Smith's interactions with Mr. Wendell Morris.... Mr. Smith's confession to Mr. Morris does not seem unbelievable...."

Certificate to CrR 6.1, 05/19/2015 at 4, Appendix D, Exh.b.4.

The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of state's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined - a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth. The employment instead, by the trial judge of a standard infected by the inclusion of references to probable reliability resulted in a constitutionally invalid conviction, pursuant to which [I am] now detained "in violation of the Constitution." A defendant has the right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment. Rogers v. Richmond, 365 U.S. 534, 544-45, 5 L.Ed.2d 460, 81 S.Ct. 735 (1961).

and the  
Supreme Court  
of Washington

Beyond the particular facts and parties in this case, the Washington court's proposed procedures carry significant risk of injustice affecting parents and the nonaffluent.

Whether the Washington Court's decision is in conflict with those of relevant appellate courts.

In addition to the conflicts with the foregoing federal appellate court decisions, the Washington Court's disposition conflicts with Brokaw v Mercer County, 235 F. 3d 1000 (7th Cir. 2000) ("[S]ubstantive due process provides the appropriate vehicle for evaluating the constitutionality of [a] four-month separation of [children from their parent[]]. See, e.g. ... Croft v. Westmoreland County Children and Youth Services, 103 F. 3d 1123, 1126 (3rd Cir. 1997) ("a state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse.")]); Kovac v. Cuyahoga County Dept. of Children and Family Servs., 809 F. Supp. 2d 754, 775 (SD Ohio 2011) (seizure and detention upon the State's bare claim of "no parent" had "no application in the context of removal of children from their parent[]."), aff'd 724 F. 3d 687 (6th Cir. 2013) (holding that social workers were acting in a police capacity rather than as legal advocates).

The commissioner overruled the law of the case to find that evidence was sufficient to convict without the coerced confession, thereby applying an alternate standard similar to the harmless-error analysis of Fifth Amendment claims. Ruling at 7. This disposition conflicts with Chavez v. Martinez, 538 US 760, 773, 155 L Ed 2d 984, 123 S Ct 1994 (2003) ("Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that ~~leads to~~ results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause... would govern the inquiry in those cases and provide relief in appropriate circumstances.")

It is of national importance that this Court correct the constitutional errors, for reasons already stated, and in light of the memorandum enacted by the Supreme Court of Washington on June 4, 2020, which states:

Dear Members of the Judiciary and the Legal Community:

We are compelled by recent events to join other state supreme courts around the nation in addressing our legal community.

.....

As lawyers and members of the bar, we must recognize the harms that are caused when meritorious claims go unaddressed due to systemic inequities or the lack of financial, personal, or systemic support. And we must also recognize that this is not how a justice system must operate. Too often in the legal profession we feel bound by tradition and the way things have "always" been. We must remember that even the most venerable precedent must be struck down when it is incorrect and harmful. See Appendix K

August 20

Such harms are manifest where the Order of Dismissal, ~~June 5~~ 2019 disposes of a valid substantive due process claim with: "[w]hile it may be argued that Smith's 'freedom' is limited by the restriction of his parenting rights, the limitation does not rise to the level of restraint within the meaning of the rules governing personal restraint petitions." Id at 18, Appendix A; Commissioner's Ruling, April 3, 2020, at 5, Appendix G. Cf. In re Dependency of J. M. R., 160 Wn. App. 929, 930, 940, 942 (2010) (where a stipulated guardianship was not voluntarily made, the appellate court has jurisdiction and dismissal is mandatory to correct the manifest injustice). ~~In adopting the finding~~ The Order of Dismissal further ~~below, the commissioner's ruling~~ states, "For this same reason, this court does not consider Smith's Motion for Provisional Remedies ... and Motion to Add Respondents, both of which were filed Feb-

ruary 5, 2019." Id at 18n8. In adopting the Order of Dismissal below, the Commissioner's ruling goes on to state on page 2n1, "His motion to order the State to admit or deny allegations is denied because the record is sufficient to establish whether review is warranted under RAP 13.4(b)." Cf. In re Personal Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 882 (1992) ("The State's response must answer the allegations and identify all material disputed questions of fact."); CR 8(d) (effect of failure to deny an averment is an admission where a response is mandated)

2. For purpose of considering my release pending disposition of this petition for certiorari, pursuant to 18 USC § 3143(b), the State has conceded further claims of misconduct prejudicial to my right to a fair trial. These include denial of counsel of choice as a result of my lost employment, which was a stigma-plus due process violation. Amends 6, 14; Kaley v. United States, 188 LEd 2d 46, 66-67 (2014); United States v. Gonzalez-Lopez, 548 US 140, 147-148, 126 S Ct 2257, 165 LEd 2d 409 (2006); RCW 49.60.180; Luis v. United States, 194 LEd 2d 256, 269 (2015); RPC 3.6(a) & 3.8(f). The State also conceded implementation of "demand-waiver doctrine," requiring dismissal with prejudice. Barker v. Wingo, 407 US 514, 529-530, 92 S Ct 2182, 33 LEd 2d 101 (1972); Doggett v. United States, 505 US 647, 655-57, 112 S Ct 2686, 120 LEd 2d 520 (1992). See Motion to Modify, May 3, 2020, at 10, Appendix K. These substantive claims both require dismissal with prejudice under CrR 8.3(b). See Motion to Modify at 2, 9. ~~There was no State's response.~~ I also have an uncontested insufficiency of evidence claim. ~~Id at 9 Amend 14.~~ Id at 9. There was no State's response to my Motion to Modify. Also conceded is my claim that police lacked reasonable probable cause and thus arrested me in violation

of the Fourth Amendment and Wash. Const. Art. I §7. Amended Motion for Discretionary Review, October 10, 2019, at ~~3~~<sup>3</sup>-5, Appendix K.

Nor is the [Bail Reform] Act by any means a scattershot attempt to incapacitate those who are merely suspected of the[] serious crimes. The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee.... §3142(f). United States v. Salerno, 481 US 789, 750, 95 L Ed 2d 697, 107 S Ct 2095 (1987) (emphasis added)

The Bail Reform Act implicates substantive due process. Id., at 481 US, at 749. ~~The~~ "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.... As incarceration ~~is~~ of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution." Demore v Hyung Joon Kim, 538 US 510,<sup>548</sup> 123 S Ct 1708, 155 L Ed 2d 724, 755 (2003) (int. citations omitted) (applying the Bail Reform Act to involuntary civil commitments); ~~see also~~ United States v Abuhamra, 389 F.3d 309, 319 (2d Cir. 2004) §

[I]f a defendant can make the required evidentiary showing, the ~~statute~~ Statute establishes a right of liberty that is not simply discretionary but mandatory: the judge "shall order the release of the person in accordance with section 3142(b) or (c)." ~~§ 3143(a)~~ <sup>§ 3143(a)</sup> (emphasis added). In sum, even though a guilty verdict greatly reduces ~~the~~ a defendant's expectation ~~to~~ in continued liberty, it does not extinguish that interest. The language of § 3143(b) confers a sufficient liberty interest in continued release (on satisfaction of the specified conditions) to warrant some measure of due process protection....

For purpose of § 3145(c), the Seventh Circuit stated, "As a preliminary matter, we agree with the Di Somma court's observation that 'a case by case evaluation is essential.' Id. at 497. ~~And in~~ Di-Somma, the appellant's challenge to his conviction went to... whether he actually committed a crime of violence. Di-Somma, 951 F.2d [494 (2d Cir. 1991)] at 498." United States v. Herrera-Soto, 961 F.2d 645 (7th Cir. 1992) at 647. "The Court notes that in United States v. Herrera-Soto, the Seventh Circuit observed that to qualify under the 'exceptional reasons' standard, it is necessary that the Defendant not simply challenge the 'conduct of his trial,' but that the asserted error go to 'whether he actually committed a crime of violence.'" Herrera-Soto, 961 F.2d at 647. United States v. Cameron, 756 F.Supp.2d 148<sup>153</sup> (D. Me 2010) (1st Cir.) at 153.

~~Thus~~ I have fulfilled this requirement in my ~~Amended Motion for Discretionary Review~~ at Petition for Writ of Habeas Corpus, 08 June 2016, at 15-16, Appendix K; Recitation of Undisputed Facts at 2, 4-5, Appendix J. The State did not respond to my averment: that in light of the DNA test excluding myself from the crime scene, and other forensic evidence, I am the wrong defendant and could not have been involved in the crime for which I was convicted. The DNA evidence is 'clear and convincing,' in context with the other forensic evidence disregarded at trial.

Thus, I fulfill the conditions for release pursuant to 18 USC § 3143(b),<sup>(1)</sup> having "filed... a petition for certiorari,"

(A) by clear and convincing evidence not likely to flee or pose a danger to the safety of any other person or the community

(B)(i) my appeal (by petition for certiorari) is not for the purpose of delay and raises substantial questions likely to result in reversal.

and for purpose of §3143(b)(2), I meet the 'extraordinary circumstances' provision under §3145(c), giving this Court the discretion to order my release as justice provides.

3. For purpose of considering whether substantive due process provides for expeditious relief from ongoing restraints pursuant to Wash. RCW 26.27.051, .071 - the State has conceded that my children were wrongfully removed to and retained in Germany in violation of my ne exeat right of custody. Amended Motion for Discretionary Review at 10, 14-15.

Requiring a return remedy in cases like this one helps deter child abductions and respects the Convention's purpose to prevent harms resulting from abductions. An abduction can have devastating consequences for a child. "Some psychologists believe that the trauma children suffer from these abductions is one of the worst forms of child abuse." H.R. Rep. No. 103-390, p.2 (1993) ... Abductions may prevent the child[ren] from forming a relationship with the left-behind parent, impairing the child's ability to mature. Abbot v Abbot, 176 L Ed 2d 789, 808-09, 561 US 1, 130 S Ct 1983 (2010).

There is [] no reason to remand [such] case for further proceedings.... [T]he burden of litigating a domestic relations proceeding can itself be so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated. ... As we have explained, it is apparent that the [deprivation] violated the Constitution. \*Troxel v. Granville, 147 L Ed 2d 49, 62, 530 US 57, 120 S Ct 2054 (2000).

This question is of national importance, where State officials have intruded upon the prerogative of the United States Dept. of State to ensure good standing with treaties.

### CONCLUSION

The petition for a writ of certiorari should be granted.

*I declare under penalty of perjury that the foregoing is true and correct.*

Respectfully submitted,

*Alan Brink*

Date: October 6, 2020