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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD ROY SCOTT,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PACIFIC COUNTY

The Honorable Michael J. Sullivan, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE'S ABUSE OF WRIT THEORY, RAISED FOR THE FIRST TIME ON APPEAL, DOES NOT BAR SCOTT'S RENEWED MOTION TO SET ASIDE THE CONVICTION.

The State properly concedes the trial court erred in dismissing Scott's renewed CrR 7.8 motion under RCW 10.73.140 because the first motion was never resolved on its merits. Brief of Respondent (BOR) at 3-4. The State nonetheless seeks to salvage that erroneous trial ruling by raising a new theory for why the motion should be dismissed. Specifically, the State claims for the first time on appeal that Scott's renewed motion is procedurally barred by the "abuse of writ" doctrine. BOR at 4-9. That claim should be rejected for the reasons set forth below.

- a. The Abuse Of Writ Doctrine Does Not Apply To Claims That Were Previously Raised But Not Adjudicated On The Merits.

Under RAP 16.4(d), "[n]o more than one petition for similar relief on behalf of the same petition will be entertained without good cause shown." Under that rule, a successive petition for similar relief or on similar grounds must be dismissed absent good cause shown, but only if "the relevant issue was previously heard and determined on the merits." In re Pers. Restraint of Van Delft, 158 Wn.2d 731, 737, 147 P.3d 573 (2006). RAP 16.4(d) provides no bar to relief because Scott's renewed CrR 7.8

motion does not raise a new issue and the issue he does raise has never been adjudicated on its merits.

The abuse of writ doctrine is inapplicable for the same reason. The Washington Supreme Court has never found abuse of the writ applied to a successive collateral attack raising the *same* claim not previously adjudicated on its merits. Rather, the abuse of writ doctrine applies to *new* claims raised in a successive petition. See, e.g., In re Pers. Restraint of Martinez, 171 Wn.2d 354, 363, 256 P.3d 277 (2011) ("When a petitioner is represented by counsel throughout the entirety of postconviction proceedings, it is an abuse of the writ to raise a new issue that could have been raised in an earlier petition."); In re Pers. Restraint of Perkins, 143 Wn.2d 261, 265 n. 5, 19 P.3d 1027 (2001) (same), In re Pers. Restraint of Greening, 141 Wn.2d 687, 700, 9 P.3d 206 (2000) (same); In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 352, 5 P.3d 1240 (2000) ("The only direct bar to the raising of new issues in successive PRPs in this court is the abuse of the writ doctrine.").

The State recognizes Washington jurisprudence on successive collateral attacks draws on federal habeas corpus law. BOR at 5-6. Federal law, however, provides no help for the State's abuse of writ contention.

A federal court "may not reach the merits of: (a) successive claims that raise grounds identical to grounds heard and decided on the merits in a previous petition, Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986); (b) new claims, not previously raised, which constitute an abuse of the writ, McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991)[.]" Sawyer v. Whitley, 505 U.S. 333, 339, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992). As in Washington, the abuse of writ doctrine under federal law applies only to petitions asserting grounds not asserted in a prior petition. It is inapplicable to a successive claim raising an identical ground never decided on the merits.

The genesis of the abuse of writ doctrine in Washington stems from the United States Supreme Court decision in Sanders v. United States, 373 U.S. 1, 83 S. Ct. 1068, 1077, 10 L. Ed. 2d 148 (1963). In re Pers. Restraint of Haverty, 101 Wn.2d 498, 503, 681 P.2d 835 (1984) (citing Sanders, 373 U.S. at 15, 17). The United States Supreme Court has since clarified a habeas petition filed after an initial petition was dismissed without adjudication on the merits is not a "second or successive" petition as that term is understood in the habeas corpus context and cannot, for that reason, constitute an abuse of the writ. Slack v. McDaniel, 529 U.S. 473, 485-86, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

In so holding, the Court in Slack pointed out the Federal Rules of Civil Procedure vest the federal courts with due flexibility to prevent vexatious litigation without the need of resorting to the abuse of writ doctrine. Slack, 529 U.S at 489. Pursuant to Fed.R.Civ.P. 41(a) and (b),<sup>1</sup> a district court in its dismissal order can appropriately instruct an applicant that upon his return to federal court he is to bring only exhausted claims issue an order dismissing a mixed petition. Id. "*Once the petitioner is made aware of the exhaustion requirement*, no reason exists for him not to exhaust all potential claims before returning to federal court." Id. (emphasis added).

Washington trial courts, like their federal counterparts, have at their disposal procedural mechanisms for preventing vexatious litigation under CR 41 without resorting to the "abuse of writ" doctrine. CR 41(a)(4) provides *a second voluntary dismissal* involving the same claim by the same plaintiff has the effect of a decision on the merits. CR 41(a)(4) is intended to prevent the abuse and harassment of a party and the unfair use of dismissal. In re Burley, 33 Wn. App. 629, 637, 658 P.2d 8, review denied, 99 Wn.2d 1016 (1983). CR 41(b), meanwhile, authorizes the court to grant a motion for involuntary dismissal if the plaintiff fails to

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<sup>1</sup> Fed.R.Civ.P. 41 addresses voluntary and involuntary dismissals of actions.

prosecute or comply "with these rules or any order of the court[.]" These procedures are sufficient to safeguard the integrity of the court system and prevent harassment of opposing parties.

CR 41 applies to CrR 7.8 motions. It is well established that personal restraint petitions are civil matters and motions to vacate under CrR 7.8(b) are the functional equivalent of personal restraint petitions. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 409-10, 972 P.2d 1250 (1999); State v. Brand, 120 Wn.2d 365, 369-70, 842 P.2d 470 (1992); In re Pers. Restraint of Becker, 143 Wn.2d 491, 496, 499, 20 P.3d 409 (2001).

- b. Even If The Abuse Of Writ Doctrine Operates Against Claims Never Adjudicated On Their Merits, The State Is Precluded From Relying On The Doctrine Here As An Alternative Basis To Affirm The Trial Court.

This Court may affirm a trial court's decision on a different ground, but only if "the record is sufficiently developed to consider the ground fairly." State v. Sondergaard, 86 Wn. App. 656, 657-58, 938 P.2d 351 (1997); cf. State v. Larson, 88 Wn. App. 849, 852, 946 P.2d 1212 (1997) (rejecting State's argument: "We will not affirm on the basis of a theory argued for the first time on appeal."). An appellate court should not affirm on a basis other than that relied on by the trial court where, as here, the opposing party does not have an opportunity to develop the record in order

to defend the new theory presented on appeal. In re Detention of Ambers, 160 Wn.2d 543, 558 n.6, 158 P.3d 1144 (2007).

The State has the burden of pleading abuse of the writ. In re Pers. Restraint of Turay, 153 Wn.2d 44, 48, 101 P.3d 854 (2004). The State offers no explanation for why it did not raise an "abuse of writ" theory at the trial level, at a time in which Scott would be in a position to fully defend against that theory. Instead, the State asserts the record is sufficiently developed to address its claim for the first time on appeal. BOR at 7.

The record, however, is not fairly developed. Because the State did not raise the abuse of writ doctrine below, Scott had no incentive to develop the record of whether his assigned counsel notified him of the procedural consequences of withdrawing the original CrR 7.8 motion or whether counsel provided ineffective assistance in failing to do that. The State's belated attempt to raise the abuse of writ doctrine for the first time on appeal sandbags Scott. If the State on appeal wants to rely on the abuse of writ doctrine for the first time on appeal, the record as it exists must be construed against it on the issue of whether Scott was on notice that withdrawal of his initial CrR 7.8 motion would be fatal to renewing the motion at a later time.

c. The Abuse Of Writ Doctrine Is Unavailable As A Matter Of Equity Because Scott Was Not Warned That Withdrawal Of The Original CrR 7.8 Motion Would Preclude Raising The Motion At A Later Time.

In any event, the State does not even allege Scott had notice of the potentially disastrous procedural consequences attendant to withdrawing the initial CrR 7.8 motion, thereby conceding the fact. Indeed, there is no written notification in the record, nor is there any record of oral notification. See State v. Minor, 162 Wn.2d 796, 800, 174 P.3d 1162 (2008) (addressing notice of prohibition to possess firearm at sentencing: "because the record is silent on oral notification, the assumption is no such notice was given.").

Abuse of writ claims are governed by equitable principles. Sanders, 373 U.S. at 17. Concerns of fairness lie at the heart of a court's equitable powers. Bird v. Best Plumbing Group, LLC, 161 Wn. App. 510, 521, 260 P.3d 209 (2011).

Equity does not demand that Scott be forever barred from showing he is innocent of the crime for which he was convicted. The trial court at no time notified Scott that granting his motion to withdraw the original CrR 7.8 motion would act as a procedural bar to bringing the motion a second time under an "abuse of writ" rationale or any other. The trial court was content with summarily granting Scott's motion to withdraw his

original CrR 7.8 motion without even a hearing on the issue, where Scott could be advised of the grave potential consequences that such a withdrawal entailed. 2CP 1-2.

This is especially troubling because Scott's motion to withdraw his CrR 7.8 motion was essentially pro se, with minimal involvement from his assigned counsel. 1CP 59-63. Counsel faxed the motion to the court, but did not even sign it. 1CP 61-63.

Despite the complete absence of anything in the record showing Scott was on notice that withdrawal of his initial CrR 7.8 motion would mean he would forever be procedurally barred from renewing the motion, the State now claims Scott is caught in procedural mousetrap from which there is no escape.

But courts have recognized in comparable contexts that notice should be given of potential procedural bars applicable to successive collateral attacks before those bars will be given effect. As noted above, the Court in Slack recognized the importance of making a petitioner aware of the procedural bar related to exhaustion as a prerequisite to dismissal of a successive petition. Slack, 529 U.S at 489.

State v. Smith, 144 Wn. App. 860, 184 P.3d 666 (2008) is also instructive. In that case, this Court held converting a wrongly-transferred CrR 7.8 motion into a personal restraint petition could infringe on Smith's

right to choose whether he wanted to pursue a future petition because he would then be subject to the successive petition rule in RCW 10.73.140 as a result of the conversion. Smith, 144 Wn. App. at 863-64. Before converting a CrR 7.8 motion into a personal restraint petition, the trial court must give notice that a conversion may have future collateral consequences. Id.

In support, Smith cited Castro v. United States, 540 U.S. 375, 383, 124 S. Ct. 786, 157 L. Ed. 2d 778 (2003). Smith, 144 Wn. App. at 864. Castro held a district court's recharacterization of a pro se motion requires giving the petitioner notice of intent to recharacterize the motion, a warning that the recharacterization could subject it to a successive motion rule, and an opportunity to withdraw or amend the motion before successive motion rule restrictions can apply. Castro, 540 U.S. at 377, 383.

The touchstone of this notice requirement is fairness. United States v. Miller, 197 F.3d 644, 651 (3d Cir. 1999); Adams v. United States, 155 F.3d 582, 583 (2d Cir. 1998) (lack of notice "may result in a disastrous deprivation of a future opportunity to have a well-justified grievance adjudicated"); cf. Burton v. Stewart, 549 U.S. 147, 151, 154, 127 S. Ct. 793, 166 L. Ed. 2d 628 (2007) (successive petition barred where petitioner warned prior to filing of first petition that applicants must

ordinarily exhaust state court remedies as to each ground on which they sought action by the federal court or run the risk of being barred from presenting additional grounds at a later date).

Basic due process principles inform the analysis. The ability to seek collateral review is of vital importance in our justice system. In re Pers. Restraint of Bailey, 141 Wn.2d 20, 25, 1 P.3d 1120 (2000). Waiver of a procedural right must be knowing and voluntary. State v. Conlin, 49 Wn. App. 593, 595-96, 744 P.2d 1094 (1987). "In the criminal context, due process requires that a criminal defendant be given notice *prior* to deprivation of a substantial right." City of Seattle v. Klein, 161 Wn.2d 554, 566, 166 P.3d 1149 (2007); U.S. Const. amend. 14; Wash. Const. art. 1, § 3. The right to undo an erroneous conviction by means of a collateral attack is one such right. Smith, 144 Wn. App. at 863-64.

Equity and due process militate against application of the abuse of writ doctrine as a bar to adjudicating Scott's claim — a claim that this Court has already determined to be meritorious. The procedural rules governing collateral attacks are undeniably complex. It cannot fairly be said Scott abused the writ procedure absent notice that withdrawal of the initial motion would bar him from bringing the motion again.

d. The State's Interpretation Of The Abuse Of Writ Doctrine Is Unduly Expansive.

Here, Scott withdrew his motion without notice of attendant procedural consequences and then refiled it six days later. 1CP 59, 62-63; 2CP 3. Not six months. Not six years. Six days. This is not a matter of piecemeal litigation where a petitioner seeks to advance one claim at a time in hopes of obtaining a tactical advantage.

Again, abuse of writ claims are governed by equitable principles. Sanders, 373 U.S. at 17. The abuse of writ doctrine exists to prevent needless piecemeal litigation or entertainment of collateral proceedings "whose only purpose is to vex, harass, or delay." Id. at 18. This is a bad faith standard. Potts v. Zant, 638 F.2d 727, 745 (5th Cir.), cert. denied, 454 U.S. 877, 102 S. Ct. 357, 70 L. Ed. 2d 187 (1981).

Scott rashly withdrew his initial CrR 7.8 motion because he was scared to be transported and housed in a jail. 1CP 158 (FF 6); 2CP 8-18. That conduct does not rise to the abuse of writ level. It was a product of anxiety at being exposed to physical violence. Id. It was not a tactic to obtain some procedural advantage.

The State acknowledges the trial court did not address the abuse of writ question because that argument was never made below but claims the trial court's findings of fact show Scott was a "vexatious litigant." BOR at

6. That is not the proper standard for determining whether an abuse of writ has occurred.

The proper focus is on the whether the abandonment of a claim and its successive renewal is solely for the purpose of vexation, harassment or delay. Sanders, 373 U.S. at 18. Scott's behavior associated with seeking new counsel or the decision to proceed pro se, whether it be rude, vacillating or in some sense vexing, does not answer the question of whether Scott abused the writ procedure by withdrawing and then renewing his CrR 7.8 motion within a span of six days.

The State relies on Scott's refusal to be transported to court as an example of his vexatious behavior. BOR at 6. The State further asserts the record is replete with examples of Scott "disrupting" the court while he was participating in courtroom proceedings via telephone, including one instance where Scott hung up on the judge. BOR at 7.

The abuse of writ doctrine does not bar a subsequent collateral attack based on some free ranging notion that a petitioner has acted badly. "The 'abuse of the writ' doctrine is of rare and extraordinary application." Paprskar v. Estelle, 612 F.2d 1003, 1007 (5th Cir.), cert. denied, 449 U.S. 885, 101 S. Ct. 239, 66 L. Ed. 2d 111 (1980). The State's approach, however, throws open the doors to dismissing successive collateral

challenges based on someone merely being a disruptive and ill-mannered litigant.

Moreover, the trial court was a willing participant in delaying proceedings to adequately address important issues surround substitution of counsel and Scott's pro se representation. It would be inequitable for the trial court to accommodate Scott regarding these issues but then on appeal allow the State to rely on that accommodation in support of its allegation that Scott's renewed CrR 7.8 motion was only designed to vex, annoy or harass.

Finally, even if a subsequent petition is abusive, courts must still reach its merits if "the ends of justice demand." Sanders, 373 U.S. at 18; In re Pers. Restraint of Taylor, 105 Wn.2d 683, 688-89, 717 P.2d 755 (1986) (citing Sanders, 373 U.S. at 16-17). If the trial court decision is allowed to stand, Scott will be forever precluded from challenging a conviction based on evidence that he did not in fact commit the crime. Equity does not compel that outcome and cannot tolerate such a result.

The State suggests remand for a reference hearing at this point would be futile because there is no reasonable way for the trial court to conduct a reference hearing in Scott's absence. BOR at 8. That is false. Even criminal defendants may voluntarily waive their right to be present in court. State v. Garza; 150 Wn.2d 360, 366, 77 P.3d 347 (2003); see

also State v. Chapple, 145 Wn.2d 310, 318, 36 P.3d 1025 (2001)

(persistent, disruptive conduct by a defendant can constitute a voluntary waiver of the right to be present). The reference hearing can take place without Scott's presence if he so chooses. The newly discovered evidence at issue does not rely on Scott's testimony, but on the reliability of various statements made by others. State v. Scott, 150 Wn. App. 281, 287-89, 293, 207 P.3d 495 (2009). For these reasons, the reference hearing may be conducted even in Scott's absence.

That being said, the State is speculating on what will happen on remand. Now that Scott is on notice of potential procedural consequences arising from CR 41 or the abuse of writ doctrine, it is reasonable to presume his actions will conform with his interests in avoiding a permanent bar to adjudication of his claim on its merits.

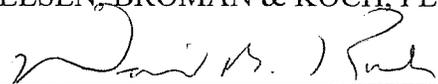
B. CONCLUSION

For the reasons stated above and in the opening brief, Scott requests that this Court vacate the dismissal of his renewed motion to vacate the guilty plea and remand for a reference hearing before a different judge.

DATED this 4<sup>th</sup> day of January 2012

Respectfully Submitted,

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CASEY GRANNIS

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 41895-9-II
	)	
RICHARD SCOTT,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5<sup>TH</sup> DAY OF JANUARY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICHARD ROY SCOTT  
SPECIAL COMMITMENT CENTER  
P.O. BOX 88600  
STEILACOOM, WA 98388

**SIGNED** IN SEATTLE WASHINGTON, THIS 4<sup>TH</sup> DAY OF JANUARY 2012.

x *Patrick Mayovsky*

# NIELSEN, BROMAN & KOCH, PLLC

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