No. 97391-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF:

ROBERT L. YATES, JR.

PETITIONER.

PETITION FOR REVIEW

Jeffrey Erwin Ellis #17139
Attorney for Mr. Yates
Law Office of Alsept & Ellis
621 SW Morrison St. Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

OTHER

A. IDENTITY OF PETITIONER

Robert Yates asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

On June 13, 2019, the Court of Appeals affirmed Mr. Yates's amended *Judgment and Sentence*. A copy of the decision is attached.

C. ISSUES PRESENTED FOR REVIEW

1. Is defendant entitled to a new sentencing hearing when he asserts and is denied his rights to be present and to allocution at a resentencing where the court must make discretionary decisions regarding the minimum term for two indeterminate sentences and whether to run those sentences consecutive or concurrent to each other and the previously-imposed determinate terms?

2. Where the amended judgment involving both indeterminate and determinant sentences indicates "the actual number of months of total confinement shall reflect an indeterminate sentence of 4,900 months to life," should this Court reverse and remand with directions for the judgment to specify both determinate and indeterminate terms, rather than one total indeterminate term.

D. STATEMENT OF THE CASE

Robert Yates was convicted of multiple counts of murder. The first two occurred before enactment of the SRA. The remaining counts occurred after. CP 1-3.

The Court of Appeals reversed Mr. Yates's previous sentence because it imposed determinate, rather than indeterminate terms on the first two counts. *State v. Yates,* 199 Wash. App. 1051 (2017), *review denied*, 189 Wash. 2d 1037, 407 P.3d 1140 (2018) ("this matter is remanded to the superior court with instructions to correct counts I and II of Mr. Yates's judgment and sentence, along with the recitation of the total term of incarceration.").

At resentencing, the court was faced with several discretionary sentencing decisions: the length of the minimum terms, whether to run those terms concurrent or consecutive to each other and to the determinate terms. At the sentencing hearing, where counsel but not Mr. Yates was permitted to appear, the court amended the *Judgment and Sentence* so that it now provides:

> IT IS ORDERED that: paragraph 4.5(a) of the Judgment and Sentence entered on October 26, 2000, is hereby corrected to reflect the term of 240 months to life on both Counts 1 and 2, and *the actual number of months of total confinement shall reflect an indeterminate sentence of 4,900 months to life*.

CP 1-3. Mr. Yates objected, through counsel, to the denial of his right to be present and to allocate RP 4-6.

E. ARGUMENT

1. Mr. Yates Had a Right to be Present and to Allocute

Through counsel, Mr. Yates requested, but was denied the right to allocute. The right of allocution is not an independent constitutional right. In Washington, the right of allocution at sentencing is statutory. RCW 9.94A.500. The constitutional "right to be heard in person" includes a right to allocution if the defendant requests it. *State v. Canfield*, 154 Wash. 2d 698, 708, 116 P.3d 391, 396 (2005) ("Given our common law and statutory history of affording allocution and the legitimate interest of a defendant to personally address the court, we conclude that where a defendant asserts his right to allocution, the court should allow him to make a statement in allocution.").

The Court of Appeals did not decide this issue. Instead, it held that because it had previously directed that Mr. Yates was not allowed to attend his own sentencing when it previously remanded for resentencing, that it would not revisit the issue. However, at that point Yates had not asserted his right to allocution. Now, he has. If, as this Court held in *Canfield*, there "is no reason to deny a defendant the opportunity to allocate" at a revocation hearing "since allowing a defendant a few moments of the court's time is minimally invasive," then there can be no reason to deny a defendant at a resentencing where discretionary decisions are being made by the court. *Canfield*, 154 Wash. 2d at 705.

2. Mr. Yates Was Improperly Sentenced to Indeterminate Sentences on All Counts.

Mr. Yates was convicted of two pre-SRA counts of murder and numerous counts of murder occurring after the adoption of the SRA. Indeterminate sentences were required for Counts I and II. RCW 9.95.010. Determinate sentences were required on the remaining counts. RCW 9.94A.010, *et seq*.

After imposing two indeterminate life terms with 20 year minimums, the sentencing court's order provides "the actual number of months of total confinement shall reflect an indeterminate sentence of 4,900 months to life." CP 2.

The lower court held that the sentencing judge did not impose a total indeterminate term. "The sentencing court's calculation of a total sentence of 4,900 months to life merely reflects the indeterminate nature of Mr. Yates' s first two counts of conviction. It does not change the determinate nature of the sentences for counts 3 through 14." *Opinion*, p. 2-3.

However, the order states that Mr. Yates has received one total "indeterminate sentence." Instead, the order should have stated that Mr. Yates has received two indeterminate "20 to life" terms and then separately calculate his total determinate terms. As it stands, the order reflects a single total indeterminate term—contrary to the law.

F. CONCLUSION

This Court should accept review, reverse, and remand for a new sentencing hearing.

DATED this 8th day of June 2019.

Respectfully Submitted:

/s/Jeffrey Erwin Ellis
Jeffrey Erwin Ellis #17139
Attorney for Mr. Yates
Law Office of Alsept & Ellis
621 SW Morrison St. Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ROBERT LEE YATES, JR., Appellant.	)))))))))	No. 35959-0-III UNPUBLISHED OPINION

PENNELL, J. — In 2000, Robert Lee Yates Jr. pleaded guilty to 13 counts of first degree murder and 1 count of attempted first degree murder. *In re Pers. Restraint of Yates*, 180 Wn.2d 33, 35, 321 P.3d 1195 (2014). The first two counts involved crimes that occurred prior to the enactment of the Sentencing Reform Act of 1981, chapter 9.94A RCW. The original sentencing court listed the sentences for counts 1 and 2 as 20-year determinate sentences.

In 2015, Mr. Yates appealed the sentencing court's denial of his CrR 7.8 motion for resentencing on counts 1 and 2. This court ultimately remanded for the sentencing court to correct the judgment and sentence to reflect indeterminate life sentences for counts 1 and 2 instead of 20-year determinate sentences. *State v. Yates*, No. 33703-1-III, (Wash. Ct. App. July 11, 2017) (unpublished),

https://www.courts.wa.gov/opinions/pdf/337031_unp.pdf, *review denied*, 189 Wn.2d 1037 (2018). Our prior decision specified that neither full resentencing, nor Mr. Yates's presence, was required at proceedings to correct the judgment and sentence. *Id*. at 3-4. A mandate on our decision was issued by our clerk on January 16, 2018. RAP 12.5.

On remand, the sentencing court corrected Mr. Yates's judgment and sentence as directed by this court. Specifically, Mr. Yates's sentence was corrected to reflect an indeterminate term of confinement of 240 months to life for both counts 1 and 2. The court also noted that, given this correction, Mr. Yates's total term of confinement was 4,900 months to life. Consistent with the terms of our decision, Mr. Yates was not present at the hearing.

Mr. Yates now appeals, arguing he improperly received indeterminate sentences on counts 3 through 14 and that he was denied his constitutional right of allocution. Both claims are unpersuasive.

Mr. Yates's first argument is based on a misunderstanding of the sentencing court's order. The only indeterminate sentences imposed were for counts 1 and 2. Counts 3 through 14 continued to carry determinate terms. The sentencing court's calculation of a total sentence of 4,900 months to life merely reflects the indeterminate

nature of Mr. Yates's first two counts of conviction. It does not change the determinate nature of the sentences for counts 3 through 14.

With respect to the right of allocution, our previous opinion specified that Mr. Yates did not have the right to be present for the ministerial correction of his judgment and sentence. This meant there was no right to allocution. Our prior decision became final upon issuance of the mandate. The terms of that decision are now the law of the case and we will not revisit them either in response to Mr. Yates's substantive appeal or his statement of additional grounds for review. RAP 12.2.

This matter is affirmed.

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.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Fearing, J.

ALSEPT & ELLIS

July 08, 2019 - 2:07 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	State of Washington v. Robert Lee Yates, Jr. (359590)

The following documents have been uploaded:

- PRV_Petition_for_Review_20190708140633SC743936_6775.pdf
  This File Contains:
  Petition for Review
  The Original File Name was YatesRPFR.pdf

A copy of the uploaded files will be sent to:

- bpearce@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

Sender Name: jeffrey ellis - Email: jeffreyerwinellis@gmail.com
Address:
621 SW MORRISON ST STE 1025
PORTLAND, OR, 97205-3813
Phone: 503-222-9830

Note: The Filing Id is 20190708140633SC743936