NO. **101475-9**

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
MICHAEL LEON PALMER,
Petitioner.

ANSWER TO PETITION FOR REVIEW

THE HONORABLE DAVID L. EDWARDS, JUDGE

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T A B L E S

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

COUNTERSTATEMENT OF THE CASE

Appellant was convicted, after a jury trial in Grays Harbor County Superior Court, cause number 17-1-203-1, of child molestation in the first degree, assault in the fourth degree and assault of a child in the second degree.

While his appeal was pending, Appellant filed an amended statement of additional grounds (SAG) alleging five grounds: 1) Violation of Attorney / Client privilege (with 16 subsections); 2) *Brady* violation *(Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)) (with 33 subsections); 3) Denial of fair bail, least restrictive conditions of release, and counsel (with 22 subsections); 4) Violation of time for trial rights (both CrR 3.3 and speedy trial) (with 37 subsections); 5) Cumulative error (with 7 subsections).

The Court of Appeals issued an opinion on August 19, 2021 reversing and remanding for a new trial because the

trial court denied Mr. Palmer's right to counsel. The court declined to address the statement of additional grounds.

Petitioner argued in both his SAG that and Motion for Reconsideration that the remedy for the violations alleged is dismissal, not simply a new trial.

The Court of Appeals withdrew its previously issued opinion and issued a new opinion on October 11, 2022, this time considering petitioner's SAG.

The Court of Appeals again reversed Appellant's convictions and remanded for a new trial:

> We conclude that the trial court committed reversible error by denying Palmer his right to counsel. However, we conclude that none of Palmer's SAG arguments warrant a reversal or dismissal of his convictions with prejudice. We reverse the convictions and remand to the trial court for a new trial.

In considering petitioner's SAG the Court of Appeals specifically found no *Brady* violation, and

found that many of his other arguments were unsupported by the record.

Appellant's attorney filed another motion for reconsideration asking the Court of Appeals to reconsider its denial of Appellant's supplemental designation of clerk's papers.

The Court of Appeals denied the motion for reconsideration. This petition followed.

ARGUMENT

Review of a decision of the Court of Appeals will be accepted by this Court only if the decision conflicts with a decision of the this Court or a published decision of the Court of Appeals, presents a significant question of law under either the state or U.S. Constitution, or if it involves an issue of substantial public interest that this Court should decide. RAP 13.4(b)(1), (2), (3) and (4). Mr. Palmer claims that the Court of Appeals erred in holding that the proper remedy in this case is

remand for a new trial for any alleged *Brady* violation, and that this Court should accept review as the decision below conflicts with other published cases. Mr. Palmer is incorrect.

1. **The Court of Appeals below found that there was no *Brady* rule violation, and its decision does not conflict with any published decision of this Court or the Court of Appeals.**

In *Brady v. Maryland,* 373 U.S. 83, 86-87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) the U.S. Supreme Court held that the state's failure to disclose evidence favorable to the defendant that is material to the issue of guilt or punishment violates due process.

The three components of a *Brady* violation are (1) the evidence must be favorable to the accused (either exculpatory or impeaching); (2) the evidence must have been *suppressed* by the State (either intentionally or inadvertently), and; (3) resulting prejudice. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Neither Appellant's SAG nor his motion for

reconsideration engages in such analysis. While there may have been documents or other evidence that the Appellant would have liked to have had to prepare for his trial, or that he thought was relevant, simply wanting it and not getting it does not result in a *Brady* violation.

While a *Brady* violation may warrant a dismissal in extreme cases, such a case is rare:

> *Brady* violations are most commonly raised after conviction as a basis for a new trial; *they seldom warrant a dismissal.* The United States Court of Appeals for the District of Columbia has summarized the *postconviction* remedy analysis for a *Brady* violation as follows:
>
> > (1) a *Brady* violation requires a remedy of a new trial; (2) such new trial may require striking evidence, a special jury instruction, or other additional curative measures tailored to address persistent prejudice; and (3) if the lingering prejudice of a *Brady* violation has removed all possibility that the defendant could receive a new trial that is fair, the indictment must be dismissed. *To be sure, dismissal is appropriate only as a last*

> *resort, where no other remedy would cure prejudice against a defendant.*

State v. *Batsell,* 198 Wn. App. 1066 (2017) at 5 (unpublished, cited pursuant to GR 14.1) (emphasis on *postconviction* in the original; emphasis on *they seldom warrant a dismissal* added) quoting *United States v. Pasha,* 797 F.3d 1122, 1139 (D.C. Cir 2015) (emphasis added by Court of Appeals). In *In re Pers. Restraint of Stenson,* 174 Wn.2d 474,276 P.3d 286 (2011), a murder case, after finding a *Brady* violation the court reversed the conviction and remanded for a new trial, not a dismissal.

After what the State assumes was a thorough review of the record, appellate attorney did not see fit to include evidentiary rulings by the trial court nor a *Brady* violation as issues on appeal. Nor has Mr. Palmer shown in his petition why a dismissal, and not a new trial, is the appropriate remedy for such an alleged violation, if any.

Petitioner argues that the appropriate and *required* remedy for an alleged *Brady* violation is dismissal, relying on *State v. Sherman,* 59 Wn. App. 763, 801 P.2d 274 (1990) and *State v. Brooks,* 149 Wn. App. 373, 203 P.3d 397 (2009).

Neither *Sherman* nor *Brooks* dealt with exculpatory evidence, but rather addressed governmental mismanagement. In *Sherman,* defense counsel moved for dismissal on the day of trial under CrR 4.7(h)(7)(i) (the rule reads the same now as it did at the time of the *Sherman* decision), which allows the court to impose sanctions for discovery violations up to and including dismissal; the court granted the motion and the state appealed. While affirming, the court held that "[d]ismissal of charges is an extraordinary remedy. It is available only when there has been prejudice to the rights of the accused which materially affected the rights of the accused to a fair trial and that prejudice cannot

be remedied by granting a new trial." *Sherman,* 59 Wn. App. at 767 (quoting *State v. Baker,* 78 Wn.2d 327, 332-33, 474 P.2d 254 (1970)). "When they deem necessary, Washington appellate courts have not hesitated in overturning a trial court's dismissal of charges." *Id.* "[w]hether dismissal is an appropriate remedy is a fact-specific determination that must be resolved on a case-by-case basis." *Id.* at 770-71.

Brooks also dealt with a dismissal under CrR 8.3 for government mismanagement, not exculpatory evidence. Once again, while affirming, the court held that "dismissal under CrR 8.3 is an extraordinary remedy, *one that the trial court should use only as a last resort."* *Brooks,* 149 Wn. App. at 384.

Sherman and *Brooks,* relied upon by petitioner, dealt with dismissals for government mismanagement of discovery obligations, not *Brady* violations for failure to

disclose exculpatory evidence. Further, they do not stand for the proposition that a dismissal is mandatory for a discovery violation. The decision of the Court of Appeals is not in conflict with either case. The petition should be denied on this ground.

2. Venue is not material to the issue of guilt or innocence.

Petitioner argues that the State violated the *Brady* rule by failing to produce "AD scratch" material and the "Holmes report" and associated photographs. Petitioner further argues that these documents or evidence were material to the issue of venue and is thus exculpatory or impeaching (petition, issue 2.) This is apparently related to the charge of assault of a child which occurred in the car while the family was on its way from McCleary to Thurston county. Petition for review, page 11. However, venue is not an element of the crime. *State v. Rocki*, 130 Wn. App. 293, 297, 122 P.3d 759 (2005). Rather, "it is a constitutional right that is waived if not asserted in a timely

fashion." *Id.* Thus, it is not material to the issue of guilt or innocence, and the outcome of the trial would have been no different. Furthermore, Petitioner was interviewed regarding this incident. Petition for review, appendix 6 (police report), page17 (not the "Holmes report"). Thus, petitioner was in the best position to know whether the offense occurred in Grays Harbor County or Thurston County. As the court below correctly held, "[a] *Brady* violation does not arise if the defendant, using reasonable diligence, could have obtained the information at issue." *State v. Palmer*, 52362-1-II 10/11/22 Slip. Op. p.16 (quoting *State v. Sublett*, 156 Wn. App. 160, 200, 231 P.3d 231 (2010)).

3. Petitioner has not briefed the issue of bail (petition, issue 3) and thus that issue should not be considered by the Court. In any event, the issue is moot.

As the Court of Appeals correctly held, the issue of pretrial bail is moot. An issue is moot if the appellate court cannot provide effective relief. *Ctr. for Biological Diversity v.*

Dep't of Fish & Wildlife, 14 Wn. App. 2d 945, 985, 474 P.3d 1107 (2020). Furthermore, petitioner has not briefed this issue. "[P]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *In re Guardianship of Ursich,* 10 Wn. App. 2d 263, 278, 448 P.3d 112 (2019).

This Court should not consider this issue.

4. The State leaves the motion for extension of time to file the Petition to the Court's discretion.

The State has no personal knowledge with which to address the factual statements in Mr. Palmer's and Mr. Lechich's motions for an extension to file the petition for review. The State leaves it to the sound discretion of this Court whether or not to grant the extension.

The state is not requesting that the petition be denied as untimely, but as failing to satisfy the requirements of RAP 13.4(b).

CONCLUSION

Mr. Palmer's petition for review fails to satisfy the requirements of RAP 13.4(b) and should be denied. The decision below does not conflict with any published decision of the Court of Appeals or of this Court. The issues raised by petitioner do not present significant questions under either the state or federal constitutions nor do they present significant questions of substantial public interest that should be decided by this court.

Mr. Palmer makes several allegations, none of which are in the record, as pointed out by the Court of Appeals.

None of the issues raised in his SAG nor petition for review merit dismissal. The decision of the Court of Appeals below was correct.

For all the foregoing reasons, the petition for review should be denied.

This document contains 1838 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 2nd day of February, 2023.

Respectfully Submitted,

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WSBA # 15489

WAL /

GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

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