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STATE OF WASHINGTON
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NO. 1004397

**SUPREME COURT OF THE STATE OF WASHINGTON**

In re the Detention of Randy Smith:

STATE OF WASHINGTON,

Respondent.

v.

RANDY SMITH,

Petitioner.

# STATE'S ANSWER TO PETITION FOR REVIEW

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# I. INTRODUCTION

Randy Smith seeks discretionary review of an unpublished Court of Appeals decision affirming his commitment as a sexually violent predator following a unanimous jury verdict. This Court should deny review.

Smith first argues that the Court of Appeals erroneously refused to review his claim that the trial court improperly commented on the evidence in the jury instructions by identifying Rape of a Child in the First Degree as a "crime of sexual violence." But although the Court of Appeals concluded that Smith failed to show manifest constitutional error, the Court nevertheless considered the merits of Smith's challenge in a footnote and rejected it. Thus, despite the Court's conclusion about waiver, Smith received review of this issue by the Court of Appeals, and further review by this Court is unnecessary.

Smith also argues that this Court should accept review to determine if the legislature intended different meanings for the terms "crime of sexual violence" and "sexually violent offense."

But courts have repeatedly considered this question and have determined that the two terms have no material difference in chapter 71.09 RCW. The decision in this case is consistent with those well-settled cases, which are thorough, well-reasoned, and provide sufficient guidance to litigants and trial courts.

Finally, review of this case is unwarranted because even if it was erroneous to identify Rape of a Child in the First Degree as a "crime of sexual violence" in the jury instructions, the record affirmatively shows that no prejudice could have resulted. Smith readily admitted at trial that he raped a three-year-old child. He also provided graphic details about the offense, testifying that he crawled on top of her, forced his penis into her vagina, and raped her for ten to fifteen minutes. In light of this testimony, no reasonable person could conclude that Smith's offense was anything but a "crime of sexual violence."

For all of these reasons, review of this case is unwarranted.

## II. RESTATEMENT OF THE ISSUES

A. Where Smith failed to object to the jury instructions below and he failed to show that the alleged error had practical

and identifiable consequences at trial, did the Court of Appeals properly conclude that Smith waived this challenge?

B. Where the sexually violent predator statute defines certain offenses as sexually violent offenses as a matter of law, did the trial court properly identify one of those offenses in the jury instructions as a "crime of sexual violence"?

## III. RESTATEMENT OF THE FACTS

### A. Smith's Sexual Offense History

In 1990, Smith went to a party with strangers where he drank alcohol and took meth. CP at 509, 515-17; VRP (Vol. 3) at 515. At some point, other partygoers separated him from a woman with whom he was having sexual relations, which made Smith angry. CP at 509, 513, 517-18; VRP (Vol. 3) at 515-16. He passed out, but upon waking up, he again started doing drugs and began "looking through the house for females." CP at 509; VRP (Vol. 3) at 516.

Smith ultimately came across two young girls—ages two and three—in the downstairs bedroom. CP at 511; VRP (Vol. 3) at 516. Smith found the three-year-old attractive, particularly her "cute face, blonde hair" and "her butt." CP at 512. He removed

her clothing and groped her vaginal area. *Id.* at 512-13. He then crawled on top of her, covered her mouth, and raped her for ten to fifteen minutes. *Id.* at 32, 510, 513, 518; VRP (Vol. 3) at 516. The girl's injuries were so severe that she needed surgery to repair the damage done to her vaginal area. CP at 32; VRP (Vol. 3) at 516.

A jury ultimately convicted Smith of Rape of a Child in the First Degree, and he was given an exceptional sentence of 275 months. CP at 32, 178; VRP (Vol. 1) at 128-29, VRP (Vol. 3) at 509, 519. After this offense, Smith began masturbating to thoughts of children. CP at 583.

While in prison, Smith received several infractions, including one for sexual harassment towards staff. CP at 523-24. He explained that he was drawn to one female staff member in particular because she was small, petite, and looked younger than her age. *Id.* at 524.

After his release from prison and beginning in 2012, Smith began a pattern of surreptitiously taking pictures of young girls

in stores and using the photos to masturbate. CP at 543-46. He estimated that the girls ranged in age from six-years-old to teenagers. *Id.* at 546. He engaged in this behavior twice a week for a year and said he took "quite a bit" of photos. *Id.* at 546, 548.

In June 2013, Smith was arrested after he was caught in a Fred Meyer trying to take a photo of a young girl underneath the dressing room door as she was changing. CP at 33, 543, 548-49, 556-57, 561-62; VRP (Vol. 2) at 337-39; VRP (Vol. 3) at 523. Earlier in the day, Smith had followed two young girls around in Walmart while taking pictures of them and fantasizing about having sex with them. CP at 550-54. Smith selected the girl in Fred Meyer, who was six-years-old, because she "had a nice butt." *Id.* at 33, 561; VRP (Vol. 3) at 523. Smith later entered an *Alford* plea to one count of voyeurism and served five years in prison. CP at 33, 567, 605; VRP (Vol. 3) at 509.

**B. Smith's Civil Commitment Trial**

In 2018, the State petitioned to commit Smith as a "sexually violent predator." CP at 1-2. A "sexually violent

predator" is defined by statute as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(19).

The case proceeded to trial in December 2019. At trial, the State presented testimony from several witnesses including Smith himself who testified about the details of his prior sexual offenses.[1] Regarding the 1990 offense against the three-year-old girl, Smith readily admitted that he "raped her." CP at 510. He testified that he covered her mouth, "crawled on her and put [his] penis in her." *Id.* at 510, 513. He said he raped her for "ten to fifteen minutes" until he ejaculated inside of her. *Id.* at 513. He attributed the rape to his anger toward other partygoers and

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[1] Smith testified by way of a videotaped deposition. *See* VRP (Vol. I) at 95. The transcript of this testimony is contained in the clerk's papers. *See* CP 461-766.

voices in his head telling him to “hurt somebody” and “make them pay.” *Id.* at 513, 523, 574. Smith also testified that he does not feel ready to be released with no supervision. *Id.* at 606. He explained, “I feel I do better on supervision, and I need a platform to build a new social network.” *Id.*

At the conclusion of the evidence, the trial court issued jury instructions. CP at 780-800. The trial court’s instructions followed the Washington pattern jury instructions and identified Smith’s 1990 offense of Rape of a Child in the First Degree as a crime of sexual violence. Consistent with WPI 365.10, Instruction No. 4, the elements instruction, stated as follows:

> To establish that Randy Smith is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:
>
> (1) That Randy Smith has been convicted of one crime of sexual violence, *namely Rape of a Child in the First Degree*.
>
> (2) That Randy Smith suffers from a mental abnormality which causes serious difficulty in controlling his sexually violent behavior.

> (3) That this mental abnormality makes Randy Smith likely to engage in predatory acts of sexual violence if not confined to a security facility.
>
> . . . .

CP at 785 (emphasis added); *see also* 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 365.10 (7th ed).

And consistent with WPI 365.16, Instruction No. 8, the trial court's instruction defining "sexual violence", stated as follows:

> "Sexual violence" or "harm of a sexually violent nature" means: *Rape of a Child in the First Degree*, Indecent Liberties by Forcible Compulsion, Child Molestation in the First Degree, and Child Molestation in the Second Degree.
>
> . . . .

CP at 789 (emphasis added); *see also* 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 365.16 (7th ed).

Smith did not take exception to the elements instruction. *See* VRP (Vol. 5) at 971-73; CP at 309-14. Nor did he take exception to the portion of the "sexual violence" instruction that included Rape of a Child in the First Degree. *See id.* And he did

not propose his own instructions setting forth the elements or defining "sexual violence." *See* CP at 333-47.

At the conclusion of the trial, the jury unanimously found beyond a reasonable doubt that Smith is a sexually violent predator. CP at 801; VRP (Vol. 5) at 1038-42. The trial court subsequently entered an order of commitment. CP at 801.

Smith appealed his commitment to Division Two of the Court of Appeals. For the first time on appeal, he argued that the trial court improperly commented on the evidence by instructing the jury that Rape of a Child in the First Degree is a "crime of sexual violence." Slip op. at 7-8. In an unpublished decision, the Court of Appeals held that Smith waived this challenge and failed to show that the alleged error was a manifest error affecting a constitutional right. *Id.* at 8-10. Nonetheless, it also rejected Smith's claim on the merits. *Id.* at 10 n. 8. It expressly agreed with prior decisions addressing this same issue and concluded that the jury instructions accurately stated the law and did not improperly comment on the evidence. *Id.*

Smith now seeks discretionary review in this Court.

## IV. REASONS WHY REVIEW SHOULD BE DENIED

### A. Review of This Case is Unwarranted Because the Court of Appeals Considered the Merits of Smith's Claim

The Court of Appeals concluded that Smith waived his claim that the jury instructions amounted to an improper judicial comment because Smith did not object to the instructions below and he failed to show a manifest error affecting a constitutional right under RAP 2.5(a)(3). Slip op. at 7-10. The court noted that Smith testified that he raped the three-year-old victim, was convicted of Rape of a Child in the First Degree, and provided graphic details about the offense. *Id.* at 9; CP at 510-11. It thus concluded that Smith did not make a plausible showing that the allegedly erroneous instruction had practical and identifiable consequences in the trial of the case. Slip op. at 9-10.

Smith claims that the decision of the Court of Appeals conflicts with other cases stating that improper judicial comments are manifest constitutional errors that can be raised for

the first time on appeal and that review is thus warranted under RAP 13.4(b)(1) and (b)(2). Pet. for Review at 4-6, 8. In support of that assertion, he relies on *State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006); *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006); and *State v. Besabe*, 166 Wn. App. 872, 880, 271 P.3d 387 (2012).

It is true that the cases cited by Smith state that improper judicial comments are manifest constitutional errors and can be raised for the first time on appeal. But as the Court of Appeals pointed out, subsequent cases from this Court have emphasized that RAP 2.5(a)(3) "does not permit *all* asserted constitutional claims to be raised for the first time on appeal, but only certain questions of 'manifest' constitutional magnitude." *State v. Kirkman*, 159 Wn.2d 918, 934, 155 P.3d 125 (2007); *see also State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009) (abrogating per se rule that an instruction misstating the law of self-defense always constitutes a manifest constitutional error); Slip op. at 8 n. 5.

In those and other recent cases, this Court explained the important policy considerations behind waiver and behind construing RAP 2.5(a) narrowly. It noted that the general rule is that courts will not consider unpreserved errors raised for the first time on review. *State v. A.M.*, 194 Wn.2d 33, 38, 448 P.3d 35 (2019). This rule serves important policy considerations, as it "encourages parties to make timely objections, gives the trial judge an opportunity to address an issue before it becomes an error on appeal, and promotes the important policies of economy and finality." *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015); *see also O'Hara*, 167 Wn.2d at 98.

And it noted that RAP 2.5(a)(3), which provides an exception to this rule when the claimed error is a "manifest error affecting a constitutional right," "strikes a careful policy balance." *Kalebaugh*, 183 Wn.2d at 583. On the one hand, it allows appellate courts to remedy "errors that result in serious injustice to an accused." *Id.* But "[a]t the same time, if applied too broadly RAP 2.5(a)(3) will devalue objections at trial and

deprive judges of the opportunity to correct errors as they happen." *Id.* Thus, the exception "actually is a narrow one, affording review only of certain constitutional questions." *Kirkman*, 159 Wn.2d at 934 (internal quotation marks omitted).

It is unclear to what extent the holding from *Levy* and *Jackman* survives these subsequent cases clarifying the applicability and scope of RAP 2.5(a). The reasoning of the Court of Appeals that allegedly improper judicial comments should be considered on a case-by-case basis is consistent with the sound policy reasons articulated by this Court about the narrow application of RAP 2.5(a).

Regardless, this case is not a good vehicle for resolving any potential ambiguity in RAP 2.5(a) case law. Even if the Court of Appeals erroneously applied RAP 2.5(a) to Smith's claim, review of this case is still unwarranted because the Court of Appeals nevertheless addressed the claim on its merits. And not only is the decision in this case unpublished but, as discussed

next, the Court of Appeals relied on directly applicable precedent and reached the correct result.

### B. The Court of Appeals Correctly Concluded that the Jury Instructions Identifying Rape of a Child in the First Degree as a "Crime of Sexual Violence" Accurately Stated the Law and Did Not Improperly Comment on the Evidence

#### 1. It is well-settled that there is no material difference between the terms "crime of sexual violence" and "sexually violent offense"

Review of this unpublished case is unnecessary because the Court of Appeals properly concluded that the jury instructions accurately stated the law and did not improperly comment on the evidence. Slip op. at 10 n. 8. The Court's decision is consistent with other decisions that have addressed this issue and have confirmed that the instructions used in this case are proper.

"A jury instruction that does no more than accurately state the law pertaining to an issue . . . does not constitute an impermissible comment on the evidence by the trial judge." *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001). An

appellate court reviews jury instructions de novo to determine if the trial court has improperly commented on the evidence. *See Levy*, 156 Wn.2d at 721.

In an initial commitment trial, the State must prove that the individual meets the definition of a "sexually violent predator," which, among other things, requires proof that the person has been convicted of or charged with a "crime of sexual violence." RCW 71.09.060(1); RCW 71.09.020(19). Although the term "crime of sexual violence" is not defined in the statute, the statute defines the term "sexually violent offense." RCW 71.09.020(18). The Court of Appeals has consistently rejected arguments that there is a material distinction between the two terms, holding that crimes expressly listed in the statutory definition of "sexually violent offense" necessarily also qualify as "crimes of sexual violence." These cases are well-settled, as this Court has consistently denied review of those decisions.

Division One first reached this conclusion in *In re Detention of Coppin*, 157 Wn. App. 537, 551-54, 238 P.3d 1192

(2010), *review denied*, 170 Wn.2d 1025, 249 P.3d 181 (2011). There, the court concluded that Coppin's convictions for first degree statutory rape provided sufficient evidence that he had been convicted of a "crime of sexual violence." *Coppin*, 157 Wn. App. at 553. The court explained that statutory provisions must be harmonized and statutes must be construed as a whole. *Id.* And it reasoned that because the definition of "sexually violent offense" lists certain enumerated crimes including statutory rape, it would be "absurd" to conclude that those same crimes are not also "crimes of sexual violence." *Id.* The court expressly rejected the argument that the terms must have different meanings, stating that "there is no material difference between the term 'violent' used in subsection [18][2] and the term 'violence' used in subsection [19]." *Id.*

More recently, Division Two reached the same conclusion in *In re Detention of Taylor-Rose*, 199 Wn. App. 866, 875-76,

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[2] The statute was recently recodified. The bracketed edits reflect the current version of the statute.

401 P.3d 357 (2017), *review denied*, 189 Wn.2d 1039, 409 P.3d 1070 (2018). There, the court rejected a challenge to the same jury instructions used in this case. *See Taylor-Rose*, 199 Wn. App. at 874. In doing so, it expressly agreed with the analysis in *Coppin*. *Id.* at 876. It reaffirmed, "A crime that is expressly listed in the definition of 'sexually violent offense' in RCW 71.09.020([18]) necessarily also qualifies as a 'crime of sexual violence.'" *Id.* Accordingly, the jury instructions accurately stated the law. *Id.* Division Two again confirmed this holding in the unpublished decision *In re Detention of Canty*, 7 Wn. App. 2d 1044, 2019 WL 624737 at *10-11 (Wash. Ct. App. Feb. 13, 2019) (unpublished).[3]

The decision in this case follows those established decisions. The Court of Appeals expressly agreed with *Coppin* and *Taylor-Rose* that the terms "crime of sexual violence" and "sexually violent offense" are "synonymous." Slip op. at 10 n. 8.

[3] This case is cited in accordance with GR 14.1.

Thus, it properly concluded that Instruction No. 4, which identified Rape of a Child in the First Degree as a "crime of sexual violence," was an accurate statement of the law, not an improper comment on the evidence. *Id.* Rape of a Child in the First Degree is a crime that the legislature expressly identified as a "sexually violent offense" and thus, it necessarily also qualifies as a "crime of sexual violence." RCW 71.09.020(18); *Coppin*, 157 Wn. App. at 553-54; *Taylor-Rose*, 199 Wn. App. at 875-76. Further, the instruction did not remove an element from the jury's consideration, as the jury was still required to find that the State proved the fact of the conviction itself.

Smith argues that this Court should accept review of this case under RAP 13.4(b)(3) and (4) because it involves constitutional questions and issues of public interest, namely, the interpretation of the civil commitment statute and the constitutionality of pattern jury instructions. Pet. for Review at 15. But as just discussed, multiple decisions have already rejected the same arguments presented in this case. Smith

completely ignores *Coppin*, *Taylor-Rose*, and *Canty* in his petition for review, and he thus fails to show that those decisions are incorrect or that this Court should upend settled law on this issue.

#### 2. Concluding that the terms have different meanings would lead to absurd results

Smith argues that the legislature intended to differentiate between the terms "sexually violent offense" and "crime of sexual violence" and that the trial court improperly conflated the two. Pet. for Review at 9-11. He claims that the term "sexually violent offense"—which is defined in RCW 71.09.020(18)—is utilized for screening cases, establishing jurisdiction, and triggering notice to the prosecuting attorney. *Id.* at 10. And he claims that the term "crime of sexual violence"—which is not defined in the statute—applies at trial and requires the jury to make a factual determination about the nature of the offense. *Id.* at 11.

This Court should reject Smith's arguments because they are inconsistent with controlling principles of statutory

construction, which require courts to take into account the context of the entire statute, harmonize related provisions, and avoid absurd results. *State v. Gray*, 189 Wn.2d 334, 340, 402 P.3d 254 (2017); *US West Commc'ns, Inc. v. Wash. Util. & Transp. Comm'n*, 134 Wn.2d 74, 118, 949 P.2d 1337 (1997); *Morris v. Blaker*, 118 Wn.2d 133, 143, 821 P.2d 482 (1992).

As explained in *Coppin* and *Taylor-Rose*, there is no material difference between the terms "violent" and "violence" in chapter 71.09 RCW. *Coppin*, 157 Wn. App. at 553; *Taylor-Rose*, 199 Wn. App. at 875-76. To harmonize related provisions and avoid absurd results, these terms must be construed as interchangeable. A conclusion that the term "sexually violent offense" is not synonymous with the term "crime of sexual violence" would mean that offenses that the legislature expressly identified as sexually violent offenses *as a matter of law* do not necessarily qualify as "crimes of sexual violence." This would be an absurd, hyper-technical interpretation of the statute that is directly contrary to legislative intent.

Such a conclusion would also mean that a term critical to the jury's inquiry is not defined by statute. This is inconsistent with the statutory scheme because every other material term considered by the jury was defined by the legislature. *See* RCW 71.09.020(9) (defining "mental abnormality"); RCW 71.0 9.020(10) (defining "personality disorder"); RCW 71.09.020(8) (defining "likely to engage in predatory acts of sexual violence if not confined in a secure facility"); RCW 71.09.020(11) (defining "predatory"); RCW 71.09.020(1 7) (defining "secure facility"). Smith attempts to remedy this problem by asserting that courts would "have discretion to fashion an appropriate definition" of the term "crime of sexual violence." Pet. for Review at 11 n. 4. But that could result in inconsistent definitions being applied in civil commitment proceedings across the state. And given the significant liberty interests at stake, it would be absurd to conclude that the legislature intended such an amorphous legal standard.

Further, giving courts discretion to fashion an appropriate definition could actually *expand* the reach of the statute. The definition of "sexually violent offense" is narrow and necessarily limits the type of offenses that the State can rely upon at trial to show that the person "has been convicted of or charged with a crime of sexual violence." RCW 71.09.020(19); RCW 71.09.06 0(1). Under Smith's interpretation, however, the jury could consider an even *broader* array of offenses to satisfy this element, as nothing in the plain language of the statute limits the jury's inquiry to the "predicate offense" as claimed by Smith. *See* RCW 71.09.020(19); Pet. for Review at 11.

Lastly, treating these terms as distinct would remove from the jury's consideration altogether whether the person was charged with or convicted of a "sexually violent offense," which is a requirement for filing a sexually violent predator petition. *See* RCW 71.09.030. But it makes no sense to conclude that the legislature intended to impose different requirements for *filing* a

petition and for *proving* a petition at trial, and a conclusion to the contrary fails to take into account the context of the entire statute.

#### 3. The record affirmatively shows that no prejudice could have resulted

Finally, contrary to Smith's assertion otherwise, even if the jury instruction amounted to an improper comment on the evidence, the error would not require reversal.

As this Court has explained, a judicial comment on the evidence is presumed prejudicial and the State bears the burden of showing the absence of prejudice, "unless the record affirmatively shows that no prejudice could have resulted." *Levy*, 156 Wn.2d at 725. "The State makes this showing when, without the erroneous comment, no one could realistically conclude that the element was not met." *State v. Boss*, 167 Wn.2d 710, 721, 223 P.3d 506 (2009).

Here, the record affirmatively shows that no prejudice could have resulted from the court's instruction because no one could realistically conclude that the first element was not met. For one, Smith readily admitted that he committed the offense of

Rape of a Child in the First Degree and that he was convicted. CP at 510. Moreover, as the Court of Appeals recognized, the "factual details surrounding Smith's underlying offense permeated the SVP trial, including Smith's own testimony that he held down a three-year-old, covered her mouth, and forcibly raped her with his penis" for ten to fifteen minutes. Slip op. at 15; *see also* CP at 510-13. Smith's offense was "a horrific act" and "[a] person of common understanding would conclude that this act caused the victim extreme pain and terror." Slip op. at 16. In light of the overwhelming and undisputed evidence presented at trial, it is inconceivable that anyone could reasonably conclude that that the forcible rape of a small child would be anything but a "crime of sexual violence."

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## V. CONCLUSION

For the foregoing reasons, this Court should deny Smith's petition for review.

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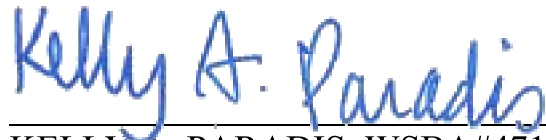
RESPECTFULLY SUBMITTED this 27th day of January, 2022.

ROBERT W. FERGUSON
Attorney General



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**SUPREME COURT OF THE STATE OF WASHINGTON**

| In re the Detention of:<br><br>RANDY SMITH,<br><br>Petitioner. | DECLARATION OF SERVICE |
|---|---|

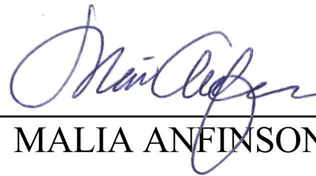
I, Malia Anfinson, declare as follows:

On January 27, 2022, I sent via electronic mail, per service agreement, a true and correct copy of the State's Answer to Petition for Review, addressed as follows:

Jodi R. Backlund
Backlund & Mistry
backlundmistry@gmail.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of January, 2022, at Seattle, Washington.



MALIA ANFINSON

## WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

## January 27, 2022 - 1:09 PM

## Transmittal Information

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|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 100,439-7 |
| **Appellate Court Case Title:** | In the Matter of the Detention of: Randy R. Smith |
| **Superior Court Case Number:** | 18-2-02803-2 |

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