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Court of Appeals  
Division III  
State of Washington

33703-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

ROBERT LEE YATES, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## I. SUMMARY OF CASE

Robert Yates plead guilty to 13 counts of first degree murder and received his bargained for 408 year sentence. Although all agree that this is a life sentence – he is 63 years of age and still has approximately 390 years left to serve – he filed a personal restraint petition in the State Supreme Court claiming he should have been sentenced to 408 years with a possible extension to life in prison rather than a lesser determinate 408-year sentence. Our State Supreme rejected this argument for collateral relief because there was “simply no way to find prejudice in this context.” *In re Pers. Restraint of Yates*, 180 Wn.2d 33, 40, 321 P.3d 1195 (2014).

Yates subsequently filed an additional and successive collateral attack in Spokane County Superior Court, pursuant to CrR 7.8, raising the same claim that the sentences imposed on counts I and II were illegal. This collateral attack was ultimately denied because Yates could not show any prejudice.

The trial court did not abuse its discretion in denying Yates’ CrR 7.8 motion because he failed to establish prejudice. Moreover, the CrR 7.8 motion was frivolous as it was successive, an abuse of the writ, and failed to allege prejudice.

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

Yates claims that the determinate sentences imposed for the two pre-SRA murders charged in count I and count II, were illegally imposed and must be vacated.

## **III. ISSUE PRESENTED**

Did the trial court abuse its discretion when it denied Yates' CrR 7.8 collateral attack on his fifteen year old judgment, where the claim raised in this attack was the same as the one previously raised and denied in *In re Pers. Restraint Yates*, 180 Wn.2d 33, and where the filing of the CrR 7.8 motion was successive, and an abuse of the writ, and where the petitioner's total failure to establish prejudice made the claim frivolous as well?

## **IV. STATEMENT OF THE CASE**

More than 15 years ago, Mr. Yates pleaded guilty to 13 counts of first degree murder, and one count of attempted first degree murder. CP 80-87. Two of the first degree murder counts, counts I and II, are the subject of this review, and were both committed over 40 years ago.

The trial court sentenced Yates to a determinate 408-year sentence. Defendant is now 63 years of age,<sup>1</sup> and wishes to have additional (potential) time added to his 408-year sentence, claiming that the court

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<sup>1</sup> CP 7.

should have given him two 20-year-to-life sentences instead of two 20-year determinate sentences. Chasing this position, the defendant first petitioned our Supreme Court for relief “claiming that he should technically have been sentenced to 408 years with a possible extension to life in prison rather than a determinate 408-year sentence.” *In re Yates*, 180 Wn.2d at 35. Defendant was represented by his present appellate counsel in that petition. Our Supreme Court rejected this claim for collateral relief, stating:

In this case, there was no practical effect resulting from the error. Yates agreed to a sentence of 408 years in prison and he should have been sentenced to a minimum of 408 years with a potential extension to a life sentence. Given the reality of the human life-span, there is no difference between those two sentences. There is simply no way to find prejudice in this context. Without a showing of prejudice, the petition must be dismissed.

#### CONCLUSION

To avoid the death penalty for 13 murders, Yates agreed to plead guilty and spend the rest of his life in prison by way of a 408-year sentence. He was fully informed of the consequence of that plea: there was no possibility that he would ever be released from prison, regardless of how long he lived. We see no reason to invalidate his plea. His petition is dismissed.

*In re Yates*, 180 Wn.2d at 40-42.

Thereafter, Yates filed an identical claim for collateral relief in Spokane County Superior Court, this time as a CrR 7.8 motion. The trial

court (Judge Michael P. Price) held a hearing on the motion, and denied the motion, stating “Mr. Yates has failed to show any prejudice in that he is serving a 408 year sentence. *See In re Smalls*, and *PRP of Yates*, cited in the briefing. The court incorporates its oral ruling into this order.” CP 113.<sup>2</sup>

## V. ARGUMENT

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED YATES’ CrR 7.8 COLLATERAL ATTACK BECAUSE THIS CLAIM WAS EXACTLY THE SAME AS HIS PREVIOUS CLAIM DENIED BY OUR SUPREME COURT *IN RE YATES*, 180 Wn.2d 33, 321 P.3d 1195 (2014). THE CrR 7.8 MOTION WAS SUCCESSIVE, AN ABUSE OF THE WRIT, AND FRIVOLOUS BECAUSE OF THE PETITIONER’S TOTAL FAILURE TO ESTABLISH ANY PREJUDICE.**

### Standard of Review

When considering constitutional arguments raised in a personal restraint petition, the court determines whether the petitioner can show that a constitutional error caused actual and substantial prejudice. *In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). A stricter standard governs consideration of nonconstitutional arguments raised in a personal restraint petition. When considering nonconstitutional arguments, the court determines whether the petitioner has established that the claimed error is “a fundamental defect resulting in a complete

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<sup>2</sup> Yates’ claim that Judge Price “relied entirely on *In re PRP of Smalls*, 182 Wn. App. 381, 335 P.3d 949 (2014)” is simply incorrect. Additionally, review of *Smalls* was denied at 182 Wn.2d 1015 (2015).

miscarriage of justice.” *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 18, 296 P.3d 872 (2013).

Appellate review is limited to determining whether the trial court abused its discretion in denying Yates’ motion. *See State v. Larranaga*, 126 Wn. App. 505, 509, 108 P.3d 833 (2005); *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002). Consequently, review on appeal of a CrR 7.8 motion is limited to the issues originally raised. *Id.*

An appellate court may affirm the trial court’s rejection of Mr. Yates’ motion under CrR 7.8(b)(2) on any grounds supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

1. Yates’ CrR 7.8 motion was properly denied because it was a repetitive claim previously brought on the same or substantially similar grounds.

Mr. Yates’ instant claim to the Superior court was exactly the same as his prior claim to our State Supreme Court in *In re Yates*, 180 Wn.2d 33. Yates first petitioned our Supreme Court for relief, “claiming that he should technically have been sentenced to 408 years with a possible extension to life in prison rather than a determinate 408-year sentence.” *In re Yates*, 180 Wn.2d at 35. The claim is identical here. “Mr. Yates’s sentences on Counts I and II are unlawful – a point beyond dispute. This Court must correct those errors and resentence Mr. Yates according to the law.” CP 1 (Yates’ CrR 7.8 motion). *Both* collateral attacks are based

upon the claim that his sentences on counts I and II are unlawful. Yates attempts to circumvent the rule prohibiting repetitive claims by attempting to change his prayer for relief. First, he prayed for a withdrawal of his plea; now he prays for a resentencing. While the requested relief is different, the underlying claim is the same.

This Court may not consider the request for relief because Yates has previously brought a collateral attack on the same *or substantially similar* grounds. *See, State v. Brand*, 120 Wn.2d 365, 370, 842 P.2d 470 (1992); RCW 10.73.090(2) (collateral attack means “any form of postconviction relief other than a direct appeal”). Summary dismissal is appropriate under RCW 10.73.140<sup>3</sup> where a petitioner previously filed a

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<sup>3</sup> **RCW 10.73.140 COLLATERAL ATTACK —  
SUBSEQUENT PETITIONS**

If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition. Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. If upon review, the court of appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the court of appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition. Upon receipt of a first or subsequent petition,

personal restraint petition or where the petition is based on frivolous grounds. *In re Pers. Restraint of Bailey*, 141 Wn.2d 20, 22, 1 P.3d 1120 (2000); *and see, In re Pers. Restraint of Becker*, 143 Wn.2d 491, 496, 20 P.3d 409 (2001). Under either RCW 10.73.140 (which applies to this court) or RAP 16.4(d) (which applies to our State Supreme Court), a successive petition for similar relief must be dismissed absent good cause shown. *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 262-63, 36 P.3d 1005 (2001).<sup>4</sup> None has been established in this case. In addition, a new issue cannot be raised in a successive petition to the Court of Appeals without a showing of good cause for the failure to raise the issue earlier. RCW 10.73.140; *In re Pers. Restraint of VanDelft*, 158 Wn.2d 731, 737-38, 147 P.3d 573, (2006). A petitioner may not avoid this requirement “merely by supporting a previous ground for relief with different factual allegations or with different legal arguments. *In re Yates*,

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the court of appeals shall, whenever possible, review the petition and determine if the petition is based on frivolous grounds. If frivolous, the court of appeals shall dismiss the petition on its own motion without first requiring the state to respond to the petition.

<sup>4</sup> The issue of whether the claim that the trial court’s sentence on counts I and II was illegal was determined on the merits in his first PRP to the Supreme Court. *See* CP 1 (Petitioner’s Motion to Vacate, quoting *In re PRP Yates*, 180 Wn.2d at 39).

177 Wn.2d at, 17. Yates has not even attempted to explain why this “new” claim was not brought along with the other claim(s) in his first petition.<sup>5</sup>

2. Yates’ CrR 7.8 motion was properly denied because it constitutes an abuse of the writ.

Even if Yates’ present claim was “new,” which it is not, the claim is barred because a petitioner’s second or subsequent personal restraint petition that raises a new issue for the first time will not be considered if raising that issue constitutes an abuse of the writ. *In re Pers. Restraint of Jeffries*, 114 Wn.2d 485, 487-88, 789 P.2d 731 (1990). Our Supreme Court has held that “if the [defendant] was represented by counsel throughout postconviction proceedings, it is an abuse of the writ for him or her to raise ... a new issue that was ‘available but not relied upon in a prior petition.’” *In re Jeffries*, 114 Wn.2d at 492 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n. 6, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986)).

Yates was represented by present counsel in his prior petition, *In re Yates*, 180 Wn.2d 33. Moreover, the “new”<sup>6</sup> issue was “available” to him as Yates deftly points out, when he argues that, in fact, Justice Gordon McCloud found that this relief was available to him. Appellant’s Br. at 6,

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<sup>5</sup> Although at least one judge suggested he had brought this claim in his last petition. See *infra*, discussing Justice Gordon McCloud’s concurrence in *In re Yates*, 180 Wn.2d at 53

<sup>6</sup> The issue arose at sentencing in 2000, sixteen years ago.

quoting *In re Yates*, 180 Wn.2d at 50-51 “Yates’s allegation that the sentence imposed was illegal is a separate claim. A claim that the sentence actually imposed was outside the court’s power is separately cognizable in a PRP and warrants relief.” *Id.* at 50. Additionally, Justice Gordon McCloud, noted as she

read the PRP, Yates has raised not one but three claims based on this set of facts: (1) that the plea is invalid because it was not knowing, intelligent, and voluntary, PRP at 3-4, 9-10 (citing, among other things, the misinformation about consequences provided to Yates by both the trial court at sentencing and the “Statement of Defendant on Plea of Guilty”); (2) that the sentence actually imposed is illegal because it exceeds the authority of the court, PRP at 4-7; and (3) that the sentence actually imposed is illegal because it violates due process clause protections against retrospective application of new criminal punishments, PRP at 9.

*In re Yates*, 180 Wn.2d at 44-45. Justice Gordon McCloud then adds:

Yates raises three arguments: (1) that he is entitled to withdraw his plea because misinformation rendered his plea involuntary, (2) that his sentence was illegally imposed, and (3) that his sentence violates due process clause protections against retroactive application of laws by the judiciary.

*In re Yates*, 180 Wn.2d at 53. Apparently all of Yates’ “new” claims were presented in his original PRP, but rejected by our high Court. Yates’ further request for relief is barred as an abuse of the writ.

3. Yates' CrR 7.8 motion was a properly denied because he failed to establish any prejudice from the judgment.

Yates claims that unlike other petitioners for collateral relief, in his case, the requirement of a showing of prejudice is not necessary. Appellant's Br. at 5-8. This is not the current state of the law. As was pointed out in Yates' first PRP, (on other murders not involving these thirteen murders):

For alleged constitutional errors, '[a] petitioner has the burden of showing actual prejudice ...; for alleged nonconstitutional error, he must show a fundamental defect resulting in a complete miscarriage of justice.' *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 251, 172 P.3d 335 (2007) (*Elmore II*). The petitioner must make these heightened showings by a preponderance of the evidence. *See Davis I*, 152 Wn.2d [647] at 671-72, 101 P.3d 1 [(2004)].

*In re Yates*, 177 Wn.2d at 17.

It is a fundamental requirement that a petitioner seeking collateral relief show actual prejudice. This requirement has evolved over the last few years. It applies even in cases where on direct appeal the error would be structural. As clarified in *In re Coggin, supra*:

As we explained in *In re Personal Restraint of Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014), a petitioner's burden on collateral review has evolved over the course of several decades. We have required petitioners who collaterally attack their convictions to satisfy a higher burden, recognizing that a personal restraint petition does not substitute for a direct appeal, and different procedural rules have been adopted recognizing this difference. Where a presumption of prejudice is appropriate for direct review

in some cases, it may not be appropriate for collateral review. *Stockwell*, 179 Wn.2d at 596-97, 316 P.3d 1007. *Even in those cases where the error would never be harmless on direct review, we have not adopted a categorical rule that would equate per se prejudice on collateral review with per se prejudice on direct review.* “We have limited the availability of collateral relief because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders.” *St. Pierre*, 118 Wn.2d [321] at 329, 823 P.2d 492 [1992] (denying relief where issue of defective charging documents was raised for the first time in a personal restraint petition (citing *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982))).

*In re Coggin*, 182 Wn.2d at 120 (petitioner must show prejudice even where on direct appeal error would be structural and reversal automatic) (emphasis added).

Also on point is *In re Pers. Restraint of Smalls*, 182 Wn. App. 381, 335 P.3d 949 (2014), *review denied*, 182 Wn.2d 1015 (2015), where Division I of the court of appeals held:

A petitioner whose judgment and sentence is facially invalid may obtain relief by *showing that this facial invalidity had a practical effect on his sentence*. A petitioner who makes this showing is entitled only to a remand to the trial court to correct the invalidity but is not entitled to assert a time-barred challenge to the validity of his plea. *If, like Yates, the petitioner cannot show prejudice caused by the sentencing court, he is not entitled to any relief and his petition will be dismissed.*

*Smalls*, 182 Wn. App. at 391 (emphasis added).

Because Yates agrees that he is not prejudiced, the superior court did not abuse its discretion in denying his motion for collateral relief when it relied on relevant existing case law to decide the case. *See* CP 113 (Order Denying PRP, citing *Smalls, supra*, and *In re Yates*, 180 Wn.2d 33).

4. Yates' collateral relief motion was frivolous.

Because Yates' CrR 7.8 motion failed to allege resulting prejudice, was successive and constituted an abuse of the writ, it is also frivolous.

On this point our Court recently explained:

The petitioner may have made a debatable showing of error without making any attempt to show the requisite prejudice necessary for collateral relief. *See In re Pers. Restraint of Coats*, 173 Wn.2d 123, 166-67, 267 P.3d 324 (2011) (citing *In re Pers. Restraint of Gentry*, 170 Wn.2d 711, 714, 245 P.3d 766 (2010); *In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 355-56, 5 P.3d 1240 (2000)). The issue may already have been resolved on direct review, and the petitioner may make no effort to show the interests of justice require the issue to be reexamined. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). The petitioner might raise a cognizable legal claim but fail to state with particularity the facts that would give rise to relief. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). *In any of these situations, a petition may be properly dismissed as frivolous even if the legal issue, properly raised, might be debatable. See In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992).

*In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686, 363 P.3d 577 (2015) (emphasis added).

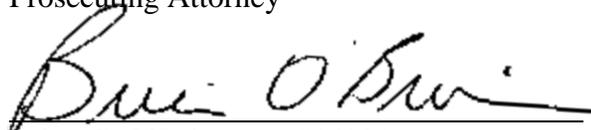
Because the CrR 7.8 motion was frivolous, the trial court did not err in denying the motion.<sup>7</sup>

## VI. CONCLUSION

The trial court did not abuse its discretion by denying the CrR 7.8 motion because the motion was successive, an abuse of the writ, failed to establish prejudice, and was frivolous.

Dated this 1 day of March, 2016.

LAWRENCE H. HASKELL  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

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<sup>7</sup> An appellate court may affirm the trial court's rejection of Mr. Yates' motion under CrR 7.8(b)(2) on any grounds supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on March 1, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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3/1/2016

(Date)

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*Hannah Long*

(Signature)