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STATE OF WASHINGTON
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF:

ROBERT CHARLES BONDS, Jr.,

Petitioner.

BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. Those persons are also responsible by law for responding to collateral attacks upon criminal convictions that are filed in state courts. *See* RAP 16.6(b).

WAPA is interested in cases, such as this, which have wide-ranging impact on the prosecution system. Recognition of the limited nature of the jurisdiction that has been conferred upon the courts by the legislature with regard to collateral attacks upon criminal convictions will foster respect for the courts by ensuring the finality of judgments.

II. ISSUES PRESENTED

1. Whether the one-year time bar for filing a collateral attack contained in RCW 10.73.090 and incorporated into RCW 7.36.130 is jurisdictional?

2. Whether, if RCW 10.73.090 and RCW 7.36.130 are not jurisdictional, may equitable tolling be applied to allow a petitioner to file a collateral attack more than one-year after the petitioner's conviction became final?

3. Whether the petitioner's pro se status provides grounds for equitably tolling the one year time-bar contained in RCW 10.73.090?

4. Whether a court may grant a petitioner's collateral attack based upon a violation of the public's Const. art. I, § 10 right to open justice?

5. Whether a trivial violation of the petitioner's Const. art. I, § 22 right to a public trial merits the vacation of his convictions?

III. STATEMENT OF FACTS

The petitioner, Robert Bonds' convictions for the offenses of attempted first degree murder and unlawful possession of a firearm in the first degree, became final on May 9, 2005, the date the mandate was issued in his direct appeal. Seventy-four days later, on July 22, 2005, Bonds, acting pro se, filed a personal restraint petition (PRP) that contained a single confrontation clause claim.

Over one year later, on July 25, 2006, Bonds, acting through an attorney, filed a motion to amend the PRP to add a new public trial issue. Bonds' motion to add this issue identified no disability that precluded his raising this issue prior to May 9, 2006.

The Court of Appeals granted Bonds' untimely motion to amend his PRP, finding that the doctrine of equitable tolling permitted the raising of the new claim. The Court of Appeals also granted Bonds' PRP, vacating his convictions on the ground that the constitutional right to a public trial had

been violated.

Bonds sought relief based upon three courtroom closures. See Brief of Petitioner, at 7 and 32-34 (July 25, 2006).¹ The February 21, 2002, closed pre-trial hearing involved an inquiry into the competency of the complainant Keith Harrell. 2/21/02RP 72. Mr. Harrell's competency was unquestioned during his brief trial testimony. 3/05/02 RP 53-57.

On March 7, 2002, the court closed the courtroom during an inquiry into whether Cory Thomas would invoke his Fifth Amendment rights if called at trial. 3/7/02RP 413-19. Bonds expressly waived his own Const. art. I, § 22 right to a public trial for the closure that occurred on March 13, 2003. 3/13/02RP 411-12. Despite being invited to object, no member of the audience objected to this brief closure. Id.

Finally, an extremely brief closure occurred during the testimony of Selena Daniels. This closure covers 3 pages of Ms. Daniels' trial testimony. Compare 3/13/02 RP 944-946 with RP 3/13/02 RP 914-970. No testimony was taken during this closed hearing, and the jury was not present. The sole purpose of the closed hearing was for the judge to admonish the witness of her obligations, and that her failure to meet those obligations could result in a contempt of court finding. 3/13/02RP 944-46.

¹The Court of Appeals opinion references a fourth closure for argument on Judith Harrell's testimony. See In re Personal Restraint Petition of Bonds, COA No. 33704-5-II, slip op. at 17. Bonds, however, never sought relief based upon this closure and offered no argument regarding this closure.

IV. ARGUMENT

A. THE LEGISLATURE HAS ERECTED A JURISDICTIONAL BAR TO THE REVIEW OF UNTIMELY COLLATERAL ATTACKS UPON FACIALLY VALID JUDGMENTS

A court's authority to reopen a judgment in a criminal case arises from either a statute or the constitution. The constitutional authority, which is contained in article 1, § 13, is very narrow and does not permit challenges that go beyond the face of a final judgment of a court of competent jurisdiction. In re Runyan, 121 Wn.2d 432, 441-42, 853 P.2d 424 (1993). Any inquiry beyond the face of a final judgment results from legislative authorization. There is none that applies to Bonds' untimely public trial claim.

As noted by this Court in the past:

The legislature has long played a role in deciding the scope of collateral relief, and this court has accepted this involvement, so long as the scope of the relief afforded is not constricted beyond the narrow boundaries of our constitution.

Runyan, 121 Wn.2d at 443.

Legislative authorization for review beyond the face of a final judgment can be found in two separate statutes. The first statute, which applies only to superior courts, is RCW 4.72.010. See State v. Sampson, 82 Wn.2d 663, 665, 513 P.2d 60 (1973). The second statute, which applies to all courts of record, is RCW 7.36.130.

The habeas corpus statute, RCW 7.36.130, is derived from a statute passed by the first legislature of Washington Territory. As first enacted, the territorial habeas corpus statute was an *absolute* prohibition against collateral review of a facially-valid judgment by a court of competent jurisdiction. Laws of 1854, p. 213, § 445. That restriction was repeatedly upheld by the Washington Supreme Court. In re Lybarger, 2 Wash. 131, 25 P. 1075 (1891); In re Grieve, 22 Wn.2d 902, 158 P.2d 73 (1945). In 1947, the habeas corpus statute was amended to allow such challenges when the challenge is based upon a constitutional violation. Laws of 1947, chapter 256, § 3. “[T]hese statutory changes have never affected, nor could they affect, the core constitutional inquiry protected by our state suspension clause.” Runyan, 121 Wn.2d at 443.

In the 1970’s, the Supreme Court created personal restraint petitions as the procedural mechanism for carrying out the Legislature’s grant of jurisdiction at the appellate court level. See generally RAP 16.1(c); Toliver v. Olsen, 109 Wn.2d 607, 746 P.2d 809 (1987). These procedural rules, however, did not override or alter the restrictions placed upon the courts’ review of collateral attacks by the Legislature. See In re Rafferty, 1 Wash. 382, 25 P. 465 (1890).²

²Once the legislature acted to expand jurisdiction beyond that preserved by Const. art. I, § 13, Const. art. IV, § 4 permits the court to adopt procedural rules for dealing with the *legislatively* expanded scope of jurisdiction. Holt v. Morris, 84 Wn.2d 841, 529 P.2d 1081 (1974), overruled on other grounds, Wright v. Morris, 85 Wn.2d 899, 540 P.2d 893 (1975).

In 1989, the Legislature acted to restore some finality to criminal judgments by limiting the authority it had previously granted to courts to look behind the face of a judgment and sentence. Honore v. Board of Prison Terms & Paroles, 77 Wn.2d 660, 691, 466 P.2d 485 (1970) (Hale, J., concurring). Specifically, the Legislature restricted the length of time a prisoner could wait before bringing a petition. See RCW 10.73.090; RCW 10.73.100. The time-bar and the legislatively authorized grounds for waiving the one-year time-bar were incorporated into the jurisdictional statute governing all habeas corpus proceedings:

No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge the party when the term of commitment has not expired, in either of the cases following:

(1) Upon any process issued on any final judgment of a court of competent jurisdiction except where it is alleged in the petition that rights guaranteed the petitioner by the Constitution of the state of Washington or of the United States have been violated and the petition is filed within the time allowed by RCW 10.73.090 and 10.73.100.

See RCW 7.36.130.

That the RCW 10.73.090 time-bar is jurisdictional has been recognized by this Court in response to requests to consider collateral attacks

To the extent any procedural rules regarding collateral attacks conflict with the legislature's substantive grant of authority, the statute controls. See, e.g., In re Personal Restraint of Johnson, 131 Wn.2d 558, 563-65, 933 P.2d 1019 (1997); Abad v. Cozza, 128 Wn.2d 575, 593 n. 2, 911 P.2d 376 (1996); State v. Walker, 93 Wn. App. 382, 967 P.2d 1289, 1293 (1998).

filed after the expiration of the one-year period. See, e.g., Shumway v. Payne, 136 Wn.2d 383, 397-98, 964 P.2d 349 (1998) (“The statute of limitation set forth in RCW 10.73.090(1) 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 contained in RCW 10.73.100]”); In re the Personal Restraint Petition of Benn, 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998) (court rules cannot be used to alter or enlarge the time limit contained in RCW 10.73.090). The doctrine of equitable tolling cannot be applied to jurisdictional statutes. See, e.g., Hazel v. Van Beek, 135 Wn.2d 45, 61, 954 P.2d 1301 (1998).

While Division Three in In re the Personal Restraint Petition of Hoisington, 99 Wn. App. 423, 993 P.2d 296 (2000), and Division Two in State v. Littlefair, 112 Wn. App. 749, 760, 51 P.3d 116 (2002), review denied, 149 Wn.2d 1020 (2003), applied equitable tolling to RCW 10.73.090, those courts could not overrule this Court’s contrary authority that acknowledges the jurisdictional nature of both RCW 10.73.090 and RCW 7.36.130. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227, 39 A.L.R.4th 975 (1984); State v. Langford, 67 Wn. App. 572, 581, 837 P.2d 1037 (1992), review denied, 121 Wn.2d 1007 (1993), cert. denied, 510 U.S. 838 (1993). This Court has never authorized the equitable tolling of the one-year time bar

contained in RCW 10.73.090, and it should not do so at this time. Carlstad, 150 Wn.2d at 593.

Division Two found support for its conclusion that RCW 10.73.090 is subject to equitable tolling in federal cases and in a student authored note. Littlefair, 112 Wn. App. at 758-759, citing Mark A. Wilner, Notes and Comments, Justice at the Margins: Equitable Tolling of Washington's Deadline for Filing Collateral Attacks on Criminal Judgments, 75 Wash. L. Reb. 675 (2000). A review of the federal statute, however, reveals that the federal case law sheds no light upon whether our Legislature intended RCW 10.73.090 act as a jurisdictional bar or as a statute of limitations. In addition, the federal cases did not have to deal with the jurisdictional language contained in RCW 7.36.130.

The federal statute, 28 U.S.C. § 2244(d), and RCW 10.73.090 share little in common other than the selection of one year as the cutoff date. The Washington statute utilized language that bars the filing of a collateral attack. See RCW 10.73.090(1) (“No petition or motion for collateral attack may be filed more than one year after the judgment becomes final....”). The federal statute, on the other hand, uses typical statute of limitations language. See 28 U.S.C. § 2244(d)(1) (“A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”).

The federal statute of limitations was adopted seven years after our Legislature enacted our time-bar statute. Compare Pub. L. No. 104-132, 110 Stat. 1214 (1996), with Laws of 1989, ch. 395. Thus, neither the federal statute nor the cases which hold that the federal time limit can be equitably tolled can shed any light upon the intent of the Washington Legislature. The contemporaneous legislative history does demonstrate that chapter 1989 was to be an absolute bar to collateral attacks filed beyond the one-year limit, except when a RCW 10.73.100 exception applied. See Final Legis. Rep., S.H.B. 1071, 51st Leg., Reg. Sess. (Wash. 1989).

Washington would not be the first state to hold that its collateral attack time-bar is jurisdictional. Courts in Alabama, Montana and Pennsylvania have reached this conclusion with respect to their time-bars. See, e.g., Arthur v. State, 820 So.2d 886 (Ala. Crim. App. 2001) (Ala. R. Crim. P. 32.2(c) is mandatory and jurisdictional); State v. Rosales, 299 Mont. 226, 999 P.2d 313 (2000) (Montana Code § 46-21-102 is jurisdictional); Commonwealth v. Hoffman, 780 A.2d 700 (Pa. Super. 2001) (42 Pa. C.S.A. § 9545(b)(1)-(2) are jurisdictional).³ The language of Washington's time-bar statute, RCW 10.73.090 and its habeas corpus jurisdictional statute, RCW 7.36.130(1), is more akin to the statutes of these states, then to the federal statute.

³These statutes are reproduced in Appendix A.

The language of RCW 7.36.130(1) is explicit: “No court or judge shall inquire into the legality of any judgment . . . except where . . . the petition is filed within the time allowed by RCW 10.73.090 and 10.73.100.” This restriction is within the constitutional power of the Legislature. Runyan, 121 Wn.2d at 443; Lybarger, 2 Wash. at 136. In the present case, the “public trial” challenge was filed outside the time allowed by this statute. When the Court of Appeals inquired into the legality of the judgment based on this challenge, it violated an express legislative prohibition.

B. ONLY EXTRAORDINARY CIRCUMSTANCES WILL JUSTIFY THE EQUITABLE TOLLING OF A STATUTE OF LIMITATIONS

While equitable tolling is available if a statute is not jurisdictional, the doctrine is used sparingly. See State v. Duvall, 86 Wn. App. 871, 875, 940 P.2d 671 (1997), review denied, 134 Wn.2d 1012 (1998). The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff. Millay v. Cam, 135 Wn.2d 193, 206, 955 P.2d 791 (1998).

In Washington equitable tolling is only appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations. Douchette v. Bethel Sch. Dist. No. 403, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991). The purpose of RCW 10.73.090 is to further the State’s compelling interest in the finality of criminal

judgments. Finality serves the goals of rehabilitation, deterrence and punishment. Kuhlmann v. Wilson, 477 U.S. 426, 452-53, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986); McCleskey v. Zant, 499 U.S. 467, 491, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991); Calderon v. Thompson, 523 U.S. 538, 118 S. Ct. 1489, 1500-01, 140 L. Ed. 2d 728 (1998); Shumway, 136 Wn.2d at 399. The purpose of Bonds' action is to upset a presumptively accurate conviction.

Essentially, Bonds is requesting that this Court add a new pro se or ignorance of the law exception to the legislatively recognized exceptions to the one-year period contained in RCW 10.73.100. This is a step that a Court may not take. See, e.g., Guy F. Atkinson Co. v. State, 66 Wn.2d 570, 575, 403 P.2d 880 (1965) ("Courts will not read into statutes of limitations exceptions not embodied therein."); Spokane v. State, 198 Wash. 682, 694, 89 P.2d 826 (1939) ("To construe a further exception into the statute ... is to legislate judicially -- an abhorrent thing"). It is also a step that this Court refused to take in Carlstad. See 150 Wn.2d at 593 (refusing to accept a tardy collateral attack solely because the pro se litigant erroneously believed that the "mailbox rule" applied to state court pleadings). It is also a step that is contrary to legislative intent.

The Legislature adopted specific and limited exceptions to the one-year time bar. See RCW 10.73.100. The "pro se exception" adopted by

Division Two under the guise of equitable tolling, would apply to the majority of collateral attacks as counsel is provided to indigent petitioners under very limited circumstances. See RCW 10.73.150(3) and (4).

The federal circuit courts of appeal have determined that the time limitation for filing a federal habeas corpus action set forth at 28 U.S.C. § 2244(d) is not jurisdictional.⁴ Accordingly, the federal courts have indicated that the time limit is subject to equitable tolling. See, e.g., Davis v. Johnson, 158 F.3d 806, 810-11 (5th Cir 1998). Although the federal courts do not require proof of governmental misconduct, the federal courts do recognize that “[e]quitable tolling will not be available in most cases, as extensions of time will only be granted if “extraordinary circumstances” beyond a prisoner’s control make it impossible to file a petition on time.” Calderon v. U.S. Dist. Court (Beeler), 128 F.3d 1283, 1289 (9th Cir. 1997), cert. denied, 523 U.S. 1061 (1998), overruled in part on other grounds, Calderon v. U.S. Dist. Court (Kelly), 163 F.3d 530 (9th Cir. 1998), cert. denied, 526 U.S. 1060 (1999) (citing Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996)).

Equitable tolling is not available for “what is best a garden variety claim of excusable neglect”. Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). Application of this

⁴The United States Supreme Court has never squarely addressed whether equitable tolling is applicable to AEDPA’s statute of limitations. Pace v. DiGuglielmo, 544 U.S. 408, 418 n. 8, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005).

principle has led the federal courts to reject equitable tolling predicated upon deficiencies related to petitioner's pro se status, lack of knowledge and expertise,⁵ delay in receiving the state disposition,⁶ delay in receiving transcripts,⁷ deficiencies in the prison law library,⁸ erroneous advice from a lawyer,⁹ hospitalization,¹⁰ prison lockdowns,¹¹ the merits of the collateral attack,¹² and prior unsuccessful efforts to be heard.¹³ Equitable tolling was

⁵See, e.g., Johnson v. United States, 544 U.S. 295, 311, 125 S. Ct. 1571, 161 L. Ed. 2d 542 (2005); Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000), cert. denied, 531 U.S. 1194 (2001); Felder v. Johnson, 204 F.3d 168, 171 (5th Cir.), cert. denied, 531 U.S. 1035 (2000); Miller v. Marr, 141 F.3d 976, 978 (10th Cir.), cert. denied, 525 U.S. 891 (1998); Eisermann v. Penarosa, 33 F. Supp.2d 1269, 1273 (D. Haw. 1999).

⁶Drew v. Department of Corrections, 297 F.3d 1278 (11th Cir. 2002), cert. denied, 537 U.S. 1237 (2003); Geraci v. Senkowski, 23 F. Supp.2d 246, 252-53 (E.D. N.Y. 1998), aff'd, 211 F.3d 6 (2nd Cir.), cert. denied, 531 U.S. 1018 (2000).

⁷See Gassler v. Bruton, 255 F.3d 492, 495 (8th Cir. 2001); Brown v. Cain, 112 F. Supp. 2d 585, 587 (E.D. La. 2000); Fadayiro v. United States, 30 F. Supp. 2d 772, 779-80 (D.N.J. 1998); United States v. Van Poyck, 980 F. Supp. 1108, 1110-11 (C.D. Cal. 1997).

⁸Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9th Cir. 2000)(en banc); Miller, 141 F.3d at 978 (not enough to say without elaboration that library was deficient).

⁹Fahy v. Horn, 240 F.3d 239, 244 (3d Cir.), cert. denied, 534 U.S. 944 (2001) ("attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling"); Geraci v. Senkowski, 211 F.3d 6, 9 (2d Cir.), cert. denied, 531 U.S. 1018 (2000); Harris v. Hutchinson, 209 F.3d 325 (4th Cir. 2000); Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999) ("a lawyer's mistake is not a valid basis for equitable tolling"); Sandvik v. United States, 177 F.3d 1269, 1270 (11th Cir. 1999) ("mere attorney negligence . . . is not a basis for equitable tolling").

¹⁰Rhodes v. Senkowski, 82 F. Supp.2d 160 (S.D.N.Y. 2000).

¹¹See Lehman v. United States, 154 F.3d 1010, 1016 (9th Cir.1998), cert denied, 526 U.S. 1040 (1999); Van Poyck, 980 F. Supp. at 1111.

¹²Helton v. Sec'y for the Department of Corrections, 259 F.3d 1310, 1314-15 (11th Cir. 2001), cert. denied, 535 U.S. 1080 (2002).

¹³Jones v. Morton, 195 F.3d 153, 160 (3rd Cir. 1999).

available when a petitioner's reliance upon prison officials to comply with his instructions regarding timely submitted petition was ignored,¹⁴ when the court lost a timely filed petition,¹⁵ and when a petitioner was mentally incompetent to assist his counsel.¹⁶

The burden of establishing entitlement to the extraordinary remedy of equitable tolling plainly rests with the petitioner. See, e.g., Alexander v. Cockrell, 294 F.3d 626 (5th Cir. 2002); Helton v. Sec'y for Dep't of Corrs., 259 F.3d 1310, 1313-14 (11th Cir. 2001)(denying equitable tolling in light of petitioner's failure to present necessary evidence); United States v. Saro, 252 F.3d 449, 454 (D.C. Cir. 2001), cert. denied, 534 U.S. 1149 (2002); see also Justice v. United States, 6 F.3d 1474, 1479 (11th Cir. 1993) ("The burden is on the plaintiff to show that equitable tolling is warranted.").

Here, Bonds identified no external impediment to his raising the open court claim within the statutory one-year period. Bonds does not contend that he was ill, hospitalized, or mentally incompetent. Bonds does not claim that the Department of Corrections or other government actor barred his access to the courts or to his legal pleadings between May 9, 2005, when his convictions became final and July 25, 2006, when he filed the motion to add

¹⁴Miles v. Prunty, 187 F.3d 1104 (9th Cir. 1999).

¹⁵Corjasso v. Ayers, 278 F.3d 874 (9th Cir. 2002).

¹⁶Calderon v. U.S. Dist. Court (Kelly), 163 F.3d 530, 541 (9th Cir. 1998), cert. denied, 526 U.S. 1060 (1999).

his open court claim.

The most Bonds claims is that he did not identify this claim on his own and Division Two unreasonably delayed the appointment of counsel. This claim fails as Bonds did not have a constitutional right to counsel, and the statutory right is limited to briefing the issues he identified on his own.¹⁷ The federal courts have refused to equitably toll their non-jurisdictional statute of limitations under similar circumstances. See, e.g. Arthur v. Allen, 452 F.3d 1234, 1249-53 (11th Cir. 2006), cert. denied, 127 S. Ct. 2033 (2007) (condemned prisoner claimed he was not appointed counsel in a timely manner); Powell v. Davis, 415 F.3d 722 (7th Cir. 2005) (prisoner claimed that appointed state public defender's office's first-in, first-out policy for handling cases delayed the filing of his petition). See also Modrowski v. Mote, 322 F.3d 965 (7th Cir. 2003) (incapacity, like the negligence, of an attorney for a habeas corpus petitioner is not a ground for equitable tolling; petitioners have the ultimate responsibility for their filings, even if that means preparing duplicative petitions).

¹⁷Murray v. Giarratano, 492 U.S. 1, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989); Pennsylvania v. Finley, 481 U.S. 551, 555, 95 L. Ed. 2d 539, 107 S. Ct. 1990, 1993 (1987); RCW 10.73.150(4).

C. EQUITABLE TOLLING IS INAPPROPRIATE WHEN THE
 PETITIONER WISHES TO RAISE A VIOLATION OF
 ANOTHER'S RIGHTS

Bonds' tardily raised claim asserted violations of both Const. art. I, § 10 and § 22 as grounds for relief. Bonds' claim, to the extent that it rests upon Const. art. I, § 10, must be denied by this Court because the Legislature has not expanded the right of habeas corpus to violations of the constitutional rights of others.

RCW 7.36.130 is derived from a statute passed by the first legislature of Washington Territory. As originally enacted, the statute was a strict limitation on the writ of habeas corpus. Laws of 1854, p. 213, §445 (codified as Remington's Revised Statutes § 1075). This statute remained in effect without amendment for over 90 years. The decisions of this Court made two points unmistakably clear: R.R.S. § 1075 was constitutional, and it meant what it said. See Grieve, 22 Wn.2d at 904 (the writ of habeas corpus is limited by law to those cases where it appears that the judgment and sentence, by virtue of which the petitioner is held in confinement, is void on its face); Lybarger, 2 Wash. at 136 (in the absence of a statute authorizing it, the supreme court could not go behind a judgment of a court of general jurisdiction to inquire as to the fact of jurisdiction in a particular case).

Over the ensuing years, this Court consistently refused to consider the challenges that were not apparent on the face of the judgment. Compare In

re Horner, 19 Wn.2d 51, 141 P.2d 151 (1943) (claim considered because facts appeared on face of judgment) with In re Voight, 130 Wash. 140, 226 P. 482 (1924) (claim not considered because facts did not appear on face of judgment). This refusal even extended to claimed violations of the right to a public trial. See Thomas v. Phelan, 157 Wash. 471, 289 P. 51 (1930).

These restrictions on the scope of habeas corpus were never altered by this Court; they were changed by the legislature. In 1947, the legislature authorized courts to inquire into the legality of any judgment whereby the party is in custody upon a final judgment of a court of competent jurisdiction only “when it is alleged in the petition that *rights guaranteed the petitioner* by the Constitution of the State of Washington or of the United States have been violated.” R.R.S. § 1075 (emphasis added), now codified at RCW 7.36.130.

This statute permitted, for the first time, an examination of the legality of judgments that went beyond the face of the document. In re Palmer v. Cranor, 45 Wn.2d 278, 273 P.2d 985 (1954). The amendment, however, did not expand the privilege of the writ of habeas corpus that was guaranteed by Const. art. I, § 13. Holt, 84 Wn.2d at 843. This expansion of a Court’s authority to examine the legality of judgments did not extend to violations of the rights guaranteed to someone other than the defendant/petitioner.

The Legislature's restriction of collateral review to violations of the petitioner's rights is consistent with the general rule that a defendant does not have standing to assert the rights - constitutional or otherwise - of others. Rakas v. Illinois, 439 U.S. 128, 138, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978) (search and seizure); State v. Walker, 136 Wn.2d 678, 685, 965 P.2d 1079 (1998) (consent search in violation of husband's rights); Benn, 134 Wn.2d at 909 (search of the jail cell of another inmate); State v. Jones, 68 Wn. App. 843,847,845 P.2d 1358, review denied, 122 Wn.2d 1018 (1993) (Fourth Amendment rights of another); State v. Gutierrez, 50 Wn. App. 583, 749 P.2d 213, review denied, 110 Wn.2d 1032 (1988) (Fifth Amendment rights of a co-defendant).

Here, Bonds expressly waived his right to a public trial under Const. art. I, §. 22. on March 7, 2002, by telling the court that he did not object to the closing of that hearing. He dares, nonetheless, to seek a vacation of his facially valid conviction based upon this hearing by claiming that the public's Const. art. I, § 10 right to have justice "administered openly" was violated.. Bonds' argument brings to mind the convicted patricide, who asks for leniency because he is now fatherless. If such a claim was cognizable in a collateral attack, then every defendant who waived his or her Const. art. I, § 22 right to a speedy trial, could obtain relief based upon a claim that the granted of his request violated the public's Const. art. I, § 10, right to have

justice administered “without unnecessary delay.” Fortunately, the Legislature has precluded such arguments by limiting this Court’s jurisdiction solely to petitions alleging “that rights guaranteed the petitioner by the Constitution of the state of Washington or of the United States have been violated”. RCW 7.36.130(1).

D. TRIVIAL VIOLATIONS OF A DEFENDANT’S RIGHT TO A PUBLIC TRIAL DO NOT MERIT THE GRANTING OF A NEW TRIAL

This Court observed in State v. Brightman, 155 Wn.2d 506, 517, ¶ 19, 122 P.3d 150 (2005), that "a trivial closure does not necessarily violate a defendant's public trial right." This observation is supported by the many courts that have recognized that a "de minimis" closure standard applies when a trial closure is too trivial to implicate the constitutional right to a public trial, permitting the avoidance of a constitutionally unnecessary retrial. See, e.g., United States v. Ivester, 316 F.3d 955, 960 (9th Cir. 2003); see also State v. Easterling, 157 Wn.2d 167, 183, ¶ 30, 137 P.3d 825 (2006) (Madsen, J., concurring) (collecting cases).

Courts that have denied requests for new trial based upon brief closures have done so after inquiring whether closure has infringed the "values that the Supreme Court has said are advanced by the public trial guarantee: '1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3)

to encourage witnesses to come forward; and 4) to discourage perjury."¹⁸ Carson v. Fischer, 421 F.3d 83, 93 (2d Cir. 2005) (quoting Peterson v. Williams, 85 F.3d 39, 43 (2d Cir. 1996) (citing Waller v. Georgia, 467 U.S. 39, 46-47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984))).

None of the closures that Bonds has complained about adversely impacted these core values. Instead, the closures encouraged the victim of the crime to come forward to testify despite his injuries, they prevented the jury from hearing inadmissible evidence,¹⁸ and allowed the court to ensure a fair trial by reminding one witness of her obligations without violating Const. art. IV, § 16. Granting a new trial for closures that comprise fewer than 50 of the 4000 page verbatim report of proceedings would unnecessarily punish the public. See, e.g., Brown v. Kuhlmann, 142 F.3d 529 (2nd Cir. 1998) (habeas petition asserting a violation of public trial denied on the grounds that it would award a windfall to a defendant who made no effort to dissuade the trial judge from making the closure and where the testimony during the limited closure was transcribed and cumulative to other evidence.).

Respectfully submitted this 20th day of May, 2008.



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¹⁸A witnesses' assertion of a privilege is not evidence that either party can utilize. See, e.g., K. Tegland, 5A Wash. Prac., Evidence Law and Practice, § 501.5, at 140 (5th ed. 2007).

APPENDIX A

Ala. R. Crim. P. 32.2(c) states:

(c) Limitations period. Subject to the further provisions hereinafter set out in this section, the court shall not entertain any petition for relief from a conviction or sentence on the grounds specified in Rule 32.1(a) and (f), unless the petition is filed: (1) In the case of a conviction appealed to the Court of Criminal Appeals, within one (1) year after the issuance of the certificate of judgment by the Court of Criminal Appeals under Rule 41, Ala. R. App. P.; or (2) in the case of a conviction not appealed to the Court of Criminal Appeals, within one (1) year after the time for filing an appeal lapses; provided, however, that the time for filing a petition under Rule 32.1(f) to seek an out-of-time appeal from the dismissal or denial of a petition previously filed under any provision of Rule 32.1 shall be six (6) months from the date the petitioner discovers the dismissal or denial, irrespective of the one-year deadlines specified in the preceding subparts (1) and (2) of this sentence; and provided further that the immediately preceding proviso shall not extend either of those one-year deadlines as they may apply to the previously filed petition. The court shall not entertain a petition based on the grounds specified in Rule 32.1(e) unless the petition is filed within the applicable one-year period specified in the first sentence of this section, or within six (6) months after the discovery of the newly discovered material facts, whichever is later; provided, however, that the one-year period during which a petition may be brought shall in no case be deemed to have begun to run before the effective date of the precursor of this rule, i.e., April 1, 1987.

Montana Code § 46-21-102 states that:

(1) Except as provided in subsection (2), a petition for the relief referred to in 46-21-101 may be filed at any time within 1 year of the date that the conviction becomes final. A conviction becomes final for purposes of this chapter when:

(a) the time for appeal to the Montana supreme court expires;

(b) if an appeal is taken to the Montana supreme court, the time for petitioning the United States supreme court for review expires; or

(c) if review is sought in the United States supreme court, on the date that that court issues its final order in the case.

(2) A claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.

42 Pa. C.S.A. § 9545(b)(1)-(2) states as follows:

(b) TIME FOR FILING PETITION.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.