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Supreme Court No. I0236I-8
(COA Nos. 82550-0-I & 82580-1-I)

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

DERRICK BRANCH,
Petitioner.

IN RE THE PERSONAL RESTRAINT PETITION
OF

DERRICK BRANCH,
Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Derrick Branch petitions for review of the Court of Appeals' June 26, 2023, opinion. The court denied reconsideration on August 10, 2023. RAP 13.4(b)(1)-(4).¹

B. ISSUES

1. A personal restraint petition (PRP) is a vehicle for addressing legal errors that were not resolved on their merits on direct appeal. The Court of Appeals refused to address the prosecutorial misconduct that undermines Branch's conviction because Branch mentioned the prosecutor's conduct in his Statement of Additional Grounds for Review (SAGR) on his first direct appeal. But not only did Branch's PRP raise a distinct issue, the Court of Appeals never resolved the SAGR

¹ The Court of Appeals consolidated Branch's PRP with the appeal from his resentencing and issued a single opinion. Review of the denial of a PRP is normally by motion for discretionary review. RAP 13.5A(a)(1). Because the court consolidated the matters and RAP 13.4(b) governs review of all claims, Branch has filed a single petition for review. RAP 13.5A(b).

claim on its merits. This Court should review the Court of Appeals' misinterpretation of its role in deciding issues raised in a timely PRP and its opinion that denies Branch his ability to litigate a meritorious claim in any posture and undermines his right to a collateral attack.

2. The prosecution violates the fundamental right to a fair trial when it elicits excluded, highly prejudicial prior act evidence in violation of a court's ruling and the strictures of ER 404(b). After the court excluded evidence of a prior rape allegation before trial, the prosecution elicited this inflammatory propensity evidence. The prosecutor's misconduct in repeatedly eliciting and emphasizing this excluded evidence denied Branch a fair trial and is an issue of substantial public importance meriting review.

3. Branch received ineffective assistance when his appellate attorney failed to challenge the prosecution's misconduct in violating the in limine ruling and introducing

excluded evidence even though this misconduct was apparent from the record and prejudiced Branch.

4. The prosecution believed Branch's phone contained exculpatory evidence but refused to allow Branch to access it unless he granted law enforcement unlimited examination of all information on his phone. The court agreed Branch could not access and use any information on his phone unless he allowed the government unfettered review of all the contents of the entire device. By making Branch's receipt of exculpatory evidence contingent upon his agreement to permit the government wholesale access to his phone, the prosecution breached its duty to identify and disclose exculpatory evidence and the court crippled Branch's right to prepare and present a defense. This denial of due process merits review.

C. STATEMENT OF THE CASE

Shaquawna Mitchell accused Derrick Branch, her then-boyfriend, of raping her in October 2015, as well as several acts of assault during their two-year relationship. CP 17-21. The

prosecution acknowledged that in the 17 months before trial, Mitchell changed her story multiple times, “recanted backwards, forwards, sideways,” and gave “wildly inconsistent statements.” 10/27/17RP 18; 7RP 287. Sometimes she accused Branch of the charged and several uncharged acts. Sometimes she accused other men or said the incidents never occurred. 10/27/17RP 18; 7RP 279-81, 294-301, 318; App.14-15, 27, 33, 66, 81-83.² Despite the inconsistent evidence, the State persisted in its case against Branch and amended the charges several times. CP 1-21.

Before trial, the court addressed the admissibility of Mitchell’s allegations of an uncharged February 2015 alleged rape. 2RP 46-48, 128, 151-59; 6RP 243-49, 267-70; 7RP 276-321; App.2-4, 10-11, 137, 149-51, 204-17, 286-93, 299-304. When the court considered the February 2015 uncharged rape allegation, it knew Mitchell sometimes claimed Branch was the

² App. refers to the Appendix attached to the PRP’s Supplemental Brief of Petitioner.

perpetrator and sometimes claimed it was someone else. 7RP 279-81, 299.

The court granted Branch's motion to exclude evidence of the uncharged February 2015 rape. 7RP 319-21; 8RP 436-43, 626-29; 9RP 657-65. But the prosecution repeatedly defied the court's ruling and questioned Mitchell about the uncharged February 2015 rape. 8RP 619-29; 9RP 668-69. The jury therefore heard evidence that Mitchell was raped not only in October 2015 (charged), but also in February 2015 (uncharged). 8RP 619-29; 9RP 668-69, 689-92, 709-11, 716-20, 726-35. The jury also heard Mitchell's testimony that Branch did not commit either rape. 8RP 619; 9RP 668-69, 726; 10RP 780, 793, 867.

In closing, the prosecution argued Mitchell was lying and trying to protect Branch when she testified he did not rape her and urged the jury to convict him. 18RP 1949-54. The jury acquitted Branch of several counts of assault. 20RP 2074-75. However, it found him guilty of the October 2015 rape that was

bolstered by the impermissible propensity evidence of the excluded February 2015 rape. 20RP 2074-75.

In Branch's first direct appeal, the court rejected challenges to his conviction but remanded for resentencing, from which Branch again appealed. CP 41-52, 551-52. The Court of Appeals consolidated Branch's PRP with his direct appeal from resentencing. Slip op. 1.

D. ARGUMENT

- 1. In Branch's PRP, the Court of Appeals improperly applied the relitigation bar to an issue that was neither raised nor resolved on the merits on direct appeal.**

In his PRP, Branch argued the prosecution committed misconduct that denied him a fair trial when it elicited highly prejudicial prior act evidence that the trial court excluded in limine. *See* Supp.Br. 8-33; Reply 1-19. The Court of Appeals rejected this claim, holding, "Having raised the claim of prosecutorial misconduct on direct appeal, Branch cannot raise the same claim again in this PRP." Slip op. 7, 11.

The opinion misapprehends the law and conflicts with this Court’s opinions governing PRPs because Branch did not raise the same issue on direct appeal, nor did the direct appeal resolve the issue on its merits. The opinion’s unreasonably expansive interpretation of unformed SAGR claims to bar raising a fully developed issue in a PRP also undermines the right to collateral attack. The appellate court’s misapplication of the law to prevent litigants from raising an issue in any procedural context is also contrary to substantial public interest. This Court should accept review.

- a. Branch’s direct appeal did not raise the issue of misconduct based on the prosecution’s violation of the court’s ER 404(b) rulings.

“[A] court should dismiss a PRP only if the prior appeal was denied on the same ground and the ends of justice would not be served by reaching the merits of the subsequent PRP.”

In re Pers. Restraint Taylor, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). A person may raise an issue in a PRP unless they already presented the same issue on direct appeal *and* the court

“finally resolved” the issue on its merits in the direct appeal. *In re Pers. Restraint Becker*, 143 Wn.2d 491, 496, 20 P.3d 409 (2001). If a person did not raise the same issue, the court considering a PRP may not refuse to consider it. Similarly, if a person raised the same issue but the court did not consider it “on its merits on appeal,” the issue has not been “finally resolved,” and a petitioner is entitled to have their claim addressed. *In re Pers. Restraint Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999).

In his PRP, Branch argues the prosecution’s elicitation of highly prejudicial prior act evidence that the trial court excluded in limine constitutes misconduct that denied Branch a fair trial. Supp.Br. 8-33; Reply 1-19. Branch did not raise that issue in his direct appeal. Branch’s attorney did not present any prosecutorial misconduct claim in his appeal.³ CP 79-91.

³ Branch’s PRP also argues his appellate attorney was ineffective for not raise that challenge in his direct appeal. Supp.Br. 33-36; *infra* §D.3.

Branch filed a SAGR but also did not raise this issue of prosecutorial misconduct. CP 91-95; Resp.Br., App.A.

Instead, Branch's SAGR made an unformed and unsupported assertion that the prosecutor asked "objectionable questions." CP 92. This passing reference to "objectionable questions" does not constitute the same claim as the prosecutorial misconduct argument presented in Branch's PRP. The SAGR did not explain the factual basis for the claim or make any legal argument. Resp.Br., App.A. The SAGR did not assign error or assert the prosecutor committed misconduct. *Id.* The SAGR did not contain a single citation to any legal authority. *Id.*

In disposing of Branch's claim in his PRP, the court admits it cannot even determine the argument Branch made in his SAGR without "the benefit of briefing in this PRP by appointed counsel." Slip op. 7. This further demonstrates the two pleadings do not present the same claim.

If it is unclear whether an issue raised in a petition is the same as an issue raised on direct appeal, the reviewing court must err on the side of permitting the petitioner to litigate the claim. “[D]oubt ... as to whether two grounds are different or the same ... should be resolved in favor of the applicant.” *Taylor*, 105 Wn.2d at 688. In resolving the doubt about whether the two claims were the same *against* Branch, the Court of Appeals contradicted this Court’s opinions.

- b. The direct appeal did not resolve any issue of prosecutorial misconduct on the merits.

Even if the SAGR could be interpreted to present the same prosecutorial misconduct claim, Branch is not precluded from raising it in his PRP because the direct appeal opinion did not finally dispose of the claim, whatever it was, on its merits. Collateral review of the same claim is barred *only if* the direct appeal opinion adjudicated the claim on its merits and the ends of justice do not support reconsideration. *Taylor*, 105 Wn.2d at 688.

On direct appeal the Court of Appeals found Branch did not present the issue sufficiently and declined to rule on it. CP 91-92. The direct appeal opinion noted, “We will not consider a defendant’s statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors.” CP 91-92. It cited RAP 10.10(c), which states the same.⁴ The opinion concluded, “Branch does not identify any inadmissible evidence introduced by the State.” CP 92.

The direct appeal opinion’s citation to RAP 10.10, combined with its finding that Branch did not identify any problematic evidence, demonstrates the opinion did not resolve Branch’s claim about the prosecutor’s “objectionable questions” on the merits. Instead, the direct appeal opinion declined to decide the SAGR claim because it was not sufficiently argued or supported. CP 91-92.

⁴ “[T]he appellate court will not consider a defendant’s statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors.” RAP 10.10(c).

Because the opinion did not finally resolve Branch's claim on the merits, Branch is entitled to raise it in his PRP. *Becker*, 143 Wn.2d at 496; *Taylor*, 105 Wn.2d at 688. The opinion's dismissal of the claim that was not finally resolved on the merits in the direct appeal conflicts with this Court's opinions.

- c. The Court of Appeals' misinterpretation of the law to prevent consideration of Branch's prosecutorial misconduct claim in any posture is contrary to the ends of justice and presents an issue of substantial public interest.

Even if the direct appeal opinion declining to consider Branch's undeveloped argument about "objectionable questions" somehow constituted a final resolution on the merits of the same prosecutorial misconduct claim that Branch raises with specificity in his PRP, the Court of Appeals erred in precluding Branch from raising the claim in his PRP because the interests of justice require litigation of the issue.

"[A] court should dismiss a PRP only if the prior appeal was denied on the same ground and the ends of justice would

not be served by reaching the merits of the subsequent PRP.”
Taylor, 105 Wn.2d at 688. When “the ends of justice would be served by reexamining the issue,” a court must consider it.
Gentry, 137 Wn.2d at 388. In assessing whether justice warrants review, courts may consider any “justification for having failed to raise a crucial point or argument in the prior application.” *Id.*

Branch’s unformed assertion in his SAGR was unsupported by any legal argument and made without counsel. Because it was a direct appeal, the trial record constrained Branch. RAP 10.3(a).

Branch, represented by counsel on his PRP, presented a developed prosecutorial misconduct claim, supported by evidence and legal argument, and demonstrated the egregious misconduct deprived him a fair trial. He supported his claim with evidence outside of the record that he could not have relied on for the direct appeal. Supp.Br., Appendix.

A PRP is the appropriate avenue for consideration of SAGR issues that were not fully developed or resolved by the court because they were insufficiently supported. *See State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). Branch has also argued his appellate attorney was ineffective for not raising the issue. *Infra* §D.3. The interests of justice require consideration and resolution of Branch's prosecutorial misconduct issue, not dismissal under the relitigation bar.

The Court of Appeals misinterpreted the law and engaged in overly restrictive gatekeeping. By refusing to consider an issue in his PRP that the court did not decide on direct appeal, the Court of Appeals prevented Branch from litigating a meritorious issues in *any* posture. This Court should accept review to correct the appellate court's misunderstanding of its role, clarify the duty to address issues petitioner raise in timely PRPs, and uphold the right to collateral attacks.

2. The prosecution's improper elicitation of highly prejudicial, excluded prior act evidence constituted misconduct and denied Branch a fair trial.

- a. The prosecution's improper elicitation of excluded propensity evidence was misconduct.

The prosecution acts improperly when it violates in limine rulings. *State v. Gregory*, 158 Wn.2d 759, 864-67, 147 P.3d 1201 (2006). This misconduct includes introducing evidence or making arguments contrary to in limine orders. *State v. Ra*, 144 Wn. App. 688, 700-01, 175 P.3d 609 (2008); *State v. Stith*, 71 Wn. App. 14, 21-23, 856 P.2d 415 (1993). Here, the prosecution did both.

The trial court closely scrutinized and properly excluded the uncharged February rape allegation as inadmissible under ER 404(b). 7RP 276-321; 8RP 436-43, 626-29. Despite the court's order, the prosecution elicited testimony from Mitchell about the uncharged February 2015 rape allegation. 8RP 619-29; 9RP 668-69, 689-92. Mitchell testified she was raped at the beginning of 2015. *Id.* And just as she told the jury that Branch did not commit the charged October 2015 rape,

Mitchell testified that “someone else” committed the prior uncharged rape as well. 8RP 619; 9RP 668-69.

Branch immediately asked to be heard outside the presence of the jury. 8RP 619. The prosecutor agreed Mitchell referred to the February 2015 uncharged prior rape but argued the court should change its ruling. 8RP 624. The court rejected the prosecution’s arguments and maintained its ruling excluding evidence of the prior alleged rape. 8RP 627-27.

But the prosecution continued questioning Mitchell about the excluded February 2015 rape when the trial resumed the next day. 9RP 667-69, 682-92. When Branch objected and the court instructed the prosecution to “move on to something else,” the prosecution ignored the court’s direction and continued to question Mitchell about the prior uncharged rape allegation. 9RP 668-69, 689-92. Although the prosecution assured the court it had only three more questions about the excluded prior rape allegation, it asked Mitchell at least 19 more questions. 9RP 682, 689-92.

The prosecutor also capitalized on the improper evidence in closing. She used the impermissible evidence of Mitchell's February 2015 rape, along with Mitchell's testimony that someone other than Branch committed that uncharged rape, to bolster her theory that Branch raped Mitchell in October 2015, even though Mitchell denied it and blamed someone else for that rape as well.

The prosecutor argued Mitchell "lied to you" because she did not want the jury to know Branch raped and assaulted her. 18RP 1949-50. The prosecutor argued Mitchell lied "to protect, protect, protect Derrick Branch with every answer to every question, that was her intention." 18RP 1950-51.

This improper argument continued a theme the prosecutor started in opening. The prosecutor told the jury Mitchell would say "someone else did these things to her," because she wanted the charges "dropped" and when they were not, she "recanted or flipped or contradicted herself" and said Branch did not rape her. 1/18/18RP 10, 14. The prosecutor

told the jury Mitchell “offer[ed] alternative and potentially bizarre explanations,” including that someone other than Branch raped her, because she was trying to protect him. 1/18/18RP 14.

The prosecution’s introduction of and argument about the excluded evidence was misconduct. The court granted the defense’s motion to exclude all evidence of the alleged February 2015 rape. 7RP 319-21; *see also* 8RP 436-43, 626-29; 9RP 657-65. When it prohibited evidence of the February alleged rape, the court fully understood that Mitchell sometimes accused people other than Branch of the incident. 7RP 279-81, 287, 299. Whether Mitchell claimed someone else or Branch committed the February alleged rape, the undue prejudice from it remained, and the court properly excluded the evidence.

In addition, the court could not have properly allowed admission of a prior uncharged alleged rape committed by someone else. Evidence must be relevant to be admissible. ER 401-02. Evidence is logically relevant only if it tends to make a

material fact more or less likely than it would be without the evidence. *State v. Vazquez*, 198 Wn.2d 239, 255-57, 494 P.3d 424 (2021). If Branch was not the perpetrator of the February 2015 rape, it was inadmissible because it was not relevant to any charge against Branch. If the perpetrator was Branch, the February 2015 rape was inadmissible because it was unduly prejudicial propensity evidence. Either way, the court properly excluded the evidence.

But the prosecution used the prior uncharged rape that the court excluded and Mitchell's denials that Branch committed either rape to support its theme. The State's argued that Branch raped Mitchell in October 2015 but that Mitchell lied and claimed it was someone else to protect him. Mitchell's testimony that someone else raped her in February 2015 as well was consistent with the theory that Mitchell claimed Branch did not commit the rapes to protect him.

The impermissible evidence permitted the jury to believe Mitchell lied about who committed the uncharged February

2015 rape, just like the prosecution argued she lied about who committed the charged October 2015 rape, and to conclude Branch committed both rapes. This violation of the in limine ruling constitutes misconduct.

b. The inflammatory propensity evidence prejudiced Branch and denied him a fair trial.

Prosecutorial misconduct that prejudices a person deprives them of their constitutional right to a fair trial and requires reversal. *In re Pers. Restraint Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). Branch objected to the bulk of the prosecutorial misconduct here. 8RP 619-29; 9RP 567-69, 682-92.⁵ Even when he did not object, the misconduct still warrants reversal because the flagrant and ill-intentioned actions of the prosecution permeated the case and created an unfair trial. *State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976 (2015).

⁵ See also 2RP 46-48, 128, 151-59; 6RP 243-49, 267-70; 7RP 276-321; 8RP 436-43; App.204-17, 299-304.

The prosecution's pervasive misconduct throughout Mitchell's testimony and its use of the excluded evidence to advance the theory that Branch was guilty, despite Mitchell's denials, prejudiced Branch. The evidence was far from overwhelming. The only evidence supporting the October 2015 rape charge was Mitchell's statement to medical professionals and her belated statement to the police. 7RP 377-78, 425; 1/22/18RP 34-45; 8RP 507-08; 12RP 1150-51, 1234. No physical, medical, or other corroborating evidence substantiated the rape charge. Mitchell declined a genital exam, and the nurse did not observe external injuries. 8RP 507, 569-71, 593. The hospital destroyed the rape kit. 1/18/18RP 10, 24; 18RP 2027; 3/29/18RP 411-38. Mitchell's conflicting statements, culminating in her testimony under oath that Branch did not rape her, was the only evidence. 9RP 717, 730-34; 10RP 780, 794, 805-07, 863-70.

Given the paucity of evidence supporting the charge and the unreliability of the State's critical witness, there is a

substantial likelihood that the improper evidence and argument about the uncharged February 2015 rape affected the jury's verdict on the rape count.

The improper use of prior sexual misconduct in cases involving sex crimes in particular creates great prejudice. *State v. Fisher*, 165 Wn.2d 727, 748-49, 202 P.3d 937 (2009); *State v. Saltarelli*, 98 Wn.2d 358, 364, 655 P.2d 697 (1982). For example, in *Fisher*, the court admitted prior act evidence to explain the witness's delay in reporting, which the court found was a permissible purpose. 165 Wn.2d at 734. In argument, however, the State used the prior act evidence to demonstrate propensity, arguing the acts were part of a pattern. *Id.* at 738.

This Court determined Fisher did not receive a fair trial and reversed, even though the defense did not object. *Id.* at 738, 746-49. The court found the evidence was prejudicial because the State used the prior uncharged act evidence "to generate a theme" throughout the case. *Id.* at 748. The same is true here.

To support its case based on its own inconsistent witness, the prosecution employed a theme that explained Mitchell's denials. In opening, the prosecution told the jury it would hear that "someone else" committed the offenses because Mitchell wanted to protect Branch. 1/18/18RP 7-14. Mitchell then testified that someone else committed the charged October 2015 rape. 9RP 716-17; 10RP 780-82, 867. She also testified that someone else committed the uncharged February 2015 rape. 8RP 619; 9RP 668-69. Finally, in closing, the prosecution told the jury Mitchell lied about who committed the rape "to protect, protect, protect Derrick Branch." 18RP 1950-51, 1968.

The prosecution's questions deliberately disregarded the court's ruling and "invited the jury to make the forbidden inference underlying ER 404(b) that [the defendant's] prior bad acts showed his propensity to commit the crimes charged." *Ra*, 144 Wn. App. at 702. The prosecution's entire theory of the case was that Branch raped and assaulted Mitchell but that Mitchell lied and blamed someone else to protect Branch. The

excluded evidence and Mitchell's claim that someone else committed the prior rape bolstered the prosecution's argument that Branch committed the charged October rape even though she testified that someone else did it.

The "highly prejudicial evidence of prior sex offense[s]" is so damning that its admission may require reversal even when the improper evidence is heard only by a judge, who is presumed to know and follow the law. *State v. Gower*, 179 Wn.2d 851, 858, 321 P.3d 1178 (2014). Here, a jury considered the improper evidence that the court excluded. Branch suffered the great prejudice that is "inherent in evidence of prior sexual offenses." *Saltarelli*, 98 Wn.2d at 364.

The prejudicial prior act evidence also exacerbates implicit bias against Black defendants, like Branch, by feeding into stereotypes that Black men are more violent. Demetria D. Frank, *The Proof is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 Harv. J. Racial & Ethnic Just. 1, 3 (2016). "The effect of

courtroom racial bias is exacerbated by the ‘over admission’ of uncharged act evidence.” *Id.*

“When prior bad act evidence is coupled with racial references, stereotypes, or generalizations, the propensity inference becomes even stronger.” Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of 404(b) Evidence*, 25 *Law & Inequity* 1, 5 (Winter 2007). In this way, the use of prior act evidence “could impermissibly trigger the black male as violent stereotype” which can “lead to a biased decision-making process.” *Id.* at 20.

The prosecution’s wrongful introduction of this evidence preyed on the unconscious biases accompanying such evidence. Courts must interpret rules to “administer justice and support court rules in a way that brings greater racial justice to our system as a whole.” Letter from Wash. State Sup. Ct. to

Members of Judiciary & Legal Cmty. (June 4, 2020).⁶ This Court should accept review to address the prejudicial misconduct of eliciting such prior act evidence in violation of the court's ruling.

3. Branch received ineffective assistance of counsel.

Branch was entitled to the effective assistance of counsel on direct appeal. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). A person receives ineffective assistance of counsel when they are prejudiced by counsel's failure to raise a meritorious issue on appeal. *In re Pers. Restraint Netherton*, 177 Wn.2d 798, 801, 306 P.3d 918 (2013).

Branch received ineffective assistance when his appellate counsel did not challenge the prosecutor's egregious misconduct in repeatedly and blatantly violating the court's ruling. *Supra* §D.2. The misconduct was apparent from the

⁶<https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>

record and prejudiced Branch. Had counsel raised the issue, it likely would have resulted in relief. Therefore, Branch received ineffective assistance. *See In re Pers. Restraint Morris*, 176 Wn.2d 157, 161, 288 P.3d 1140 (2012).

4. The court wrongly conditioned Branch's access to exculpatory evidence on a wholesale invasion of his rights to privacy, association, and against self-incrimination.

Due process requires the prosecution to “learn of and disclose” to the accused evidence within its knowledge or possession that is favorable to the defense or material to guilt or punishment. *In re Pers. Restraint Mulamba*, 199 Wn.2d 488, 499, 508 P.3d 645 (2022); *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); U.S. Const. amend. XIV.

The prosecution failed to comply with this obligation when it told Branch it believed his phone contained exculpatory evidence but refused to turn it over. The court compounded the constitutional error when, rather than order the release of Branch's phone, it conditioned Branch's right to this

exculpatory evidence on his providing the government with unlimited access to the contents of his entire phone. This violated Branch's right to present a defense and to a fair trial.

Police seized Branch's phone following his arrest. 1 IRP 983; App.123. They believed the phone contained evidence demonstrating he violated no contact orders. App.78-79. The police obtained search warrants for the phone but could not access its contents, so they retained the phone. 1 IRP 983-84; App.116-19, 122-29.

The prosecution told Branch it believed the phone contained exculpatory evidence based on conversations with Mitchell. App.101-03, 116; 10/27/17RP 14-15; 2RP 178. However, it would not turn over the phone so Branch could access the exculpatory information unless Branch agreed to unlock the phone and allow police to search its entire contents, beyond what the warrant allowed. The prosecution also refused to investigate what the exculpatory information might be and did not ask Mitchell more about it. 7RP 340.

In an attempt to learn the exculpatory evidence, Branch moved for the return of his phone multiple times. 10/27/17RP 11-21; 2RP 175-88; 3RP 207-18; 7RP 337-50; 9RP 634-50; App. 89-119. The court refused to let Branch use the exculpatory evidence on his phone unless Branch agreed to create a mirror copy of the phone and provide it to the State. 9RP 634-49.

The government may not circumvent its discovery and *Brady* obligations by disclosing exculpatory evidence to which a person is entitled only if the person waives other valuable constitutional rights. Similarly, the court cannot condition a defendant's access to exculpatory evidence to which he is constitutionally entitled on a waiver of other rights to which he is also entitled.

A phone contains “an intimate window into a person's life.” *Carpenter v. United States*, __U.S.__, 138 S. Ct. 2206, 2217, 201 L. Ed. 2d 507 (2018). Phones reveals not only the user's contacts, but their movements and familial, political,

professional, religious, and sexual associations. *Id.*; *State v. Hinton*, 179 Wn.2d 862, 869-70, 319 P.3d 9 (2014). Phones carry “[t]he sum of an individual’s private life” and “expose to the government far *more* than the most exhaustive search of a house.” *Riley v. California*, 573 U.S. 373, 394-96, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014).

An accused person is entitled to disclosure of exculpatory evidence *and* to their rights to privacy, free association, and against self-incrimination. U.S. Const. amends. I, IV, V, XIV; Const. art. I, §§ 4, 7, 9. By requiring Branch to disclose all the information on his phone in exchange for receiving exculpatory evidence, the court wrongly made Branch choose which constitutional rights to forfeit.

The Court of Appeals defended the State’s withholding of the exculpatory evidence by concluding Branch “knew more about the contents of his phone than the State.” Slip op. 14. While Branch may be presumed to have a general idea of information on his phone, the prosecution had a duty to identify

the specific exculpatory or impeaching information. Branch could not know “the essential facts enabling him to take advantage of any exculpatory evidence” without the prosecution identifying at least the subject of the *Brady* information among the vast contents of his phone. *State v. Mullens*, 171 Wn.2d 881, 896, 259 P.3d 158 (2011).

The Court of Appeals also rejected Branch’s claim because “he does not challenge the propriety of the State’s warrants to search his phone.” Slip op. 15. But the search warrant for Branch’s phone was necessarily limited in scope to the time, place, and contents for which the police had probable cause. *See State v. Thein*, 138 Wn.2d 133, 147-48, 977 P.2d 582 (1999). The State sought to leverage its possession of exculpatory information to force Branch to reveal the entire contents of his phone far in excess of any permissible warrant. This amounts to a general warrant.

The court’s limitless ruling permitting the government complete access to all information on the phone far exceeded

the information authorized by the bounds of a narrowly tailored search warrant. That a lawful warrant existed allowing a specified search does not permit a boundless intrusion, nor does it excuse the prosecution from its obligation to disclose exculpatory information.

The prosecution violated its duty to disclose exculpatory evidence. The court's conditioning of Branch's access to the evidence on his relinquishment of other rights insulated the prosecution from its duty to investigate and disclose exculpatory evidence and violated Branch's due process rights. This Court should grant review.

E. CONCLUSION

For all these reasons, this Court should accept review.

RAP 13.4 (b).

Counsel certifies this brief complies with RAP 18.17 and the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 4,902 words.

DATED this 11th day of September, 2023.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a long horizontal flourish extending to the right.

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APPENDIX A

June 26, 2023, unpublished opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DERRICK DWAYNE BRANCH, Appellant.	No. 82550-0-I Consolidated with No. 82580-1-I DIVISION ONE UNPUBLISHED OPINION
In the Matter of the Personal Restraint Petition of: DERRICK DWAYNE BRANCH, Petitioner.	

CHUNG, J. — Derrick Branch was convicted of rape in the second degree and felony violation of a domestic violence no-contact order, both alleged as crimes of domestic violence and carrying additional domestic violence aggravators. After his first appeal, this court remanded for resentencing. The trial court imposed a determinate sentence and then, on the State's motion, modified it to an indeterminate sentence. Branch now appeals the modified sentence, arguing that even though the court properly imposed an indeterminate term, he is entitled to a full resentencing hearing. In his personal restraint petition (PRP), consolidated here with the direct appeal, Branch claims the State committed prosecutorial misconduct by eliciting excluded prior act testimony from its

complaining witness and his counsel provided ineffective assistance by failing to raise the claim of prosecutorial misconduct in his prior appeal. He also asserts the State violated his constitutional rights by failing to meet its Brady¹ obligation to disclose exculpatory evidence on his phone and by refusing to return his phone unless he agreed to give the State access to its contents. We affirm the trial court's order granting the State's CrR 7.8 motion and amending his sentence, and we deny his petition.

FACTS

The relevant background and procedural facts are set out in our opinion on Branch's first direct appeal:

Branch and S.M. met in February 2015 and began a romantic relationship. After S.M. moved in with Branch, she returned home with physical injuries. On July 1, 2015, Valley Medical Center emergency department treated S.M., where she reported that her boyfriend attacked and raped her.

On June 1, 2016, S.M. reported domestic violence at the Des Moines Police Department. The next day, the Des Moines Police Department responded to a 911 call, where S.M. reported that her boyfriend choked her. She was transported to the emergency room at Highline Medical Center where she reported that her boyfriend physically and sexually abused her during their relationship. S.M. went to [the] Des Moines Police Department again on June 3, 2016, and reported more details about the prior rape and abuse from her boyfriend.

S.M. then obtained a protection order against Branch. On numerous occasions, Branch was seen with S.M. after the court entered a no-contact order.

The State charged Branch with four counts of assault, three counts of violation of a no-contact order, and one count of rape.

At trial, S.M. testified that Branch never assaulted or raped her. She explained that her injuries were either caused by someone other than Branch or by herself when she would attack Branch and he would defend himself.

¹ Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

State v. Branch, No. 78379-3-I, slip op. at 2-3 (Wash. Ct. App. Feb. 18, 2020) (unpublished), <http://www.courts.wa.gov/opinions/pdf/783793.pdf>.

On remand, after considering mitigating factors, the trial court sentenced Branch to an exceptionally low determinate sentence of 90 months. Soon thereafter, however, the State filed a CrR 7.8 motion arguing it had been incorrect in recommending a determinate sentence for his second degree rape conviction and that the court should sentence Branch to an indeterminate sentence. The sentencing court agreed and modified the judgment and sentence by adding the maximum term of life, thus converting Branch's sentence to an indeterminate one. Branch appealed the order granting the CrR 7.8 motion and modifying his judgment and sentence.

Separately, Branch filed his own CrR 7.8 motion alleging prosecutorial misconduct. The trial court transferred that motion to this court as a PRP, which we consolidated with Branch's direct appeal of his modified sentence after resentencing.

DISCUSSION

I. Appeal of Indeterminate Sentence

Branch appeals the trial court's decision to grant the State's CrR 7.8 motion and amend his exceptional downward determinate sentence of 90 months to an indeterminate sentence of a minimum of 90 months to a maximum term of life in prison.

We review a ruling on a CrR 7.8 motion for abuse of discretion. State v. Crawford, 164 Wn. App. 617, 621, 267 P.3d 365 (2011). A trial court abuses its discretion if its decision rests on untenable factual grounds or was made for untenable legal reasons. State v. Frohs, 22 Wn. App. 2d 88, 92, 511 P.3d 1288 (2022). Interpretation of the Sentencing Reform Act is a question of law that we review de novo. Crawford, 164 Wn. App. at 622.

After the parties' opening briefs were filed, the Washington Supreme Court decided In re Pers. Restraint of Forcha-Williams, 200 Wn.2d 581, 520 P.3d 939 (2022). Forcha-Williams concludes that sentencing courts lack the discretion to replace an indeterminate sentence with a determinate one. 200 Wn.2d at 606. The Court reasoned that setting and altering criminal penalties is the sole prerogative of the legislature, and RCW 9.94A.507 requires both a minimum and maximum term for sentencing of sex offenders. 200 Wn.2d at 591-93.

Branch was convicted of second degree rape, and he concedes that under Forcha-Williams, the court was required to impose an indeterminate term. We accept the concession. Branch argues that nevertheless, this court should remand for a full sentencing hearing because if the trial court had known it was required to impose a maximum term of life, it may have sentenced Branch to a lower minimum term.

As we noted in Branch's direct appeal, "[w]here a defendant has requested an exceptional sentence below the standard range, 'review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence

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below the standard range.’ ” Branch, No. 78379-3-I, slip op. at 10 (quoting State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). We held in Branch’s first appeal that the trial court initially “did not exercise its discretion” and ordered “remand so that it can,” Branch, No. 78379-3-I, slip op. at 12, and it is clear that the sentencing court on remand did so. The trial court held a hearing and considered evidence, presentence reports and exhibits, and the arguments of counsel. It then exercised its discretion by sentencing Branch to an exceptional downward sentence, and supported the exceptional sentence with written findings of fact and conclusions of law. Thus, the sentencing court had already exercised its discretion by imposing an exceptional downward minimum term; subsequently modifying that sentence by granting the State’s CrR7.8 motion and adding the statutory maximum term—a term over which it had no discretion—did not change that exercise of discretion. Remand for resentencing is unnecessary.

II. Personal Restraint Petition

In his PRP, Branch claims a violation of his right to a fair trial based on prosecutorial misconduct and ineffective assistance from appellate counsel because they failed to raise the prosecutorial misconduct issue in his first direct appeal. He also challenges the State’s failure to disclose exculpatory evidence on his cell phone under Brady, claiming it violated his rights to present a defense and a fair trial. Finally, Branch claims conditioning the return of his phone on his providing the State with his password violated his rights to privacy, association, and against self-incrimination.

A person is entitled to relief via a PRP when that person is restrained unlawfully. RAP 16.4; In re Pers. Restraint of Dodge, 198 Wn.2d 826, 836, 502 P.3d 349 (2022). The petition will be granted “if (1) [the defendant] was actually and substantially prejudiced by a violation of his constitutional rights; or (2) that the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.” In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 331-32, 166 P.3d 677 (2007) (internal quotations omitted). The petitioner has the burden of proof by a preponderance of the evidence. In re Pers. Restraint of Cook, 114 Wn.2d 802, 814, 792 P.2d 506 (1990).

A. Prosecutorial Misconduct and Ineffective Assistance of Counsel

Branch’s prosecutorial misconduct and ineffective assistance claims both arise from the same allegedly “improper questions” asked by the prosecutor during S.M.’s testimony. The State argues that this court rejected the same grounds in Branch’s first direct appeal.

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 Lord, 123 Wn.2d 296, 329, 868 P.2d 835 (1994). A petitioner is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interests of justice require relitigating that issue. In re Pers. Restraint of Yates, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). The interests of justice are served only if there has been an intervening change in the law or some other justification for the petitioner’s failure to raise a crucial point or argument in the prior application. Id. “Simply ‘revising’ a previously rejected legal argument, however, neither creates

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a 'new' claim nor constitutes good cause to reconsider the original claim." In re Pers. Restraint of Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). Nor may a petitioner recast an issue previously resolved on direct appeal by claiming ineffective assistance of counsel. In re Pers. Restraint of Benn, 134 Wn.2d 868, 906, 952 P.2d 116 (1998).

In his Statement of Additional Grounds (SAG) in his first direct appeal, Branch argued the State asked S.M. "objectionable questions knowing that [S.M.]'s answers would introduce inadmissible evidence." On this point, this court's opinion states, "Branch does not identify any inadmissible evidence introduced by the State." Branch, No. 78379-3-I, slip op. at 14. Branch further argued the questions were "a rape shield violation" and also violated "the motions in limine." We noted Branch could not seek relief for violations of the rape shield statute because it protects victims, not defendants. Further, we stated, "Branch does not point to any motions in limine that the prosecutor violated." Id.

While we determine that Branch did previously raise the same issue about the prosecutor's questions, with the benefit of briefing in this PRP by appointed counsel, the basis for Branch's arguments is more apparent. Thus, while we determine Branch cannot relitigate that claim via collateral attack, we nonetheless examine it to explain that conclusion.

Before trial, the State sought to admit ER 404(b) evidence of prior acts of violence by Branch toward S.M., including statements made to a sexual assault nurse examiner, to the police, and in support of a petition for a domestic violence protection order (DVPO) regarding an alleged sexual assault in February 2015.

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Because S.M. was a recanting victim, the State sought to offer this evidence to bolster S.M.'s credibility and, thus, to prove the charged acts occurred, as well as to show her fear of Branch. The court denied the State's motion to admit this 404(b) evidence because it could not find by a preponderance that the uncharged acts occurred. It reserved whether the same evidence could be used later to impeach S.M.

In its direct examination of S.M., the State laid a foundation that S.M. was living with Branch in the summer of 2015. The following exchange then occurred:

[State] Okay. And were you still going to college at this time?

[S.M.] I think no.

[State] Why?

[S.M.] Uhm, because some things had happened prior, uhm, that had stopped me from going to college.

[State] What was that?

[S.M.] Uhm, I was attacked and sexually assaulted, not by -- not by [Branch], but by someone else, and so I stopped going to college.

During a recess from testimony, Branch argued that the "State can't open their own door" for the 404(b) evidence previously excluded, to which the State responded it "did not have any idea that would be her reply." After further discussion, the court reiterated its prior ruling not to allow the State to impeach S.M. with prior inconsistent statements using evidence of prior uncharged acts—specifically the February 2015 sexual assault that was the subject of the petition for a DVPO, in which S.M. had identified Branch.

The next morning, after additional colloquy about the issue, the court noted that although S.M. mentioned the February 2015 sexual assault on direct,

“it didn’t sound like [the State] was specifically trying to elicit” prior act evidence and characterized S.M.’s testimony as “spontaneous.” Branch asked the court to strike S.M.’s testimony from the prior day about the February 2015 assault and to issue a limiting instruction. The State opposed the request and asked instead to question S.M. about the February 2015 incident in order to distinguish it from the charged act. The court declined Branch’s request to strike the testimony, stating the jurors would likely not be able to obey that instruction and it was not necessary to prevent unfair prejudice to Branch.

When S.M.’s testimony resumed, the State established that S.M. and Branch’s relationship began in February 2015, that they were living together, that Branch was her boyfriend in October and November 2015, and that Branch was the only boyfriend S.M. ever had. Then the State asked S.M. to go back to the prior day’s testimony “that [S.M.] had been attacked and sexually assaulted by someone else and that it happened near the college in Auburn.” Branch objected, the court overruled the objection, and the court asked the parties to move on.

Later, out of the presence of the jury, the State asked the court to allow it to “ask clarifying questions to distinguish [S.M.’s testimony] as to the time period, where it occurred, whether she reported, and if she had injury.” Branch objected, but the court allowed the State to ask these questions. The court reasoned that while it had excluded ER 404(b) evidence, at this point, S.M. had testified to a sexual assault by someone other than Branch, and the State was not asking the court to revisit the 404(b) analysis. When direct examination resumed, the State

asked its questions. Branch objected to the State's question about whether the assault by the stranger occurred at the beginning or end of 2015. The court overruled the objection and S.M. responded it "probably happened [at] the beginning."

The crux of Branch's claim both on direct appeal and in this PRP is that pre-trial, the court had excluded ER 404(b) evidence relating to uncharged prior acts of violence by Branch against S.M., and that it was misconduct for the State to have then elicited S.M.'s testimony about the February 2015 assault.

Generally, to prevail on a prosecutorial misconduct claim, a defendant who timely objects must prove that the prosecutor's conduct was both improper and prejudicial in the context of the entire trial. State v. Zamora, 199 Wn.2d 698, 708-09, 512 P.3d 512 (2022) (citing State v. Loughbom, 196 Wn.2d 64, 70, 470 P.3d 499 (2020)) (internal quotations omitted). On collateral review, a petitioner must prove that "the alleged misconduct was either a constitutional error that resulted in actual and substantial prejudice or a fundamental defect that resulted in a complete miscarriage of justice." In re Pers. Restraint of Lui, 188 Wn.2d 525, 539, 397 P.3d 90 (2017).

The prosecutor's questions to S.M. about the February 2015 incident were not improper. The State did not elicit S.M.'s testimony about it; rather, S.M. raised the incident herself in response to a question about why she left college. Further questioning by the State about the incident did not elicit any of the previously excluded ER 404(b) evidence. ER 404(b) prohibits "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show

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action in conformity therewith.” But S.M. did not testify that Branch attacked and sexually assaulted her. Rather, she testified that the perpetrator was someone else. Nor did the court permit the State to impeach S.M. with her prior statement in support of her petition for a DVPO that accused Branch of the February 2015 assault. Because the prosecutor’s questions were not improper, Branch also cannot establish that they were prejudicial.

Having raised the claim of prosecutorial misconduct on direct appeal, Branch cannot raise the same claim again in this PRP. He also cannot recast this claim as ineffective assistance of appellate counsel. See In re Pers. Restraint Petition of Khan, 184 Wn.2d 679, 688-89, 693, 363 P.3d 577 (2015) (allowing ineffective assistance claim on new ground not previously raised on direct review, but refusing to review a separate ineffective assistance claim that was “a repackaging of” grounds resolved on direct review). Thus, we deny Branch’s PRP claim based on prosecutorial misconduct.

B. Claims Based on Cell Phone Information

Branch claims his rights to present a defense and to a fair trial were denied because the State withheld exculpatory evidence on his phone. He further claims the court violated his rights to privacy, association, and against self-incrimination by conditioning Branch’s access to his phone.²

² Branch at points claims the State, rather than the court, was responsible for these violations, alleging it “tried to leverage its possession of exculpatory information to force Mr. Branch to give up his rights to privacy, association, and against self-incrimination.”

The State seized Branch's phone incident to his arrest. The State had warrants to search the phone for evidence that Branch violated a no-contact order, but it could not unlock the phone, and Branch refused to provide the code. Pre-trial, S.M. told her victim advocate that "she was concerned that she could get into trouble for something on the phone, she didn't specify what." The State subsequently informed Branch that "the phone may contain potentially exculpatory information (based on what the victim represented to the advocate). Please consult with the defendant as to whether he wants to consent to the search of his cell phone by providing the password."

Branch moved for the return of his phone. The court decided Branch should have access to his phone, but if he decided to use anything from it, then the State should have access to the unlocked phone. The court offered to let Branch's investigator unlock the phone and make a copy of its contents for Branch's inspection. If Branch decided to use the copy, a copy would also be turned over to the State. Branch agreed he would notify the court if he wanted such an order, but the record does not show he ever did so. The State never succeeded in unlocking Branch's phone.

A Brady violation occurs when a prosecutor suppresses "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87, cited in In re Pers. Restraint of Mulamba, 199 Wn.2d 488, 497, 508 P.3d 645 (2022). Brady claims are reviewed de novo. Mulamba, 199 Wn.2d at 498.

A Brady violation consists of three elements. First, the withheld evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching; second, the evidence must have been suppressed by the State, either willfully or inadvertently; and third, prejudice must have ensued. Mulamba, 199 Wn.2d at 498 (citing Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (internal quotations omitted); In re Pers. Restraint of Stenson, 174 Wn.2d 474, 486-87, 276 P.3d 286 (2012)).

Here, as to whether the withheld evidence was favorable to Branch, Branch argues the phone's contents must have been favorable to him because the State used the word "exculpatory." But beyond this speculation, Branch has not pointed to any evidence that there was exculpatory information. While the State did not further investigate what S.M. meant by her statement to her victim advocate,³ its failure to do so is not evidence that the State knew of any information on the phone that was exculpatory.

Regarding the second element of suppression of evidence, the "prosecution is under no obligation to turn over materials not under its control." State v. Mullen, 171 Wn.2d 881, 901, 259 P.3d 158 (2011) (quoting United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991)). Moreover, when a defendant has enough information to be able to ascertain the supposed Brady material on the defendant's own, there is no suppression by the government.

³ A prosecutor has a duty to learn of and disclose any favorable evidence known to others acting on the government's behalf. Mulamba, 199 Wn.2d at 499 (citing Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)). There is no record evidence that the State followed up with S.M. about what she meant.

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Aichele, 941 F.2d at 764 (citing United States v. Dupuy, 760 F.2d 1492, 1501 n.5 (9th Cir. 1985) (collecting cases)). Here, Branch knew more about the contents of his phone than the State. The State agreed it would gain access to the unlocked phone only if Branch chose to use its contents, and Branch did not so choose. The State had access to the physical phone, but not the contents, so it did not suppress information.

Finally, Branch cannot establish the third element for a Brady violation, prejudice. Prejudice means material to the result. Mulamba, 199 Wn.2d at 498. Evidence is material for Brady purposes when there is a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Mulamba, 199 Wn.2d at 498 (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (plurality)). Branch does not explain how the suppressed evidence was material, but rather argues that he cannot make an offer of proof when the State is in possession of his phone. But the information remained inaccessible to the State, and Branch had more knowledge about the phone’s information content than did the State. See Mullen, 171 Wn.2d at 899 (“[A]ny allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense.”). Branch also chose to interview S.M. without creating a record about what she said was on the phone. Branch fails to establish prejudice from the State’s failure to disclose information on Branch’s own cell phone.

In addition to the alleged Brady violation, Branch also argues that by conditioning the return of the phone on his providing his password, the court violated his rights to privacy, association, and against self-incrimination. But he does not challenge the propriety of the State's warrants to search his phone.⁴ A valid warrant provides the "authority of law" required to "disturb" a person's "private affairs." CONST. art. I, § 7. While Branch cites cases stating that cellphones reveal private information, he fails to provide any argument applying that authority to the facts here. "This court will not consider claims insufficiently argued by the parties." State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990).

We affirm the trial court's order granting the State's CrR 7.8 motion and amending his sentence, and we deny Branch's PRP.

Chung, J.

WE CONCUR:

Birk, J.

Manna, J.

⁴ Instead, Branch claims the court's "limitless ruling permitting the government complete access to all information on the phone far exceeded the information authorized by the . . . narrowly tailored search warrant."

APPENDIX B

August 10, 2023, Order Denying Motion for Reconsideration

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DERRICK DWAYNE BRANCH,

Appellant.

In the Matter of the Personal Restraint
Petition of:

DERRICK DWAYNE BRANCH,

Petitioner.

No. 82550-0-I
Consolidated with
No. 82580-1-I

DIVISION ONE

ORDER DENYING MOTION
FOR RECONSIDERATION

Appellant Derrick Branch filed a motion for reconsideration of the opinion filed on July 14, 2023, in this consolidated appeal and personal restraint petition. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 82550-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: September 11, 2023

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