No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Alan Smith — PETITIONER
(Your Name)

vs.

Mary Kathleen Webber, et al — RESPONDENT(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)

APPENDIX A
Order of the Supreme Court of Washington
Denying Review (Commissioner's Ruling)

Alan Justin Smith #381201
(Your Name)

IB-01 PO Box 769
(Address)

Connell, WA 99326-079
(City, State, Zip Code)

N/A
(Phone Number)

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of	)	No. 97692-9
	)	
ALAN JUSTIN SMITH,	)	**ORDER**
	)	
Petitioner.	)	Court of Appeals
	)	No. 75380-1-I
	)	

Department II of the Court, composed of Chief Justice Stephens and Justices Madsen, González, Yu and Whitener, considered this matter at its July 7, 2020, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify Commissioner's Ruling Denying Review, Ex Parte Motion to File Petition for Speedy Relief, Ex Parte Motion for Temporary Restraining Order, Motion for Telephonic Appearance, and Motion for Preliminary Injunction and Relief from Unlawful Restraint are all denied.

DATED at Olympia, Washington, this 8th day of July, 2020.

For the Court

Stephens, C. J.
CHIEF JUSTICE

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of: ALAN JUSTIN SMITH, Petitioner.	No. 97692-9 Court of Appeals No. 75380-1-I RULING DENYING REVIEW

A jury found Alan Smith guilty of first degree murder for the death of his wife Susann. Division One of the Court of Appeals affirmed his judgment and sentence, this court denied review, and the United States Supreme Court denied his petition for a writ of certiorari. Mr. Smith timely filed a personal restraint petition in this court, which transferred the petition to the Court of Appeals for consideration. Mr. Smith then filed amended petitions and other supplemental motions, some of which were untimely. The State responded to the amended petition, Mr. Smith replied, and the acting chief judge dismissed the amended petition as frivolous. Mr. Smith now seeks this court's discretionary review. RAP 16.14(c).

To obtain this court's review, Mr. Smith must show that the acting chief judge's decision conflicts with a decision of this court or with a published Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(1), (b). To obtain postconviction relief generally, Mr. Smith must show that he was actually and

substantially prejudiced by constitutional error or that his trial suffered from a nonconstitutional error that inherently resulted in a complete miscarriage of justice. *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 347, 325 P.3d 142 (2014). If Mr. Smith ultimately fails to present an arguable basis for collateral relief in law or in fact given the constraints of the personal restraint petition procedure, his collateral challenge must be dismissed as frivolous under RAP 16.11(b). *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015). Because Mr. Smith fails to establish a basis for review under RAP 13.4(b), his motion for discretionary review is denied, as explained below.[1]

In February 2013 Mr. Smith's estranged wife was found dead in her bathroom, having been beaten in the head with a blunt instrument and drowned in her bathtub. The murder occurred about a year after the couple had separated and while they were in the midst of an acrimonious divorce involving a child custody dispute. In the fall of 2012 Mr. Smith had told a woman he was dating, Rachel Amrine, that he wished to get rid of Susann. Ms. Amrine thought Mr. Smith was joking, and she and Mr. Smith discussed using a rubber mallet to kill someone. When in a later conversation Mr. Smith again mentioned his wish to get rid of Susann, Ms. Amrine became concerned that he was serious. Around the time of the first conversation with Ms. Amrine, Mr. Smith bought a rubber mallet like one he had discussed killing Susann with and a set of coveralls. Fabric impression evidence at the murder scene was consistent with the type of coveralls that Mr. Smith had bought, and Susann's injuries could have been caused by a rubber mallet.

[1] Mr. Smith has filed additional motions in this court. His motion to amend his motion for discretionary review is granted, and I have considered his arguments as amended. 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).

The murder investigation soon focused on Mr. Smith. His internet history showed that before the murder he had researched flights to Venezuela and Canada for one adult and two children. After police notified him of Susann's murder, he searched for tickets for only one adult. Data retrieved from a GPS device in Mr. Smith's car revealed that on the day Susann's body was discovered, Mr. Smith had stopped by some dumpsters in a grocery store parking lot after dropping the children off at school. Mr. Smith later took a detour from his usual route from work to home by a route that went by Susann's home, but her street was closed off by police investigating the murder. After driving by the roadblock, Mr. Smith returned to work. Witnesses reported seeing a man riding a bicycle near Susann's home in the early morning on the day that she was murdered. Mr. Smith had recently bought a bicycle, which investigators found abandoned in a ravine near Mr. Smith's home.

In June 2013 Mr. Smith and then-girlfriend Love Thai sought to join City Church, but they were not allowed to join because Mr. Smith was under investigation for murder. While trying to join the church, Mr. Smith met Wendell Morris, a City Church parishioner who had formerly served as a "licensed associate minister" at Eastside Baptist Church. Mr. Morris agreed to meet with Mr. Smith and Ms. Thai at a coffee shop to "minister the Word of God" to them. When Mr. Morris arrived, Ms. Thai approached him and told him that Mr. Smith was in his car and was upset and needed support. While Mr. Smith spoke to Mr. Morris, Mr. Morris said that he needed to know if Mr. Smith was involved in the murder for which he was being investigated. Mr. Smith looked around and stated that he was concerned about how "safe" the area was. Mr. Morris told Mr. Smith that whatever he said would stay between them. The two then went for a walk, during which Mr. Smith confessed that he had killed Susann. Mr. Smith then told Mr. Morris, "I trust you with this information," which Mr. Morris took to be Mr. Smith's grant of permission to report his statements to the police. During

the next several days, Mr. Morris tried to persuade Mr. Smith to turn himself in. But when Mr. Smith failed to do so, Mr. Morris reported Mr. Smith's confession to police.

The State charged Mr. Smith with first degree murder. He moved to suppress his confession, arguing that it was subject to clergy-penitent privilege. The trial court held an evidentiary hearing at which pastors from Eastside Baptist and City Church testified. Eastside Baptist Pastor Arthur Banks testified that as a licensed associate minister Mr. Morris had been allowed to perform certain functions of a pastor, but only under a pastor's supervision. Mr. Morris had never been ordained as a minister at Eastside Baptist, which would have allowed him to perform such functions without supervision. Eastside Baptist did not have an organized confession but urged parishioners to confess their sins to God. Banks explained that when Mr. Morris left Eastside Baptist to join City Church he ceased to be a licensed minister. City Church pastor Jason Michalski testified that his church's policies require staff to inform parishioners that any information that they share may be disclosed to other staff members, and that the church reserves the right to report such information to the authorities. Mr. Michalski said that City Church parishioners are not required to confess their sins to pastors or leaders. He further testified that Mr. Morris had never been a licensed or ordained minister at the church, and he explained that Mr. Morris was only a leader of a "city group," meaning a small group that meets outside church to discuss scripture. The court ruled that the statement was admissible because clergy-penitent privilege did not apply. Mr. Smith waived his right to a jury trial.

There was an 18-month delay before trial, with most of the continuances at the request of defense counsel. At trial the State presented photographs of bloody footprints from the crime scene and testimony from forensic identification specialist Sergeant Shelly Massey of the Royal Canadian Mounted Police, who compared the photographs to impressions of Mr. Smith's feet. Sgt. Massey testified that the comparison showed

that Mr. Smith could have made the impression left at the crime scene. Mr. Smith moved for a hearing on the admissibility of Sgt. Massey's testimony as scientific evidence. The trial court denied the motion, ruling that the testimony only involved a physical comparison of images, and that Sgt. Massey was able to state only that Mr. Smith had possibly left the footprints at the scene. The court found Mr. Smith guilty as charged.

In his personal restraint petition, Mr. Smith argued that (1) the State failed to prove his guilt beyond a reasonable doubt, (2) his right to a speedy trial was violated, (3) his trial counsel was ineffective, (4) his statements to Mr. Morris were inadmissible, (5) his statements to police were inadmissible, (6) his children were improperly removed from his custody, (7) prosecutors committed misconduct, and (8) he did not voluntarily waive his right to a jury trial. The acting chief judge dismissed each of these claims. Mr. Smith now seeks review of several issues in his amended motion for discretionary review: (1) whether the removal of his children violated his due process rights, (2) whether Washington courts have jurisdiction to determine custody of his children, (3) whether cumulative government misconduct prejudiced his right to a fair trial, (4) whether the corpus delicti rule precludes admission of his confession, and (5) whether the State proved guilt beyond a reasonable doubt. The issues Mr. Smith previous raised that are not presented here for review are deemed waived. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

As to the first two issues presented, relief is not available here. A personal restraint petition is limited to resolving an unlawful restraint and is not applicable when another form of relief offers a remedy. RAP 16.4(d); *see also In re Pers. Restraint of McNeil*, 181 Wn.2d 582, 590-93, 334 P.3d 548, 554 (2014). Child dependency and parental rights termination proceedings are governed by statute and the procedures afforded therein provide Mr. Smith with an adequate means of challenging the court's jurisdiction and process for removal of his children. *See* Chapter 13.34 RCW. The

acting chief judge properly applied RAP 16.4(d), and Mr. Smith fails to demonstrate a basis for review under RAP 13.4(b).

As to Mr. Smith's government misconduct claim, he first argues that the State delayed issuing a DNA report. The acting chief judge held that Mr. Smith failed to cite to any portion of the record supporting this accusation. And Mr. Smith raised other claims of misconduct, which the acting chief judge held were conclusory and unsupported. In filing a personal restraint petition, a petitioner must state with particularity facts that, if proven, would entitle him to relief. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). This means that the petitioner is not required to actually present evidence but must at least identify the existence of material evidence and where it can be found. *In re Pers. Restraint of Ruiz-Sanabria*, 184 Wn.2d 632, 641, 362 P.3d 758 (2015). And a petitioner may support a petition by relating material facts within the petitioner's personal knowledge, even if the petitioner's version of the facts are self-serving. *Id.* But bald assertions and conclusory allegations are not sufficient. *Rice*, 118 Wn.2d at 886. Here, in his personal restraint petition Mr. Smith made only broad sweeping allegations of government misconduct that were not supported as required by *Rice*. Accordingly, Mr. Smith fails to show any basis for reviewing these claims under RAP 13.4(b). *See In re Pers. Restraint of Rhem*, 188 Wn.2d 321, 327, 394 P.3d 367 (2017).

Mr. Smith also argues that his confession was inadmissible under the corpus delicti rule. The corpus delicti rule addresses the admissibility of statements but primarily concerns the sufficiency of the State's evidence. *State v. Cardenas-Flores*, 189 Wn.2d 243, 263, 401 P.3d 19 (2017). The corpus delicti of a crime involves two elements: (1) an injury or loss (2) caused by someone's criminal act. *Id.* The State need not provide independent evidence of mens rea. *Id.* at 264. As the acting chief judge explained, here the State presented evidence that the victim suffered multiple head

injuries that were inflicted by a weapon. This is sufficient to show both elements of mens rea, and the acting chief judge faithfully applied the correct principles in adjudicating this claim. Accordingly, Mr. Smith fails to demonstrate any basis for review.

Finally, Mr. Smith argues that the State failed to prove him guilty beyond a reasonable doubt. But following a conviction, the evidence is viewed in a light most favorable to the State, with all reasonable inferences from circumstantial evidence viewed in a manner supporting the prosecution. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Here, the evidence showed that Mr. Smith had expressed a desire to get rid of the victim because of an acrimonious divorce, he had purchased items consistent with the murder weapon and evidence found at the scene, a man was seen riding a bike near the scene of the murder and Smith's bike was later located nearby, and Smith made internet searches for flights to Venezuela after he was notified of the death. Viewed in the light most favorable to the prosecution, taken together and drawing all inferences in favor of the State, this evidence was sufficient to support the murder conviction.

In sum, Mr. Smith fails to demonstrate a basis for review under RAP 13.4(b).

The motion for discretionary review is denied.

Michael E. Johnston

COMMISSIONER

April 3, 2020

THE SUPREME COURT
STATE OF WASHINGTON

SUSAN L. CARLSON
SUPREME COURT CLERK

ERIN L. LENNON
DEPUTY CLERK/
CHIEF STAFF ATTORNEY

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

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

September 23, 2019

LETTER SENT BY E-MAIL

Alan Justin Smith (**sent by U. S. mail only**)
#381201
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326-0769

Hon. Richard D. Johnson, Clerk
Court of Appeals, Division I
600 University Street
One Union Square
Seattle, WA 98101-1176

Mary Kathleen Webber
Snohomish County Prosecutors Office
MSC 504
3000 Rockefeller Avenue
Everett, WA 98201-4061

Re: Supreme Court No. 97692-9 - Personal Restraint Petition of Alan Justin Smith
Court of Appeals No. 75380-1-I

Clerk, Counsel and Mr. Smith:

The Petitioner's "Motion for Discretionary Review", which seeks review of the Court of Appeals order that dismissed his personal restraint petition in the above referenced cause number, was received on September 23, 2019. Because the motion was placed in the institution's mail on September 19, 2019, it is considered timely filed under GR 3.1. The case has been assigned the above referenced Supreme Court cause number. A copy of the motion is enclosed for the Respondent.

Pursuant to RAP 17.4(e), the Respondent "may" submit an answer to the motion. If the Respondent wishes to submit an answer to the motion for discretionary review, the answer should be served and filed by October 23, 2019. Any reply to the answer should be served and filed by November 22, 2019. The matter will be submitted to the Court Commissioner for consideration upon the receipt of the answer and reply, or the expiration of the due dates for filing the same.

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

Sincerely,

Susan L. Carlson
Supreme Court Clerk

SLC:bw

Enclosure for Respondent

SUSAN L. CARLSON
SUPREME COURT CLERK

ERIN L. LENNON
DEPUTY CLERK/
CHIEF STAFF ATTORNEY

THE SUPREME COURT
STATE OF WASHINGTON

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October 15, 2019

Alan Justin Smith
#381201
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326-0769

Mary Kathleen Webber **(sent by e-mail)**
Snohomish County Prosecutor's Office
MSC 504
3000 Rockefeller Avenue
Everett, WA 98201-4061

Re: Supreme Court No. 97692-9 - Personal Restraint Petition of Alan Justin Smith
Court of Appeals No. 75380-1-I

Counsel and Mr. Smith:

On October 15, 2019, this Court received the Petitioner's "Motion for Leave to File Amended Motion for Discretionary Review" and "Motion for Discretionary Review (Amended"). Copies of the motions are enclosed for the Respondent.

Counsel for Respondent may serve and file any answer to the motion to file an amended motion for discretionary review by October 29, 2019. Any reply to any answer should be served and filed by November 12, 2019.

The motion will be submitted to the Court Commissioner for consideration upon the receipt of the answer and reply, or the expiration of the due dates for filing the same.

Sincerely,

Erin L. Lennon
Supreme Court Deputy Clerk

ELL:sk

Enclosures for Respondent

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Alan Smith — PETITIONER
(Your Name)

vs.

Mary Kathleen Webber, et al — RESPONDENT(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)

APPENDIX A
Decision Dismissing Personal Restraint Petition in the WA Court of Appeals and Related Orders

Alan Justin Smith #381201
(Your Name)

IB-01 PO Box 769
(Address)

Connell, WA 99326-079
(City, State, Zip Code)

N/A
(Phone Number)

FILED
8/20/2019
Court of Appeals
Division I
State of Washington

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

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	)	No. 75380-1-I
ALAN JUSTIN SMITH,	)	ORDER OF DISMISSAL
Petitioner.	)	

Alan Smith filed a personal restraint petition challenging his conviction for first degree murder in Snohomish County Superior Court Cause No. 13-1-01546-8. To successfully challenge a judgment and sentence by means of a personal restraint petition, a petitioner must establish either (1) actual and substantial prejudice arising from constitutional error, or (2) nonconstitutional error that inherently results in a "complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Because Smith's petition presents no arguable basis for collateral relief, it must be dismissed.

A personal restraint petition must be filed within one year after the judgment and sentence becomes final. RCW 10.73.090. A collateral attack on a judgment and sentence filed after this time period is time-barred unless a petitioner can show that: (1) the judgment and sentence is facially invalid or was not entered by a court of competent jurisdiction, or (2) an exception under RCW

10.73.100 applies.[1] A petitioner bears the burden of demonstrating that his request for relief is timely. In re Pers. Restraint of Quinn, 154 Wn. App. 816, 832, 226 P.3d 208 (2010).

Smith's judgment and sentence became final on January 19, 2019, the date the United States Supreme Court denied his petition for a writ of certiorari in his direct appeal. He has filed a significant number of briefs and pleadings in this action. This court has reviewed and considered all of Smith's pleadings that fall within the one-year timeline, which include (1) his original petition, filed June 14, 2016; (2) his first amended petition, filed November 2, 2018, and (3) his second amended petition, portions of which were filed December 31, 2018 and January

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[1] "The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;
(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
(5) The sentence imposed was in excess of the court's jurisdiction; or
(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard."

RCW 10.73.100.

18, 2019. This court also considered Smith's replies to the State's response, dated January 28, 2019 and May 9, 2019.[2]

However, some of Smith's non-responsive pleadings were filed after the expiration of the one-year time limit, to-wit: (1) a document entitled "Revision Note" filed February 1, 2019; and (2) what appears to be an addendum to Smith's confrontation clause claim, filed February 1, 2019. These pleadings, which were untimely filed, were not considered by this court. See In re Pers. Restraint of Fowler, __ Wn. App. __, 442 P.3d 647, 649 (2019) (a petitioner may amend an initial petition or file a supplemental brief only if the supplemental brief is timely filed).[3]

The facts are taken from the unpublished opinion of this court in Smith's direct appeal, State v. Smith, noted at 197 Wn. App. 1027 (2017).

> On February 12, 2013, Susann Smith, wife of Alan Smith, did not show up for work. Her employer called the police, who went to her residence and found her lying face down in the bathtub. Her death was caused by multiple head injuries and asphyxia due to drowning.
>
> At the time of her death, Susann had been separated from Smith for over a year and the two were in the midst of acrimonious

---

[2] This court received a second copy of Smith's reply brief, filed May 20, 2019, that appears to be identical to the first.

[3] Smith does not specifically address the requirements of RCW 10.73.090 with regard to these pleadings. To the extent that Smith's claim that he is "actually innocent" of the murder is a request that the time bar be equitably tolled, this court declines to do so. A petitioner who can demonstrate actual innocence may use that claim as a gateway to reaching otherwise untimely claims, such as ineffective assistance of counsel. In re Pers. Restraint of Weber, 175 Wn.2d 247, 284, 284 P.3d 734 (2012). The gateway actual innocence exemption applies if, in light of reliable new evidence, it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt. Weber, 175 Wn.2d at 258-59. Smith fails to present such new evidence.

dissolution proceedings. Smith was frustrated and angry with the way the proceedings were going and was very concerned that Susann would take the children away from him and return to her home country of Germany.

[In] Fall 2012, Smith was involved with a woman named Rachel Amrine. He told Amrine that he would like to just get rid of Susann and asked if she knew of a way to make that happen without anyone knowing. In a joking manner, they discussed the possibility of using potassium chloride or a rubber mallet to kill someone. When Smith again mentioned his desire to have Susann disappear, however, Amrine started to wonder if he was being serious.

Smith purchased a rubber mallet and a pair of disposable coveralls in October 2012. Forensic testing and analysis indicated that Susann's injuries were consistent with the type of mallet that Smith purchased, but did not conclusively establish that her wounds were caused by that type of mallet. Fabric impressions found at the scene were also consistent with the impressions that would have been left by the coveralls that Smith purchased.

Susann's body was found in the home she formerly shared with Smith. There were no signs of forced entry and the door was unlocked. Blood was found in the bedroom, the bathroom, and near the front door. There were bloody footwear impressions in the kitchen, the hallway, and leading to the front door. A hand towel found under the body contained Smith's DNA.

Based on surveillance footage and eyewitness accounts, there had been a man riding a bike near Susann's residence early in the morning on February 12, 2013. Smith had purchased a bicycle from Gregg's Green Lake in November 2012. A few weeks after Susann's death, the bike was found abandoned in a ravine across from Smith's apartment complex.

A global positioning system (GPS) device found in Smith's vehicle, provided data that allowed investigators to track Smith's movements. The Bothell police observed that on February 12, 2013, Smith made some detours from his usual daily route from home to his children's day care and then to his job at Boeing. That morning he stopped at some dumpsters in an Albertsons' parking lot after stopping at the day care center. Around 2:00 p.m., Smith left Boeing and drove in the vicinity of Susann's residence. The road leading to her home was barricaded, however, by police who

were investigating her death. Smith then drove to a gas station and later returned to Boeing.

Smith's internet search history for February 2013 revealed searches for flights to Venezuela and Canada, initially for one adult and two children. After he was notified of his wife's death, however, he began to search for tickets for only one adult.

The investigation into Susann's death continued for a number of months. During that time, in June 2013, Smith began dating a woman named Love Thai. Thai and Smith wanted to attend City Church's Belltown campus. They were told that because of their involvement in the homicide investigation they could not attend services at any of the City Church campuses or be part of the church's community groups.

Smith met Wendell Morris, a City Church group leader at a church-sponsored event. Sometime after learning that she and Smith could no longer attend services at City Church, Thai contacted Morris's wife. The Morrises decided to meet with Thai and Smith to "minister the Word of God" to them.

Morris testified that he had agreed to meet Smith at a coffee shop in South Lake Union. When Morris arrived, Thai approached him, told him that Smith was outside in his car, and that he needed some support. Morris went to Smith's car and saw that Smith was upset. Morris told Smith that he had come "to point [him] to the Lord, [and] the Word of God." Smith began to speak with Morris about some of his recent struggles.

Morris told Smith that he needed to know if Smith was involved in the murder of his wife. Smith looked around and expressed concern about how "safe" the area was. Morris told Smith that whatever he said would stay between the two of them.

The two decided to take a walk, and then Smith said "[w]hat you asked me about in the car, the answer is yes." When asked for clarification, Smith stated, " 'I did it to her,' " and became emotional. Smith then looked at Morris and stated "I trust what you do with this information." Morris understood Smith's comment to mean that he had Smith's permission to take his statements to the authorities.

Smith and Morris continued their conversation and Smith indicated that he would like to be baptized. Morris decided that they could go that day to the Citadel church in Des Moines, because it was open

> late. When they arrived at the Citadel they discovered that the church did not have a baptistery. Morris had mentioned earlier that he could possibly baptize Smith and he agreed to do so at Alki beach in West Seattle.
>
> During the next few days, Morris contacted Smith by phone and text message to try to persuade him to speak with the authorities. When Smith declined to turn himself in, Morris called the police on June 25, 2013.

Smith waived his right to a jury trial and moved to suppress his statements to Morris. At the suppression hearing there was extensive testimony about Morris's status as a spiritual advisor with the church. The trial court determined that while Morris told Smith the confession would be confidential, it was not privileged because Morris was acting in his individual capacity. The trial court denied the motion to suppress. The trial court ultimately found Smith guilty as charged.

1. Sufficiency of the evidence

Smith first contends that a "[p]reponderance of probative evidence shows that I am actually innocent." Although not entirely clear, he appears to challenge the sufficiency of the evidence to convict him. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). An appellant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences reasonably drawn from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable, and we defer to the trier of fact on

witness credibility and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Smith argues that various measurements taken by the medical examiner were inconclusive as to the date and time that Susann was killed. He also notes that there was DNA from an unknown male on Susann's body at the time of her death.

But Smith asserted both of these defenses at trial. Nevertheless, the trial court noted that there was substantial circumstantial evidence identifying Smith as the perpetrator. Smith and Susann were in the midst of an acrimonious dissolution and Smith was worried Susann would return to Germany with the children. Smith made statements that he would like to "get rid of" Susann to other witnesses. He purchased items consistent with the murder weapon and fabric impressions at the scene. A man was seen riding a bike near Susann's residence early in the morning on the date she was found dead, and Smith's bike was later found abandoned in a ravine across from Susann's apartment complex. GPS evidence showed that Smith left work mid-day during the day of her death and drove near her residence, which was barricaded by police, and then drove back to work. Smith also began searching for flights to Venezuela as soon as he was notified of Susann's death. The trial court found that this evidence, combined with

Smith's confession to Morris, established beyond a reasonable doubt that Smith killed Susann.[4]

2. Preaccusatorial delay and speedy trial

Smith contends that preaccusatorial delay violated his right to due process. He argues that he was considered as a "person of interest" by law enforcement as early as February 2013 but was not charged with a crime until July 2013. Courts utilize a three-prong test to determine whether such delay violates due process: "(1) the defendant must show actual prejudice from the delay; (2) if the defendant shows prejudice, the court must determine the reasons for the delay; (3) the court must then weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution." State v. Oppelt, 172 Wn.2d 285, 295, 257 P.3d 653 (2011). Here, Smith fails to identify any significant delay, nor that he was prejudiced in any way. He asserts that his children were "seized without a warrant" in February, but fails to demonstrate how this decision, presumably by order of the juvenile court, related in any way to the length of time until he was charged.

[4] Smith contends that the charging document was "inartful" because Susann's actual time of death was outside the charging period. Relying on his same argument that the medical testimony was inconclusive as to the exact time of death, he contends that the evidence was insufficient to show that he killed Susann "on or about the 10th day of February, 2013 through the 11th day of February, 2013," as specified in the charging document. But the trial court disagreed, finding that the other circumstantial evidence supported the testimony that she was killed during this time period.

Smith also argues that he was denied his right to a speedy trial.[5] Smith's claim appears to hinge on the fact that he was charged with first degree murder on July 19, 2013 but his trial did not begin until approximately a year and a half later, on January 15, 2015. He argues that a delay of 18 months is presumptively prejudicial.

A defendant has a constitutional right to speedy trial under both the Sixth Amendment and Washington Constitution Art. 1, §22. To establish a constitutional speedy trial violation, the "defendant must show that the length of the delay crossed a line from ordinary to presumptively prejudicial." State v. Iniguez, 167 Wn.2d 273, 283, 217 P.3d 768 (2009). This analysis is highly fact-specific. Iniguez, 167 Wn.2d at 283, 292. Once the defendant demonstrates a delay is presumptively prejudicial, a court analyzes the factors set out in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L.Ed. 2d 101 (1972) to determine if a constitutional violation occurred. Iniguez, 167 Wn.2d at 283. The factors to be considered include the length of the delay, the reason for the delay, the extent to which the defendant asserted his speedy trial right, and the prejudice to the defendant because of the delay. Iniguez, 167 Wn.2d at 283-84. These factors are not exclusive, and none are required for a delay to be a constitutional violation. Iniguez, 167 Wn.2d at 283.

[5] As the State notes, Smith does not specifically identify whether he asserts a constitutional or rule-based violation. Because Smith does not provide any documents, such as continuance orders, establishing whether he was brought to trial within the time limits of CrR 3.3, this court does not assess any claim of a rule-based violation.

Here, the delay was sufficient long to be considered presumptively prejudicial, triggering the Barker analysis. Nevertheless, Smith has not established a speedy trial violation. 18 months is not an especially lengthy delay in the case of first degree murder, particularly when there is significant forensic evidence. Each of the trial continuances was requested by Smith's attorney. Smith objected only to the length of the final continuance. And he does not show particularized prejudice, such as excessive and oppressive pre-trial incarceration or impairment to his defense. All four Barker factors weigh in favor of the State. Smith fails to show that the delay constituted a speedy trial violation.

3. Ineffective assistance of counsel

Smith next contends that his attorney at trial was constitutionally ineffective, in violation of the Sixth Amendment. To establish ineffective assistance of counsel, a defendant must demonstrate both that his attorney's representation was deficient, i.e., that it fell below an objective standard of reasonableness, and resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "If either part of the test is not satisfied, the inquiry need go no further." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). There is a strong presumption that a defendant received effective representation. McFarland, 127 Wn.2d at 336.

Smith contends that his attorney failed to advise him of his speedy trial rights or the possibility of filing a motion to dismiss for speedy trial violations. As discussed above, because Smith does not demonstrate a speedy trial violation, such a decision was not unreasonable.

Smith argues that his attorney failed to submit the transcript of Morris's interview with law enforcement. But Smith fails to identify what purpose its admission would have served, and thus cannot establish it was unreasonable not to do so.

Smith argues that his attorney "disregarded my instructions to consult with my therapist Dr. Eusario." Citing Harris v. Blodgett, 853 F. Supp. 1239 (W.D. Wash. 1994), aff'd sub nom. Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995), Smith contends that "[i]n an aggravated murder case, the reasonable objective standard entails hiring a psychologist/psychiatrist to advise counsel for various reasons." But Harris does not stand for so broad a proposition. In fact, the court in Harris specifically held that, while it was ineffective for trial counsel to fail to investigate the defendant's mental health in that particular case, "the court does not conclude that a defense psychiatrist is necessary in *every* aggravated murder case." Harris, 853 F. Supp. at 1260.

Smith next contends that trial counsel failed to thoroughly investigate Susann's time of death. He contends that this failure "more likely than not impacted the outcome." But a personal restraint petition must set out the facts underlying the claim and the evidence available to support the factual assertions. In re Pers. Restraint of Rice, 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992). Mere

speculation or conclusory allegations are not sufficient to command judicial consideration and discussion in a personal restraint proceeding. Rice, 118 Wn.2d at 886 (competent, admissible evidence, such as affidavits, required to establish facts entitling petitioner to relief). Smith's conclusory assertion is not sufficient to warrant relief.

Smith raises several other conclusory claims of ineffective assistance, including that (1) trial counsel failed adequately consult with him; (2) that trial counsel failed to object to "cumulative non-probative evidence," the prosecutor's comments on his right to silence, and opinions of witness credibility; (3) that trial counsel failed to argue that the motive for the crime was sexual, given that Susann was found killed in her bed with evidence of recent sexual activity; (4) that trial counsel should have submitted a transcript of his daughter's testimony from the dependency trial; and (5) that his attorney's "legal investigation of voluntariness was unreasonably confined to in-custody proceedings." These claims, unsupported as they are by citation to the record or to relevant legal authority, are too conclusory to permit review.

Finally, Smith contends that appellate counsel was ineffective. To establish ineffective assistance of appellate counsel, a petitioner must establish that there were meritorious claims that counsel failed to raise in a direct appeal. Because none of the claims Smith raises here have merit, he fails to establish appellate counsel was ineffective for failing to raise them. Smith also asserts that appellate counsel was ineffective for failing to move to withdraw pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). But Smith, who

was able to file a pro se statement of additional grounds in his direct appeal, fails to establish how he was prejudiced thereby.

4. Admissibility of Smith's statements to Morris

Smith argues that the admission of Morris's testimony violated his Sixth Amendment right to confrontation. The confrontation clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. Const. amend. VI. The confrontation clause bars the admission of "testimonial" hearsay unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). But Morris testified at trial and Smith had the opportunity to cross-examine him. Morris's testimony did not implicate the confrontation clause.

Smith next argues that the confession to Morris was a "privileged communication to [a] spiritual advisor and inadmissible." But Smith raised this identical argument in his direct appeal. A petitioner may not renew issues that were considered and rejected on direct appeal unless the interests of justice require relitigation of those issues. In re Pers. Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). "A personal restraint petition is not meant to be a forum for relitigation of issues already considered on direct appeal[.]" In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 491, 965 P.2d 593 (1998). Smith does not establish a basis for reconsideration of this claim.

Smith next argues that the statements to Morris were improperly admitted pursuant to ER 804(b)(3). ER 804(b)(3) provides that hearsay statements against penal interest are admissible if (1) the declarant is unavailable to testify, (2) the statements so far tend to expose the declarant to criminal liability that a reasonable person in the same position would not have made the statement unless convinced of its truth, and (3) corroborating circumstances clearly indicate the statement's trustworthiness. Again, Morris was not unavailable to testify at trial, and there is no evidence that the statements were admitted pursuant to ER 804(b)(3).

Smith argues that his statements to Morris should have been excluded under the corpus delicti rule. The doctrine of corpus delicti protects against false confessions. "Corpus delicti means the body of the crime and must be proved by evidence sufficient to support the inference that there has been a criminal act." State v. Brockob, 159 Wn.2d 311, 327, 150 P.3d 59 (2006) (internal quotation marks omitted). A defendant's incriminating statement alone is not sufficient to establish that a crime took place. Brockob, 159 Wn.2d at 328. The State must present "evidence independent of the incriminating statement that the crime a defendant described in the statement actually occurred." Brockob, 159 Wn.2d at 328. While the independent evidence need not be sufficient to support a conviction, it "must provide prima facie corroboration of the crime described in a defendant's incriminating statement." Brockob, 159 Wn.2d at 328.

In a homicide case, the corpus delicti consists of two elements the State must prove at trial: (1) the fact of death and (2) a causal connection between the

death and a criminal act.[6] State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). The corpus delicti can be proved by either direct or circumstantial evidence. Aten, 130 Wn.2d at 655. Here, there is no question that Susann's death was the result of a criminal act. She sustained multiple brutal head injuries inflicted by a mallet-like weapon. Considering all of the circumstances and drawing all reasonable inferences in the light most favorable to the State, the State presented sufficient corroborating evidence establishing the corpus delicti of first degree murder.

Finally, Smith contends that the statements to Morris should be inadmissible because they were "presumptively unreliable" due to having been made under duress. He also contends that the admission of his statements to Morris rendered his waiver of his right to a jury trial involuntary. Smith cites no legal authority in support of either of these claims, and this court does not consider them further.

5. Admissibility of Smith's statements to law enforcement

Smith next contends that his confession to law enforcement should have been inadmissible because it was obtained through coercion. He contends that he cooperated with the law enforcement investigation because detectives told him that his children were in Child Protective Services (CPS) custody and that "[a]

[6] Contrary to Smith's apparent belief, proof of the identity of the person who committed the crime is not part of the corpus delicti, which only requires proof that a crime was committed by someone. City of Bremerton v. Corbett, 106 Wn.2d 569, 574, 723 P.2d 1135 (1986).

reasonable person would not consider himself free to ignore police requests for information under the circumstances."

Detectives drove to Boeing to talk with Smith on February 12, 2013, the date of Susann's death. They interviewed Smith for approximately 25-30 minutes until one of them asked Smith if he had any reason to harm his wife and Smith requested an attorney. The detectives ceased questioning him and told him he was free to leave. Smith went back to his office and one of the detectives called his commander, who stated that Smith's children were being placed in CPS custody. The detectives then informed Smith that CPS was taking custody of his children and he could obtain the CPS paperwork at the Bothell Police Department. Smith drove to the police department. En route, he called the detective's phone and authorized a search of his car and apartment, and offered to voluntarily give a DNA sample. The searches took place that evening. At the conclusion of the search, Smith gave another hour-long interview to the detectives.

On February 16, 2013, the detectives visited Smith's apartment again. A detective told Smith that CPS would retain the children until Smith was cleared in the murder investigation. Smith willingly spoke with detectives for some time but eventually became agitated and told the detectives to leave. On February 22, 2013, detectives returned to Smith's apartment to serve search warrants and talked with Smith for approximately an hour. Smith ended the interview, stating "I don't have anything else to say." On March 8, 2013, Smith went to the police department to retrieve the keys to his car. The detectives asked if they could

question Smith further. Smith refused to answer any questions on the advice of his attorney. On June 27, 2013, detectives contacted Smith and told him they had spoken to Morris. Smith indicated he did not want to speak to the detectives. He was arrested and read his Miranda rights. Following a CrR 3.5 hearing, the trial court found that Smith was not in custody on February 12, February 16 or February 22 because a reasonable person in Smith's position would not have believed he was in custody.

A defendant's statements made in a noncustodial setting are voluntary and therefore admissible if, under the totality of the circumstances, the statement was not coerced. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). A statement is coerced if it is obtained by promises or misrepresentations by law enforcement that overcome the free will of the defendant. Broadaway, 133 Wn.2d at 132. An officer's encouragement to a suspect to cooperate, or other psychological ploys, may affect a suspect's decision to confess, but the confession is voluntary "so long as that decision is a product of the suspect's own balancing of competing considerations." State v. Unga, 165 Wn.2d 95, 102, 196 P.3d 645 (2008).

Here, there is nothing in the record indicating that Smith's free will was overcome by the fact that his children were in CPS custody. On several occasions Smith felt free to terminate questioning by detectives and indeed did

so. There was substantial evidence that Smith's statements to detectives were voluntary.[7]

6. Challenges to dependency and guardianship proceedings

Smith challenges orders of dependency and guardianship placing his minor children in the custody of a relative, contending that the seizure of his children violated substantive due process, that the orders infringe on his free exercise of religion, that reconciliation services were not offered to him, that his stipulation to the orders was made under duress, and that appointed counsel in these proceedings was ineffective. But while 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. See, e.g., In re Welfare of M.R., 51 Wn. App. 255, 258, 753 P.2d 986 (1988) ("[A] personal restraint petition cannot be used to challenge an order terminating parental rights.").[8] This court cannot consider Smith's challenges related to the dependency or guardianship proceedings in the context of his personal restraint petition.

7. Governmental misconduct

[7] Because Smith's encounters with law enforcement were voluntary, we do not address Smith's claim, raised for the first time in reply, that evidence obtained via the searches of his car and apartment should also have been suppressed.

[8] For the same reason, this court does not consider Smith's "Motion for Provisional Remedies to Prevent Children's Further Removal or Concealment" and "Motion to Add Respondents," both of which were filed February 5, 2019.

Smith cites various instances of governmental misconduct that he contends entitle him to dismissal under CrR 8.3(b). But as Smith acknowledges, he did not at any time request dismissal on these grounds. Nor, despite what Smith suggests, does this court have this ability to dismiss criminal charges pursuant to CrR 8.3(b).

Smith next contends that the State committed misconduct when it belatedly disclosed "the exculpatory DNA report." He argues that the State's actions prejudiced his right to a fair trial "by compelling him to choose between the right to a speedy trial and the right to be represented by adequately prepared counsel." But Smith cites to no portion of the record demonstrating when the report was provided or how his right to a speedy trial was affected.

Smith raises several other conclusory claims of misconduct. He contends that the prosecutor improperly commented on his constitutional right to silence and expressed opinions as to Smith's guilt. He also argues that the State caused him to be fired from his job at Boeing, thereby causing him to be unable to retain the counsel of his choice. These claims are not supported by adequate citation to the record nor reasoned legal authority.

8. Waiver of jury trial

Citing Voigt v. Webb, 47 F. Supp. 743 (E.D. Wash. 1942), Smith argues that the right to a jury trial cannot be waived in cases of first degree murder. But while RCW 10.01.060 prevents a defendant charged with a capital offense from waiving the right to a jury trial, Smith was charged with and convicted of first

degree murder, which is not a capital offense. Smith was entitled to waive his right to a jury trial.

Because Smith has failed to demonstrate that he is unlawfully restrained or entitled to relief, now, thereby, it is

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Mann, A.C.J.

Acting Chief Judge

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Alan Smith — PETITIONER
(Your Name)

vs.

Mary Kathleen Webber, et al — RESPONDENT(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)

APPENDIX B
Decision on Direct Appeal

Alan Justin Smith #381201
(Your Name)

IB-01 PO Box 769
(Address)

Connell, WA 99326-079
(City, State, Zip Code)

N/A
(Phone Number)

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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February 1, 2016

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CASE #: 74515-8-I
In re the Guardianship of: N.H.S.; Alan J. Smith, Pet. v. State of WA., DSHS, Res.

Counsel:

RE: Snohomish County No. 15-7-00665-3

On January 5, 2016, a notice of appeal was filed in Snohomish County Superior Court. It appears that the order being appealed from is not a final judgment but is reviewable by discretionary review, pursuant to RAP 2.3. A notice of appeal of a decision which is not appealable will be given the same effect as a notice for discretionary review. RAP 5.1(c).

Pursuant to RAP 6.2(b), a motion for discretionary review must be filed in the appellate court within 15 days after filing the notice, or, in cases where the appellate court has appointed counsel for a party entitled to seek discretionary review at public expense pursuant to rule 15.2, within 15 days after appointment.RAP 17.4(a) requires that the motion be accompanied by a notice of the time and date set for oral argument of the motion. A copy of the motion and notice must be served on all parties at least 15 days prior to the date noted for the hearing on the motion. Matters on discretionary review are considered by a commissioner on Fridays at 09:30 a.m.

0-17

The motion and notice setting the above-referenced discretionary review for oral argument should be filed on or before **January 20, 2016.** If the motion and notice are not filed by that date, the court will consider imposition of sanctions in accordance with RAP 18.9.

Unless the court directs otherwise, any answer must be filed and served no later than 10 days after the motion is served on the answering party. RAP 17.4(e).

Counsel are requested to please note the Court of Appeals number in all future references to this case.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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February 1, 2016

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CASE #: 74516-6-I
In re the Guardianship of: F.L.A.S.; Alan J. Smith, Pet. v. State of WA., DSHS, Res.

Counsel:

RE: Snohomish County No. 15-7-00666-1

On January 5, 2016, a notice of appeal was filed in Snohomish County Superior Court. It appears that the order being appealed from is not a final judgment but is reviewable by discretionary review, pursuant to RAP 2.3. A notice of appeal of a decision which is not appealable will be given the same effect as a notice for discretionary review. RAP 5.1(c).

Pursuant to RAP 6.2(b), a motion for discretionary review must be filed in the appellate court within 15 days after filing the notice, or, in cases where the appellate court has appointed counsel for a party entitled to seek discretionary review at public expense pursuant to rule 15.2, within 15 days after appointment.RAP 17.4(a) requires that the motion be accompanied by a notice of the time and date set for oral argument of the motion. A copy of the motion and notice must be served on all parties at least 15 days prior to the date noted for the hearing on the motion. Matters on discretionary review are considered by a commissioner on Fridays at 09:30 a.m.

The motion and notice setting the above-referenced discretionary review for oral argument should be filed on or before January 20, 2016. If the motion and notice are not filed by that date, the court will consider imposition of sanctions in accordance with RAP 18.9.

Unless the court directs otherwise, any answer must be filed and served no later than 10 days after the motion is served on the answering party. RAP 17.4(e).

Counsel are requested to please note the Court of Appeals number in all future references to this case.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

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

STATE OF WASHINGTON, Respondent, v. ALAN JUSTIN SMITH, Appellant.	)	No. 73219-6-I ORDER DENYING MOTION TO MODIFY 03/10/2016

Appellant Alan Smith has filed a motion to modify and an amended motion to modify the commissioner's November 5, 2015 ruling denying his pro se motion for appointment of substitute counsel as "standby counsel." Respondent, State of Washington, has filed an answer.

The Washington Constitution grants a criminal defendant the right of self-representation. State v. Rafay, 167 Wn.2d 644, 652, 222 P.3d 86 (2009). But that right is not "without limits or qualifications." Rafay, 167 Wn.2d at 656. Nor does a criminal defendant have a right to hybrid representation on appeal. State v. Romero, 95 Wn. App. 323, 326, 975 P.2d 564 (1999). We have considered the motion to modify and the amended motion to modify under RAP 17.7 and have determined that both motions should be denied

Smith has not clearly requested to proceed pro se. If he seeks to represent himself, he shall have 21 days from the date of this order in which to file an unequivocal motion seeking to represent himself on appeal. This court will then

determine whether, under the circumstances, the motion should be granted. See RAP 18.3(a)(1); Rafay, 167 Wn.2d at 653.

Now, therefore, it is hereby

ORDERED that the motion to modify and the amended motion to modify are both denied; and, it is further

ORDERED that appellant shall have 21 days from the date of this order in which to file an unequivocal motion to represent himself on appeal; and, it is further

ORDERED that if appellant fails to file an unequivocal motion for self-representation on appeal, the court administrator/clerk shall set a revised briefing schedule.

Done this 10th day of March, 2016.

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Alan Smith — PETITIONER
(Your Name)

vs.

Mary Kathleen Webber, et al — RESPONDENT(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)

APPENDIX H

Order on Rehearing / Motion to Modify

Alan Justin Smith #381201
(Your Name)

IB-01 PO Box 769
(Address)

Connell, WA 99326-079
(City, State, Zip Code)

N/A
(Phone Number)

SUSAN L. CARLSON
SUPREME COURT CLERK

ERIN L. LENNON
DEPUTY CLERK/
CHIEF STAFF ATTORNEY

THE SUPREME COURT
STATE OF WASHINGTON

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May 7, 2020

LETTER SENT BY E-MAIL ONLY

Alan Justin Smith
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Hon. Richard D. Johnson, Clerk
Court of Appeals, Division I
600 University Street
One Union Square
Seattle, WA 98101-1176

Mary Kathleen Webber
Snohomish County Prosecutors Office
3000 Rockefeller Avenue
Everett, WA 98201-4061

Re: Supreme Court No. 97692-9 - Personal Restraint Petition of Alan Justin Smith
Court of Appeals No. 75380-1-I

Clerk, Counsel and Mr. Smith:

The Petitioner's "Motion to Modify Commissioner's Ruling Denying Review" was received on May 7, 2020.

The motion to modify is set for consideration by a Department of the Court on the Court's July 7, 2020, Motion Calendar. The motion will be determined without oral argument. See RAP 17.5(b).

Any answer to the motion should be served and filed by May 28, 2020. Any reply to answer should be served and filed by June 18, 2020.

Sincerely,

Signed by docket clerk for:
Susan L. Carlson
Supreme Court Clerk

MT:bw

SUSAN L. CARLSON
SUPREME COURT CLERK

ERIN L. LENNON
DEPUTY CLERK/
CHIEF STAFF ATTORNEY

THE SUPREME COURT
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June 22, 2020

LETTER SENT BY E-MAIL ONLY

Alan Justin Smith
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Mary Kathleen Webber
Snohomish County Prosecutors Office
3000 Rockefeller Avenue
Everett, WA 98201-4061

Re: Supreme Court No. 97692-9 - Personal Restraint Petition of Alan Justin Smith
Court of Appeals No. 75380-1-I

Counsel and Mr. Smith:

The following motions were received from the Petitioner on June 17, 2020:

- Ex parte motion for leave to file petition for speedy relief with TRO, citing RAP 17.4 (b), (c);
- Ex parte motion for temporary restraining order;
- Motion for telephonic appearance; and
- Motion pursuant RCW 26.27.071 and RAP 16.15((b), for preliminary injunction and relief from unlawful restraint.

The motions will be set for consideration by a Department of the Court on the Court's July 7, 2020, Motion Calendar, alongside the motion to modify. The motions will be determined without oral argument, see RAP 17.5(b).

Sincerely,

Erin L. Lennon
Supreme Court Deputy Clerk

ELL:bw

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ALAN JUSTIN SMITH, Appellant.	)	No. 73219-6-I DIVISION ONE UNPUBLISHED OPINION FILED: January 9, 2017

SPEARMAN, J. — Alan Smith was convicted of first degree murder for killing his wife. He appeals, claiming that the trial court erred by admitting statements that were protected by the clergy-penitent privilege, and testimony regarding barefoot impression comparison analysis. We find no error and affirm.

FACTS

On February 12, 2013, Susann Smith, wife of Alan Smith, did not show up for work. Her employer called the police, who went to her residence and found her lying face down in the bathtub. Her death was caused by multiple head injuries and asphyxia due to drowning.

At the time of her death, Susann had been separated from Smith for over a year and the two were in the midst of acrimonious dissolution proceedings. Smith was frustrated and angry with the way the proceedings were going and

was very concerned that Susann would take the children away from him and return to her home country of Germany.

Fall 2012, Smith was involved with a woman named Rachel Amrine. He told Amrine that he would like to just get rid of Susann and asked if she knew of a way to make that happen without anyone knowing. In a joking manner, they discussed the possibility of using potassium chloride or a rubber mallet to kill someone. When Smith again mentioned his desire to have Susann disappear, however, Amrine started to wonder if he was being serious.

Smith purchased a rubber mallet and a pair of disposable coveralls in October 2012. Forensic testing and analysis indicated that Susann' s injuries were consistent with the type of mallet that Smith purchased, but did not conclusively establish that her wounds were caused by that type of mallet. Fabric impressions found at the scene were also consistent with the impressions that would have been left by the coveralls that Smith purchased.

Susann's body was found in the home she formerly shared with Smith. There were no signs of forced entry and the door was unlocked. Blood was found in the bedroom, the bathroom, and near the front door. There were bloody footwear impressions in the kitchen, the hallway, and leading to the front door. A hand towel found under the body contained Smith's DNA.

Based on surveillance footage and eyewitness accounts, there had been a man riding a bike near Susann's residence early in the morning on February 12, 2013. Smith had purchased a bicycle from Gregg's Green Lake in November

2012. A few weeks after Susann's death, the bike was found abandoned in a ravine across from Smith's apartment complex.

A global positioning system (GPS) device found in Smith's vehicle, provided data that allowed investigators to track Smith's movements. The Bothell police observed that on February 12, 2013, Smith made some detours from his usual daily route from home to his children's day care and then to his job at Boeing. That morning he stopped at some dumpsters in an Albertsons' parking lot after stopping at the day care center. Around 2:00 p.m., Smith left Boeing and drove in the vicinity of Susann's residence. The road leading to her home was barricaded, however, by police who were investigating her death. Smith then drove to a gas station and later returned to Boeing.

Smith's internet search history for February 2013 revealed searches for flights to Venezuela and Canada, initially for one adult and two children. After he was notified of his wife's death, however, he began to search for tickets for only one adult.

The investigation into Susann's death continued for a number of months During that time, in June 2013, Smith began dating a woman named Love Thai. Thai and Smith wanted to attend City Church's Belltown campus. They were told that because of their involvement in the homicide investigation they could not attend services at any of the City Church campuses or be part of the church's community groups.

Smith met Wendell Morris, a City Church group leader at a church-sponsored event. Sometime after learning that she and Smith could no longer

attend services at City Church, Thai contacted Morris's wife. The Morrises decided to meet with Thai and Smith to "minister the Word of God" to them. Verbatim Report of Proceedings (VRP) (4/14/14) at 192-194.

Morris had been an associate minister at Eastside Baptist Church (Eastside Baptist). He left Eastside Baptist in 2010 and joined City Church, intending to "lessen [his] profile" and "shed the title of 'associate minister.'" Id. at 177-78. In his words, he wanted to become merely "a man of God among other men of God." Id. After a year, Morris sought out additional opportunities with City Church and became a small group leader. Morris did not tell Smith that he had previously been an associate minister at Eastside Baptist.

Morris testified that he had agreed to meet Smith at a coffee shop in South Lake Union. When Morris arrived, Thai approached him, told him that Smith was outside in his car, and that he needed some support. Morris went to Smith's car and saw that Smith was upset. Morris told Smith that he had come "to point [him] to the Lord, [and] the Word of God." Id. at 196. Smith began to speak with Morris about some of his recent struggles.

Morris told Smith that he needed to know if Smith was involved in the murder of his wife. Smith looked around and expressed concern about how "safe" the area was. Id. at 201. Morris told Smith that whatever he said would stay between the two of them.

The two decided to take a walk, and then Smith said "[w]hat you asked me about in the car, the answer is yes." VRP (4/04/14) at 203. When asked for clarification, Smith stated, "'I did it to her,'" and became emotional. Id. at 204.

Smith then looked at Morris and stated "I trust what you do with this information." Id. Morris understood Smith's comment to mean that he had Smith's permission to take his statements to the authorities.

Smith and Morris continued their conversation and Smith indicated that he would like to be baptized. Morris decided that they could go that day to the Citadel church in Des Moines, because it was open late. When they arrived at the Citadel they discovered that the church did not have a baptistery. Morris had mentioned earlier that he could possibly baptize Smith and he agreed to do so at Alki beach in West Seattle.

During the next few days, Morris contacted Smith by phone and text message to try to persuade him to speak with the authorities. When Smith declined to turn himself in, Morris called the police on June 25, 2013.

Smith was charged with first degree murder with a deadly weapon, with the aggravating factor of domestic violence. He moved to suppress evidence of his statements to Morris. At the suppression hearing, the court heard testimony from ministers from Eastside Baptist and City Church.

Pastor Arthur C. Banks, from Eastside Baptist Church, Tacoma, testified that an ordained minister for his church is one who has been examined by several churches within the denomination and has received a recommendation that he or she has met the spiritual qualifications to be ordained. If Eastside Baptist accepts the recommendation, then that person is ordained, and he or she can perform all of the functions of a pastor without supervision.

Pastor Banks further testified that Morris had become a licensed associate minister with Eastside Baptist. He explained the role of the licensed associate ministers and that they may only perform duties at Eastside Baptist under the supervision of the pastor. For example, a licensed associate minister would not be able to perform a baptism, communion, wedding, or funeral without being supervised by the pastor.

Pastor Banks confirmed that when Morris joined City Church, he became a member of that church and was no longer a member of Eastside Baptist. At that point neither Eastside Baptist nor Pastor Banks had any authority over Morris. The pastor also testified that Eastside Baptist does not have an organized confession but asks its congregation to confess to God; on occasion when Pastor Banks counsels members, he tells them upfront that he reserves the right to notify the authorities if they have done anything harmful or illegal.

Pastor Jason Michalski from City Church testified that its policies require church staff to inform their members that any information they share may be disclosed to other staff members, and that the church reserves the right to report the content of a disclosure to the authorities. He also explained that City Church is "not a church that necessarily you need to go confess your sins to a pastor or a leader or anyone." VRP (4/14/14) at 140. Pastor Michalski also testified that the "City Groups" were small community groups of members that would meet outside of service to discuss particular topics or portions of scripture. Pastor Michalski confirmed that Morris served as a City Group leader, but testified that Morris was never a licensed or ordained minister at City Church.

The trial court found that Morris was not acting as a member of the clergy for Eastside Baptist when he spoke with Smith and that he did not have any authority from Eastside Baptist to counsel anyone or perform a baptism. The trial court also found that Morris never became a licensed or ordained minister with City Church and that he was not acting as a City Group leader when he spoke with Smith. While it was undisputed that Morris told Smith that their conversation would stay between the two of them, the trial court determined that the communication was not confidential because Morris was acting in his individual capacity. The trial court also found Smith's statement — "I respect what you do with this information" — led Morris to believe that Smith understood that he would go to the civil authorities with the information. Based on these findings, the trial court concluded that Smith had not sustained his burden of showing that his statements were protected by clergy-penitent privilege.

At trial, the State presented photographs of bloody footwear impressions found in the kitchen and bathroom of Susann's residence. Sgt. Shelly Massey, a forensic identification specialist for the Royal Canadian Mounted Police, compared these photographs to inked impressions of Smith's feet (bare and wearing socks). Sgt. Massey testified that based on the impression left at the scene, she was "unable to exclude and in fact ... would include Mr. Smith as a possible source of who could have made this particular impression." Id. at 64. Smith moved the court for a Frye[1] hearing to determine the admissibility of Sgt. Massey's testimony, arguing that the use of barefoot morphology evidence is not

[1] Frye v. United States, 93 F. 1013 (D.C. Cir. 1923).

generally accepted in the scientific community. The trial court denied the motion because Sgt. Massey made a physical comparison of the prints and could not state an opinion more definite than that Smith was a "'possible' maker of the footprints." CP at 890.

Smith was found guilty and sentenced to 344 months. Prior to sentencing, Smith moved for new counsel, arguing that he had received deficient representation and that he and his attorney had an irreconcilable conflict. The trial court found that any conflict between Smith and counsel arose from differences of opinion with regard to trial tactics, and that his complaints did not rise to the level of ineffective assistance of counsel. He appeals.

DISCUSSION

Smith contends that the trial court erred when it denied his motion to suppress his "confession" because it was protected by the clergy-penitent privilege. He argues that Morris was acting as a member of the clergy when he heard Smith's confession, because he was a licensed minister at Eastside Baptist.

Our review of findings of fact following a suppression motion is limited to "those facts to which error has been assigned." State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal. Id. Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. State v. Halstien, 122 Wn.2d 109, 129, 857 P.2d 270 (1993). Unchallenged findings of

fact will be accepted as verities on appeal. Hill, 123 Wn.2d at 647. We review de novo the trial court's conclusions of law. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) abrogated by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

The clergy-penitent privilege is statutory and has no apparent origin in the common law. State v. Glenn, 115 Wn. App. 540, 546, 62 P.3d 921 (2003). RCW 5.60.060(3) provides:

> A member of the clergy, a Christian Science practitioner listed in the Christian Science Journal, or a priest shall not, without the consent of a person making the confession or sacred confidence, be examined as to any confession or sacred confidence made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

The privilege is held by the penitent and only the penitent can waive it. RCW 5.60.060(3). For the privilege to attach, statements must be (1) confidential communications, (2) made to a member of the clergy, (3) as a confession. State v. Glenn, 115 Wn. App. 540, 546, 62 P.3d 921 (2003). In this process the trial court must determine several questions of preliminary fact, during which it is not bound by the rules of evidence, except those that pertain to privileges. Id.

Under RCW 26.44.020(6), "clergy," means "any regularly licensed or ordained minister, priest, or rabbi of any church or religious denomination, whether acting in an individual capacity or as an employee or agent of any public or private organization or institution." Such person must be ordained in order to be considered a member of the "clergy." State v. Martin, 137 Wn.2d 774, 783-84, 975 P.2d 1020 (1999).

Smith argues that Morris was a licensed minister with Eastside Baptist Church when they spoke, and therefore Morris qualified as a member of the clergy to whom Smith made his confession. But Smith does not challenge the trial court's finding of fact that "[w]hen Morris joined City Church, he ceased to be a member of Eastside Baptist."[2] CP at 864. He is therefore not a "licensed minister" for the purposes of the statute. Furthermore, "[s]imply establishing one's status as 'clergy' is not enough" for the privilege to apply; the person "must also be functioning in that capacity . . . . State v. Motherwell 114 Wn.2d 353, 358, 788 P.2d 1066 (1990).[3] Here, even if Morris had maintained his status as a licensed minister with Eastside, it is clear from the record that he was not acting in that capacity when he and Smith met. Morris had no authority to act on behalf of Eastside without the pastor's supervision.

Smith next argues that he made a "confession" that Morris heard as part of his duties as a minister of City Church. He contends that Morris met with him intending to convince him to confess his sins and stay true to his conversion and faith. He also claims that because City Church had no specific policy on confession, it was likely that Morris's actions were enjoined by City Church

[2] Smith challenges only one factual finding—that Morris was not an ordained minister with Eastside Baptist. There is no evidence in the record that Morris was ever ordained; he held only a license with Eastside Baptist, which he later gave up when he became a member of City Church. The trial court's finding is not erroneous.

[3] Motherwell is often cited as authority in regards to interpreting the clergy-penitent privilege, even though it interpreted the mandatory reporting exemption for clergy. See Jane Doe v. The Corp. of the Pres. of the Church of Jesus Christ of Latter-Day Saints, 122 Wn. App. 556, 563, 90 3d. 1147 (2004); State v. Buss, 76 Wn. App. 780, 785, 887 P.2d 920 (1995), abrogated by Martin, 137 Wn.2d 774, 975 P.2d 1020 (1999); Glenn, 115 Wn. App. at 553 at n.7.

practice or rules. The determination of what constitutes a "confession" for the purposes of RCW 5.60.060(3) is to be made by the church of the particular clergy member, not the court. Martin, 137 Wn.2d at 787. The record shows that City Church did not have a confession practice, and its policies specified that any information revealed in counseling was not confidential. As a result, Smith has not shown that his statements to Morris were a "confession" to which the clergy-penitent privilege would attach.

Smith next argues that his disclosure was privileged because he believed that his statements were confidential based on Morris's assurances. Confidentiality is a requirement for establishing the clergy-penitent privilege. Martin, 137 Wn.2d at 789–90. Here, Smith may have intended and/or believed that his statements would be confidential, but neither are sufficient to establish a statutory privilege if none of the other requirements are met.

We conclude that Smith has not shown that his statements are protected by the clergy-penitent privilege. The trial court properly denied his motion to suppress on that ground.

Smith next argues that Sgt. Massey's testimony comparing the foot impressions found at the scene of the homicide, to those taken from Smith should, not have been admitted. He contends that in making the comparisons, Sgt. Massey employed scientific, technical, or specialized knowledge that was not generally accepted in the scientific community. He contends that at the very least, the court should have held a Frye hearing to consider its admissibility. The State argues that a Frye hearing was not necessary because the testimony

involved a physical comparison rather than a scientific test and the witness's only conclusion was that Smith could not be excluded as a possible source of the impressions.

We review the trial court's decision to admit or deny evidence under the Frye standard de novo. State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993), overruled in part on other grounds by State v. Bruckner, 133 Wn.2d 63, 941 P.2d 667 (1997). The trial court's determination of whether expert testimony is admissible under ER 702 is reviewed for an abuse of discretion. Id. at 890.

Washington courts employ the Frye test to determine if evidence based on novel scientific procedures is admissible at trial. Cauthron, 120 Wn.2d at 887. The two-pronged test asks, "(1) whether the scientific theory upon which the evidence is based is generally accepted in the relevant scientific community, and (2) whether the technique used to implement that theory is also generally accepted in the relevant scientific community." State v. Gentry, 125 Wn.2d 570, 585, 888 P.2d 1105 (1995). A third prong that asks whether the generally accepted technique was performed correctly goes to the weight of the evidence, not to its admissibility. Id.

The Frye test is appropriate to those situations in which the scientific evidence has the potential to mislead lay jurors, who may be awed by the apparent infallibility of scientific experts and their techniques. State v. Brewczynski, 173 Wn. App. 541, 558, 294 P.3d 825 (2013). Smith argues that a Frye hearing was necessary here because, in his view, Sgt. Massey employed a scientific process that had not been found to be generally accepted as reliable by

the scientific community. Br. of Appellant at 28. The State argues that under Brewczynski, the analysis Sgt. Massey offered was a physical comparison, not a scientific test, and a Frye hearing was not required. The State is correct.

In Brewczynski, the defendant challenged the expert's technique for footwear comparison, arguing that it was not generally accepted in the community of footwear experts. 173 Wn. App. at 555. The expert made an impression of the suspect's boot by shaping clay around the bottom and sides, and then comparing the image with the overlay of a print found at the scene. The expert concluded that Brewczynski's right boot had a similar tread pattern and size and could have made the print. Id. The court rejected Brewczynski's argument that a Frye hearing was necessary because the method used by the expert was a matter of physical comparison rather than a scientific test. "'In such cases, the jury is in a position to weigh the probative value of the testimony without abandoning common sense and sacrificing independent judgment to the expert's assertions.'" Id. at 556 (quoting State v. Hasan, 205 Conn. 485, 490, 491, 534 A.2d 877 (1987)).

Similarly here, Sgt. Massey did nothing more than make a visual comparison of photographs of the foot impressions at the crime scene and those taken from Smith. The trial court did not err when it denied Smith's request for a Frye hearing.

Smith also argues that barefoot morphology has not garnered general acceptance in the scientific community. He points out that while Washington has not considered the scientific acceptability of barefoot morphology analysis, other

states have found that such evidence was not sufficiently reliable to pass a Frye test and be admitted at trial. He cites State v. Jones, 514 S.E. 2d 813, (S.C. 2001) ("Jones I"), 681 S.E.2d 580 (S.C. 2009) ("Jones II"), and State v. Berry, 546 S.E.2d 145 (N.C. App. 2001), as instances where the courts rejected barefoot morphology evidence. These cases are not persuasive, however, because they involve different standards for admission and expert opinion testimony that resulted in a conclusive identification. Neither North Carolina nor South Carolina courts use the Frye standard for admissibility. Jones II, 681 S.E.2d at 590; State v. Goode, 461 S.E.2d 631, 645 (N.C. 1995). And in the Jones cases and in Berry, the experts offered testimony based on barefoot impression that positively identified the defendant as the maker of the print. The courts found the method not to be sufficiently reliable to support the admission of such testimony. Jones I, 541 S.E. 2d at 818, Jones II, 681 S.E.2d at 591, and Berry, 546 S.E.2d at 149, 154.

The State argues that this case is the most similar to State v. Kunze, 97 Wn. App. 832, 988 P.2d 977 (1999) which found that the scientific reliability of the method was irrelevant to whether the evidence was admissible. In that case the court considered ear-print identification evidence and found it to be inadmissible, because the majority of testifying experts indicated that it was not generally accepted in the scientific community. The appellate court was explicit, however, that upon retrial, there would be no bar to testimony stating that the defendant could not be excluded as a possible maker of the print left at the scene. Id. at 856. The Kunze court found that this type of comparison — "an

'eyeballing' of readily discernible similarities and differences — is based on 'visual techniques'... or, ... on personal knowledge that can readily be understood and evaluated by the jury," and "need not be supported by a showing of general acceptance. Id.

Here, Sgt. Massey described how she compared footprints by analyzing:

> "the shape of the foot, the location of the tow (sic) pads, the specific space that each towed (sic) pad takes up, the distance of various tow (sic) pads to what we call the met tar sell (sic) ridge, or the front edge, leading edge of the balance ball of the foot, the width and shape of the ball of the foot, the widths of the arch, the heal (sic), the overall length of the foot, so a combination of these features is what we are looking at."

VRP (1/23/15) at 30. Her conclusion was not that Smith "did make the prints, it's that he could have made them." Id. at 93. Sgt. Massey's process and conclusion is similar to the testimony about ear print evidence that was admitted without a Frye hearing in Kunze. We find no error in the admission of Sgt. Massey's testimony regarding the physical comparison of Smith's prints to the prints found at the scene.[4]

Smith argues that his constitutional right to effective assistance of counsel was violated when the trial court refused to grant his motion for new counsel. We review the denial of a motion to substitute counsel for an abuse of discretion. State v. Lindsey, 177 Wn. App. 233, 248, 311 P.3d 61 (2013), review denied, 180 Wn.2d 1022 (2014). A trial court abuses its discretion when its decision is "'manifestly unreasonable or based upon untenable grounds or reasons.'" State

[4] Smith does not argue that the trial court abused its discretion when it admitted the evidence under ER 702. Even if it had been error to admit the testimony, it would have been harmless. Based on all of the other evidence against Smith, there is no basis for us to conclude that the outcome of the trial would have been different had the evidence not been admitted.

v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014) (quoting State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012).

A defendant must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). A substitution may be justified when the attorney-client relationship is plagued by things that suggest that the attorney cannot provide diligent representation. In re Personal Restraint of Stenson, 142 Wn.2d 710, 724-31, 16 P.3d 1 (2001). However, a defendant must show more than a general loss of trust or confidence. State v. Schaller, 143 Wn. App. 258, 268, 177 P.3d 1139 (2007).

To determine whether Smith was entitled to new counsel, we examine three factors: (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry into the conflict, and (3) the timeliness of the motion for substitution of counsel. State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). Here, Smith argues only that the trial court failed to undertake an adequate inquiry into the conflict. A trial court must inquire into "(1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings." Stenson, 142 Wn.2d at 723.

At the hearing, Smith first raised various points and arguments that he felt should have been part of his defense, including DNA analysis and greater emphasis on the timing of events. He further argued that counsel failed to provide more strident advocacy regarding witness credibility, and that his

external circumstances, such as media attention and his children's dependencies, should have been brought to the court's attention.[5]

Contrary to Smith's contention, the trial court considered each of the Stenson factors in detail on the record. First, the court found that many of the reasons for Smith's dissatisfaction, e.g., the points he wanted counsel to emphasize, were either heard by the judge, or irrelevant to his defense. The other points of dissatisfaction were found to be "trial strategy decisions which must rest with the lawyers. . . ." (VRP 2/25/15) at 32. Second, the court reviewed the file and found that Smith had been diligently represented throughout. And finally, the trial court found that substituting counsel prior to sentencing would delay the imposition of a sentence for an undetermined period of time. Based on the trial court's inquiry, we find no abuse of discretion in denying Smith's motion to substitute counsel.

[5] Smith compares his case to the conflict between client and counsel found in United States v. Williams, 594 F.2d 1258, 1259 (9th Cir. 1979) and Frazer v. United States, 18 F.3d 778, 785 (9th Cir. 1994), by way of Stenson, 142 Wn. 2d at 724. In Williams, the Ninth Circuit held that the District Court erred when it denied the defendant's request, after a strong showing of irreconcilable conflict, where even "the response of counsel tended to confirm that the course of the client-attorney relationship had been stormy one with quarrels, bad language, threats, and counter-threats." 594 F.2d at 1260. In Frazer, the defendant's attorney called him a "'stupid nigger son of a bitch and said he hopes I get life. And if I continue to insist on going to trial I will find him to be very ineffective." 18 F.3d at 780.There is nothing in the record that suggests that the issues between Smith and his lawyers even approached this level of conflict.

Statement of Additional Grounds

In his pro se statements of additional grounds, Smith lists over thirty additional errors.[6] Several of his claimed errors have either been addressed by counsel or are not proper matters for a statement of additional grounds under RAP 10.10(a). These include the admission of forensic evidence, the denial of his motion for alternate counsel, and the admission of his confession. Smith also asks the court to reweigh the evidence and make alternate findings regarding witness credibility. These are issues for the trier of fact that cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Smith's other additional grounds for error include ineffective assistance of counsel, sufficiency of the evidence, prosecutorial misconduct, probable cause for search and arrest warrants and admissibility of evidence.

Smith argues that he was deprived of his right to a defense because he was subject to coercion by counsel and law enforcement. He argues that his statements and his consent to search were made under threats that he would not be able to see his children. We are unable to review these claims because they rely on facts or evidence not in the record. While they may be properly raised in a personal restraint petition, we will not consider them here. State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

[6] Smith also submits an amendment to his statement of additional grounds (SAG) where he explains why he filed a SAG. In this Amendment he claims that the trial court erred by failing to hold a voluntariness hearing with regard to the confession and that both trial and appellate counsel were ineffective for failing to raise the issue. The record contains nothing, however, that suggests the confession was not voluntary, nor does Smith provide any basis for a finding of involuntariness.

A successful ineffective assistance of counsel claim requires the defendant to show that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish deficient representation, the defendant must show that counsel's representation "f[ell] below an objective standard of reasonableness." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Courts presume that counsel provided effective representation and require the defendant to prove that no legitimate strategic or tactical reasons exist. Id. "Prejudice" for this purpose is the "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Smith fails to articulate any respect in which he was prejudiced by the acts or omissions about which he complains. His challenge fails on this basis alone. We need not consider both prongs of Strickland (deficient performance and prejudice) if a petitioner fails one prong of the test. 466 U.S. at 697.

Smith next argues that his conviction is not supported by sufficient evidence, presumably excluding his confession. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational trier of fact could have found that each element of the crime was proved beyond a reasonable doubt. State v. Drum, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010). We draw all reasonable inferences from the evidence in the State's favor and interpret the evidence most strongly against the defendant. State v. Joy, 121

Wn.2d 333, 339, 851 P.2d 654 (1993). We assume "the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 820 P.2d 1068 (1992). Here, there is ample evidence in the record upon which a reasonable trier of fact could find each element of first degree murder beyond a reasonable doubt.

Smith raises other additional grounds related to the trial court's admission of evidence. We review the trial court's admission of evidence for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). "'A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.'" State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426 (1997) (quoting Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994)). Smith has not shown that any of the challenged decisions to admit evidence were unreasonable or untenable.

Smith challenges the trial court's denial of his motion to suppress arguing that there was no probable cause for arrest and that the police improperly obtained evidence without a warrant. He fails to identify, however, any finding of fact to which he assigns error regarding probable cause for either his arrest or any of the search warrants. Nor does he explain the insufficiency of evidence at the suppression hearing that would make the findings erroneous.

Finally, Smith raises issues of prosecutorial misconduct, arguing that the State's questioning elicited improper opinion testimony about Smith's silence and his guilt. Prosecutorial misconduct is grounds for reversal if the conduct is both improper and prejudicial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551

(2011). We evaluate a prosecutor's conduct by examining it in the full trial context, including the evidence presented, the argument, the issues the evidence addressed in argument, and the jury instructions. Id. A defendant suffers prejudice only where there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. Id. Here, Smith does not identify the challenged conduct with sufficient specificity to enable us to evaluate it. We conclude that none of Smith's additional grounds for appeal have merit.[7]

Affirmed.

Spearman, J.

WE CONCUR:

[7] Smith moved to modify the denial of his attorney's motion to withdraw as counsel on this appeal. The motion is denied.

RICHARD D. JOHNSON,
Court Administrator/Clerk

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CASE #: 73219-6-I
State of Washington, Res/Cross-App. v. Alan Justin Smith, App/Cross-Res.

Counsel:

Enclosed please find a copy of the Order Denying Appellant's Motion for Revised Schedule of Pro Se Briefing entered by this court in the above case today.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

enclosure

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

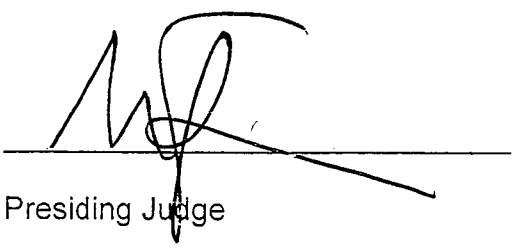
STATE OF WASHINGTON Respondent, v. ALAN J. SMITH, Appellant.	No. 73219-6-I ORDER DENYING APPELLANT'S MOTION FOR REVISED SCHEDULE OF PRO SE BRIEFING

Appellant Alan J. Smith filed a motion for revised schedule of pro se briefing in the above matter. A panel of this court has determined the motion should be denied.

NOW THEREFORE,

IT IS HEREBY ORDERED that appellant motion for revised schedule of pro se briefing is denied.

DATED this 16th day of August, 2016.



Presiding Judge

RICHARD D. JOHNSON, *Court Administrator/Clerk*

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CASE #: 73219-6-I
State of Washington, Res/Cross-App. v. Alan Justin Smith, App/Cross-Res.

On August 29, 2016, a motion to modify was filed in the above-referenced case. Any response to the motion is due by **September 9, 2016.** Any reply to the response is due 10 days after the response is filed. After the time period for the reply has passed, the motion will be submitted to a panel of this court for determination without oral argument. RAP 17.5(b). The parties will be notified when a decision on the motion has been entered.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

APPENDIX B
D-25

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

June 17, 2016

Alan J. Smith
#381201
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla,, WA 99362

*****CORRECTED LETTER*****

CASE #: 75380-1-I
Personal Restraint Petition of Alan J. Smith

King County No. 13-1-01546-8

Counsel:

The above case has been transferred to Division I of the Court of Appeals.

All matters in connection with the above cause should be addressed to the Court Administrator/Clerk of the Court of Appeals, Division I, One Union Square Building, 600 University Street, Seattle, Washington 98101.

Counsel are requested to please note the Court of Appeals number in all future references to this case.

You will be informed when a decision on the petition is reached. Any request limited solely to the status of the petition will be placed in the file without further action.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

CMR

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

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	)	No. 75380-1-I
ALAN JUSTIN SMITH, Petitioner.	)	ORDER OF STAY

Alan Smith filed a personal restraint petition challenging the judgment and sentence imposed pursuant to his conviction for first degree murder in Snohomish County Superior Court Cause No. 13-1-01546-8. The record shows an appeal of Smith's judgment and sentence is currently pending in this court in State v. Smith, No. 73219-6-I. That case is not yet final. Accordingly, any further consideration should be stayed pending final resolution of Smith's direct appeal. RAP 16.4(d); In re Pers. Restraint of Grasso, 151 Wn.2d 1, 10, 84 P.3d 859 (2004) ("A personal restraint petition is not a substitute for direct appeal and availability of collateral relief is limited."). Now, therefore, it is hereby

ORDERED that this personal restraint petition is stayed pending issuance of the mandate in State v. Smith, No. 73219-6-I.

Done this 19th day of July, 2016.

Trickey, ACJ
Acting Chief Judge

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

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	)	No. 75380-1-I
ALAN JUSTIN SMITH,	)	ORDER LIFTING STAY AND DIRECTING RESPONSE TO PERSONAL RESTRAINT PETITION
Petitioner.	)	

Alan Smith filed a personal restraint petition challenging the judgment and sentence imposed pursuant to his conviction for first degree murder in Snohomish County Superior Court Cause No. 13-1-01546-8. This court stayed consideration of the petition pending the resolution of Smith's direct appeal, State v. Smith, No. 73219-6-I. Because that case is now final, the stay should be lifted.

The Snohomish County Prosecutor's Office is directed to file a response to the petition. The response is due June 6, 2018. Smith may file a reply within 30 days of the date of service of the response. After a reply is filed or the time to file a reply expires, the petition will be submitted to the Acting Chief Judge for determination. Now, therefore, it is hereby

ORDERED that the stay previously imposed is lifted; and, it is further

ORDERED that the Snohomish County Prosecutor's Office shall file its response no later than June 6, 2018.

Done this 9th day of April, 2018.

Mann, ACJ
Acting Chief Judge

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

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	)	No. 75380-1-I
ALAN JUSTIN SMITH,	)	ORDER OF STAY
Petitioner.	)	

Alan Smith filed a personal restraint petition challenging the judgment and sentence imposed pursuant to his conviction for first degree murder in Snohomish County Superior Court Cause No. 13-1-01546-8. Petitioner has now requested a stay of 60 days in order to file an amended personal restraint petition. The petitioner's motion shall be granted. Now, therefore, it is hereby

ORDERED that consideration of this personal restraint petition is stayed until July 30, 2018, for petitioner to file an amended petition. Should petitioner not file an amended petition by this date, this court will proceed with the resolution of Smith's original petition filed on June 13, 2016.

Done this 4th day of June, 2018.

Mann, A.C.J.
Acting Chief Judge

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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August 14, 2018

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Seth Aaron Fine
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CASE #: 75380-1-I
Personal Restraint Petition of Alan J. Smith

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on August 14, 2018, regarding petitioner's motion for extension of time to file amended personal restraint petition for 30 days:

NOTATION RULING
Personal Restraint Petition of Alan Smith, No. 75380-1-I
August 14, 2018

Alan Smith filed a personal restraint petition challenging the judgment and sentence imposed for his conviction for first degree murder in Snohomish County Superior Court Cause No. 13-1-01546-8. Smith sought a stay of this court's consideration of his petition in order to file an amended petition. This court stayed consideration of the petition until July 30, 2018. Smith now seeks an extension of the stay for an additional 30 days. Smith's motion is granted.

Consideration of this personal restraint petition is stayed until **August 30, 2018**, for Smith to file an amended petition. If Smith does not file an amended petition by August 30, 2018, this court will proceed with the resolution of his original petition filed on June 13, 2016.

Masako Kanazawa
Commissioner

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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September 12, 2018

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CASE #: 75380-1-I
Personal Restraint Petition of Alan J. Smith

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on September 12, 2018, regarding petitioner's motion for extension of time to file an amended personal restraint petition for 60 days:

NOTATION RULING
Personal Restraint Petition of Alan Smith, No. 75380-1-I
September 12, 2018

Alan Smith filed a personal restraint petition challenging the judgment and sentence imposed pursuant to his conviction for first degree murder in Snohomish County Superior Court No. 13-1-01546-8. The petition was stayed for nearly two years while Smith's direct appeal proceeded. Once Smith's direct appeal became final, this court lifted the stay and requested the State to file a response. Before the State could do so, Smith sought a stay of this court's consideration of his petition in order to file an amended petition. This court stayed consideration of the petition until July 30, 2018. Smith then sought a second extension until August 30, 2018, which this court granted.

Smith now seeks a third extension until October 30, 2018. Smith has not identified any specific barriers to completing his petition, other than referring to the "complexity" of the case and the limits of his law library access. Smith's request is granted. However, there will be no further extensions for Smith to amend his original petition.

The deadline for the State to file its response is also extended to December 31, 2018. Smith may file a reply within 30 days of the date of service of the response. When a reply is filed or the time to file a reply expires, the petition will be submitted to the Acting Chief Judge for determination.

Masako Kanazawa
Commissioner

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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January 11, 2019

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Alan J. Smith
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Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326-0769

CASE #: 75380-1-I
Personal Restraint Petition of Alan J. Smith

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on January 11, 2019, regarding respondent's motion to transfer report of proceedings from direct appeal Case No. 73219-6-I to this personal restraint petition:

The State filed a response to the PRP on 12-28-2018. There are approximately 32 volumes of vrps in the direct appeal. The motion is denied without prejudice to renew, upon identification of the specific volumes of vrps cited in the State's response.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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February 13, 2019

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Alan J. Smith
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Coyote Ridge Corrections Center
PO Box 769
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CASE #: 75380-1-I
Personal Restraint Petition of Alan J. Smith

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on February 11, 2019, regarding respondent's amended motion to transfer portions of the report of proceedings from the direct appeal No. 73219-6-I to the personal restraint petition:

Granted.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

Alan Justin Smith #381201, DA36
Coyote Ridge Corrections Center
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Received 23 April 2019 AM

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DA36

Clerk, Court of Appeals, DIV I
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RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
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February 28, 2019

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Alan J. Smith
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CASE #: 75380-1-I
Personal Restraint Petition of Alan J. Smith

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on February 27, 2019, regarding petitioner's reply to response to personal restraint petition:

NOTATION RULING
In re Pers. Restraint of Alan Smith
No. 75380-1-I
February 27, 2019

Alan Smith filed a personal restraint petition challenging the judgment and sentence imposed pursuant to his conviction for first degree murder in Snohomish County Superior Court No. 13-1-01546-8. The petition was stayed for nearly two years while Smith's direct appeal proceeded. Since the stay was lifted, there have been several delays, primarily due to the significant number of motions and amended petitions filed by the petitioner.

The State filed its response to Smith's petition on 12/28/2018. Smith's reply was due January 28, 2019. It is unclear whether Smith knew this. Smith has not filed a reply but has continued to file various other pleadings.

The deadline for Smith to file his reply to the State's response is extended to **April 1, 2019.** Smith is prohibited from filing any other motions or amendments to the petition without permission of the court. When a reply is filed or the time to file a reply expires, the petition will be submitted to the Acting Chief Judge for determination.

Mary S. Neel
Commissioner

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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June 5, 2019

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CASE #: 75380-1-I
Personal Restraint Petition of Alan J. Smith

Counsel:

This is to inform you that the Petitioner's Reply has been filed in the above case. The case has now been submitted to the Acting Chief Judge for final determination. You will be informed when a decision is reached. Any inquiry regarding the status of the personal restraint petition will be placed in the file without further action.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
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August 20, 2019

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Alan J. Smith
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Coyote Ridge Corrections Center
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CASE #: 75380-1-I
Personal Restraint Petition of Alan J. Smith

Counsel:

Enclosed please find a copy of the Order Dismissing Personal Restraint Petition entered by this court in the above case today.

Pursuant to RAP 16.14(c), "the decision is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in Rule 13.5A."

This court's file in the above matter has been closed.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

enclosure

APPENDIX L -i-

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
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July 12, 2017

Alan J. Smith
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Monty James Booth
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CASE #: 74513-1-I
In re the Dependency of: N.H.S.; Alan J. Smith, Pet. v. State of WA., DSHS, Res.
Snohomish County No. 13-7-00329-1

CASE #: 74514-0-I
In re the Dependency of: F.LA.S, Alan J. Smith, Pet. v. State of WA., DSHS, Res.
Snohomish County No. 13-7-00330-5

CASE #: 74515-8-I
In re the Guardianship of: N.H.S.; Alan J. Smith, Pet. v. State of WA., DSHS, Res.
Snohomish County No. 15-7-00665-3

CASE #: 74516-6-I
In re the Guardianship of: F.L.A.S.; Alan J. Smith, Pet. v. State of WA., DSHS, Res.
Snohomish County No. 15-7-00666-1

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on July 11, 2017, regarding petitioner's notices of appeal treated as motions for discretionary review:

Notation Ruling
74513-1-I, 74514-0-I, 74515-8-I, 74516-6-I
July 11, 017

Notices of appeal were prematurely filed on these cases in January of 2016. The notices were treated as notices of discretionary review. A review of the trial court docket reflects that since that time judgments have been entered on these cases. Therefore, the discretionary review cases are dismissed as moot.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

c: The Hon. David A. Kurtz
Snohomish County Clerk