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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

CAMERON J. PETERSON, APPELLANT

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IN RE PERSONAL RESTRAINT PETITION OF:

CAMERON J. PETERSON, PETITIONER.

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENT OF ERROR**

The trial court erred by refusing to issue a subpoena for medical records that may provide a basis for granting a new trial.

## **II. ISSUE PRESENTED**

Did the trial court properly deny a post-conviction request, eight months after the trial concluded, for a subpoena duces tecum under CrR 4.8, for the victim's medical records?

## **III. STATEMENT OF THE CASE**

### Procedural History.

The defendant was convicted of second degree assault on December 4, 2015. CP 7. He was sentenced to three months in jail on December 17, 2015. CP 10. He filed a notice of appeal on December 18, 2015. CP 8. His appeal was dismissed on December 13, 2016, after this Court found sufficient evidence existed to convict Mr. Peterson of second degree assault. At that time, this Court also considered and dismissed defendant's SAG claims, which included a claim that the victim's medical records were never subpoenaed. The mandate issued on January 12, 2017. CP 27, 28-35.

A motion for issuance of subpoena duces tecum pursuant to CrR 4.8, requesting the victim's medical records, was filed on July 12, 2017, nineteen months after the trial concluded. CP 36-56. The motion was denied

in the Spokane County Superior Court on October 20, 2017; the court ruled that CrR 4.8 only applied to pre-trial matters. CP 83-84, 85-86. A notice of appeal was filed by the defendant on November 16, 2017. CP 87-88. Shortly thereafter, a motion for relief under CrR 7.8(b)(2), (3) and (5) was also filed in the Spokane County Superior Court on November 30, 2017. An order transferring the motion to this Court as a PRP, pursuant to CrR 7.8 (2), was filed on February 1, 2018. The appeal filed on November 16, 2017, and the PRP filed February 1, 2018, were then consolidated on February 20, 2018.

#### IV. ARGUMENT

##### **THE TRIAL COURT PROPERLY DENIED A POST-CONVICTION REQUEST FOR A SUBPOENA DUCES TECUM UNDER CrR 4.8.**

###### 1. Standard of Review for Appeal.

Decisions regarding discovery in criminal matters are reviewed under a manifest abuse of discretion standard. *State v. Blackwell*, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993). A manifest abuse of discretion arises when “the trial court’s exercise of discretion is ‘manifestly unreasonable or based upon untenable grounds or reasons.’” *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002) (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). Under a manifest abuse of discretion standard, “[t]he trial court’s decision will be affirmed unless no reasonable judge would have reached the same conclusion.” *In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985).

This Court need not agree with the trial court's decision for it to affirm that decision. It must merely hold the decision to be reasonable.

Here, the defendant appeals from the trial court's order denying his post-conviction request for a subpoena duces tecum for medical records. The trial court correctly ruled that CrR 4.8 applies only to pre-trial matters. The simple answer lies in the title to section 4 of the Criminal Rules for Superior Court, which contains CrR 4.8. It says: "4. PROCEDURES PRIOR TO TRIAL."

Additionally, the specific rule relied upon by defendant, CrR 4.8(b), states in section (1)(B) that "[t]he court in which the action is *pending* ... may issue a subpoena for production." "Pending" is defined as, "1. not yet decided: being in continuance; the case is still pending," or "2. Imminent, Impending." Merriam-Webster's Collegiate Dictionary 915 (2003). Here, the mandate was issued, terminating appellate review of defendant's case, on January 12, 2017. The case was no longer pending. The court's decision was a reasonable interpretation of the court rules. Thus, the trial court did not err in declining to issue a subpoena duces tecum, under the pretrial discovery rules, for the victim's medical records.

## 2. Standard of Review for PRP.

The standards of review for a personal restraint petition ("PRP") are well-settled. A petition alleging constitutional error must meet the heavy

burden of demonstrating “actual and substantial prejudice” in order to obtain relief. *In re Pers. Restraint of Haverty*, 101 Wn.2d 498, 504, 681 P.2d 835 (1984); *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 86, 660 P.2d 263 (1983); *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 650 P.2d 1103 (1982); *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 884, 828 P.2d 1086, *cert. denied* 506 U.S. 958, 113 S.Ct. 421 (1992). Allegations unsupported by persuasive reasoning are not sufficient to meet the threshold burden of proof that is necessary to attack a judgment or sentence. *In re Hagler*, 97 Wn.2d 818; *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986), *review denied*, 110 Wn.2d 1002 (1988). The petitioner must demonstrate by a preponderance of the evidence that any claimed constitutional error caused him actual and substantial prejudice. *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). If the petitioner does not demonstrate actual prejudice, the petition will be dismissed. *In re Pers. Restraint of Grisby*, 121 Wn.2d 419, 423, 853 P.2d 901 (1993).

In the case of *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 792 P.2d 506 (1990), the court made clear that the law governing personal restraint petitions required that, in the context of constitutional error, “*a petitioner must satisfy his threshold burden of demonstrating actual and substantial prejudice*. Unless a petitioner makes a prima facie showing of

such prejudice, his petition will be dismissed.” 114 Wn.2d at 810 (citations omitted) (emphasis added). The law is not that a petition “may” be dismissed if a petitioner does not make the requisite showing. The law requires the petition “will” be dismissed without the requisite showing. *In re Grisby*, 121 Wn.2d at 423-24.

Actual prejudice must be proven by the petitioner even for constitutional errors that can never be considered harmless on direct appeal. *In re St. Pierre*, 118 Wn.2d at 328-329. Relief will only be granted if the constitutional error had substantial and injurious effect or influence in determining the jury’s verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 123 L.Ed.2d 353, 113 S.Ct 1710 (1993). Conclusory allegations of constitutional violations are insufficient to support a personal restraint petition. *In re Cook*, 114 Wn.2d at 813.

In contrast, an even higher standard applies when dealing with allegations of *non-constitutional* error. To obtain review of such an error in a PRP, petitioner must show that the “claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.” *Id.* at 812. It is the petitioner’s burden to establish this “threshold requirement.” *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). To do so, a PRP must present competent evidence in support of its claims. *In re Rice*, 118 Wn.2d at 885-86. It cannot be based

on speculation, conjecture, or inadmissible hearsay. *Id.* at 886. In petitions based on matters outside the appellate record, a petitioner must demonstrate “competent, admissible evidence” to support his arguments. *In re Rice*, 118 Wn.2d at 886; *see also In re Pers. Restraint of Moncada*, 197 Wn. App. 601, 391 P.3d 493 (2017).

If the facts alleged would potentially entitle the petitioner to relief, a reference hearing may be ordered to resolve conflicting factual allegations. *In re Rice*, 118 Wn.2d at 886-87. In other words, a reference hearing is used to determine the truth of the petition’s allegation; it is not a discovery device to determine whether there is available evidence. *Id.* at 886.<sup>1</sup>

These restrictions on relief in a PRP exist because of significant policy considerations. “Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.” *In re Hagler*, 97 Wn.2d at 824. As a PRP is no substitute for an appeal, the standards for review in a PRP are significantly higher than on appeal.

Here, the record shows that there is only speculation as to what may be contained in the sought after medical records. CrR 7.8 motions and

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<sup>1</sup> In the case at bar, the defendant has presented nothing more than speculation and conjecture as to what may be contained in his sought after medical records.

personal restraint petitions are not mechanisms by which a defendant may fish for evidence supporting his allegations. There is no showing of any prejudice, much less “actual and substantial” prejudice as required for a constitutional violation, or a “fundamental defect which inherently results in a complete miscarriage of justice.” The defendant’s personal restraint petition should, therefore, be dismissed.

The defendant is attempting to improperly use pre-trial discovery rules to develop a post-trial motion. Other avenues are available to the defendant to properly obtain this information, such as filing a civil action and using the discovery process therein.

3. Discretionary Review.

Assuming, arguendo, that the request for a subpoena duces tecum was proper under CrR 4.8, the denial of that request would not be a final judgment. A final judgment is one that settles all the issues in a case. *In re Detention of Turay*, 139 Wn.2d 379, 392, 986 P.2d 790 (1999). The order denying the request for issuance of the subpoena is most closely akin to a discovery order, and is not immediately reviewable for the same policy against piecemeal review that makes discovery orders appealable only from a final judgment. *See State ex rel. Smith v. Jones*, 149 Wash. 614, 271 P. 1005 (1928); *State ex rel. Seattle Gen. Contr. Co. v. Superior Court*, 56 Wash. 649, 106 P. 150 (1910).

The Rules of Appellate Procedure provide two methods of seeking review – review as a matter of right and discretionary review. RAP 2.1(a). RAP 2.2(a) lists the types of decisions that are appealable as a matter of right. If a decision is not appealable as a matter of right, a party may seek discretionary review under RAP 2.3. A decision that is not listed in RAP 2.2(a), is reviewable solely under the discretionary review criteria set out in RAP 2.3. *In re Dependency of Chubb*, 112 Wn.2d 719, 721, 773 P.2d 851 (1989). The failure to mention a particular decision or proceeding in RAP 2.2(a) indicates the Supreme Court’s intent that the matter is only reviewable under the discretionary review guidelines of RAP 2.3. *Id.* at 721. Therefore, the appropriate appellate procedure regarding the defendant’s “direct appeal” from the order denying the subpoena duces tecum is for the defendant to seek discretionary review.

4. CrR 7.8 Analysis.

The defendant filed a motion for relief under CrR 7.8(2), (3) and (5) in Spokane Superior Court. Spokane Superior Court then transferred the case to the court of appeals as a PRP.

Analyzing the first claim, CrR 7.8(b)(2) has been construed to require the moving party to demonstrate that the evidence asserted to be newly discovered (1) will probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before the 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, 223, 634 P.2d 868 (1981); *State v. Macon*, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996). With respect to the first requirement – that the evidence will probably change the result of the trial – our Supreme Court has held that a showing that evidence “*may* lead to a different result [falls] far below the minimal requirement that the claimed evidence *will*, in the court’s considered judgment, probably change the result.” *State v. Peele*, 67 Wn.2d 724, 731, 409 P.2d 663 (1966). As to the second requirement, *nothing* has been discovered by the defense which relates to the medical records. As to the third requirement, the medical records were known to exist at the time of trial. As to the fourth requirement, there has been no showing of materiality, only defendant’s speculation. As to the fifth requirement, the medical records would only be used as impeachment evidence. 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). Here, none of the requirements are met.

Under CrR 7.8(b)(3), defendant’s second basis for relief, a defendant may obtain relief from a final judgment based on fraud, misrepresentation, or misconduct of an adverse party. Such allegations must be established by clear and convincing evidence, as this rule is the

counterpart of CR 60(b)(4). *See State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d (1996) (citing *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009 (1991)). The defendant has presented no evidence of fraud, misrepresentation, or misconduct of an adverse party.

Under CrR 7.8(b)(5), the defendant's third basis for relief, the court has authority "[o]n motion and upon such terms as are just ... [to] relieve a party from a final judgment" for "[a]ny other reason justifying relief from the operation of the judgment." CrR 7.8(b)(5).

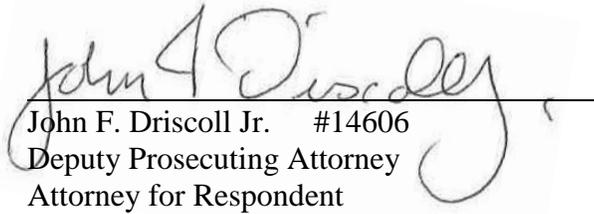
Relief under CrR 7.8(b)(5) is limited to extraordinary circumstances not covered by any other section of the rule. *State v. Brand*, 120 Wn.2d 365, 369, 842 P.2d 470 (1992); *State v. Olivera–Avila*, 89 Wn. App. 313, 319, 949 P.2d 824 (1997); *State v. Cortez*, 73 Wn. App. 838, 841-42, 871 P.2d 660 (1994). Extraordinary circumstances include fundamental and substantial irregularities in the court's proceedings or irregularities extraneous to the court's action. *State v. Aguirre*, 73 Wn. App. 682, 688, 871 P.2d 616 (1994). Final judgments should be vacated or altered only in those limited circumstances "where the interests of justice most urgently require." *State v. Shove*, 113 Wn.2d 83, 88, 776 P.2d 132 (1989). Such is not the case here.

## V. CONCLUSION

The defendant has made no showing, whatsoever, that he is entitled to relief. This entire petition is based on speculation, rather than fact. As a result, his claims fail and this Court must dismiss his petition.

Dated this 26 day of April, 2018.

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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 26, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Richard Wall  
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4/26/2018  
(Date)

Spokane, WA  
(Place)

  
\_\_\_\_\_  
(Signature)

# SPOKANE COUNTY PROSECUTOR

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