

*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2018-220

NOVEMBER TERM, 2019

In re Joseph L. Bruyette\*

} APPEALED FROM:

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} Superior Court, Rutland Unit,  
} Civil Division

}

} DOCKET NO. 587-9-14 Rdcv

Trial Judges: Michael J. Harris,  
Samuel Hoar, Jr.

In the above-entitled cause, the Clerk will enter:

Petitioner appeals pro se from the dismissal of his fourth petition for post-conviction relief (PCR) as an abuse of the writ. We affirm.

Petitioner is currently serving a lengthy sentence for burglary and multiple counts of sexual assault. His direct appeal was denied, see State v. Bruyette, 158 Vt. 21 (1992), and his prior three PCRs have also been denied. Petitioner’s third PCR was denied as an abuse of the writ, a ruling we affirmed on appeal. See In re Bruyette, No. 2012-471, 2014 WL 7237815, at \*1 (Vt. Dec. 12, 2014) (unpub. mem.) (recounting in detail history of petitioner’s PCR filings), <https://www.vermontjudiciary.org/LC/unpublishedeo.aspx>. Petitioner’s fourth PCR is at issue here. In this PCR, petitioner alleged that his trial counsel was ineffective at sentencing for failing to investigate and present mitigating evidence. The State opposed the PCR as an abuse of the writ and it filed a motion to dismiss. In a July 2016 entry order, the court found that the State met its burden under In re Laws, 2007 VT 54, 182 Vt. 66, to plead abuse of the writ. It provided petitioner the opportunity to disprove abuse. In April 2017, the State moved for summary judgment in its favor. In a June 2018 order, the court granted the State’s motion. It found that petitioner had been provided more than enough time to adduce evidence in support of his claim and to demonstrate why the claim was not barred and he had failed to do so. The court thus dismissed petitioner’s PCR with prejudice. This appeal followed.

Petitioner asserts that the State failed to establish that this was an abuse of the writ but provides no specific argument on this point. He argues that his trial counsel was ineffective at sentencing. He also complains about the Office of the Defender General and Prisoner’s Rights Office.

We find no basis to disturb the court’s decision. We have recognized that “a petitioner can abuse the writ by raising a claim in a subsequent [PCR] petition that he [or she] could have raised in his [or her] first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice.” In re Laws, 2007 VT 54, ¶ 18 (quotation omitted). The State “bears the burden of pleading abuse of the writ,” and it “satisfies this burden if, with clarity and particularity, it notes

petitioner’s prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ.” Id. ¶ 21 (quotation omitted). The burden then shifts to the petitioner “to disprove abuse” by showing “cause and actual prejudice.” Id. ¶¶ 21-22 (quotation omitted). To show “actual prejudice,” a petitioner “must show not merely that the errors at his trial created a possibility of prejudice, but that they worked to his [or her] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” Id. (quotation omitted).<sup>1</sup>

In this case, the court concluded that the State met its burden of pleading abuse of the writ and the record supports that conclusion. The burden then shifted to petitioner “to disprove abuse.” Id. ¶ 21. Petitioner failed to do so. He did not produce any evidence to demonstrate “cause and actual prejudice” id. ¶ 22, via affidavit or at an evidentiary hearing as contemplated in the court’s July 2016 entry order. He did not respond to the State’s motion for summary judgment despite being granted numerous extensions of time. The court did not err in dismissing his PCR with prejudice as an abuse of the writ.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice

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<sup>1</sup> This would be true even if this Court concluded that ineffective assistance of prior PCR counsel in failing to advance an ineffective-assistance-of trial-counsel argument is a defense to abuse of the writ. Even in that circumstance, petitioner would still have to establish prejudice from the alleged errors of trial counsel. See In re Towne, 2018 VT 5, ¶ 36.