96908-6

Nos.35686-8-III and 35853-4-III

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON ,

Respondent,

vs.

CAMERON J. PETERSON,

Appellant-Petitioner.

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

CASES:

United States Supreme Court:

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A. Identity of Petitioner:

Cameron J. Peterson, asks this court to accept review of the decision designated in Part B of this motion.

B. Decision to be Reviewed:

The decision of the Court of Appeals, Division III, filed December 18, 2018, and Order Denying Motion for Reconsideration filed January 31, 2019.

C. Issues Presented for Review:

This case presents the following question of substantial interest to the citizens of this state:

1. Whether a defendant who seeks to challenge his conviction for second degree assault on grounds of ineffective assistance of counsel at trial is entitled under CrR 4.8 to a subpoena duces tecum to obtain the alleged victim's medical records to establish the absence of any injury consistent with the testimony of the State's witnesses?

D. Statement of the Case:

Appellant/Defendant Cameron Peterson was found guilty by a jury of Second Degree Assault on December 4, 2015. CP 7. The charge arose out of an incident that occurred at the Special K Tavern in April 2015. At trial, the State presented several witnesses who testified that Peterson struck the alleged Victim,

Gregory L. Zielke, Sr., over the head with a bottle, glass or other object. One witness described the blow to Mr. Zielke as resulting in a "gash" that caused significant bleeding. CP 40 - 41. Zielke allegedly lost consciousness as a result of the blow. Peterson denied striking Zielke on the head. .

Following the alleged assault, Zielke was transported to Sacred Heart Medical Center hospital for the express purpose of having him examined for possible head injuries. CP 53. The records of that examination were not produced by the State as part of the discovery in the case and were not introduced or otherwise used at trial. Peterson's trial attorney made no effort to obtain the records despite Peterson's repeated requests to do so.

Peterson appealed his conviction. Whether Peterson had received effective assistance of counsel at trial was not raised on direct appeal. CP 43 - 47. Following the denial of his appeal, Peterson made repeated efforts to obtain copies of those records from the Public Defender and from the Spokane Police Department. None of those efforts were successful. (Declaration of Cameron Peterson in Support of Motion for Relief From Judgment, p. 2).

Peterson then asked the superior court issue a subpoena to Sacred Heart Medical Center to allow him to obtain the records. CP 36. In support of that request, Peterson claimed that he had not assaulted Zeilke as described by the witnesses at trail and the medical records would not show any injury to Zeilke's head consistent with the testimony at trial. CP 37-38. Peterson's request for a subpoena was denied on the grounds that there was no action currently

pending in the superior court and that the court lacked authority to issue the requested subpoena. (CP 83-84)

Peterson then filed a motion to vacate his conviction pursuant to CrR 7.8(b) and requested the issuance of a subpoena to obtain the records to support his motion. That motion was transferred to the Court of Appeals for consideration as a Personal Restraint Petition (PRP) pursuant to CrR 7.8(c)(2). The appeal and PRP were then consolidated in the Court of Appeals.

The Court of Appeals denied both the appeal and the PRP in an unpublished opinion. The Court of Appeals first held that CrR 4.8, which allows the superior court to issue a subpoena at the request of a party, does not apply to post-conviction proceedings. The court cited *District Attorney's Office for the Third Judicial District v. Osborne,* 557 U.S. 52, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009), and *State v. Mullen*, 171 Wn.2d 881, 902, 259 P.3d 158 (2011) as support for the proposition that the rules of discovery do not apply after a conviction.

The Court of Appeals also held that Peterson could not establish the prejudice prong of the his ineffective assistance of counsel claim and dismissed his PRP. The court reasoned that, without the actual records, Peterson's claim that use of the records at trial would probably have changed the outcome was based on nothing more than speculation.

In so holding, the Court of Appeals acknowledged that it was placing an impossible burden on Peterson. According to the Court of Appeals, Peterson was entitled to a subpoena to obtain the victim's medical records only if he could show actual prejudice from counsel's failure to obtain the records for use at trial.

To establish such prejudice, however, Peterson would need to present those same records to the court, which he cannot do without first getting a subpoena isued by the court. Peterson now petitions this Court for review.

V. Argument Why Review Should Be Accepted:

1. Whether a Defendant Who has Been Convicted at Trial is Entitled to a Court Issued Subpoena to Obtain Records Necessary to Establish a Claim of Ineffective Assistance of Counsel at Trial is a Question of Substantial Public Interest that Should be Decided by this Court.

After exhausting all other possible means of obtaining the alleged victim's medical records, Peterson applied to the superior court for issuance of a subpoena dues tecum requiring Sacred Heart Medical Center to provide the records. In opposing the request, the State did not argue that Peterson had failed to show adequate reason for issuance of a subpoena. Instead, the State argued that the superior court had no authority to issue a subpoena because the criminal discovery rules do not apply once a defendant has been found guilty. (CP 68-82)

The Court of Appeals agreed, relying in part on the fact that CrR 4.8 comes under the heading of "PROCEDURES PRIOR TO TRIAL" and that CrR 4.7 addresses discovery, which preserves a defendant's rights while preparing for trial. The Court of Appeals also reasoned that CrR 4.8 does not apply following a conviction because there is no "action" pending before the superior court once a conviction has been affirmed on appeal.

The Court of Appeals' ruling in this case misconstrues the nature of the relief requested by Peterson and unnecessarily limits a defendant's ability to seek post-conviction relief. Regardless of whether a defendant is entitled to "discovery" following a conviction, there is no basis to limit the application of CrR 4.8 solely to pre-trial proceedings. CrR 4.8 is not a rule of discovery. Unlike CrR 4.7, CrR 4.8 imposes no obligation on either party to disclose information or materials to an opposing party. In fact, notice to the opposing party is not a requirement for issuance of a subpoena under CrR 4.8, except when the subpoena seeks production of evidence or inspection of items from a defendant or a victim. CrR 4.8(b)(2). CrR 4.8 merely provides a mechanism by which any party can obtain potentially relevant and admissible evidence from third parties through issuance of a subpoena. There is no logical reason why the superior court's power to issue a subpoena should be restricted to pre-trial proceedings only.

As a practical matter, third parties who hold information that may be considered confidential or which may expose the third party to potential liability if improperly disclosed, such as medical records, may and often do require a court order or court issued subpoena before divulging the information. Thus, limiting the superior court's ability to issue subpoenas following a conviction severely and unnecessarily limits a criminal defendant's ability to obtain information and evidence that may be highly relevant to issues raised in post-conviction proceedings.

The Court of Appeals reliance on *State v. Mullen*, 171 Wn.2d 881, 902, 259 P.3d 158 (2011) completely misreads that decision In *Mullen*, this Court

recognized that a subpoena is the proper method for obtaining documents in the possession of a third party. The Court also noted that the State's obligation to disclose exculpatory evidence prior to trial did not necessarily apply to any and all evidence discovered after trial. *Id.*, 171 Wn.2d at 902. Nothing in *Mullen* even remotely suggests that a defendant does not have the right to conduct further investigation or attempt to obtain exculpatory evidence from third parties after a conviction.

Here, the records Peterson seeks to obtain are clearly material to the question of guilt and whether he received effective assistance of counsel at trial. If the alleged victim's medical records show that he was examined and no injury consistent with the testimony of the State's witnesses was found, the credibility of those witnesses and the veracity of their testimony would be seriously undermined to say the least. Yet, according to the Court of Appeals, Peterson has no right to obtain those records. The sole justification for denying Peterson access to the records is that he has already been convicted. Whether that is a correct application of the Criminal Rules is a matter of substantial public interest that should be determined by this Court.

2. The Decision of the Court of Appeals in this Case Raises a Significant Question of Law Under the Washington State Constitution Regarding the Right of a Criminal Defendant to Seek Post-Conviction Relief.

In denying Peterson's PRP, the Court of Appeals held that he could establish the prejudice prong of his ineffective assistance of counsel claim only by

presenting the alleged victim's actual medical records. The Court of Appeals reasoned that, absent the records, any claim of prejudice from trial counsel's failure to obtain the records for use at trial was based on nothing more than "speculation."

The Court of Appeals recognized that its ruling resulted in a classic Catch-22, or what the court characterized as a "paradoxical situation." Nevertheless, the court stated that it was bound by the rule requiring a Personal Restraint petitioner alleging constitutional error to meet the threshold burden of showing actual prejudice. See, *In re Personal Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

The Court of Appeals incorrectly applied the standard for determining when a personal restraint petitioner has met his or her initial burden of showing prejudice resulting from a constitutional error. To meet that initial burden, a petitioner need only demonstrate that the facts as alleged would potentially entitle him or her to relief. *In re Personal Restraint of Rice*, 118 Wn.2d 876, 886-87, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). A petitioner need not show that he or she is in fact entitled to relief or that the petition will ultimately be successful.

Here, by requiring Peterson to present the alleged victim's actual medical records, the Court of Appeals essentially imposed as an initial burden the requirement of showing actual entitlement to relief, not simply the likelihood or potential for relief. As the Court of Appeals recognized, it is impossible for Peterson to demonstrate entitlement to relief without the actual records, which

according to the Court of Appeals, he has no right to obtain through a court issued subpoena, even though he cannot get the records without such a subpoena.

Even without the records, however, Peterson can still demonstrate the potential for relief by showing that the records, if made available to him, would likely show the absence of any injury consistent with the testimony at trial. To show a likelihood or potential of entitlement to relief, Peterson need only submit competent evidence showing that the requested records are likely to exist and will probably be exculpatory.

That is exactly what Peterson did here. Peterson submitted his own declaration stating under oath that he did not strike the alleged victim on the head with a glass bottle or other object as described by the State's witnesses. He also submitted police reports showing that the alleged victim was transported to the hospital for the express purpose of being examined for a head injury. If those facts are taken as true, there is a strong likelihood that the requested records exist and would show the absence of any injury consistent with the testimony at trial.

Of course, it is possible that the alleged victim never made it to the hospital or that he refused to be examined once there. It is also possible that any examination was inconclusive as to whether he had sustained a head injury consistent with the testimony at trial. Those possibilities, however, do not render Peterson's claim a matter of speculation. Peterson is not simply guessing that the records will be exculpatory, he has provided specific information which, if believed, raises a substantial likelihood that the records will in fact be exculpatory.

The present case is distinguishable from cases in which this Court has held that a personal restraint petitioner failed to meet his or her initial burden. For example, in *In re Personal Restraint of Rice*, 118 Wn.2d at 886, this Court held that a PRP petitioner cannot simply state what he thinks witnesses would testify to, but must present their affidavits or other corroborating evidence. Similarly, in *In re Personal Restraint of Williams*, 111 Wn.2d 353, 759 P.2d 436 (1988), this Court held that the petitioner had failed to establish a prima facie claim that prior convictions used for purposes of sentencing were unconstitutionally obtained where the petitioner did not submitted any affidavits, certified transcripts, or court dockets (all of which were readily available) showing that his guilty pleas were without assistance of counsel or were otherwise not voluntarily or knowingly entered. *Id.*, 111 Wn.2d at 664-65. The Court concluded that the petitioner's claims were nothing more than "naked castings into the constitutional sea." *Id.*, at 665.

Here, Peterson's claim of ineffective assistance of counsel is based on more than bare, unsupported allegations. In fact, Peterson provided the superior court with all of the evidence available to him without a court issued subpoena. At the same time, Peterson requested a subpoena to allow him to obtain records that are likely to, or at least have the potential to, demonstrate that he did not commit the crime for which he was convicted and did not receive effective assistance of counsel. This is not a case where a petitioner has simply failed to present evidence that is readily available. On the contrary, Peterson's own

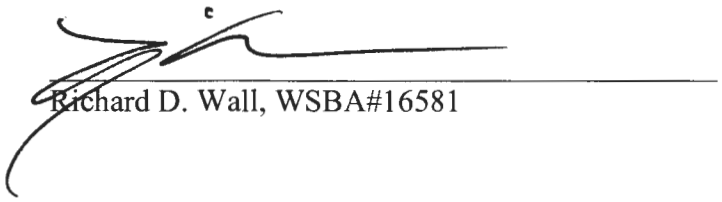
declaration details the great lengths he went to in his effort to obtain those records before requesting the court to issue a subpoena.

In any event, Peterson is not claiming that the Court of Appeals was required to grant his petition based on the record as it now stands. Instead, he asserts error only in the denial of his request for a subpoena to obtain the evidence he needs to support his ineffective assistance of counsel claim. Because that evidence is contained in medical records, the disclosure of which is prohibited by both state and federal laws except under specific circumstances, Peterson has no means of obtaining the records without the requested subpoena. Whether a PRP petitioner has a right to issuance of a subpoena under these circumstances is a significant and important question under the state constitution that should be determined by this Court.

VI. Conclusion:

For the foregoing reasons, this court should accept review, reverse the decision of the Court of Appeals, and remand this case to the superior court with instructions to issue the requested subpoena.

Respectfully submitted this 27th day of February, 2019.



Richard D. Wall, WSBA#16581

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of February, 2019, a true and correct copy of the foregoing PETITION FOR REVIEW was sent via legal messenger to the following:

Brian C. O'Brien, DPA
Spokane County Prosecuting Attorney's Office
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Spokane, WA 99260

And was sent via US Mail postage prepaid to Appellant at:

Cameron Peterson
4907 E. Fairview
Spokane, WA 99217

Melissa Hoppe

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

STATE OF WASHINGTON, Respondent, v. CAMERON J. PETERSON, Appellant.	)	No. 35686-8-III (consolidated with No. 35853-4-III) UNPUBLISHED OPINION
IN THE MATTER OF PERSONAL RESTRAINT OF CAMERON J. PETERSON	)	

FEARING, J. — Cameron Peterson appeals a superior court order denying his motion to issue a postconviction subpoena duces tecum for medical records. In a consolidated personal restraint petition, Peterson seeks the same relief. We affirm the superior court's denial of relief.

FACTS

On April 12, 2015, Cameron Peterson and Gregory Zielke Sr. patronized a tavern. Someone forcefully struck Zielke on his head, and the blow rendered Zielke unconscious. At trial, the State presented witnesses who testified that Peterson walloped Zielke with a

bottle, glass, or other object. One witness described a resulting "'gash'" on Zielke's head that caused significant bleeding. Clerk's Papers at 37. Peterson has always denied striking the blow. Following the assault, medical personnel transported Gregory Zielke to Sacred Heart Medical Center.

The State charged Cameron Peterson with second degree assault. The prosecution did not introduce at trial medical records for the hospital treatment of Zielke. A jury convicted Peterson of the charge. The superior court sentenced Peterson to three months' confinement.

Cameron Peterson appealed his conviction. This court held that sufficient evidence supported the conviction and affirmed the conviction.

PROCEDURE

Following the appeal of the conviction for second degree assault, Cameron Peterson, citing CrR 4.8(b), filed a motion in the superior court for issuance of a subpoena duces tecum directing the records custodian for Sacred Heart Medical Center to produce all records relating to the diagnosis and treatment of Gregory Zielke for the head injury. In support of the subpoena request, Peterson argued that he did not assault Zielke as described by witnesses and the medical records would confirm a lack of injury to Zielke's head.

The superior court denied the motion for issuance of the subpoena duces tecum. The court ruled that CrR 4.8 applied only to pretrial discovery. Peterson appealed this decision to this court.

Cameron Peterson later filed with the superior court a motion, under CrR 7.8(b)(2), (3) and (5), for relief from judgment and for discovery. Pursuant to CrR 7.8(c)(2), the superior court transferred the motion to this court as a personal restraint petition. This court consolidated the appeal with the personal restraint petition.

LAW AND ANALYSIS

Despite consolidating Cameron Peterson's personal restraint petition with his appeal, we separate the two for purposes of analysis. Although Peterson seeks a subpoena duces tecum for medical records in each proceeding, the rules attending the request differ within the two proceedings. We also address his request within the context of a motion to vacate judgment under CrR 7.8.

Appeal

After completion of the appeal of his conviction, Cameron Peterson asked the superior court to issue a subpoena duces tecum, under CrR 4.8(c), to obtain the medical records of his victim. The superior court ruled that CrR 4.8 applies only to pretrial motions. We agree.

Cameron Peterson seeks to garner a subpoena duces tecum for discovery purposes. CrR 4.7 governs criminal discovery. *State v. Pawlyk*, 115 Wn.2d 457, 471, 800 P.2d 338

(1990). CrR 4.8 addresses subpoenas. The title to section 4 of the criminal rules for Superior Court, which contains CrR 4.7 and 4.8, is "PROCEDURES PRIOR TO TRIAL" CrR 4.7, which addresses discovery, speaks in terms of discovery leading to trial. The discovery rules constitute pretrial mechanisms to facilitate litigation and preserve a defendant's rights while preparing for trial. *See State v. Copeland*, 89 Wn. App. 492, 497, 949 P.2d 458 (1998).

CrR 4.8(a)(1)(B) refers to "[t]he court in which the action is pending" as the body issuing the subpoena. After the appeal affirms the conviction, no action pends before the superior court.

In *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009), the United States Supreme Court suggested that a defendant may not engage in ongoing disclosure after a conviction. After a conviction, the defendant has been "constitutionally deprived" of his liberty, the presumption of innocence is gone, and a defendant is no longer entitled to the same pretrial liberty interests. *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. at 68-69. Our own state Supreme Court shares the same view as the Court in *Osborne*. *See generally State v. Mullen*, 171 Wn.2d 881, 902, 259 P.3d 158 (2011) the Washington Supreme Court observed that pretrial discovery principles do not apply to postconviction processes.

An offender may possess a due process right for postconviction discovery. *In re*

Personal Restraint of Gentry, 137 Wn.2d 378, 972 P.2d 1250 (1999). *In Gentry*, the court noted that, although a defendant possesses no due process right to discovery as a matter of course postconviction, the defendant may obtain discovery to the extent he or she can show good cause to believe discovery would prove entitlement to other relief. *In re Personal Restraint of Gentry*, 137 Wn.2d at 390-91. In his brief, Cameron Peterson cited *Gentry*, but he employs the decision in his CrR 4.8 argument. He does not assert the due process clause.

Motion to Vacate Judgment

We question whether we should address Cameron Peterson's motion to vacate his conviction under CrR 7.8 when the motion becomes a personal restraint petition when transferred to this appeal court. We analyze Peterson's claim under CrR 7.8 anyway.

Cameron Peterson argues that, by filing a motion to vacate his conviction under CrR 7.8, a new action is now "pending" before the trial court and therefore he gains entitlement to use the criminal discovery rules to obtain the subpoena duces tecum. The argument contains some logic, but falls short when considering the limited nature of CrR 7.8.

CrR 7.8(b) declares:

> On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void; or
>
> (5) Any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

Whereas the court rule references "newly discovered evidence," the rule authorizes no formal discovery.

Cameron Peterson seeks vacation of his conviction under three of the grounds listed in CrR 7.8: newly discovered evidence, fraud, and any other justifying reason. We address each ground in such order.

If the defendant seeks vacation of judgment under CrR 7.8(b)(2), he must demonstrate that the evidence (1) will probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981). The absence of any one factor is grounds to deny the motion. *State v. Gassman*, 160 Wn. App. 600, 609, 248 P.3d 155 (2011). Cameron Peterson could have subpoenaed the medical records before his trial, so the lack of discovery is not excused. He claims he directed his trial counsel to procure

the records, but his claim, if true, only shows a lack of diligence of his counsel and confirms the records could have been discovered before trial. Also, since we do not know of the contents of the medical records, we cannot find that discovery would probably change the result of the trial.

Cameron Peterson also bases his motion for vacation of the judgment on CrR 7.8(b)(3), which permits relief from a final judgment based on fraud, misrepresentation, or other misconduct by an adverse party. Nevertheless, Peterson does not allege or present any evidence of fraud, misrepresentation, or misconduct of an adverse party.

Cameron Peterson posits a third basis of relief under CrR 7.8(b)(5). Under this subsection of the rule, a court may relieve a party from a final judgment for any other reason justifying relief from the operation of the judgment. Ineffective assistance of counsel qualifies for relief under section (5). *State v. Cervantes*, 169 Wn. App. 428, 434, 282 P.3d 98 (2012).

Cameron Peterson justifies his motion for relief on a claim of ineffective assistance of counsel at trial resulting from his counsel's failure to obtain evidence critical to his defense. Nevertheless, Peterson claims he gains entitlement to a subpoena merely by alleging ineffective assistance of counsel, rather than showing ineffective assistance. He must establish ineffective assistance of counsel.

To prove ineffective assistance of counsel, the defendant must show that (1) defense counsel's representation was deficient, falling below an objective standard of

reasonableness and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Courts will presume counsel was effective. *State v. Sutherby*, 165 Wn.2d at 883.

Cameron Peterson does not acknowledge or cite either prong of ineffective assistance of counsel. Although Peterson argues that no reasonable defense attorney would have failed to obtain the victim's medical records for use at trial, this panel cannot find prejudice because the panel can only speculate as to the contents of those records.

Personal Restraint Petition

The law governing personal restraint petitions requires a petitioner alleging constitutional error to "satisfy his threshold burden of demonstrating actual and substantial prejudice." *In re Personal Restraint of Cook*, 114 Wn.2d 802, 810, 792 P.2d 506 (1990). If the petitioner does not demonstrate actual prejudice, the law requires dismissal of the petition. *In re Personal Restraint of Grisby*, 121 Wn.2d 419, 423-24, 853 P.2d 901 (1993). The petition must be dismissed if the petitioner fails to meet his or her burden of showing actual prejudice arising from constitutional error. *In re Personal Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

Cameron Peterson presents nothing more than speculation as to the contents of his desired medical records of Gregory Zielke. Peterson claims that the ability to pursue postconviction relief depends on his ability to get access to the medical records in order to demonstrate prejudice. This argument confirms the lack of a showing of prejudice.

We recognize the paradoxical situation faced by Cameron Peterson. He must gain a copy of the medical records to show prejudice. But he cannot gain a copy of the medical records because he has yet to show prejudice. Nevertheless, we remain bound by the rules promulgated for a personal restraint petition.

CONCLUSION

We affirm the superior court's denial of an issuance of a subpoena duces tecum. We dismiss Cameron Peterson's personal restraint petition.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Korsmo, J.

Pennell, A.C.J.

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COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CAMERON J. PETERSON, Appellant.	)	No. 35686-8-III (consolidated with No. 35853-4-III) ORDER DENYING MOTION FOR RECONSIDERATION
IN THE MATTER OF PERSONAL RESTRAINT OF CAMERON J. PETERSON	)	

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of December 18, 2018, is hereby denied.

PANEL: Judges Fearing, Korsmo, Pennell

FOR THE COURT:

Lawrence-Berrey, C.J.
ROBERT LAWRENCE-BERREY, Chief Judge