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

80995-0

In Re Personal Restraint of:	)	NO. 33704-5-II
ROBERT BONDS,	)	
Petitioner.	)	**PETITIONER"S REPLY TO STATE"S RESPONSE**

I. Introduction

Comes now the Petitioner (Robert Bonds) appearing before the Court pro-se, pursuant to RAP 16.10(a)(2) hereby presents the following Reply to the States Response to his Personal Restraint Petition.

II. Arguments in Reply

(a) Appellate Counsel's Performance Was Objectively Unreasonable

As argued in the Opening Brief of Petitioner, Mr. Bonds due process rights were implicated when his appellate counsel failed to raise a meritorious issue regarding trial counsel's failure to challenge hearsay statements of co-defendant's Spencer Miller and Tonya Wilson's which were admitted and implicated Mr. Bonds at trial. The state has submitted a response making several arguments why the present personal restraint petition should be dismissed, each of those arguments will be addressed in turn.

First, the State argues that appellate counsel could not have been ineffective for failing to forecast a change in the law. Citing Fuller v. United States, 398 F.3d 644, 651 n.4 (7th Cir. 2005), "Crawford was issued March 8, 2004, some approximately 2 weeks after oral argument in the direct appeal." The State also argues that "Because Crawford announced a significant departure from previous hearsay jurisprudence, appellate counsel's performance on direct appeal did not fall below an objective standard of reasonableness." States Response at 4.

According to Appendix "C" of the Response oral argument was conducted on February 23, 2004. Although, arguably oral argument was already completed at the time Crawford was announced, appellate counsel surely could have raised the Crawford issue in a Supplemental Brief, or in Added Authority Pursuant to RAP 10.8, as the appellate court did not issue its decision on the appeal until August 17, 2004, which was over 6-months after Crawford was announced. See Appendix "B" to the response. Moreover, even, as a last resort, appellate counsel could have filed a motion for reconsideration pursuant to RAP 12.4, even after the court issued its opinion in August 2004.

Additionally, the State has completely failed to recognize that Mr. Bonds specifically argued that appellate counsel, even prior to Crawford, had a viable claim under

prior hearsay Jurisprudence. See Opening Brief of Petitioner at n.1; ("Prior to the holding in Crawford, a co-defendant's statements incriminating a defendant violated the Sixth Amendments confrontation clause. (citations omitted here).

The State also argues that:

> even if appellate counsel should have raised Crawford on direct review, defendant has failed to meet the second prong of Strickland and make a showing of reversible error. More specifically, the court's ruling in Crawford does not apply to the record in this case where, contrary to petitioner's assertions. there was no use of co-defendant's statements against petitioner.

State's Response at 4-5. The State continues:

> Here, there were no "testimonial" statements offered against petitioner. In his petition, defendant attaches portions of the trial transcripts, where codefendant statements were allegedly offered as proof of guilt against petitioner. (See PRP at 4, arguing that Miller and Wilson's statements were used). What petitioner fails to also make part of the record is the court's instructions where the jury was instructed not to consider these statements as proof of defendant's guilt. Instruction number seven provided:
>
> You may not consider an admission or incriminating statement made out of court by one defendant as evidence against a codefendant.
>
> Appendix D.

States Response at 6.

The State's argument that the statements of Miller and Wilson are non-testimonial are, for the reasons stated in the (PRP) without merit. The statements of Miller and

Wilson to police were clearly testimonial, even under a narrow standard. Crawford, 124 S.Ct. at 1364.

The State also argues that Mr. Bonds claim that the prosecutor linked him to Miller and Wilson's statements is without merit. However, for the reasons already set forth in the opening brief, and the cases cited at Note 1, the prosecutors arguments were clearly successful in undoing the redacated statements of both Miller and Wilson and linked Mr. Bonds to their statements implicating his confrontation rights.

The State finally argues that even if "the State attempted to improperly use co-defendant's statements as proof of guilt against Bonds, 'jurors are presumed to follow' instructions." State's Response at 7 (citation omitted). However, although it is partly true, that jurors are presumed to follow limiting instructions, the United States Supreme Court in Bruton v. United States, 391 U.S. 123, 138, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), held:

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. * * * Such a context is presented here, where the powerfully incriminating extrajudicial statements of a co-defendant are deliberately spread before the jury in a joint trial."

Bruton 391 U.S., at 135-136, 88 S.Ct. at 1627. Also see U.S. v. Jones, 16 F.3d 487, 493 (2nd Cir. 1994)(Juror's

are presumed to adhere to limiting instructions, however, this presumption fades when there is overwhelming probability that jury will be called upon to perform humanly impossible feats of mental dexterity); U.S. v. Figueroa, 618 F.2d 934, 946 (2nd Cir. 1980).

The chances in this case, that the jury was able to follow the court's limiting instruction was severely diminished by the fact that instruction Six provided:

> you may give such weight and credibility to any alleged out-of-court statements of defendants Spencer Miller and Tonya Wilson as you see fit, taking into consideration the surrounding circumstances.

Instruction NO. 6 Appendix "D" to the State's Response.

III. Conclusion

For the reasons stated herein, and in the Opening Brief of Petitioner, this Court should reverse Bonds convictions, and remand for a new trial were his co-defendant's statements are excluded.

DATED this 13 day of December, 2005.

Respectfully submitted,

Robert Bonds

ROBERT BONDS
Petitioner
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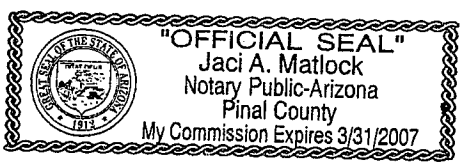
Notary: Jaci A Matlock 12-13-05



CERTIFICATE OF SERVICE

I, ROBERT BONDS, petitioner herein, hereby certify, declare and state under penalty of perjury that on the 13 day of December, 2005, I placed into the United States Mail (postage pre-paid) at the Florence Corrections Center addressed to:

GERALD A. HORN
Prosecuting Attorney
930 Tacoma Ave. South, Rm 946
Tacoma, WA 98402-2171

a copy of the following document(s) in this action: CERTIFICATE OF SERVICE: PETITIONER'S REPLY TO STATE'S RESPONSE.

I, declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct to to the best of my knowledge. See 28 U.S.C. § 1746; 18 U.S.C. § 1621.

Robert Bonds
ROBERT BONDS
Petitioner

Notary Jaci A Matlock 12-13-05

"OFFICIAL SEAL"
Jaci A. Matlock
Notary Public-Arizona
Pinal County
My Commission Expires 3/31/2007

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