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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

IN RE THE PERSONAL RESTRAINT PETITION OF:

JIMMEE CHEA,

PETITIONER.

Appeal from the Superior Court of Pierce County
The Honorable Karen L. Strombom

No. 98-1-03157-5

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Should this court dismiss as untimely, claims raised by petitioner’s counsel that were not in the original petition when: 1) the attorney was not authorized to raise such claims; 2) the new claims are untimely under RCW 10.73.090 and .100; and, 3) under *In re PRP of Benn*, it is not proper to allow amendment of the petition? 1

2. Is this court controlled by decisions of the Washington Supreme Court regarding the correctness of the wording of an accomplice liability instruction rather than the Ninth Circuit? 1

3. Should this court dismiss issues that were rejected on directed review without any further consideration as petitioner still has not demonstrated why the interests of justice require their re-litigation? 1

B. STATEMENT OF THE CASE.....2

1. Procedure.....2

2. Facts3

C. ARGUMENT..... 11

1. THIS COURT SHOULD NOT CONSIDER ISSUES RAISED BY PETITIONER’S COUNSEL WHICH WERE NOT RAISED IN THE INITIAL PETITION..... 11

2. THE NINTH CIRCUIT’S OPINION IN *SARAUSAD V. PORTER* IS NOT CONTROLLING..... 16

3. CLAIMS THAT ARE MERELY REFORMULATIONS OF CLAIMS REJECTED IN THE DIRECT APPEAL SHOULD BE DISMISSED AS PETITIONER STILL HAS NOT MADE ANY SHOWING THAT THE INTERESTS OF JUSTICE REQUIRE THEIR RELITIGATION. 19

4. THE STATE WILL RELY ON ITS PREVIOUSLY FILED
RESPONSE ON THE REMAINING ISSUES20

D. CONCLUSION.211

Table of Authorities

State Cases

<i>Goodman v. Boeing Co.</i> , 75 Wn. App. 60, 74, 877 P.2d 703 (1994)	18
<i>In re Jeffries</i> , 114 Wn.2d 485, 488, 789 P.2d 731 (1990)	19
<i>In re Pers. Restraint of Benn</i> , 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998)	1, 11, 13, 16
<i>In re Pers. Restraint of Gentry</i> , 137 Wn.2d 378, 390, 972 P.2d 1250 (1999)	13
<i>In re Personal Restraint of Grisby</i> , 121 Wn.2d 419, 430, 853 P.2d 901 (1993)	16
<i>In re Personal Restraint of Lord</i> , 123 Wn.2d 296, 303, 868 P.2d 835 (1994)	19, 20
<i>Shumway v. Payne</i> , 136 Wn.2d 383, 398, 964 P.2d 349 (1998)	11
<i>State v. Cronin</i> , 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000)	17, 19
<i>State v. Davis</i> , 101 Wn.2d 654, 656, 682 P.2d 883 (1984)	17
<i>State v. Gore</i> , 101 Wn.2d 481, 486-87, 681 P.2d 227, 39 A.L.R.4th 975 (1984)	16
<i>State v. Henderson</i> , 114 Wn.2d 867, 870, 792 P.2d 514 (1990)	17
<i>State v. Kincaid</i> , 103 Wn.2d 304, 314, 692 P.2d 823 (1985)	17
<i>State v. Mills</i> , 85 Wn. App. 285, 290, 932 P.2d 192 (1997)	14
<i>State v. Neher</i> , 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989)	18
<i>State v. Roberts</i> , 142 Wn.2d 471, 511-12, 14 P.3d 713 (2000)	17
<i>State v. Winston</i> , 105 Wn. App. 318, 323, 19 P.3d 495 (2001)	14

<i>State v. Winterstein</i> , 140 Wn. App. 676, 686-687, 166 P.3d 1242 (2007)	17
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Federal and Other Jurisdictions

<i>Sarausad v. Porter</i> , 479 F.3d 671 (9th Cir. 2007), <i>re-hearing denied</i> , 503 F.3d at 822, <i>cert. granted Waddington v. Sarausad</i> , ___ U.S. ___, 170 L.Ed.2d 352 (2008).....	16, 17
---	--------

Statutes

RCW 10.73.090	1, 13, 15
RCW 10.73.090(1)	11
RCW 10.73.100	1, 11, 12, 13, 15
RCW 10.73.150	13
RCW 10.73.150(4)	14
RCW 9A.08.020	19

Rules and Regulations

CR 15(c)	12
RAP 18.8(a)	12

Other Authorities

Laws of 1995, ch. 275, sec. 1	14
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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.¹

1. Should this court dismiss as untimely, claims raised by petitioner's counsel that were not in the original petition when: 1) the attorney was not authorized to raise such claims; 2) the new claims are untimely under RCW 10.73.090 and .100; and, 3) under *In re PRP of Benn*, it is not proper to allow amendment of the petition?
2. Is this court controlled by decisions of the Washington Supreme Court regarding the correctness of the wording of an accomplice liability instruction rather than the Ninth Circuit?
3. Should this court dismiss issues that were rejected on directed review without any further consideration as petitioner still has not demonstrated why the interests of justice require their re-litigation?

¹ The State relies on its earlier response on the issues pertaining to juror/prosecutorial misconduct and ineffective assistance of trial counsel.

B. STATEMENT OF THE CASE.

1. Procedure

Petitioner, Jimmee Chea, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 98-1-03157-5. CP 70-86. He was sentenced on five counts of aggravated murder in the first degree, and five counts of assault in the first degree. *Id.* Petitioner appealed from entry of this judgment and sentence. *See* App. B to The State's Initial Response (Mandate and Opinion). His convictions were affirmed by Division II of the Court of Appeals in an unpublished opinion. *Id.* The mandate issued on January 18, 2006. *Id.*

On January 9, 2007, petitioner filed a timely personal restraint petition alleging that his convictions or sentence should be vacated because: 1) he received ineffective assistance of counsel; 2) juror/prosecutorial misconduct; 3) there was insufficient evidence that he committed the murders; 4) he received improper multiple punishments; and, 5) a person cannot be convicted of aggravated murder on the basis of accomplice liability. The State filed a response to this petition. On December 11, 2007, this court issued an order appointing counsel, directing briefing and referring the petition to a panel. *See* Appendix A.

Petitioner's counsel filed the court ordered brief on March 31, 2008. The following is the State supplemental response to that brief.

2. Facts adduced at trial.

Around 2:00 a.m. on July 5, 1998, just before closing time, several gunmen burst into the Trang Dai Karaoke Bar in Tacoma, Washington. RP 2772. The occupants of this café, who were primarily Vietnamese, took cover. RP 2637-2638, 2773, 2779, 2785, 2902, 2943, 3725. The gunmen came through the front door and began firing rapidly. RP 3743-3745. Several patrons in the bar took cover at the first loud sound and could not say anything about the gunmen. RP 2765-2777, 2779-2792, 2808-2811, 2952. One patron saw two men, wearing hats, shooting. RP 2907. She couldn't see their faces, but one was carrying a long gun and they were shooting everywhere. RP 2907-2913. Three patrons were killed inside the bar and another died later at the hospital. RP 3411, 3412, 5554-5559, 55561-5563. A waitress, Chin, is found dead outside the back door. RP 2535, 2904, 5559. Dung Nguyen testified that he was going to follow Chin out the back door; when she ran out the back, Nguyen heard shots being fired and saw Chin fall. RP 2915-2916. She described it as "she just walk out the door and she fell down." RP 2916. Other customers were wounded by bullets or bullet fragments; the owner, who

was in his office, was hit by gunfire as was the DJ who was on stage. RP 2787–2790, 3411, 3745-3748, 3750. In the end, five people are dead and five more are wounded. *Id.*

Forensic officers spent hours collecting and processing the evidence at the scene. Over 55 shell casings were located in and outside the café, as well as numerous bullet fragments. RP 3411-3412, 4742-4808, 5158-5212. It was determined that these shell casings came from five different guns: an assault rifle, a .380 semiautomatic handgun and three different 9 millimeter semiautomatic handguns. RP 5382-5421. Shell casings from the assault rifle, the .380 and one of the 9 millimeters, were found inside the café and in front. Shell casings from the other two 9 millimeters and another casing from the assault rifle were found in the back alleyway. RP 5162, 5167-5168, 5506.

A neighboring business had a surveillance camera aimed at the back alleyway. RP 3424-3425. Police recovered the tape from this camera; it shows the alley shortly before the shooting. RP 3436-3437. Upon viewing, Detective Davidson of the Tacoma Police Department recognizes one of the cars, the silver one, as belonging to Chea, a member of a local Asian street gang, the LOC'd Out Crips or LOCs. RP 3436-3438.

Detectives obtain search warrants to search Chea's home among other places. RP 3452-3457. As a result of the service of these warrants, several people are brought to the station for questioning. RP 3462. One of the people brought in is Veasna Sok. RP 3464. Sok confesses to being involved in the Trang Dai shootings as the driver of the white car, and he implicates several other people, including both defendants. Sok tells police that Chea was driving the other car and that Phet was in that car. Sok implicates six others: Sarun Ngeth, Marvin Leo, Samath Mom, who were in Sok's car, and Ri Le, John Phet, and Khanh Trinh, who were with Chea in his car. RP 4441. Sok was arrested on July 18, 1998. RP 4440. Sok later implicated John Chak as also being in Phet's car and involved in the incident. RP 4442.

At trial, Sok testified that in July of 1998 that he was member of the LOC gang, and had been so for a couple of years. RP 4327-4328. Sok testified he arrived back in Tacoma on July 5, 1998, around 6-7:00 p.m. RP 4338. A girl called him asking if he wanted to go watch the fireworks at the waterfront. RP 4339. Sok showered, grabbed his 9 millimeter handgun so he could protect himself against other gang members, and left in his Acura Legend. RP 4339-4340.

After spending some time with his girl, Sok dropped her off and went to Sarun Ngeth's house. RP 4345. Sok picked up Ngeth and Marvin Leo and started to drive around to find their other "homies." RP 4346-4337. Ngeth was armed with his .380 and Leo took custody of Sok's 9 millimeter. RP 4348. While they were driving around, Khanh Trinh called them to say that he was with Chea and other LOCs; Trinh wanted to know if Sok wanted to "put in work" that night. RP 4387-4388. Sok understood "work" to mean do a drive-by. RP 4388. Trinh told him to go to Ngeth's house; Sok told the others about putting in work. RP 4388-4389.

Sok, Ngeth and Leo waited about 10 minutes before Chea and others showed up, Chea was wearing red clothes. RP 4390. Le, Mom, Trinh and Phet were in Chea's car. RP 4391. Chea asked if they wanted to put in work; Le mentioned he wanted to get Sonny at the café. RP 4396. Sok understood this to mean to shoot Sonny. RP 4397. Sok told Chea that they had his Tek 9 and Ngeth's .380. RP 4399. Chea asked to put the guns in Sok's car; Sok popped the trunk and someone put a big black gym bag in Sok's trunk. RP 4401. They discussed stealing a car, and Sok understood that this was so that they didn't have to use one of their own cars in a drive-by. RP 4404. After being unsuccessful in stealing a car, a

third carload of LOCs left, leaving Sok's and Chea's carload. RP 4410. Chea drove by and said they were going to go by the café anyway. RP 4411. The two cars drove by the front of the café then around to the alley; Le got out of Chea's car and came back to tell Sok that they were going to call the café to see if Sonny was there. RP 4413-4414. They drove the two cars to a nearby market, Le and Chak got out of Chea's car, and went to the front of the store. RP 4415-4416. A few minutes later Chea drove up to say that Sonny was at the café and that they were going back. RP 4416. This time they drove to the back alley and backed their cars down, Chea going first. RP 4417-4418. Sok got out and went to Chea's car, asking what was going to happen. RP 4419. Chea told him they were "gonna do some shit" which also means a shooting. RP 4419-4420. Sok testified that the pictures taken from the surveillance video showed these events. RP 4420-4421. Chea was in the driver's seat of his car, and Sok was in his car with Ngeth, the rest were getting guns out of the trunk and tying bandanas around their faces and putting beanies on so that only their eyes showed. RP 4422-4426. Trinh, Phet, Leo, Le, Mom, and Chak headed toward the café, and a few seconds later Sok heard gunshots. RP 4427-4428. Sok testified that he saw Le and Chak run out from the alley with guns, but did not see them shooting; they ran to Chea's car. RP 4430.

Mom and Leo came out behind them, also with guns, and got into Sok's car. RP 4430. The last to come out were Phet and Trinh and they were firing their guns back in the direction they were running from. RP 4431. Both cars ended up at Trinh's house. RP 4434. Everyone came into the house and put their guns on the table. RP 4436. Le and Trinh began wiping them down and putting them back in the gym bag. RP 4436. Le took the guns away. RP 4436-4437. Sok does not know what happened to the guns, but Chea said another LOC got rid of them. RP 4456. Sok saw Chea once between the night of the shooting and the time of arrest; Chea warned him not to drive his car. RP 4439-4440.

The Owner of the Trang Dai confirmed that Sonny Kim and Ri Le had been in a fight at the Trang Dai. RP 3729-3732. The owner also confirmed the call coming in to Sonny Kim just before the shooting. RP 3740-3741.

Detectives also interviewed Chea and Phet after advising them of their constitutional rights. Chea told the detectives that he was a member of the LOCs and the only one that drove his Honda Civic. RP 3469-3479. As for his whereabouts on July 4, 1998, Chea said that he had been in Seattle between 8:00 and 10:00 p.m, alone in his Honda Civic. RP 3470. He stated he returned to Tacoma, went to the waterfront and finally went

home at approximately 12:00 to 12:30 a.m. RP 3470. He said that he did not see anyone in Seattle, and that no one was home when he got there. RP 3470. When shown a picture of the Civic that was captured on the security tape, Chea stated "I'm not the only one that drives that car."

After Sok's disclosure about another participant, detectives contacted Chak who admitted his involvement to them. At trial Chak testified that in July 1998 he belonged to the LOC'd Out Crip gang, and that he had been a member for about a year. RP 3891-3892. Chak testified that Chea called him on the morning of July 4, 1998, and invited Chak to come with him to Ri Le's house. RP 3899. Chea, wearing red clothing, picked him up in his gray Honda Civic and they went to Le and Trinh's house. RP 3899-3901. Phet and Sam Mom were also there. RP 3900.

Chak testified that Chea and Le were talking about Sonny "mean mugging" Chea, which was a sign of disrespect that could trigger violent retaliation. RP 3901- 3903. At one point Le and Trinh left for a while and returned with red clothing. RP 3905. Eventually they meet up with other LOCs and everybody gets in to three cars. RP 3908-3910. Chak understands that they are going to do a drive-by. RP 3910. After an unsuccessful attempt to steal a car, one carload of LOCs leaves. RP 3910-3913. Sok and his carload, and Chea and his carload, which includes

Phet, drive to a market. RP 3914. Chea tells Chak to make a phone call to make sure that Sonny is at the café; when Sonny answers, Chak hangs up. RP 3915. Chak tells everyone what happened and gets back into Chea's car. RP 3915. Both cars head for the alley behind the café. The cars go down the alley twice, the second time backing so that they could leave without ending up going the wrong way on a one way street. RP 3916. Chea stays in his car and Sok and Sarun Ngeth stay in Sok's car; everyone else gets out and gets a gun from the trunk of Chea's car. RP 3918. Chak gets an assault rifle; Trinh has a 9 millimeter; Mom has another 9 millimeter; Leo has a .380, and Le has a AK-47. RP 3919. Chak did not remember what kind of weapon Phet had, but everyone was armed. *Id.* All six head down the breezeway leading toward the café. RP 3919. Chak testified Le told Trinh and Phet to guard the back door and shoot if anyone comes out. RP 3920. Leo, Le, Mom, and Chak head for the front door; Chak opens the front door and everyone rushes in. RP 3920. Chak testifies that the other three start shooting, but that he does not shoot. The other three fire continuously. RP 3921-3922.

After a short time, the three back out the door with Le still firing; he continues to fire through the wall as they back up the breezeway. RP 3922. Chak testified that Phet and Trinh have gotten back into the cars by

the time he passes the back door. Chak gets into Chea's car, who tells them not to mess with the guns, then they all returned to Le's house. RP 3923.

C. ARGUMENT.

1. THIS COURT SHOULD NOT CONSIDER ISSUES RAISED BY PETITIONER'S COUNSEL WHICH WERE NOT RAISED IN THE INITIAL PETITION.

“The statute of limitation set forth in *RCW 10.73.090(1)*² is a mandatory rule that acts as a bar to appellate court consideration of personal restraint petitions filed after the limitation period has passed, unless the petitioner demonstrates that the petition is based solely on one or more . . .” of the grounds listed in *RCW 10.73.100*.³ ***Shumway v. Payne***, 136 Wn.2d 383, 398, 964 P.2d 349 (1998) (emphasis added).

The Supreme Court has held that a defendant who has filed a timely petition is not permitted to amend the petition to add new issues once the time for filing a timely petition has expired.⁴ ***In re Pers. Restraint of Benn***, 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998). Benn filed a timely petition but then attempted to file an amendment to his

² See Appendix B.

³ See Appendix C

⁴ The analysis opinion suggests that if the new issues fell within the exceptions of *RCW 10.73.100* that amendment might be permissible.

petition raising a challenge to the court's instructions on self defense after the one year statute of limitation expired. The Supreme Court held, "There is no provision in the rules of appellate procedure similar to CR 15(c) which allows amendments to relate back to the date of the original pleading; indeed, there is no provision at all regarding amendments to personal restraint petitions." 134 Wn.2d at 939. The court noted that Benn was not seeking a waiver of a court rule, but rather a waiver of a statute of limitation and "RAP 18.8(a) does not allow the court to waive or alter statutes." *Id.* It went on to find that there was no exception under RCW 10.73.100 for the challenge to the self-defense instruction under either a direct theory, or an ineffective assistance of counsel theory. *Id.*

In this case, petitioner filed a timely first time petition that raised several issues: 1) ineffective assistance of counsel; 2) juror/prosecutorial misconduct; 3) violation of double jeopardy by being punished for five counts of murder in the first degree; 4) insufficient evidence to support his conviction as an accomplice for five counts of assault in the first degree; 5) insufficient evidence to support his conviction as an accomplice for five counts of murder; and, 6) improper conviction as an accomplice of aggravated murder. The Chief Judge screened these issues for frivolity and made a determination that appointment of counsel was necessary for briefing before referring the matter to a panel of judges for determination

of the merits. *See* Order, Appendix A. The order also directed appointment of “a lawyer to represent Petitioner in this court’s consideration of the petition at public expense, including briefing of the *issues initially raised by Petitioner.*” *Id.* (emphasis added).

Petitioner’s opportunity for filing a timely collateral attack expired on January 18, 2007, one year from the date the mandate issued on direct review. *See* App. B to The State’s Initial Response (Mandate and Opinion). On April 1, 2008, Petitioner’s appointed counsel filed a brief that raised issues that had not be raised in the original petition. These issues include: 1) a constitutional challenge to the accomplice liability instruction; 2) ineffective assistance of appellate counsel; and 3) cumulative error. None of these issues fall under the exceptions of RCW 10.73.100. Consequently, RCW 10.73.090 and the decision of the Washington Supreme Court in *Benn* preclude this court from considering these claims.

Nor is there any authority for appointment of an attorney at public expense to raise these additional claims on petitioner’s behalf. A defendant trying to collaterally attack his conviction has no constitutional right to court-appointed counsel to help him in his endeavor. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999). RCW 10.73.150 provides a limited statutory right to appointment of counsel at

public expense:

Counsel shall be provided at state expense to an adult offender convicted of a crime . . . when the offender is indigent or indigent and able to contribute as those terms are defined in RCW 10.101.010 and the offender:

(4) Is not under a sentence of death and requests counsel to prosecute a collateral attack after the chief judge has determined that the issues raised by the petition are not frivolous, in accordance with the procedure contained in rules of appellate procedure 16.11 . . .

RCW 10.73.150(4).

In enacting this provision, the legislature stated it was “appropriate to extend the right to counsel at state expense beyond constitutional requirements in certain *limited* circumstances to persons who are indigent(.) . . .” *State v. Mills*, 85 Wn. App. 285, 290, 932 P.2d 192 (1997) (emphasis added) (quoting Laws of 1995, ch. 275, sec. 1). The right to appointment of counsel for issues raised in a personal restraint petition comes only after a finding by the chief judge that the issues raised are not frivolous. RCW 10.73.150(4); *State v. Winston*, 105 Wn. App. 318, 323, 19 P.3d 495 (2001) (first the chief judge reviews the petition to determine whether the issues have any merit and “[o]nly if the chief judge determines that his issues raised are not frivolous will counsel be appointed.”).

The statute governing appointment of counsel of personal restraint petitioners does not provide any authorization for appointed counsel to raise additional issues in an opening brief that (1) were not raised by the petitioner, (2) did not comply with RCW 10.73.090 or .100; 3) were not screened to determine whether they had merit, and (4) were not screened for frivolity. Allowing the court appointed attorney to review the entire record and present additional issues to the court completely undermines the finality of direct review and grants a petitioner representation not envisioned by the statute. In essence, this would allow a petitioner to have the opportunity to have appointment of counsel at public expense to review his entire trial record twice – once on direct review and once in the personal restraint petition process. Appointed counsel must be limited to presenting argument only on the issues initially raised in the petition by petitioner.

For the foregoing reasons, this court should refuse to consider the claims raised in petitioner's brief regarding the constitutionality of the accomplice liability statute, ineffective assistance of appellate counsel and cumulative error.

2. THE NINTH CIRCUIT'S OPINION IN **SARAUSAD V. PORTER** IS NOT CONTROLLING.

Petitioner relies upon the recent decision in *Sarausad v. Porter*, 479 F.3d 671 (9th Cir. 2007), *re-hearing denied*, 503 F.3d at 822, *cert. granted Waddington v. Sarausad*, ___ U.S. ___, 170 L.Ed.2d 352 (2008)⁵ to support his claim that the accomplice liability instruction given in his trial relieved the State of its burden of proof.

The Ninth Circuit's constitutional holdings are not binding on this court or the Washington Supreme Court. *In re Personal Restraint of Grisby*, 121 Wn.2d 419, 430, 853 P.2d 901 (1993); *In re Personal Restraint of Benn*, 134 Wn.2d 868, 937, 952 P.2d 116 (1998). This court is bound by the decisions of the Washington Supreme Court. *State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227, 39 A.L.R.4th 975 (1984) (the Court of Appeals is bound by decisions of the Washington Supreme Court).

⁵ At the outset, it should be noted that there was a strong dissent on the denial of the motion for rehearing in the federal court, with several circuit justices agreeing that the Ninth Circuit was overstepping its bounds by not giving proper deference to the Washington Supreme Court's interpretation of state law. *See Sarausad v. Porter*, 503 F.3d at 823-826. It remains to be seen whether the Supreme Court agrees with their dissent or not.

The accomplice liability instruction given in this case mirrored Washington's accomplice liability statute; consequently, the instruction complies with what the Washington Supreme Court has indicated would be proper wording. *State v. Cronin*, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000); *State v. Roberts*, 142 Wn.2d 471, 511-12, 14 P.3d 713 (2000) (citing *State v. Davis*, 101 Wn.2d 654, 656, 682 P.2d 883 (1984)). The instruction is consistent, in the relevant part, with an instruction that has been approved by this court as a proper statement of the law. *State v. Winterstein*, 140 Wn. App. 676, 686-687, 166 P.3d 1242 (2007). These decisions should control this issue rather than the Ninth Circuit decision in *Sarausad*.

Nor can petitioner show that he can raise a challenge to this instruction as he proposed an accomplice liability instruction in the trial court which contained the same ambiguous language of which he now complains. The doctrine of invited error holds that a party cannot request an instruction and later complain on appeal that the instruction should not have been given. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); *State v. Kincaid*, 103 Wn.2d 304, 314, 692 P.2d 823 (1985). The doctrine of invited error applies when an instruction given by the trial court contains the same error as the defendant's proposed instruction.

State v. Neher, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989); *Goodman v. Boeing Co.*, 75 Wn. App. 60, 74, 877 P.2d 703 (1994).

Petitioner tries to challenge the accomplice liability given in the trial court, but fails to explain how his proposed instruction does not also contain the same error of which he now complains. His proposed accomplice liability instruction read:

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the specific crime; or
- (2) aids or agrees to aid another person in planning or committing the specific crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 160-201 (Defendant’s proposed instruction No. 8)(emphasis added).

Petitioner’s proposed instruction uses “a crime” twice in the second

paragraph and allows the jury to find a defendant guilty of a crime committed by another person if it found defendant had general knowledge that his actions would promote "a crime" contrary to the requirements of RCW 9A.08.020. *State v. Cronin*, 142 Wn.2d at 578. In other words petitioner proposed an instruction that was a misstatement of the law under *Cronin* as well as ambiguous under the Ninth Circuit decision. Because he proposed an instruction with the same type of error, he is precluded by the doctrine of invited error from challenging this instruction.

3. CLAIMS THAT ARE MERELY REFORMULATIONS OF CLAIMS REJECTED IN THE DIRECT APPEAL SHOULD BE DISMISSED AS PETITIONER STILL HAS NOT MADE ANY SHOWING THAT THE INTERESTS OF JUSTICE REQUIRE THEIR RELITIGATION.

As noted in the State's earlier response, a petitioner may not raise in a personal restraint petition an issue which "was raised and rejected on direct appeal unless the interests of justice require re-litigation of that issue." *In re Personal Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). "Simply 'revising' a previously rejected legal argument . . . neither creates a 'new' claim nor constitutes good cause to reconsider the original claim." *In re Jeffries*, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). A petitioner may not create a different ground for relief merely by alleging

different facts, asserting different legal theories, or couching his argument in different language. *Lord*, 123 Wn.2d at 329.

Petitioner's challenge to the sufficiency of the evidence supporting his convictions and the challenge as to whether he was properly convicted, as an accomplice, of aggravated murder, are reformulations of issues raised on direct appeal. Petitioner presents additional arguments on the merits of these claims in his brief, but still has not addressed the required predicate showing of why the interests of justice require re-litigation of these issues. Because petitioner has failed to make this showing, the court should not consider these claims again.

4. THE STATE WILL RELY ON ITS PREVIOUSLY FILED RESPONSE ON THE REMAINING ISSUES.

The issues regarding juror/prosecutor misconduct and the ineffective assistance of counsel claims were addressed in the State's initial response to the petition. After reviewing the arguments in the brief, the State will rely on its earlier pleading with regard to these claims.

D. CONCLUSION.

For the foregoing reasons set forth in the State's initial response and this brief, the State asks this court to dismiss the personal restraint petition.

DATED: May 9, 2008.

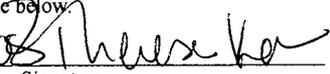
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WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.9.08 
Date Signature

APPENDIX “A”

Order Referring Petition

to file

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DEC 13 2007

②

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GERALD A. HORNE
PIERCE COUNTY PROSECUTING ATTORNEY
APPELLATE DIVISION

DIVISION II

In re the
Personal Restraint Petition of

JIMMEE CHEA,

Petitioner.

No. 35773-9-II

ORDER REFERRING PETITION
TO PANEL, APPOINTING
COUNSEL, AND SETTING
BRIEFING SCHEDULE

FILED
COURT OF APPEALS
07 DEC 11 AM 10:00
STATE OF WASHINGTON
BY *GA*

Jimmee Chea seeks relief from personal restraint imposed after a jury convicted him of five counts of first degree aggravated murder and five counts of first degree assault in Pierce County Superior Court cause 98-1-03157-5. After initial consideration under RAP 16.11(b), the Acting Chief Judge has determined that the issues raised by this petition are not frivolous.

Accordingly, it is hereby ordered that this petition is referred to a panel of judges for determination on the merits. Under RAP 16.11(b) and 16.15(h), this court will appoint a lawyer to represent Petitioner in this court's consideration of the petition at public expense, including briefing of the issues initially raised by Petitioner. This court also orders that under RAP 16.15(h), any necessary preparation of the record of prior proceedings shall be at public expense and waives charges for reproducing briefs or motions in this appellate cause. At public expense, this court will provide to Petitioner's appointed lawyer copies of the briefs, together with attached records, and of the verbatim report of the prior proceedings already transferred from Petitioner's direct appeal file, cause 29087-1-II.

Within 20 days of appointment of counsel, Petitioner must arrange to transcribe any additional hearings from other proceedings necessary to resolve the issues raised in the petition by filing a statement of arrangements. *See* RAP 9.2, 16.7(a)(2)(i). Within the same 20 days, Petitioner must also designate any clerk's papers or exhibits from other proceedings necessary to resolve the petition. *See* RAP 9.6, 16.7(a)(2)(i). The record on review should be filed within 30 days of when Petitioner files the statement of arrangements and the designation of clerk's papers. Respondent also remains obligated to provide to this court copies of any records of other proceedings relevant to answering the petition. *See* RAP 16.9. The parties must comply with RAP Title 9 when providing the record necessary to decide this petition.

Petitioner's opening brief is due within 45 days after the report of proceedings is filed. Respondent's brief is due within 30 days after service of Petitioner's brief. Respondent may instead rely on its previously filed response but must notify this court and Petitioner if it intends to do so. If Respondent files a brief, then Petitioner may file a reply brief within 20 days after service of Respondent's brief. After the opening briefs are filed, this court will determine under RAP 16.11(c) whether to decide the Petition with or without oral argument.

DATED this 11/18 day of December, 2007.

Van Doren, A.C.J.
Acting Chief Judge

cc: Jimmee Chea
Pierce County Clerk
County Cause No. 98-1-03157-5
Kathleen Proctor
Washington State Office of Public Defense

APPENDIX “B”

RCW 10.73.090

§ 10.73.090. Collateral attack -- One year time limit

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

(2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

(a) The date it is filed with the clerk of the trial court;

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

HISTORY: 1989 c 395 § 1.

APPENDIX "C"

RCW 10.73.100

§ 10.73.100. Collateral attack -- When one year limit not applicable

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
- (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
- (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;
- (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
- (5) The sentence imposed was in excess of the court's jurisdiction; or
- (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

HISTORY: 1989 c 395 § 2.