

Washington State Supreme Court

No. 42509-2-II

Supreme Court No: 89582-1

State of Washington

Motion for Discretionary Review

Vs.

Michael A Smith
Petitioner

Seeking Review of
Courts of Appeals

Div 2. Order

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2014 JAN 30 A 9:24
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Identify of moving party

I Mr Michael A Smith designation of

Party.

1 A. Identity of Petitioner

2 Mr Michael A Smith, ask this court to accept
3 review of the decision or part of the
4 decision designated in Part B, of motion.

5
6
7 Petitioner seek the relief designated
8 in Part B

9
10
11 B. Decision or Statement of Relief
12 Sought.

13
14
15 Petitioner requests that this court
16 grant discretionary review. RAP 13.5 A.
17 On Nov 13, 2013 the Court of Appeals
18 Div 2, dismissed Smith's Appeal.

19
20
21 Pursuant to Rap 13.4 and 10.8

22 petitioner requests that this court reconsider
23 the Court of Appeals unpublished opinion
24 filed 11-13-2013.

Table of Authorities Washington Cases

	(Pages)
State V Manussier, 129 Wn2d 652, 921 P.2d 473 (1996)	8.
State V Warren, 144 Wash. App. 1050 (Wash. App. Div 2) 6-3-2008	11.
State V. Hendrickson, 129 Wn 2d 61, 77, 917 P. 2d 563 (1996) Claim de novo.. Supreme court cases	13.
Apprendi V New Jersey, 530 U.S 466, 147 L.E. d2 d 485, 120 S.C.T 2348 (2000)	2, 9, 10, 13, 14
State V Jones, 526 U.S 227, 119 S. C.T. 1215, 143 L. Ed. 2d 311 (1999)	9.
Almendarez-Torres V. U.S	14.
Riley V Taylor, 237 F. 3d 300 (3rd Cir)	13.
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CONSTITUTIONAL PROVISIONS	
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⊕ Rap 13.4	

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10 20 30

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5. C. Issue presented for Review

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7. D. Statement of the case

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9. E. Argument why review should be accepted

80

10.
11. 6. The United States Supreme Courts decision
12. in Apprendi v New Jersey, 147 L. Ed, 2d 435,
13. 120 S. CT. 2348 (2000) now holds this to be
14. true as a matter of federal constitutional law

15.
16. 2. Mr. Smull's right to a speedy trial was
17. violated where his trial was continued over
18. his objection and without his signature on the
19. order.

20.
21. F. Conclusion

150

1 Specifically, based on the United States
2 Supreme Court decision in Apprendi v
3 New Jersey, 530 U.S. 466, 147 LEd2d
4 435, 120 Sct 2348 (2000) Petitioner asks
5 this Court to review the decision to
6 reject the due process challenge to
7 Smith's life sentence filed in S.A.C.

8
9
10 2. Ineffective Assistance of Counsel
11 Defense Counsel's failure to request
12 lesser included offense also failed
13 to ask for material witness warrant

14
15
16 3. Speedy Rights Violation, trial court
17 abuse its discretion in entering the
18 September 16, 2010 order continuing
19 Mr Smith's trial under CrR 3.3

20
21
22 (f) (1) . . .

4 State deprive defendant of his constitutional
rights to confrontation, and presumption
of innocence.

Const Amendments 6 + 14

All caller was also on witness list
and gave a written statement like
into the same as all phone call
and didn't show up, for court.

Central to right to a fair trial,
guaranteed by Sixth and Fourteenth
Amendments, is the principle
that one accused of a crime is
entitled to have his guilt or
innocence determined solely on
the basis of evidence introduced
at trial, and not on other
circumstances not "adduced as proof"
at trial.

(3)

C. Issues Presented for Review or Facts relevant to motion.

Mr Smith was convicted of one count of burglary in the first degree. The count also carried a deadly weapon enhancement. The jury found Smith "not guilty" of assault in the fourth degree. Following a jury trial; the court concluded that Smith was a persistent offender.

Accordingly the court imposed a life sentence in prison without the possibility of parole.

The court of appeals, Div 2; affirmed the conviction in, an unpublished decision.

The facts are set forth in petitioner opening brief.

Speedy trial Violation: Under CrR 3.3(b)(1) a defendant detained in jail must be brought to trial within 60 days of being arraigned. CrR 3.3(b)(1), (c)(1).

1 The September 16, 2010, Order continuing
2 trial was entered pursuant to CrR 3.3
3 (f) (1)

4
5 Under CrR 3.3 (f) (1), Continuances - may
6 be granted as follows... Upon written
7 agreement of the parties, WHICH
8 MUST BE SIGNED BY
9 THE DEFENDANT...

10
11
12 Defense counsel's failure to request lesser
13 included offense also failed to ask for
14 material witness warrants.

15
16
17 This violated the petitioner sixth
18 amendment right to effective assistance
19 of counsel...

20
21
22 State deprive defendant of his
23 constitutional rights to confrontation
24 and presumption of innocence.

25
26
27
28
(5)

1 D. Statement of the case

2
3 In August of 2010, Mr Rusty Parrott
4, Mr William Edmiston, and Ms Lois
5 Hopkins lived in a trailer in Lakewood.
6 Mr. Parrott owned the trailer, Ms.
7 Hopkins's boyfriend.

8
9
10 Mr Cody Davis is Ms Hopkins
11 son, and had been living in the
12 trailer with the others, but was
13 kicked out of the trailer because
14 he could not pay the rest of his rent
15 shortly before the 8th of August,
16 2010

17
18
19 On that evening of same day of
20 August 8, 2010, Mr Edmiston and
21 Mr Parrott were ~~watching~~ ~~TV~~
22 ~~watching~~ watching TV, when they heard
23 a car pull up outside the trailer.

24
25
26 Mr Edmiston saw Mr Davis get
27 out of the car.

1 Edmiston believed, Mr Davis
2 might want to start trouble,
3 so he locked the door to
4 the trailer.

6 Mr Davis approached the door
7 to the trailer saying that he
8 wanted to "get his things".
9

11 Mr Edmiston responded that there
12 was nothing for Mr Davis to get
13

15 Mr Davis began trying to kick
16 on the door to the trailer
17 Eventually, Mr Davis and the
18 others enter the trailer.
19

21 A big guy grabbed Mr Edmiston
22 and force Mr Parrott to floor
23 in the hallway of the trailer
24

1 E. Argument why review should be accepted.

2
3 This motion relates to Smith's due
4 Process challenge to his life sentence.
5 See SAG brief. The current practice, by
6 which the sentencing judge determines
7 by a preponderance of the evidence
8 whether an individual qualifies as, a
9 Persistent offender, came under strong attack
10 from Justices Madson, Sander, and Johnson
11 in State v Manussier, 129 Wn.2d 652
12, 921 P.2d 473 (1996)

13
14
15 The three justices argued that because
16 the Persistent Offender Accountability
17 Act (P.O.A.A) subject individuals to a
18 sentence beyond the statutory maximum,
19 in order to survive state constitutional
20 scrutiny, the persistent offender allegation
21 must be tried to a jury based on proof
22 beyond a reasonable doubt.

23
24
25 Smith relies upon this reasoning in his
26 S.A.G brief when he challenged his
27 sentence as unconstitutional law.

1 The United States Supreme Courts
2 decision in *Apprendi v New Jersey*, 147
3 L. Ed. 2d 435, 120 S. CT. 2348 (2000)
4 now holds this to be true as a matter
5 of federal constitutional law.

7
8 At issue in *Apprendi* was a state statutory
9 scheme that allowed a trial judge, following a
10 jury conviction on a criminal offense, to hold a
11 separate proceeding, at that proceeding the
12 judge could find by a preponderance of the
13 evidence that the defendant's purpose in
14 committing the offense was to intimidate
15 the victim based on a particular
16 characteristic of that victim --- for example
17 race. In light of such a finding, the judge could
18 then sentence the defendant above the statutory
19 maximum for the offense tried to the jury.

21
22 In striking down the statutory scheme, the
23 Supreme Court looked to, its earlier
24 decision in *State v Jones*, 526 U.S.
25 227, 119 S. CT. 1215, 143 L. Ed. 2d 311
26 (1999) where in the court had construed
27 a federal statute.

1-A1 We there noted that "under the due process
2 clause of the fifth Amendment and the
3 notice and jury trial guarantees of the
4 Sixth Amendment, any fact (other than prior
5 conviction) that increases the maximum
6 penalty for a crime must be charged in
7 an "indictment" submitted to a jury, and
8 proven beyond a reasonable doubt.

10
11 Apprendi, 120 S. Ct. at 2362. Here
12 by contrast, Smith - does argue that
13 the court's reasoning in Apprendi
14 should apply to the recidivist issue, and
15 that the dissent in Manussier, was
16 correct. Based upon the reasoning
17 in Apprendi, Smith ask the court
18 to review court of appeals, div 2,
19 decision, and reverse his Life
20 Sentence.

22
2-A
23 Mr Smith's right to a speedy trial was
24 violated where his trial was continued
25 over his objection and without his
26 signature on the order

1 The trial court abused its discretion
2 in entering the September 16, 2010 order
3 continuing Mr Smith's trial under CrR
4 (f)(1) where Mr Smith did not sign
5 the order.

7
8 Ineffective assistance of counsel.

9 Defense Counsel's failure to request Smith's
10 lesser included offense, Jury instructions
11 shows once again that Counsel is Ineffective
12 State v Warren, 144 Wash. App. 1050
13 (Wash. App. Div 2 (6-3-2008))

15
16 He argues that he was legally and factually entitled
17 to these instructions and defense counsel's
18 fails to request them "Put the Jury in an
19 untenable "all or nothing" position of either
20 convicting him of Washington most serious
21 offense or else acquitting an admitted killer..

22
23 We agree that "Warren" received ineffective
24 assistance of Counsel due to defense Counsel's
25 failure to request lesser included offense
26 instructions. Thus we reverse his convictions
27 and remand for a new trial...
28 Cage v. Louisiana, 498 U.S. 39 (1990)

Verbatim transcript of Proceeding:

Volumes (I-II) Pages 25 to 30..

Failure to act in timely manner under the circumstances defense failed to file motion to dismiss having legal knowledge that the state was violating my rights to the discovery rule, rule 4.7 therefore understanding that Smith's due process rights are being violated as defense counsel never filed for material witness warrant, and for this reason Counsel was ineffective and failed..

State deprive defendant of his constitutional rights to confrontation, and presumption of innocence.. See "witness list"

Const Amends 6 + 14

911 caller was also on State's witness list, and gave a written statement like into the same, as 911 phone call, and never show up, for court..

Central to right to a fair trial guaranteed by Sixth and fourteenth Amendments, is the principle that one accused of a crime is entitled to have his guilty

1 or innocence determined solely on the
2 basis of true evidence introduced
3 at trial, and not on ~~any~~ other
4 circumstances not as proof at trial.

5 Riley v Taylor, 237 F.3d 300 (3rd Cir)

6 Both U.S. Constitutional Amendment
7 VI, and Washington Constitutional Article
8 I, section 22 (amod. X) guarantees effective
9 assistance of counsel. Strickland v Washington,
10 446 U.S. 668, 685-86, 104 S. Ct 2052
11 80 L. Ed. 2d 674 (1984) + State v
12 Hendrickson, 129 Wn 2d 61, 73 917 P.
13 2d 563 (1996) Claim de 1000.00

16
17 1-A Furthermore, even if this Court were to
18 conclude that the POAA did not require the
19 sentencing court to go beyond the mere fact
20 of conviction the United States Supreme
21 Court in "Apprendi" suggested that given
22 the right case, the Supreme Court would
23 be willing to apply the reasonable doubt
24 standard to proof of a prior conviction
25 when that prior conviction is used
26 to go beyond the statutory
27 maximum. 120 S Ct. at 2362.

1-A, In "Apprendi" the Court noted that there
was a limited exception to the general rule
requiring proof beyond a reasonable doubt of
any fact that increases the statutory maximum.
That exception, which was created in *Almendarez
-Torres V U.S.*, permits the sentencing judge
to make a finding relating to the fact of a prior
convictions. *Apprendi*, 120 S Ct. at 2361-62.
The *Apprendi* Court went on, to not, however,
that the holding in *Almendarez-Torres* is subject
to attack.

Even though it is arguable that "*Almendarez-
Torres*" was incorrectly decided, and that
a logical application of our reasoning today
should apply if the recidivist issue were
contested, *Apprendi* does not contest
the decision validity, and we need not
revisit it for purpose of our decision today.

2-A Under Cumulative errors such as, scrivener's
errors or clerical mistake this court can't
make "Smith", *Miller, see*; Fourteenth Amendment
due-process and fundamental fairness; Eighth
Amendment right to be free from cruel and
unusual punishment, Sixth Amendment right to
effective assistance of Counsel. *Cooper V.
Fitzharris*. 586 F. 2d 1325 (9th Cir 1978)
(en banc) (14)

1 Conclusion

2
3 Because the recently decided case
4 of Apprendi v. New Jersey compels
5 this Court to vacate Mr Smith, sentence
6 this Court to review its decision
7 in this case...
8
9

10
11 Dated this 26 day of
12 January, 2014
13
14

15
16
17 Respectfully Submitted
18

19
20 Mr Michael A Smith A-A-31
21 Clallam Bay Correction Center
22 1830 Eagle Crest Way
23 Clallam Bay WA 98326-9723
24

25
26 Mr Michael Smith 992874
27
28