NO. 33704-5

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT
PETITION OF:

ROBERT BONDS, PETITIONER

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 01-1-06020-3

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO PETITIONER'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure

Petitioner, ROBERT BONDS, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 01-1-05476-9 for the offenses of attempted first degree murder, two counts, and unlawful

possession of a firearm in the first degree. (See State's Response to PRP - Appendix A).

For these convictions he is serving a sentence of 680 months, including firearm enhancements. Id.

Defendant's convictions were affirmed by an unpublished decision issued on July 15, 1999. (See State's Response to PRP - Appendix B). A mandate was issued on May 9, 2005. (See State's Response to PRP - Appendix C).

On July 22, 2005, defendant filed his first personal restraint petition, raising the issue of whether the court improperly admitted a co-defendant's statements against petitioner under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004). (Appendix A – ACORDS).

On May 4, 2006, this court entered an order "REFERRING PETITION TO PANEL, APPOINTING COUNSEL, AND SETTING BRIEFING SCHEDULE." (Appendix B). Under RAP 16.11(b) the court ordered that the "Acting Chief Judge has determined that the issue of whether redacted statements of co-defendants admitted at a joint trial under Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and its progeny, constitute a violation of Crawford is not frivolous." Id. Under RAP 16.11(b) and 16.15(h) the court appointed counsel to "represent Petitioner in this court's consideration of the petition

at public expense, including the briefing of the issues raised by Petitioner." Id. (emphasis added).

On July 25, 2006, over a year past the filing of the mandate, petitioner's appointed counsel filed a motion to amend the personal restraint petition under RAP 16.4 in the interest of justice. (Appendix A).

The State filed an objection to the amendment of the petition. (Appendix A).

On August 8, 2006, Commissioner Schmidt, granted the motion to file an amended petition. (Appendix A).

On August 24, 2006, the State filed a motion to modify the commissioner's ruling and on October 2, 2006, the State filed the supplemental authority of In re Benn, 134 Wn.2d 868, 938 n.24, 952 P.2d 116 (1998). (Appendix A).

On November 15, 2006, the full panel entered an order denying the State's motion to modify the Commissioner's ruling. (Appendix A).

The State sought discretionary review of this court's order denying the motion to modify and allowing the filing of an untimely amended petition. The Clerk of the Supreme Court found that this court had committed "probable error" by allowing amendment of the petition, but denied review because this argument was still available to the State. (Appendix C).

2. Facts

In the early morning hours of October 14, 2001, defendant Robert Bonds lured Daron Edwards and Keith Harrell to the AM/PM store at 1101 South Sprague, Tacoma, and then opened fire on them.

The events that culminated in these shootings began the day before when Andre Bonds drove to the Harrell residence at 1216 South 19th. RP 3/6/02 234. All of the people who lived at that address were home: Ernest Trent, Verniessia Brown, Sabrina Stark, Keith Harrell, and Judith Harrell. RP 3/13/03 1082. At one point, Andre stopped the car and just looked around. RP 3/13/03 1083. A short time later, Andre Bonds stopped his car in the middle of the street in front of the Harell residence, got out, and then had a conversation with Daron Edwards, who met him on the street. RP 3/6/02 228, 235; RP 3/13/03 1083; RP 3/28/02 35. Andre Bonds was armed at the time and his gun was visible. RP 3/13/02 35. Andre Bonds informed Daron Edwards that he was going to revoke Daron Edwards' hilltop privileges. RP 3/6/02 236; RP 3/13/03 1083. Andre Bonds also stated that he was coming back with five of his homeboys. RP 3/6/02 294. Andre Bonds was one of the founders of the Hilltop Crips and, as a founder, carried great authority within the gang. RP 3/26/02 2346, 2347. Daron Edwards interpreted Andre Bonds' statement to mean that Andre Bonds was not going to let him live on the hilltop any longer. RP 3/6/02 236. Andre Bonds was armed with a black semi-automatic handgun when he made this statement to Daron Edwards, who took the threat seriously.

RP 3/6/02 246; 3/7/02 432. Cory Thomas, Ernest Trent, and Verniessia Brown were present when Andre Bonds arrived and threatened Daron Edwards. RP 3/7/02 431-32, RP 3/12/02 728.

Later that night Daron Edwards went as planned to Browne's Star Grill, a hip-hop club on the Hilltop. RP 3/6/02 237. The Hilltop Crips consider Browne's to be in their territory. RP 3/26/02 2349. The busiest nights at Browne's are Friday and Saturday, when 100 to 200 people frequent the club. RP 3/5/02 104. After Browne's closes, these patrons customarily retire to the nearby AM/PM mini-mart, also within the territory claimed by the Hilltop Crips. RP 3/13/02 1104; 3/26/02 2349.

Daron Edwards was not worried about his personal safety at that time. RP 3/6/02 237-38. Daron Edwards was accompanied by his friends Ernest Trent and Carl Trent. RP 3/6/02 238.

Once inside Browne's, Daron Edwards saw Andre Bonds. RP 3/6/02 239. Daron Edwards also saw his friend Keith Harrell and Cory Thomas. RP 3/6/02 240. Daron Edwards considered Cory Thomas to be his cousin. RP 3/6/02 242. After Daron Edwards had been in the club for approximately twenty minutes, he witnessed an altercation between Cory Thomas and Andre Bonds. RP 3/6/02 240. Andre Bonds had approached Cory Thomas and asked him why he was staring at Andre Bonds while he was out on the dance floor. RP 3/7/02 437. When Cory denied staring, Andre Bonds told him that he had a problem. RP 3/7/02 437. Cory Thomas and Andre Bonds exchanged words and then Andre Bonds asked

Cory Thomas if he wanted to fight. RP 3/7/02 438. When Cory Thomas said he didn't care if they fought, Andre Bonds stated that he did not want to. RP 3/7/02 439. As Cory Thomas turned to walk away, he was hit in the face by Andre Bonds. RP 3/7/02 440; RP 3/18/02 43.

Daron Edwards walked over to help Cory Thomas and, as he did, he saw Andre Bonds hit Cory Thomas who was turning away from Andre Bonds. RP 3/6/02 241. As Cory Thomas fell, Daron Edwards also was hit from behind. RP 3/6/02 241. Cory Thomas and Daron Edwards got up from the floor and Daron Edwards hit Andre Bonds. RP 3/6/02 241. Daron Edwards hit Andre Bonds because he had just punched his cousin. RP 3/6/02 253.

Ernest Trent watched the fight and thought that "after Andre punched Cory, Daron came though like a freight train." RP 3/19/02 44. Trent saw Daron Edwards pin Andre Bonds on the floor and then repeatedly hit him. RP 3/19/02 44. This incident lasted only a few seconds. RP 3/6/02 247.

During the fight between Andre Bonds and Daron Edwards, defendant Robert Bonds came to the assistance of Andre Bonds and punched Daron Edwards in the face. RP 3/18/02 44.

After this scuffle, Daron Edwards was escorted out of Browne's and went to his car to take off his bloody sweater. RP 3/6/02 248. Daron Edwards then attempted to re-enter Browne's but was stopped at the door by security guards. RP 3/6/02 250.

Andre Bonds happened to be at the door when Daron Edwards was denied admission and he mumbled something at Daron Edwards. RP 3/6/02 250. Daron Edwards responded that they could "go outside right now" and so the two men went outside the front of Browne's. RP 3/6/02 250. Some twenty or thirty people assembled there with Daron Edwards and Andre Bonds. RP 3/6/02 256.

Once outside, Daron Edwards hit Andre Bonds. RP 3/6/02 257. Daron Edwards and Andre Bonds exchanged blows from approximately thirty seconds. RP 3/6/02 258. Daron Edwards pushed Andre Bonds up against the glass front of Browne's and slammed him on the glass. RP 3/13/02 1096. This altercation ended when police arrived. RP 3/13/02 1096.

At the conclusion of the fight, Daron Edwards believed that he had injured Andre Bonds and therefore won the fight. RP 3/6/02 258-59. Defendant Robert Bonds stood right next to Andre Bonds during the fight. RP 3/6/02 260. Defendant Tonya Miller stood on the other side of defendant Robert Bonds. RP 3/6/02 260.

During the various altercations between Andre Bonds and Daron Edwards, Tyrone Furgeson, the owner of Browne's, heard some patrons comment that Andre Bonds had a "strap," meaning a gun. RP 3/5/02, 117-118, 148.

Defendant Spencer Miller was also outside Browne's that night. RP 3/21/02 1992. Because he was not allowed to go into Browne's, he sat

on Vivian Allen's red 1987 Nissan parked in back of Browne's. RP 3/21/02 1992-1993.

As he walked away from the fight, Daron Edwards said, "This is Compton" and defendant Spencer Miller yelled back, "Fuck Compton" or "Fuck California, I'm from Hilltop." RP 3/6/02 261; 3/13/02 925.

Daron Edwards then got into the Trent car and rode away. RP 3/6/02 264. With the others in his group, he went home to the Harrell residence at 1216 South 19th. RP 3/6/02 264.

Defendant Robert Bonds watched as Daron Edwards got into the car. RP 3/13/02 1100. Robert Bonds pulled out a gun from his pants and said "fuck these niggers." RP 3/13/02 100, 3/14/02 1172. Raymond Sinclair, another patrol at Browne's, saw defendant Robert Bonds' gun and described it as "a big chrome looking type of gun." RP 3/25/02 2213.

After approximately ten minutes, the Harrell telephone rang and Cory Thomas answered it. RP 3/6/02 266. Cory Thomas spoke to Verneissia Brown who reported that the car that Sabrina Stark and other were trapped at the AM/PM. RP 3/7/02 449, 450. Cory Thomas believed that Sabrina and the other people were in trouble. RP 3/7/02 451; RP 3/12/02 641, 660, 717.

Andre Bonds had been enroute to the East Side and after a phone call he immediately turned around and drove to the AM/PM where he contacted defendant Robert Bonds. RP 3/19/02 1531, 1534. At approximately the same time, defendant Tonya Wilson called Andre

Bonds and summoned him to the AM/PM. RP 3/26/02 2446; 3/27/03 2478-2479; 3/19/03 1531-1533.

As a result of the phone call, Daron Edwards went to the AM/PM, along with Cory Thomas and Ray Sinclair. RP 3/6/02 269. Daron Edwards, Cory Thomas and Ray Sinclair left in Judith Harrell's car. RP 3/6/02 269; RP 3/7/02 451. Keith Harrell and Ernest Trent led the way in another vehicle. RP 3/6/02 269, RP 3/7/02 451. There was usually a gun in Keith Harrell's car. RP 3 /18/02 55.

Upon arriving at the AM/PM, Cory Thomas did not immediately see Sebrina Stark and when he saw her, she was not in any car. RP 3/12/02 642. Cory Thomas had armed himself with a gun earlier in the day. RP 3/18/02 57. Daron Edwards saw Andre Bonds, defendant Robert Bonds, defendant Tonya Wilson, and one other person in a car. RP 3/6/02 273, 278. When Daron Edwards exited his car, he noticed that Andre was holding a gun and standing outside a car. RP 3/6/02 273.

Daron Edwards, accompanied by Keith Harrell, approached Andre Bonds and asked him if he wanted "another ass whipping." RP 3/6/02 275; RP 3/7/02 464. Andre Bonds apparently declined the offer and walked away; he then got back into the car and drove off. RP 3/6/02 279.

As the station wagon containing the defendants Robert Bonds and Tonya Wilson drove off, it stopped at a nearby traffic light. RP 3/6/02 279-280. Within seconds, gunfire rang out "from everywhere." RP 3/6/02 280; RP 3/12/02 759; RP 3/13/02 1118. The barrage of gunfire lasted

about a minute. RP 3/6/02 283. Cory Thomas noted that gunfire came from the station wagon that defendant Tonya Wilson drove and wherein defendant Robert Bonds, the only passenger sat in the back seat. RP 3/7/02 469. The gunfire from the station wagon came out the back window. RP 3/18/02 100. Cory Thomas also noted that gunfire came from the alley behind the AM/PM. RP 3/7/02 470, 471. Daron Edwards was shot in the back, hip, and arm. RP 3/6/02. Daron Edwards noticed that Keith Harell had fallen to the ground and believed him to be dead. RP 3/6/02 282, 285.

Ernest Trent, another member of the Edwards-Harrell group, also saw the events preceding the shooting and the shooting. When Ernest Trent arrived at the AM/PM, he observed Andre Bonds and defendant Robert Bonds standing in the parking lot. RP 3/18/02 61. Ernest Trent noted that the two men split up and walked in different directions when the Harrell cars pulled in. RP 3/18/02 61. Ernest Trent also observed that Andre Bonds was armed with what appeared to be a silver nickel-plated 9 millimeter handgun. RP 3/18/02 63. Ernest Trent could not see whether defendant Robert Bonds had a gun. RP 3/18/02 63. Ernest also saw defendant Spencer Miller there but could not see whether defendant Spencer Miller had any gun. RP 3/18/02 63-64. Ernest Trent saw defendant Robert Bonds walk towards a station wagon and get in it. RP 3/18/02 66, 67. The station wagon then pulled out of the parking lot and moved slowly down 12th Street. RP 3/18/02 68. There were only two

people in the car: the woman driver and defendant Robert Bonds. RP 3/18/02 160. Robert Bonds had been seen with a gun with him that night. RP 3/20/02 1912. Ernest Trent then saw shots being fired out of the passenger side rear window. RP 3/18/02 69. Ernest Trent counted approximately eight shots coming from the station wagon. RP 3/18/02 70. Ernest Trent watched as Keith Harrell was struck with gunfire. RP 3/18/02 71. Ernest Trent also saw Daron Edwards get shot; he heard Daron Edwards say, "Oh shit, oh shit." RP 3/18/02 72. Ernest Trent also saw gunfire coming from across the opposite side of Sprague Street as well as from the John Deere store that is kitty-corner from the AM/PM. RP 3/18/02 73. Ernest Trent saw Cory Thomas return fire as he stood over the wounded Keith Harrell and Daron Edwards. RP 3/18/02 74. Ernest Trent saw an individual standing behind the wall of the AM/PM and extending his hand out, shooting a gun. RP 3/18/02 75.

Raymond Sinclair also had accompanied Daron Edwards and Keith Harell to the AM/PM. Raymond Sinclair, who had earlier seen defendant Robert Bonds with a gun, also saw him in the station wagon with defendant Tonya Wilson. RP 3/25/02 2222. Defendant Tonya Wilson sat in the driver's seat and defendant Robert Bonds sat on the passenger side. RP 3/25/02 2222.

Shavella Brown, sister of Verniessia Brown, was also at the AM/PM that night. RP 3/13/02 820, 327-328. While there, she saw a brown station wagon. RP 3/13/02 828. Later on, after the shooting

erupted, she saw sparks coming from the brown station wagon as it drove through the traffic light; she believed the sparks were gunfire. RP 3/13/02 839, 908. After the gunfire started, Shavella Brown heard between ten and twenty shots. RP 3/31/02 857.

Sabrina Stark, who was riding a car that pulled away from the AM/PM after the shots started, peeked up and saw defendant Spencer Miller at the side of the AM/PM. RP 3/14/02 1119-1120. Sabrina Stark saw the backside of defendant Spencer Miller. RP 3/14/02 1120. His arm was reaching around a corner and she could not see what was in his hand. RP 3/15/02 1236. No one else was standing near defendant Spencer Miller. RP 3/14/02 1121. Sabrina Stark made note of defendant's Spencer Miller's outfit, which was a Sean John Puffy's gear fashion ensemble. RP 3/14/02 1125. Several hours later, Sabrina Stark saw defendant Spencer Miller at the 76 station on MLK and he was wearing the same outfit. RP 3/15/02 1235. At that point, Sabrina Stark was certain that the individual she had seen at the AM/PM was defendant Spencer Miller. RP 3/15/02 1236.

Tineka Hall saw Spencer Miller in the alley behind the AM/PM shortly before the shooting started. RP 3/21/02 2102-2103.

Salena Daniels ran to the location where Daron Edwards and Keith Harrell were. RP 3/13/02 942. After observing their condition, she ran inside the store to call 911 and learned that the store clerk had already

called. RP 3/13/02 942. She then called Judith Harell to tell her that Keith Harrell and Daron Edwards had been shot. RP 3/13/02 943.

Cory Thomas also saw that Daron Edwards had been shot. RP 3/7/02 473-474. As Cory Thomas responded and tried to pick up Daron Edwards to put him in the car, Cory Thomas observed more gunshots coming their way. RP 3/7/02 474. By that time, Cory Thomas had returned fire with the gun he brought to the AM/PM. RP 3/7/02 474, 516. After Cory Thomas emptied the clip, Ernest Trent threw the gun away. RP 3/18/02 98.

After the shooting, defendant Robert Bonds and Tonya Wilson went to Vivian Allen's residence. RP 3/21/02 2004; RP 3/21/02 2002. Defendant Spencer Miller also went there. Although Renee Allen earlier told police that defendant Spencer Miller had been at her residence after the shootings, she recanted this at trial. RP 3/21/02 2004. In addition, defendant Spencer Miller stated he went to Renee Allen's house immediately after the shootings. RP 3/26/02 2424.

After the shooting ceased, Cory Thomas and others helped Daron Edwards into the Cadillac and drove him to a hospital. RP 3/6/02 284-285. Daron Edwards then underwent surgery. RP 3/6/02 285.

Ernest Trent put Keith Harrell into his car and drove him to the hospital. RP 3/18/02 75. Keith Harrell was nonresponsive at that time. RP 3/18/02 77. Harrell underwent brain surgery immediately. RP 3/5/02 61, 52. During surgery, doctor removed a piece of lead from Keith

Harrell's head and handed it to nurse Dawn Bisceglia, who immediately gave it to police. RP 3/13/02 1066, 1068, 1072. Doctors were unable to remove one of the bullets in Harrell's brain. RP 3/5/02, 54-55. After surgery Harrell remained in a coma for five days. RP 3/5/02 56. By the time of trial, he had been unable to resume his work as a licensed practical nurse. RP 3/5/02 61. At the time of trial, doctors had informed Harrell that he would not get his speech back or be able to walk without a came for at least two more years. RP 3/5/02 61.

Tacoma Police Department Doug Grant responded to the scene after receiving a call of shots fired. RP 3/5/02 73. Officer Grant noted a large pool of blood approximately three feet in diameter in the parking lot as well as a trail of blood. RP 3/5/02 79-80. Officer Grant could not find any victims or witnesses at that locations. RP 3/5/02 79. Officer Grant then went to the location at 9th and Sheridan where police had stopped a vehicle. RP 3/5/02 81. He also went to the area of 19th and MLK after receiving a report that an individual with a gun had run through the area. RP 3/5/02 81. Officer Grant was looking for a person with a gun. RP 3/5/02 82. After that futile effort, Officer Grant returned to the AM/PM store where he recovered a store surveillance tape, Exhibit 266. RP 3/5/02 83.

Other Tacoma Police officers responded to the shooting and made efforts to secure the scene and preserve evidence. RP 3/20/02 1751. Officers found eight shell casings at the scene. RP 3/20/02 1751.

Detective Werner knew from the presence of casings that a semi-automatic handgun had been used because a revolver would not eject casings. RP 3/20/02 1754-1755, 1757. He also recovered a round that had entered a nearby apartment. RP 3/20/02 1756.

Detective Ringer later took a statement from defendant Tonya Wilson who acknowledged driving the station wagon in the early morning hours of October 14, 2001. RP 3/26/02 2441, 2449. Defendant Tonya Wilson denied that any shots had been fired from her car. RP 3/26/01 2455. Defendant Tonya Wilson confirmed that she had called Andre Bonds on the cell phone while she was at the AM/PM. RP 3/26/02 2446. Phone records confirmed this. RP 3/27/03 2478, 2479.

Terry Franklin, a firearms expert with the Washington State Patrol Crime Laboratory, examined the eight shell casing found at the scene and concluded with a reasonable degree of scientific certainty that they were fired from the same firearm. RP 3/25/02 2157. Franklin also examined the bullet fragments and concluded that they were the same caliber as the casings; Franklin could not say that the bullets were otherwise tied to the casings. RP 3/25/02 2159.

C. PERSONAL RESTRAINT LAW.

Personal restraint procedure has its origins in the State's habeas corpus remedy, guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of habeas corpus relief is the

principle that the writ will not serve as a substitute for appeal. A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal. In re Hagler, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982).

Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders. These are significant costs, and they require that collateral relief be limited in state as well as federal courts. Hagler, Id. In this collateral action, the petitioner has the duty of showing constitutional error and that such error was actually prejudicial. The rule that constitutional errors must be shown to be harmless beyond a reasonable doubt has no application in the context of personal restraint petitions. In re Mercer, 108 Wn.2d 714, 718-21, 741 P.2d 559 (1987); Hagler, 97 Wn.2d at 825. Mere assertions are insufficient in a collateral action to demonstrate actual prejudice. Inferences, if any, must be drawn in favor of the validity of the judgment and sentence and not against it. In re Hagler, 97 Wn.2d at 825-26. To obtain collateral relief from an alleged nonconstitutional error, a petitioner must show "a fundamental defect which inherently results in a complete miscarriage of justice." In re Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). This is a higher standard than the constitutional standard of actual prejudice. Id. at 810.

Because of the costs and risks involved, there is a time limit in which to file a collateral attack. The statute that sets out the time limit provides:

> 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.

RCW 10.73.090(1). In addition to the exceptions listed within that statute, there are other specific exceptions to the one-year time limit for collateral attack.[1]

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[1] § 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.

D. LAW AND ARGUMENT.

1. THIS PETITION SHOULD BE DISMISSED WHERE PETITIONER FAILS TO PRESENT IN HIS PETITION A REQUEST FOR RELIEF UNDER CRAWFORD AND WHERE TRIAL COUNSEL AGREED TO REDACTIONS AT ISSUE.

a. Issue waiver at petition level.

The defendant appears before this court asking for relief under Bruton. However, in petitioner's original petition, he asserted that appellate counsel was ineffective for failing to challenge the admission of hearsay below under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004). The State in turn argued that counsel is not ineffective for failing to forecast a change in the law. See, e.g., Fuller v. United States, 398 F.3d 644, 651 n.4 (7th Cir. 2005). This court appointed counsel to brief the issue of whether "redacted statements of co-defendants admitted at a joint trial under Bruton v. United States, . . ., and it progeny constitute a violation of *Crawford* is not frivolous.

Defendant has entirely failed to put forth why he is entitled to relief under Crawford, the very reason this court ordered additional briefing in this matter. As argued below, the only authority defendant has relief for from this court is simply the traditional Bruton standard, and

does not ask this court to find that Crawford calls for any additional protections. As such this court should summarily dismiss the petition at this point.

b. Issue waiver at trial level.

The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." In Re Personal Restraint of Breedlove, 138 Wn.2d 298, 312, 979 P.2d 417 (1999) (citation omitted). If the party asserting error "materially contributed thereto," a court reviews the error as waived. See, In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (A defendant who agreed to allow the testimony of a polygraph examiner could not later object to the inclusion of the testimony). See also, State v. Elmore, 139 Wn.2d 250, 985 P.2d 289 (1999) (a party may not challenge on appeal a statement of the case read to the panel at the beginning of voir dire that it proposed), cert.denied, 531 U.S. 837, 121 S. Ct. 98, 148 L. Ed. 2d 57 (2000). This doctrine applies equally to constitutional issues. State v. Henderson, 114 Wn.2d 867, 871, 792 P.2d 514 (1990).

In this case defendant agreed to the form of the redactions, or the State agreed to redact in the manner defendant suggested. RP 2/26/02 145-150, 153, 161-162. Because counsel agreed to these redactions, and

there is no claim of ineffective assistance of trial counsel, this petition should be dismissed as to the form of redactions. In re Breedlove, 138 Wn.2d 298, 312.

2. EVEN IF THE CLAIMED BRUTON ERROR IS PROPERLY BEFORE THE COURT, THE RECORD SHOWS THAT THE REDACTED STATEMENTS COMPLIED WITH BRUTON AND THEREFORE COMPLIED WITH CRAWFORD, AND THIS COURT SHOULD DISMISS THE PETITION.

Defendant poses two Confrontation Clause/Bruton issues to this court, (1) whether the form of the redactions of codefendant's statements violated his right to confrontation, and (2) whether the use of the redacted statements in closing violated his right to confrontation. An examination of the record and the context of statements and arguments, demonstrates that there was no Confrontation Clause violation. Even assuming any error, defendant has also failed to meet his burden of constitutional error and the petition should be dismissed.

Use of a nontestifying codefendant's statements to police violates the confrontation clause. This prohibition dates back to the Supreme Court's issuance of Bruton v. United States[2] and nothing in the opinion issued in Crawford, supra, changes this analysis. At issue in Bruton was

[2] Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

the use of a confession of one non-testifying co-defendant where the confession incriminated both. Id. at 124. The trial court gave a limiting instruction but failed to redact the statement in anyway. Id. The court concluded that the use of these statements violated the non-confessing defendant's Sixth Amendment right to cross-examination because it was legal fiction to believe that the jury could truly disregard the statements against the codefendant. The court noted however:

> If it were true that the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause, because by hypothesis the case is treated as if the confessor made no statement inculpating the nonconfessor.

391 U.S. at 126.

Lawyers and judges responded to Bruton, by redacting codefendant statements, thereby alleviating the problem of a jury intermixing one defendant's confession as proof of guilt against the other. See, Richardson v. Marsh, 481 U.S. 200, 208, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987) (where the confession of the nontestifying codefendant was redacted to omit all references to another defendant, there is no confrontation clause violation even where the statement later becomes incriminating when linked with other evidence). This solution made the Bruton court's hypothetical a reality because under this approach the confessor then makes "no statement inculpating the nonconfessor." Id.

Consistent with Crawford, the court in Marsh required that "where two defendants are tried jointly, the pretrial confession of one cannot be admitted *against the other unless the confessing defendant takes the stand.*" 481 U.S. at 206. The court also laid out what constitutes being a "witness" or testimony:

> Ordinarily, a witness whose testimony is introduced at a joint trial is not considered a witness "against" a defendant if the jury is instructed to consider that testimony only against a codefendant. This accords with the almost invariable assumption of the law that jurors follow their instructions.

Marsh, 481 U.S. at 206 (citing Francis v. Franklin, 471 U.S. 307, 325, n. 9, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985). The court rejected extending Bruton any farther than pertaining to "facially incriminating confessions" and that where the confession an "inferential incrimination (e.g. evidence requiring linkage) then the court will continue with the presumption that jurors can follow instructions which is "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and defendant in the criminal justice process." 481 U.S. at 211.

Bruton and Marsh were reexamined in Gray v. Maryland.[3] At issue in Gray was the manner in which the court redacted the

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[3] 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998).

codefendant's statement. The court had admitted the statement but replaced the codefendant's name with the word "deleted" or a blank space. The court concluded that these redactions did not satisfy Bruton because the word "deleted" or a blank "obviously refer[s] directly to someone, often obviously the defendant, and . . . . involve[s] inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." 523 U.S. at 196-197.

Recently Division I has continued to look to Bruton, rather than modifying the Bruton framework post Crawford in analyzing whether admission of a codefendant's statement violates the confrontation clause. See State v. Vincent, 131 Wn. App. 147, 120 P.3d 120, review denied, 149 P.3d 377 (2005). In Vincent, the defendant challenged the use of a nontestifying brother's statements under the *confrontation clause*. After a thorough analysis of Bruton and its progeny the court agreed the poorly framed redaction resulted in a violation of defendant's right to confrontation but that such violation was harmless. 131 Wn. App. at 151-156.

Other jurisdictions that have squarely addressed whether the court's issuance of Crawford changed the analysis under Bruton have answered the question with a resounding no. See, Pennsylania v. Whitaker, 2005 PA Super 241; 878 A.2d 914 (2005) (holding Crawford

does not obviate the principles set forth in Bruton and to find that Crawford bars the "contextual implication" of criminal defendant in the properly admitted confession of non-testifying co-defendants, we would be extending the principles espoused in Crawford to an improper degree); United States v. Le, 316 F. Supp. 2d 330 (E.D. Va. 2004); Accord McCoy v. U.S., 890 A.2d 204, 215-216 (D.C. 2006).

In Le the court considered whether proposed redactions in a multi-defendant gang RICO case was sufficient to satisfy Bruton. 316 F.Supp.2d 330, 332. After finding that the redactions were consistent with Bruton the court considered whether Crawford required a different conclusion. In rejecting that Crawford mandated different results the court stated that Crawford did not call for "such a dramatic result," and that it cannot be "assumed that the Justices intended to overrule Richardson *sub silencio*." 316 F. Supp. 338 at n8. The court concluded that as long as the statements do not facially incriminate any of the defendants, and are not offered against the defendant challenging the statement, then there is no confrontation clause issue. Id. at 338.

In an explanation that Crawford was not a departure from hearsay jurisprudence, but rather a consistent clarification in this body of law, the Crawford court emphasized that several cases, including Bruton remained constant with the requirement that the State could not offer testimonial statements against a defendant in a criminal trial. 541 U.S. at 56-57.

It is the State's position that because the redactions satisfied Bruton, there is no Crawford violation because there were no testimonial statements offered against Bonds.

Perhaps seeing this, defendant interestingly makes his argument under Bruton and not Crawford. Defendant largely contends that it was not the statements that were admitted (see sections (a) and (b) below), but the manner in which they were used in closing (section (c)). Turning to examine each of these issues, they are plainly without merit and it is obvious why appellate counsel never raised these issues under Bruton in the direct appeal.

a. "Bobby."

Appellate counsel suggests that the following exchange implicates defendant (this is during Spencer Miller's statement when he is discussing he and Stretch (Andre) walking away from Browne's after the fight (RP 2400-02)):

> Right when we got to the alley Daron – the guy that was going to take Daron – was in the tank top walked up further than everybody by, like, with a few other people. He was with this guy named Bobby. That's my homeboy's brother, Bobby. He was with him. He was like trying to calm down, like, come on, man. You're going to get hurt here. You'll get hurt. He just went off the blue like fuck Hilltop. This is Compton. L-A. L-A. And I just like – I said – I said, nigger, fuck Compton, fuck L-A, see what I'm saying."

RP 2403.

Defendant contends that this language was prejudicial because "While "Bobby" may not have been Mr. Bonds, a person unfamiliar with the people involved may have believed Mr. Miller was placing Robert Bonds at the scene of the important verbal altercation between Mr. Miller and Daron Edwards." (Opening Brief of Appellant at 16). This argument goes well beyond any protection that either Bruton or Crawford can ensure. Defendant is asking this court to make erroneous assumptions about the evidence and further assume the jurors had this misperception. The parties and court went to great length to redact any statements incriminating codefendants and when defendant's argument rests on "confusion" [e.g. ER 403 based grounds] and not confrontation clause grounds, then such objections should have been made at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985)(an objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321.

Furthermore, even without the instruction the defendant's argument here presumes inferences that no sound jury in this case would have made given the evidence. Here, Spencer Miller is talking about what Daron (one of the victim's in this case and a person on the opposite side of the confrontation with Spencer Miller and Robert Bonds) is doing outside of Browne's before the "Fuck Compton" exchange. 3/26/02 RP 2400-02. There is no way that Daron and Robert Bonds – sworn enemies in this

case, would be walking together and supporting each other. There is also no way that a jury would make such a mistake as believing that "Bobby" could be "Robert Bonds."

b. Implicitly Implicate.

Defendant also argues that since "other witnesses stated Mr. Bonds was with Mr. Miller and Ms. Wilson, and Mr. Miller and Ms. Wilson verify such accusations were true, they implicitly implicate Mr. Bonds even without mentioning him." (Opening Brief of Defendant at 16). But this is exactly the type of inference that Marsh addressed and rejected as a Bruton violation. Relying on Bruton and Marsh, Division II rejected a similar argument in State v. Cotton, 75 Wn. App. 669, 879 P.2d 971 (1994). In Cotton defendant also argued that his confrontation rights were violated by codefendant statements which indirectly implicated him. 75 Wn. App. at 691. The court rejected this, finding that "the only way in which Cotton is implicated by the out-of court statements is through linkage with other evidence presented by the State. The fact that the State links a nontestifying codefendant's confession through other evidence to the defendant's complicity in the crime is not, however, a sufficient reason to exclude the testimony under Bruton." 75 Wn. App. at 691.

Defendant makes a similar "implicitly implicate" argument with respect to "guns," complaining that Miller's statement to police explaining

what happened to the guns tends to explain that Mr. Miller and Mr. Bonds had guns at the scene. (Opening Brief of Defendant at 17, citing 4/3/02 RP 3154). Again, this is the type of testimony that falls outside Bruton concerns. Defendant is assuming that the jury could not follow the court's instructions to not use one codefendant's statement as evidence against another.

c. Prosecutor's use of statements during closing.

To prevail on a prosecutorial misconduct argument, "the defendant must establish both improper conduct by the prosecutor and prejudicial effect." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996) (citing State v. Furman, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)). "Prejudice is established only if there is a substantial likelihood the instances of misconduct affected the jury's verdict." Pirtle, 127 Wn.2d at 672 (citing State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981)). If a defendant neither objects to a portion of the closing argument nor requests a curative instruction, any objection to the claimed misconduct is waived unless the "prosecutorial misconduct is so flagrant and ill intentioned that no curative instruction could have obviated the prejudice engendered by the misconduct." State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988) (citing State v. Dunaway, 109 Wn.2d 207, 221, 743 P.2d 1237, 749 P.2d

160 (1987); State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978); State v. Case, 49 Wn.2d 66, 74-75, 298 P.2d 500 (1956); State v. Claflin, 38 Wn. App. 847, 849 n.2, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985)). The question to be asked is "whether there was a 'substantial likelihood' the prosecutor's comments affected the verdict." Belgarde, 110 Wn.2d at 508 (citing State v. Reed, 102 Wn.2d 140, 147-48, 684 P.2d 699 (1984); State v. Charlton, supra at 664)). In a PRP, the petitioner must show actual and substantial prejudice by a violation of his or her constitutional rights or by a fundamental error of law. In re Personal Restraint of Cook, 114 Wn.2d 802, 810, 792 P.2d 506 (1990); In re Personal Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994).

i. "If you look at the evidence as a whole, . . ."

Defendant contends that a prosecutor's invitation to look at the evidence as a whole asked the jury to convict Bonds based on Miller's testimony. (Opening Brief of Petitioner at 19). When examining the entire argument, it is clear this is not the case. This argument came in the context of how to examine what happened before the shootings, and was simply reminding the jury of a variety of evidence to support this fact:

> If you look at the evidence as a whole, if you look at it in a common sense fashion, if you look at what Spencer Miller admitted about what happened at Browne's, if you look at what Daron Edwards said happened at Browne's, if you look at what Raymond Sinclair said happened at Browne's, what you get overall is a picture of this: there are two fights

> at Browne's, one is Cory Thomas mouthing off to Andre Bonds inside the bar in a brief fight there that's suppressed by the security almost immediately. And you see the aftermath of it in the photos.
>
> The next thing you see is a fight out front, and you also have testimony about people also went out back and went out front, did they go out before the fight in front, after the fight in front, and people have different recollections of the order in which things happen. That's to be expected.

RP 2982, 4/2/02.

First, the point the prosecutor was arguing to the jury (the existence of two fights at Browne's) was undisputed evidence. Second, the jury is presumed to follow the court's instructions and could not infer, from Miller's statement, guilt on the part of Bonds. It would be impossible for a prosecutor to go through all of the evidence in the case and caution the jury each time it mentions a co-defendant's statement in passing to caution, "but don't use this against so and so." The purpose of the instruction is to provide that as part of the law to the jury and jurors are presumed to follow such cautionary instructions.

Also, a timely objection and curative instruction would have cured any alleged error. Give that there was neither an objection nor a request for an instruction, defendant cannot establish any prejudice.

ii. Fuck the Hilltop.

Nor is there any merit to defendant's claim that the prosecutor inappropriately linked defendant to Miller and Wilson's redacted

statements. Defendant argues that during closing the prosecutor linked petitioner to Spencer Miller's statements by arguing:

> The only additional thing is to consider who had the motive to shoot, who had the motive, a reason to pull that trigger, who cared whether Daron Edwards was saying "fuck the hilltops; Robert Bonds, and Spencer Miller care because they are Hilltops and that kind of disrespect toward the gang, against Andre Bonds cannot be tolerated and is taken care of that night."

(RP 3016).

Taken in its entire context, the prosecutor was not attributing any admission or statement from another codefendant to defendant Bonds. The prosecutor carefully argued that when Daron Edwards "mouths off about 'Fuck, Hilltops.'" RP 2978. Spencer Miller admitted in his statement that it "set him off." RP 2978. The prosecutor never linked defendant Bonds to any kind of admission that it also "set him off" but argued that it was a reasonable inference that Roberts Bonds, as co-founder of the Hilltop Crips, would take offense to such a statement. PRP Appendix F, RP 2978, 2979, 3016.

The inference defendant complains of could also be made without any linkage to Miller's statement. It was known to the jury that defendant belonged to the Hilltop Crips and it was logical to infer and argue that such words were a threat. There was also separate independent evidence that Bonds witnessed this statement. Daron Edwards placed Bonds as a

witness to Andre Bonds and Daron Edwards fight just moments before the "F Compton" exchange. RP 260-261, 3/6/02. Raymond Sinclair was very detailed in the Compton exchange and recalls that it was a verbal exchange between Daron, Andre Bonds, and Roberts Bonds. RP 2211, 3/25/02. Sinclair recalled that Daron was the first to say "F the Hilltop," and Spencer Miller followed with "F California," and immediately following this exchange Andre and Robert walked toward their cars and Robert displayed a gun. RP 2211, 2212, 3/25/02.

Also, Crawford is only implicated by the use of a nontestifying witness's *hearsay* statement. The "F Compton" exchange was not hearsay because it was not offered for the truth of the matter asserted, but rather for the effect on the hearer. ER 801(c). Again, it was a reasonable and logical inference from the evidence that Bonds, an Original Gangster (OG) and founder of the Hilltop Crips would take offense to "F the Hilltop." His actions immediately following this support that inference; he walked to his car and displayed a gun. RP 2213, 3/25/02.

Defendant also failed to object below and a timely objection and request for a limiting instruction would have cured any alleged error.

iii. Guns.

Defendant argues that the prosecutor "further linked Mr. Bonds to Mr. Miller's statement by urging the jury to consider that Mr. Miller spoke of getting rid of "guns" in a plural form. RP 3154, 4/3/02 (Opening Brief of Petitioner at 20). But the context of the statement shows otherwise. In this portion of the State's closing argument, the prosecutor very carefully narrowed the focus onto what evidence supported a finding of guilt for Miller:

> Now, there are a number of other things that were not mentioned about the evidence *against Spencer Miller*. And I'm going to run through these because I know you want to start deliberating and I'm almost done. All right.
>
> He made the statement to Detective Ringer of what happened to the guns afterwards, and it was plural, guns.

RP 3154, 4/3/02 (emphasis added).

Thus, contrary to defendant's argument there was no attempt to implicate defendant Bonds with this evidence. Again, what defendant is attempting to argue is that this violates Bruton because there may be contextual implication. However, the Marsh already rejected the argument that Bruton extends to "contextual implication" noting that "evidence requiring linkage differs from evidence incriminating on its face" and that a curative instruction is enough to protect any misuse of the statement. 481 U.S. at 208-209, 211.

Also, without a timely objection and request for a curative instruction, defendant cannot establish prejudice.

iv. Wilson's telephone call to Andre Bonds.

Defendant also complains about the following argument:

> . . . the fact that he [Andre Bonds] is summonsed to the scene by Robert Bonds by Tonya Wilson by that phone call indicates to you that something is going to happen. It also indicates to you that it's not Andre Bonds who's the driving force behind this. It's not Andre Bonds who's out to avenge his honor after getting his – this is Daron Edward's words, an ass whipping at Browne's.
>
> It's not Andre Bonds who's the driving force. It's Tonya Wilson and Robert Bonds. And the interesting thing about Andre Bonds . . .

RP 3148, 4/3/02.

In this argument, it appears from the context, that the State inadvertently attributed the phone call to Robert Bonds, but then quickly corrected itself, attributing the statement to Tonya Wilson. RP 3148, 4/3/02.

There was also evidence other than the hearsay, supporting the state's assertion that Robert Bonds and Tonya Wilson were working together. For example, multiple witnesses account Wilson and Robert being in the car together during the shooting. Witness Timia Mitchell and Vivan Allen also support that Wilson and Bonds show up at Allen's house

together, right after the shooting. RP 1547, 3/19/02, RP 2004, 3/21/02. Therefore the State's argument that the two worked together stands independent of any reliance on hearsay. RP 3148-49.

Even if you were to read the transcript in the manner defendant suggests, there is nothing to show that this is a Bruton violation because the statement does not facially implicate defendant Bonds in the attempted murder. This out of court statement had nothing to do with who the shooter was or how the gun fire went down. Instead it is an explanation for how Andre Bonds, who had nothing to do with the shooting, got to the scene. Thus even under a Bruton analysis, defendant's argument fails.

Finally, a timely objection and request for a curative instruction would have cured any error where it is unclear from the transcript whether the prosecutor meant to link defendant Bonds to this statement at all. This court may further presume that the jury followed the already existing instruction to not use any co-defendant statement as evidence against another.

d. Defendant fails to establish prejudice.

Even assuming error, any violation of Bonds' confrontation rights was harmless. See Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.

Ct. 1431, 89 L. Ed. 2d 674 (1986).[4] Once defendant establishes a constitutional error, defendant bears the burden of showing he was actually and substantially prejudiced by a constitutional violation. In re Personal Restraint of Markel, 154 Wn.2d 262, 267, 111 P.3d 249 (2005). Defendant bears the burden of establishing prejudice by a preponderance of the evidence. In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992).

Defendant cannot show that he was actually and substantially prejudiced. The conviction of Bonds did not turn on Wilson's statements. Instead, multiple witnesses placed defendant at the attempted homicide scene, with a gun, and inside the car that Wilson was driving when the shots rang out.

There was evidence to support that Robert Bonds had a motive for the shooting. Robert Bonds was considered an OG, original gangster, and a founding member of the HTC (Hilltop Crips), along with Andre Bonds. RP 3/26/02, 2347. Robert Bonds' homeboy Andre had warned Daron

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[4] This is also assuming the court finds that a curative instruction would not have cured the error with respect to closing argument. Factors for determining whether a violation of the Confrontation Clause was harmless error include (1) the importance of the witness's testimony in the prosecution's case, (2) whether the testimony was cumulative, (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, (4) the extent of cross-examination otherwise permitted, and (5) the overall strength of the prosecution's case. Van Arsdall, 475 U.S. at 684.

Edwards that he was going to enlist his homeboys to help enforce revoking Edward's "hilltop privileges." RP 3/6/02 294. Later, Edwards shows up at both Browne's and the AM/PM, both known Hilltop Crip territories. RP 3/26/02 2349. Robert Bonds joined in on the fist fight between Cory, Andre and Daron at Browne's. 3/25/02 RP 2209 (Sinclair), 3/18/02, RP 45 (Ernest Trent). Immediately following the "F Compton" exchange both Andre and Robert Bonds head towards their cars and both are seen carrying guns. RP 3/25/02, 2212-2214. Andre Bonds left the parking lot before any shots were fired and caused the attention of victim Daron Edwards, Keith Harell and their group to be distracted. RP 3/6/02 279.

Robert Bonds was present just prior to and at the time of the shooting. He was seen in the station wagon with Tonya inside when Cory, Raymond and Daron all headed out together and Robert had a gun in his hands. 3/25/02 RP 2220, 2226. As the victims arrived at the AM/PM parking lot and uttered insults toward Andre Bonds, the defendant dispersed to opposite sides of the parking lot. RP 3/18/02 61.

Multiple witnesses placed Robert Bonds in the station wagon and observed gunshots were fired from the station wagon:

a. Victim Daron Edwards observed Bonds with Tonya in the station wagon before the shooting. 3/6/02, RP 277-78, 352.

b. Ernest Trent saw Robert Bonds walk towards the station wagon right before the shooting and saw that as the wagon started pulling out gunshots were heard. 3/18/02 RP 66-69. Trent saw approximately eight shots fired from the station wagon's driver's side rear window. 3/18/02 RP 70, 95, 133. While Trent could not see who was pulling the trigger, he could see two people in the car, including one in the back seat where Robert entered the vehicle, leaning forward and firing. 3/18/02, RP 100.

c. Cory Thomas recalled that Tonya was driving the station wagon and Robert Bonds was in the back seat and that as station wagon pulled out shots started coming from the car. Although he could not see who was shooting, he knew the shots were coming out the back window of the station wagon and no one else was in the car. 3/7/02 RP 469.

d. Neicee saw Wilson and Robert Bonds leave the Rite Aid parking lot together in the station wagon and later saw them at the AM/PM with Tonya driving and Robert Bonds in the back seat. 3/12/02, RP 745. The station wagon was pulling away as gunfire erupted. 3/12/06 RP 759-60.

e. Shavella Brown recalled that at the time gunfire broke out she saw sparks coming from the back left side of the station wagon as it pulled away. 3/12/02, RP 839, 3/13/02, RP 859.

f. Sabrina Starks. Sabrina was trying to get Daron to leave Browne's when she saw Robert Bond across the alley. 3/14/02, RP 1098. As Daron was getting into the car, Robert Bonds called out to him, "Fuck these niggers," and pulled out a gun. 3/14/02, RP 1100, 1101. She later saw Robert Bonds in the station wagon at the AM/PM. 3/15/02, RP 1194.

g. Vivian Allen reported seeing Robert Bonds and Tonya Wilson over at her house later that night. 3/21/02 RP 2004.

As the evidence above outlines, this case did not turn on Tonya Wilson's statement when it came to the conviction of Robert Bonds. Witnesses all account that Tonya was in the driver's seat, Robert was in the back driver's seat, and the gunfire came from Robert's seat. This record overwhelmingly supports defendant's conviction and defendant has failed to meet his burden of establishing a constitutional error that resulted in prejudice.

Petitioner attacks the credibility of the witnesses, saying many did not see where the shots were coming from. First, defendant is relying on defense witness statements for the majority of this assertion. One of the most compelling witnesses, Raymond Sinclair, adds corroboration to every State's witness who recalls seeing Robert in the car at the time of the shooting. If Sinclair were truly just pointing fingers at Robert Bonds to see him convicted then he would have placed Robert in the car, pulling the trigger. Instead, Sinclair is able to document every piece of involvement Robert had with the events that led up to that night, including the fist fight (3/25/02, 2209), "F Compton," (3/25/02, 2212-2213), that Robert had a gun, (3/25/02, 2213) and that Robert was seen with a gun in his hands before the shooting. (3/25/02, RP 2226). The one important

detail that Sinclair was unable to provide (e.g. who pulled the trigger) was supplied by other State's witnesses who all reported the same account.

Victim Daron Edwards' testimony has the same ring of truth as Sinclair's. As a shooting victim, his motive for making sure that the perpetrator was convicted was high. However, he also was unable to say where the gunfire came from, other than "behind him." 3/6/02, 280-81. But also like Sinclair he was able to say that defendant Robert Bonds and with Tonya Wilson, seated in the back passenger seat, while Tonya was in the driver's seat. 3/6/02, RP 277-278, 352, 357.

Given the strength of the State's case, any alleged violation of the Confrontation Clause is harmless.

3. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL – CRAWFORD ISSUE.[5]

Petitioner asks this court to find ineffective assistance of appellate counsel for failing to raise the Crawford issue at the direct appeal level. Petitioner makes this argument in large part to ask this court to apply a different standard of review. (See Opening Brief of Petitioner at 41-42 arguing that the burden is on the State to show the error is harmless if this

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[5] Because the State is presenting a time bar argument for courtroom closure it also does not present argument in response to defendant's contention that his counsel was ineffective in failing to present the closure issue, but instead reserves the right to brief this issue should this court reject the time bar issue.

court finds that counsel was ineffective). However, as argued supra, there is no merit to the Crawford/Bruton issue, and even if there was any merit, the error is harmless.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336.

The Strickland test applies to appellate as well as trial counsel. See, e.g., Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 764, 145

L. Ed. 2d 756 (2000). A petitioner alleging ineffective assistance of appellate counsel must prove both that (1) appellate counsel acted objectively unreasonable in failing to raise a particular issue on appeal, and (2) absent counsel's deficient performance, there was a reasonable probability that defendant's appeal would have been successful before the state's highest court. e.g., Smith v. Robbins, 528 U.S. at 285, 120 S. Ct. at 764. If a petitioner raises ineffective assistance of appellate counsel on collateral review, he or she must first show that the legal issue that appellate counsel failed to raise had merit. In re Pers. Restraint of Maxfield, 133 Wn.2d 332, 344, 945 P.2d 196 (1997). Second, the petitioner must show that he or she was actually prejudiced by appellate counsel's failure to raise the issue. Id.

Defendant has failed to establish that appellate counsel was objectively unreasonable in failing to raise the Crawford issue. As argued supra in section 2 of the State's brief, there was no reason for appellate counsel to raise the Crawford issue because there were no testimonial statements *offered against* Robert Bonds. Even if there was any merit to the argument, petitioner cannot show that he was actually prejudiced. See argument supra, section two.

4. UNDER THE RULE ANNOUNCED IN IN RE BENN, DEFENDANT'S AMENDED PETITION PRESENTS AN UNTIMELY ISSUE OF COURTROOM CLOSURE, AND THIS PORTION OF THE PETITION MUST BE DISMISSED AS TIME BARRED. ASSIGNED COUNSEL ALSO PRESENTS AN ARGUMENT ON AN ISSUE THIS COURT DID NOT ORDER BRIEFING ON CONTRARY TO RCW 10.73.150.

Defendant's timely original petition raised a single issue and only this issue: "whether redacted statements of co-defendants admitted at a joint trial under Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and its progeny constitute a violation of Crawford is not frivolous." Appendix E. It was this issue the Chief Judge screened for frivolity and made a determination that appointment of counsel was necessary for briefing. Id. Defendant's "amended petition" raising the issue of courtroom closure under State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995), is not properly before this court because (a) it is time barred, and (b) it briefs an issue that was not screened for frivolity and for which no counsel was appointed. The State requests this court summarily dismiss this portion of the petition as time barred.

a. Time Bar.

Here, defendant's mandate was issued on May 9, 2005, thus his amended petition filed July 27, 2006, is untimely. A petitioner who timely

files a personal restraint petition may not untimely amend the original petition and put before the court additional issues. In re Benn, 134 Wn.2d 868, 938, 952 P.2d 116 (1998).

In Benn, supra, like the instant case, Benn's attorney filed a timely petition but then attempted to file an amendment to his petition raising the LeFaber[6], issue after the one year statute of limitation expired in a death penalty case. 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 Benn court noted that the defendant 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. The court 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.

Similarly here, defendant attempts to waive a statutory time rule, but as the Supreme Court has ruled, the time for the filing of personal restraint petitions creates a statute of limitation. Nor does State v. Bone-

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[6] State v. LeFaber, 128 Wn.2d 896, 899-900, 913 P.3d 369 (1996).

Club, 128 Wn.2d 254, 906 P.2d 325 (1995), "right to a public trial" fall within an exception to the one year time bar. The Bone-Club ruling was issued long before the filing of Bonds' direct appeal, first petition, or amended petition. Petitioner attempts in his amended petition to couch the Bone-Club issue as an ineffective assistance of appellate counsel in order to circumvent the one year time bar. However, the list in RCW 10.73.090(1), .100, is an exclusive list that is constitutional and mandatory and honors the interest in the finality of judgments. In re Pers. Restraint of Taylor, 105 Wn.2d 683, 686, 717 P.2d 755 (1986). A claim of "ineffective assistance of trial or appellate counsel does not fall under the permissible grounds for collateral review more than one year after finality," for such a "basis would circumvent the legislature's limiting exceptions and allow a defendant to seek relief on almost any ground." State v. Wade, 133 Wn. App. 855, 138 P.3d 168 (2006).

Petitioner may attempt to argue that the time limit under RCW 10.73.100 should be "equitably tolled." However, as the Supreme Court noted in its ruling, "even if equitable tolling is applicable to personal restraint petitions, it is appropriate only when the party invoking it has exercised reasonable diligence and there is evidence of bad faith, deception, or false assurances preventing a timely filing." (Appendix C - Denial of Motion for Discretionary Review at 2, citing In re Pers.

Restraint of Carlstad, 150 Wn.2d 583, 593, 80 P.3d 587 (2003)). For obvious reasons, the doctrine of equitable tolling is extremely limited and courts do not extend it to "a 'garden variety claim of excusable neglect.'" State v. Littlefair, 112 Wn. App. 749, 759-60, 51 P.3d 116 (2002), review denied, 149 Wn.2d 1020, 72 P.3d 761 (2003) (citations omitted). According to court of appeals decisions, RCW 10.73.090 may be subject to equitable tolling in a proper case. See, Littlefair, 112 Wn. App. at 759.

The equitable tolling doctrine "'permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed.'" In re Carlstad, 150 Wn.2d 583, 593, 80 P.3d 587 (2003) (quoting State v. Duvall, 86 Wn. App. 871, 874, 940 P.2d 671 (1997)) (emphasis added). The remedy is "generally used . . . when the plaintiff exercises diligence and there is evidence of bad faith, deception, or false assurances by the defendant." Carlstad, 150 Wn.2d at 593. The facts as presented in Littlefair, outline when this limited doctrine should be applied. There, an immigrant defendant pleaded to a deportable offense. Two years after the judgment and sentence was entered, the Immigration and Naturalization Service (INS) notified Littlefair that it would seek to deport him because of his conviction. Littlefair, 112 Wn. App. at 755. Littlefair was not aware of his possible deportation when he pleaded guilty. Littlefair, 112 Wn. App. at 763. Because this was not his fault and

because he would not have pleaded guilty if he had known he could be deported, the court concluded that the one-year time period in RCW 10.73.090 should be equitably tolled. Littlefair, 112 Wn. App. at 763.

Here, there is no record of bad faith, deception, or false assurances. Nothing prevented the defendant from amending his petition prior to the one year expiration. Defendant had at his disposal the court record at the direct appeal and for the filing of his petition. Simple inadvertence to raise an issue does not excuse the delay and this court should dismiss this portion of the petition.

b. Briefing of an unscreened issue.

If this court considers the brief on the merits, then it is setting a precedent that any time counsel is appointed to brief the merits of a petition under RCW 10.73.150, the court appointed attorney may also review the entire record and present additional issues to the court. This completely undermines the finality of direct review. A personal restraint petitioner has no constitutional right to court-appointed counsel. 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 issue raised is 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.").

Appointed counsel's brief raises additional issues that (1) were not screened to determine whether they had merit, and (2) were not screened for frivolity. In essence, this filing permits 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.

A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal. In re Hagler, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). Here, the untimely amendment of the petition undermines principles of finality and uses resources not contemplated under statute. Petitioner must be bound to the original claims raised in his direct petition. This is so because pro se petitioners are held to the same standard as professionals in briefing and arguments. In re Connick, 144 Wn.2d 442, 458, 28 P.3d 729 (2001). To this end, this court has noted:

> Although functioning pro se through most of these proceedings, Petitioner – not a member of the bar – is nevertheless held to the same responsibility as a lawyer and is required to follow applicable statutes and rules.

Connick, 144 Wn.2d at 455.

The State reserves the right to respond to the merits of the petition should this court find that the issue is not time barred.

E. CONCLUSION:

For the foregoing reasons the State respectfully requests that this court dismiss the petition. In the event the court does not agree that the

right to public trial is time barred the State reserves the right to brief the merits of this issue.

DATED: February 23, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

FOR 2/23/07
MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

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.

2/23/07 Johnston
Date Signature

APPENDIX "A"

ACCORD Printout

CASE EVENTS # 337045

Date	Item	Action	Participant
02/28/2007	Other filing ***Comment:*** *see if State filed mot to mod Comm's rul of 1/29/07 @ SC*	Due	
02/15/2007	Status Report ***Comment:*** *check status @ SC*	Due	
01/29/2007	Discret Review to SC Denied ***Comment:*** *mot for d/r denied; State moves to stay COA proceedings on Mr. Bond's PRP pending decision on State's motion for d/r/ That motion is granted only for the duration necessary to permit the State to seek modification of my ruling denying review, should it wish to do so.*	Information - not filed	SUPREME COURT
12/15/2006	Respondents brief ***Comment:*** *state's response to petitioner's amended brief; ** brief set 30 days from ruling on mot to mod (see rul of 9/27/06 and 11/15/06*	Due	LUNA-GREEN, MICHELLE
12/13/2006	Court of Appeals case file (pouch) ***Comment:*** *Pouch to SC w/motion for DR*	Sent by Court	
12/13/2006	Letter **Service Date:** 2006-12-13 ***Comment:*** *Re: Dec 12th letter-correction...*	Sent by Court	PONZOHA, DAVID
12/12/2006	Letter **Service Date:** 2006-12-12	Sent by Court	PONZOHA, DAVID
12/12/2006	Notice of Discret Review to Supreme Crt **Service Date:** 2006-12-12 ***Comment:*** *cc of State's Motion for Emergency State of Appellate Proceedings Pending Ruling on Motion for DR (DR of 11/15/06 order).*	Filed	LUNA-GREEN, MICHELLE
11/15/2006	Order on Motions **Service Date:** 2006-11-15 ***Comment:*** *mot to modify commissioner's ruling 8/8/06 denied*	Filed	HOUGHTON, ELAINE
10/04/2006	Additional Authorities **Service Date:** 2006-10-03	Filed	LUNA-GREEN, MICHELLE
09/27/2006	Ruling on Motions **Service Date:** 2006-09-29 ***Comment:*** *Respondent's motion to extend time to file its response to personal restraint petition is granted. The response is due 30 days after this court's decision on the motion to modify.*	Filed	PONZOHA, DAVID

09/19/2006	Motion to Extend Time to File **Service Date:** 2006-09-18 **Motion Status:** Decision filed ***Comment:*** *state's mot for ext of time to file response to prp amended brief*	Filed	LUNA-GREEN, MICHELLE
09/11/2006	Letter **Service Date:** 2006-09-11 ***Comment:*** *Counsel:* *On August 24, 2006, a motion to modify a Commissioner's ruling of August 8, 2006 was filed in the above-referenced matter. A panel of judges will consider the motion without oral argument on the next available motion calendar. A response to the motion was filed August 31, 2006.* *If you have any questions, please contact this office.*	Received by Court	PONZOHA, DAVID
08/31/2006	Response to motion **Service Date:** 2006-08-31	Filed	COLLINS, NANCY P
08/24/2006	Motion to Modify Ruling **Calendar Type:** Judge's No-Oral Argument Motion Calendar **Hearing Official:** One, Panel **Service Date:** 2006-08-24 **Hearing Date:** 11/08/2006 **Hearing Location:** None **Motion Status:** Decision filed ***Comment:*** *mot to modify ruling allowing the filing of an amended personal restraint petition*	Filed	LUNA-GREEN, MICHELLE
08/08/2006	Ruling on Motions ***Comment:*** *Petitioner's motion to amend personal restraint petition is granted. The State's response is due 45 days from the date of this ruling.*	Filed	SCHMIDT, ERIC B
08/04/2006	Ruling on Motions **Service Date:** 2006-08-04 ***Comment:*** *Petitioner's motion to extend time to file his opening brief is granted. The court accepts the brief for filing.*	Filed	PONZOHA, DAVID
08/01/2006	Response to motion	Filed	LUNA-GREEN, MICHELLE
07/27/2006	Motion for Amended brief **Service Date:** 2006-07-25 **Motion Status:** Decision filed ***Comment:*** *mot to amend personal restraint petition*	Filed	COLLINS, NANCY P
07/27/2006	Petitioner's Brief **Service Date:** 2006-07-25 ***Comment:*** *opening brief is due within 45 days of the designation of clerk's papers. If petitioner files an additional statement of arrangements, he*	Filed	COLLINS, NANCY P

	*may move for an ext. of this deadline. Respondent's brief is due 45 days after service of petitioner's brief. Petitioner may file a reply brief within 30 days after service of respondent's brief. See note below*** ** *rec'd a corrected copy of petitioner's brief on 07/28/06*		
07/18/2006	Motion to Extend Time to File **Service Date:** 2006-07-14 **Motion Status:** Decision filed ***Comment:*** *mot for ext of time to file petitioner's opening brief*	Filed	COLLINS, NANCY P
06/22/2006	Notice of Substitution of Counsel **Service Date:** 2006-06-20 ***Comment:*** *Nancy P. Collins for David Donnan*	Filed	DONNAN, DAVID L.
06/14/2006	Clerk's Papers **Pages:** 125	Filed	DONNAN, DAVID L.
06/01/2006	Ruling on Motions ***Comment:*** *Petitioner's motion for extension of time to file a designation of clerk's papers is granted. The court accepts the designation for filing without sanction.*	Filed	PONZOHA, DAVID
05/26/2006	Designation of Clerks Papers **Service Date:** 2006-05-25 ***Comment:*** *must designate any clerk's papers or exhibits necessary to resolve the issues raised. Should petitioner determine that additional rp's are necessary to resolve the issues raised, he must file an additional statement of arrangements within the same 15 days.*	Filed	DONNAN, DAVID L.
05/26/2006	Motion to Extend Time to File **Service Date:** 2006-05-25 **Motion Status:** Decision filed ***Comment:*** *motion for extension of time to file designation of clerk's papers*	Filed	DONNAN, DAVID L.
05/25/2006	Letter ***Comment:*** *Enclosed are the items you requested per my telephone conversation with Ann Joyce on May 23, 2006. The items include the mandate, opinion, Respondent and Appellant briefs and the Statement of Arrangements from his direct appeal No. 28847-8. Let me know if you have any questions or need further assistance.*	Sent by Court	PONZOHA, DAVID
05/23/2006	Telephone Call ***Comment:*** *telephone call fromMr. Donnan's office requesting copies of mandate, decision, briefs and statement of arrangements from petitioner's direct appeal #28847-8.*	Received by Court	DONNAN, DAVID L.

05/04/2006	Case Received and Pending	Status Changed	
05/04/2006	Letter **Service Date:** 2006-05-04 ***Comment:*** *Enclosed is a copy of an Order from a decision of this court appointing you as counsel to represent the Petitioner in this court's consideration of the petition at public expense, including briefing of the issues raised by Petitioner. Along with this order, we are enclosing a copy of the complete personal restraint petition file together with any brief that have been filed in this case. Additionally, Minuteman Press will be sending you copies of all of the verbatim report proceedings related in this case in the near future. If you have any questions related to this matter, please do no hesitate to call.*	Sent by Court	DONNAN, DAVID L.
05/04/2006	Report of Proceedings ***Comment:*** *vrp's 29 vol. pulled from 28847-8 sent to Minuteman Press to be copied and then sent to assigned counsel - David L. Donnan #19271 in Seattle. When original rp's come back the complete case and pouches will be stored at Tammy's desk for reference then when COFd can be sent back to the basement and filed in Boxes CR-1067 (1-2 of 6); Box CR 1608 (3-4 of 6); Box CR-1609 (5-6 of 6)*	Sent by Court	
05/04/2006	Other Order **Service Date:** 2006-05-04 ***Comment:*** *Order referring petition to panel, appointing counsel, and setting briefing schedule*	Filed	VAN DEREN, MARYWAVE
05/04/2006	Trial Court Action **Service Date:** 2006-05-04 ***Comment:*** *Order referring petition to panel, appointing counsel, and setting briefing schedule*	Not Required	VAN DEREN, MARYWAVE
12/19/2005	Reply to Response to Prp **Service Date:** 2005-12-19 ***Comment:*** *Petitioner's Reply to State's Response.*	Filed	Bonds, Robert
11/10/2005	PRP Ready	Status Changed	
10/10/2005	Response to Personal Restraint Petition **Service Date:** 2005-10-10 ***Comment:*** *State's Response to PRP*	Filed	LUNA-GREEN, MICHELLE
09/30/2005	Ruling on Motions ***Comment:*** *Petitioner's motion to consider record from direct appeal is granted in part. The report of proceedings from COA No. 28847-8-II shall be transferred to this petition. The clerk's papers are not retained by the court and must be obtained from the trial court.*	Filed	SCHMIDT, ERIC B

09/27/2005	Other filing ***Comment:*** *resent perfection letter to Florence Corr Cntr.*	Sent by Court	PONZOHA, DAVID
09/19/2005	Other filing ***Comment:*** *Perfection letter returned undeliverable.*	Received by Court	Bonds, Robert
09/06/2005	Perfection Letter **Service Date:** 2005-09-06 ***Comment:*** *requesting response from Pierce Co Dep Pros Atty*	Filed	PONZOHA, DAVID
08/29/2005	Motion - Other **Motion Status:** Decision filed ***Comment:*** *Motion to Consider Record from Direct Appeal No. 28847-8-II*	Filed	Bonds, Robert
08/22/2005	Petitioner brief (PRP & Other Petitions) ***Comment:*** *PRP opening brief*	Filed	Bonds, Robert
08/04/2005	Filing fee	Waived	PONZOHA, DAVID
07/22/2005	Case Received and Pending	Status Changed	
07/22/2005	Certif of Inmate Acct/PLRA ***Comment:*** *prison account statement*	Received by Court	Bonds, Robert
07/22/2005	Personal Restraint Petition	Filed	

APPENDIX "B"

Order Referring Petition to Panel

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

COPY RECEIVED
MAY 05 2006
GERALD A. HORNE
PIERCE COUNTY PROSECUTING ATTORNEY
APPELLATE DIVISION

FILED
COURT OF APPEALS
DIVISION II
06 MAY -4 AM 11:40
STATE OF WASHINGTON
BY
DEPUTY

In re the
Personal Restraint Petition of

ROBERT BONDS,

Petitioner.

No. 33704-5-II

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

please

Robert Bonds seeks relief from personal restraint imposed following his jury trial convictions of two counts of first degree attempted murder (with firearm sentencing enhancements) and one count of first degree unlawful possession of a firearm. The mandate disposing of Petitioner's direct appeal issued on May 9, 2005, and he filed this petition on July 22, 2005. During Petitioner's joint trial with two co-defendants, the trial court admitted into evidence redacted confessions of those co-defendants, together with a limiting instruction. Petitioner contends that this violated his Sixth Amendment right to confront witnesses under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); he also contends that he received ineffective assistance of counsel when his appellate lawyer failed to raise this issue on direct appeal.

After initial consideration under RAP 16.11(b), the Acting Chief Judge has determined that the issue of whether redacted statements of co-defendants admitted at a joint trial under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and its progeny constitute a violation of *Crawford* is 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 appoints David Donnan to represent Petitioner in this court's consideration of the petition at public expense, including briefing of the issues 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 a copy of the verbatim report of the prior proceedings provided to this court during Petitioner's direct appeal.

Within 15 days of appointment of counsel, Petitioner must designate any clerk's papers or exhibits necessary to resolve the issues raised in the petition. Should Petitioner determine that additional reports of proceedings are necessary to resolve the issues raised by the petition, he must file an additional statement of arrangements within the same 15 days.

Petitioner's opening brief is due within 45 days of the designation of clerk's papers. If Petitioner files an additional statement of arrangements, he may move for an extension of this deadline. Respondent's brief is due 45 days after service of Petitioner's brief. Petitioner may file a reply brief within 30 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 4th day of May, 2006.

Van Deren A.C.J.
Acting Chief Judge

cc: Robert Bonds
Pierce County Clerk
County Cause No(s). 01-1-06020-3
Michelle Luna-Green
Washington State Office of Public Defense

APPENDIX "C"

Order Denying Discretionary Review

THE SUPREME COURT OF WASHINGTON

FILED
SUPREME COURT
STATE OF WASHINGTON
2007 JAN 29 P 2:15
CLERK

In re the Personal Restraint Petition of

ROBERT BONDS,

Petitioner.

NO. 79575-4

RULING

Robert Bonds was convicted with others of attempted first degree murder. Division Two of the Court of Appeals affirmed the conviction on direct appeal, issuing its mandate in May 2005. Acting pro se, Mr. Bonds filed a personal restraint petition in the Court of Appeals in July 2005, arguing that a co-defendant's out-of-court statements were admitted at trial in violation of his right of confrontation. On May 5, 2006, the acting chief judge of the Court of Appeals ruled that the petition was not frivolous, referred the petition to a panel of judges for determination on the merits, and appointed counsel for Mr. Bonds at public expense. The acting chief judge also set a briefing schedule.

On July 27, 2006, Mr. Bonds's counsel moved to amend the personal restraint petition, asserting that in her review of the record she discovered possible reversible error in several orders closing the courtroom to the public during trial and pretrial proceedings. She submitted with the motion an amended petition arguing this issue. The State opposed the motion, but a commissioner of the court granted the motion on August 8, 2006. The State moved to modify the commissioner's ruling. On November 15, 2006, a panel of judges of the court denied the State's motion. The

5071/9

State now seeks this court's discretionary review, moving also for a stay of Court of Appeals proceedings pending this court's decision on the motion for discretionary review.

The State mainly argues that the Court of Appeals ruling permitting Mr. Bonds to file an amended petition conflicts with this court's decision in *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 952 P.2d 116 (1998). In *Benn*, the petitioner timely filed a personal restraint petition but later moved to supplement his petition to challenge a self-defense instruction, filing his motion beyond the one-year time limit on collateral attack. This court noted that no rule allowed amendments to a personal restraint petition to relate back to the original petition, nor did the rules permit the court to waive the statutory time limit on collateral attack. *Id.* at 938-39. The court then examined the petitioner's challenge to the self-defense instruction and concluded that it was not based on a ground for relief exempt from the time limit. *Id.* at 939-40. The court therefore denied the motion to supplement. *Id.* at 941.

Here, as indicated, Mr. Bonds moved to amend his petition more than one-year after his judgment and sentence became final, beyond the time limit on collateral attack. RCW 10.73.090(1). And the ground for relief he asserts—that the trial court unlawfully closed the courtroom to the public—does not appear to fall within any exception to the time limit. *See* RCW 10.73.100. Mr. Bonds urges that the time limit should be "equitably tolled." But even if equitable tolling is applicable to personal restraint petitions, it is appropriate only when the party invoking it has exercised reasonable diligence and there is evidence of bad faith, deception, or false assurances preventing a timely filing. *In re Pers. Restraint of Carlstad*, 150 Wn.2d 583, 593, 80 P.3d 587 (2003). Mr. Bonds asserts no such circumstances. He points to the length of time it took the Court of Appeals to decide that the original petition was not frivolous. But the court did not act in bad faith, nor did it deceive Mr. Bonds or provide him

false assurances. Nothing prevented Mr. Bonds from timely asserting the court closure issue.

The Court of Appeals therefore may have erred in permitting Mr. Bonds to amend his petition. But even if the court committed "probable error," as the State asserts, its ruling does not so "alter[] the status quo" or "limit[] the freedom of a party to act" as to merit interlocutory review. RAP 13.5(b)(2). In allowing Mr. Bonds to amend his petition, the Court of Appeals expressed no opinion about the timeliness of the new issue he raises. The State remains free to argue that the issue is time-barred, and the Court of Appeals could ultimately decide that issue in the State's favor. For the same reason, I am not persuaded that the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings" as to require this court's review at this time. RAP 13.5(b)(3).

The motion for discretionary review is therefore denied.

As indicated, the State also moves to stay the Court of Appeals proceedings on Mr. Bonds's personal restraint petition pending a decision on the State's motion for discretionary review. That motion is granted only for the duration necessary to permit the State to seek modification of my ruling denying review, should it wish to do so.

COMMISSIONER

January 29, 2007