

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:

JESS RICHARD SMITH,  
  
Petitioner.

No. 102740-1

Court of Appeals No. 68084-6-I  
RULING DENYING REVIEW

Jess Smith filed the personal restraint petition in this case in Division One of the Court of Appeals in October 2011, challenging a 2006 judgment and sentence. Determining that the judgment and sentence had become final when the mandate on direct appeal was issued in April 2010, the acting chief judge of the Court of Appeals dismissed the petition as untimely.<sup>1</sup> The court issued its certificate of finality on April 23, 2014. In November 2023 Smith filed a motion in the Court of Appeals to recall the certificate of finality, arguing that he had in fact timely filed the petition. The court denied the motion. Smith now seeks this court's discretionary review.

Preliminarily, Smith's motion to file an amended motion for discretionary review and his motion to file an addendum in support of review are granted. Turning to the motion for discretionary review, to obtain this court's review, Smith must show that the Court of Appeals committed obvious error that renders further proceedings useless, that

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<sup>1</sup> The acting chief judge actually found the petition a "mix" of untimely claims and claims potentially exempt from the time limit. An untimely "mixed" petition must be dismissed in its entirety as untimely. *In re Pers. Restraint of Hankerson*, 149 Wn.2d 695, 702-03, 72 P.3d 703 (2003).

it committed probable error that substantially alters the status quo or substantially limits the freedom of a party to act, or that it so far departed from the accepted and usual course of proceedings as to call for this court's review. RAP 13.5(b).<sup>2</sup> Smith argues that he timely filed his personal restraint petition because he filed it within one year after he filed a timely CrR 7.8 motion in superior court in October 2010, characterizing his current petition as a "conformed" petition filed to avoid the bar on successive petitions in the Court of Appeals. But that is not how the rules work. The issuance of the mandate on direct appeal marked the commencement of the one-year period for filing a petition for collateral relief. RCW 10.73.090(3)(b). Smith timely filed his CrR 7.8 motion, and that motion was transferred to the Court of Appeals for treatment as a personal restraint petition and assigned cause number 66364-0-I. The Court of Appeals then stayed consideration of that petition pending Smith's direct appeal from a superior court order ministerially vacating one of Smith's convictions (manslaughter) on double jeopardy grounds. (In the same appeal, Smith challenged the transfer of his CrR 7.8 motion, and the Court of Appeals ultimately held that the transfer order was not appealable, holding also that Smith could not use the appeal from the superior court's ministerial order to challenge his 2006 felony murder conviction.) Smith meanwhile filed his current personal restraint petition in October 2011 under a separate cause number, 68084-6-I, and this petition, too, was stayed pending the appeal. After the Court of Appeals issued its decision in the appeal, Smith moved to withdraw his petition in cause number 66364-0-I so that he could proceed only under cause number 68084-6-I. The court granted that motion. The only petition left, therefore, was the current one, number 68084-6-I, which Smith did not timely file. The acting chief judge thus properly dismissed the petition as

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<sup>2</sup> Smith cites the criteria for review listed in RAP 13.4(b). But in relation to personal restraint petitions, these criteria apply only to Court of Appeals decisions dismissing or deciding petitions. RAP 13.5A(a)(1), (b). The court here did not decide or dismiss a petition but only denied a motion to recall the certificate of finality. Nonetheless, it is evident Smith argues the court erred.

untimely, providing the Court of Appeals no valid basis to recall the certificate of finality.

The motion for discretionary review is denied.

  
DEPUTY COMMISSIONER

March 14, 2024

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

In the Matter of the Personal Restraint  
of:

JESS RICHARD SMITH,  
  
Petitioner.

No. 68084-6-I

ORDER DENYING MOTION  
TO RECALL CERTIFICATE OF  
FINALITY

Petitioner, Jess Richard Smith, has moved to recall the order of dismissal entered on May 3, 2013. We have considered the motion under RAP 12.9 and have determined that it should be denied.

Now, therefore, it is hereby

ORDERED that the motion is DENIED; and it is further

ORDERED that the request for fees pursuant to RAP 18.1 is DENIED.

Seldman, J.

Birk, J.

Chung, J.

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

In the Matter of the Personal	)	
Restraint of:	)	No. 68084-6-I
	)	
JESS RICHARD SMITH,	)	ORDER OF DISMISSAL
	)	
Petitioner.	)	
	)	

Jess Smith has filed this personal restraint petition challenging his conviction in King County Superior Court Case No. 00-1-05900-7 KNT. Smith originally pleaded guilty to second degree murder in 2001. Smith appealed and the trial court later vacated the conviction. In an amended information, the State charged Smith with first degree felony murder and intentional second degree murder. A jury convicted Smith of first degree felony murder and the lesser offense of first degree manslaughter. The trial court imposed a standard range sentence and filed the judgment and sentence on September 1, 2006. Smith appealed, and this court affirmed the felony murder conviction, struck the manslaughter conviction on double jeopardy grounds, and remanded to the trial court for any necessary further proceedings. State v. Smith, No. 58779-0-I. This court issued the mandate on April 14, 2010.

On October 18, 2010, Smith filed a CrR 7.8 motion to vacate the September 1, 2006 judgment and sentence. On October 21, 2010, the trial court transferred the matter to this court for consideration as a personal restraint petition. In re Pers.

Restraint of Smith, No. 66364-0-I.<sup>1</sup> Also on October 21, 2010, the trial court entered an "Order Vacating Count II." Smith filed a notice of appeal seeking review of the "judgment and sentence of October 21<sup>st</sup>, 2010." In State v. Smith, No. 66335-6-I, Smith claimed that the trial court erred in transferring the CrR 7.8 motion and challenged his first degree felony murder conviction on double jeopardy grounds. This court held that the transfer order was not appealable. This court also refused to consider any arguments regarding the first degree felony murder conviction because Smith should have raised any such challenge in his direct appeal of that conviction. Because the trial court did not consider or exercise any independent judgment on any of his claims at the entry of the October 2010 order, this court was not required to consider Smith's challenges to his September 1, 2006 judgment and sentence that he had not raised in his previous appeal. See RAP 2.5(c)(1).

Smith filed the current petition in October 2011. As a general rule, personal restraint petitions must be filed within one year after the judgment and sentence becomes final. RCW 10.73.090. Despite his apparent belief to the contrary, Smith's judgment and sentence became final when this court entered the mandate in his direct appeal of the September 1, 2006 judgment and sentence, that is, on April 14, 2010. RCW 10.73.090(3)(b). The trial court did not resentence Smith in October 2010. Cf. In re Skylstad, 160 Wn.2d 944, 162 P.3d 413 (2007) (where conviction was affirmed but sentence was reversed in first appeal, petition filed while appeal of new

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<sup>1</sup> The petition was dismissed on Smith's motion in July 2012.

sentence was pending was timely because judgment and sentence were not yet both final). In entering the October 2010 order vacating count II, the trial court did not exercise independent judgment, or review or rule on any issue as to the felony murder conviction. See State v. Smith, No. 66335-6-I, Slip Op. at 7-8 (discussing State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993)). Thus, this petition is time-barred under RCW 10.73.090(1) unless Smith can show that his judgment and sentence is facially invalid or an exception under RCW 10.73.100 applies.

Smith appears to claim, among other things,<sup>2</sup> that 1) his constitutional rights were violated when the State was allowed to charge a higher degree after vacation of his 2001 guilty plea and/or his conviction for first degree felony murder violates double jeopardy; 2) the trial court failed to properly instruct the jury on self defense; 3) that the State was required to charge first degree felony murder and second degree intentional murder in the alternative; 4) the trial court failed to notify Smith and defense counsel of an inquiry from the jury and responded privately rather than in open court; 5) defense counsel provided ineffective assistance; and 6) he is entitled to relief under Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). Although Smith does not contend that his judgment and sentence is invalid on its face or identify a specific exception applicable to any particular claim, the State concedes that at least two of the claims, the double jeopardy claim and the Gant claim, appear to be timely. RCW 10.73.100(3) & (6). But at least one of the issues

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<sup>2</sup> Smith filed a motion to supplement his petition with a claim relying on Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). He has also filed various "supplemental" materials.

Smith attempts to raise in the present petition, relating to ineffective assistance of counsel, clearly is not an issue that qualifies under any of the exceptions to the statutory time bar contained in RCW 10.73.100. Accordingly, Smith has at best presented here a "mixed petition"— a petition containing at least one time-barred matter, which must be dismissed. In re Pers. Restraint of Hankerson, 149 Wn.2d 695, 702-03, 72 P.3d 703 (2003); In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 345-46, 5 P.3d 1240 (2000). Where one claim is time-barred, the appellate court "will not analyze every claim that is raised in order to determine or advise which claims are time barred and which are not, nor will it decide claims under RCW 10.73.100 that are not time barred." Hankerson, 149 Wn.2d at 703. However, "any claim that is not time barred may be refiled without danger of untimeliness." Hankerson, 149 Wn.2d at 702.

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 3<sup>rd</sup> day of May, 2013.

  
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Acting Chief Judge

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 MAY -3 PM 3:24



# THE SUPREME COURT OF WASHINGTON

In the Matter of the Personal Restraint of: )

No. 102740-1

JESS RICHARD SMITH, )

## ORDER

Petitioner. )

Court of Appeals

No. 68084-6-I

Department II of the Court, composed of Chief Justice González and Justices Madsen, Stephens, Yu and Whitener, considered this matter at its June 4, 2024, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's motion to modify the Deputy Commissioner's ruling is denied.

DATED at Olympia, Washington, this 5th day of June, 2024.

For the Court

  
CHIEF JUSTICE

**Additional material  
from this filing is  
available in the  
Clerk's Office.**