

NO. 80995-0

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, APPELLANT

v.

ROBERT CHARLES JR. BONDS, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson
No. 01-1-06020-3

Court of Appeals No. 33704-5

SUPPLEMENTAL BRIEF OF APPELLANT

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A. ISSUES PERTAINING TO REVIEW.

1. May a court allow an untimely amendment to a personal restraint petition contrary to *In re Benn* and *Shumway*, where the doctrine of equitable tolling does not apply to a jurisdictional statute such as RCW 10.73.090?
2. Assuming *arguendo* that the doctrine of equitable tolling may be invoked to bypass the jurisdictional timeline provisions of RCW 10.73.090, the doctrine does not apply in this case where defendant complains of a violation to a public constitutional right and where there were no unusual circumstances in this case that prevented timely filing of an original petition.
3. May an appellate court appoint an attorney pursuant to RCW 10.73.150, where petitioner did not request appointment of the attorney, and may the court permit the attorney to brief an issue outside the court's directive?

B. STATEMENT OF THE CASE.

Bonds' convictions for the offenses of attempted first degree murder, two counts, and unlawful possession of a firearm in the first degree, became final on May 9, 2005, the date the mandate was issued. *In re Bonds*, No. 33704-5-II, 2007 Wash. LEXIS 3042 (Wash. November 14, 2007), at *1.

On July 22, 2005, Bonds filed his first personal restraint petition, raising the sole issue of whether the court improperly admitted a co-defendant's statements against him citing *Crawford v. Washington*, 541

U.S. 36, 124 S. Ct. 1354, 1374, 158 L.Ed.2d 177 (2004). (*In re Bonds* at *15).

On May 4, 2006, the Court of Appeals, Division II, entered an order “Referring Petition to Panel, Appointing Counsel, and Setting Briefing Schedule.” (Appendix A). 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, Bonds’ appointed counsel filed a motion to amend the personal restraint petition under RAP 16.4 in the interest of justice. *In re Bonds*, at *15-16. A commissioner granted the motion to amend the petition over the State’s objection. *Id.* The State filed a motion to modify the commissioner’s ruling, and the motion was denied. *Id.*

The State sought discretionary review of the court’s order denying the motion to modify and granting the petitioner’s motion to amend his

personal restraint petition. The Commissioner of this court denied review, but 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.” Denial of Motion for Discretionary Review at 2.

The Court of Appeals granted Bonds’ petition, finding that the doctrine of equitable tolling applied to the amended petition. *In re Bonds* at *20-21. Judge Penoyer issued a dissent. *Id.* at *27-31.

C. LAW AND ARGUMENT.

SUMMARY OF ARGUMENT

This case centers on the very issue of finality. Petitioner had a direct appeal with appointed counsel. He then filed a personal restraint petition, alleging what he thought to be the error in his restraint: hearsay. Without the request of petitioner, counsel was appointed to represent him on the issue raised in his collateral attack. Counsel, at the acquiescence of the Court of Appeals, was permitted to ignore the provisions of RAP 16.4, and not only brief the merits of the petition, but any other error which counsel believed was committed at the trial level. Thus, the petition became for all practical purposes - a direct appeal. This kind of treatment of personal restraint petitions is what drove Justice Hale to write a

scathing opinion of the writ over thirty years ago:

Nearly all good things are subject to bad usage -- including the writ of habeas corpus. Evolving as a device to liberate individuals held without authority of law, it has become, I think, by a process of judicial contortion, scarcely recognizable except for its name. Persistently proclaimed by the courts as no substitute for appeal, the writ, through a series of judicial mutations, has, nevertheless, become exactly what it is said not to be, *a belated writ of appeal* which . . . [has] no end to it.

Honore v. State Bd. Of Prison Terms & Paroles, 77 Wn.2d 660, 466 P.2d 485 (1970) (Hale, concurring)(emphasis added).

The order in this case encourages counsel to act like criminal defense think tanks, scouring the record for any error, and raising it to the court long past the direct appeal date, and asking for reversal not on a claimed error from petitioner, but what can only be looked upon as an untimely, legal technicality.

The Court of Appeals' decision permitting the untimely amendment of a personal restraint petition is (1) directly contrary to *In re Benn* and *Shumway*, (2) misapplies the doctrine of equitable tolling, and (3) misused appointed counsel. The State requests reversal of this decision and dismissal of the amended petition as untimely.

1. THERE IS NO STATUTE OR COURT RULE WHICH PERMITS AN AMENDMENT TO A PERSONAL RESTRAINT PETITION AND UNDER *IN RE BENN* AND *SHUMWAY*, THE COURT OF APPEALS ERRED IN PERMITTING AN UNTIMELY AMENDMENT TO THIS PETITION AND THE DOCTRINE OF EQUITABLE TOLLING DOES NOT ALTER THIS CONCLUSION.

“The statute of limitation set forth in RCW 10.73.090(1) is a mandatory rule that acts as a *bar* to appellate court consideration of personal restraint petitions filed after the limitation period has passed, unless the petitioner demonstrates that the petition is based solely on one or more . . .” of the grounds listed in RCW 10.73.100. *Shumway v. Payne*, 136 Wn.2d 383, 398, 964 P.2d 349 (1998) (emphasis added). The time limitations set on filing a petition are constitutionally sound. *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 448, 853 P.2d 424 (1993).

These timelines are not subject to waiver, nor is there a “good cause” exception to the time provisions. *Shumway*, 136 Wn.2d at 399 (citing *In re Personal Restraint of Benn*, 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998)). Instead, “RCW 10.73.090 imposes a constitutionally valid ‘time limit’ as a means of controlling the flow of postconviction collateral relief petitions.” *Id.*

The Court of Appeals’ decision below ignores the mandatory timelines of RCW 10.73.090 and the decisional law which flows from this statute – *In re Benn* and *Shumway*, *supra*.

The facts that drove the court's decision in *Benn* are remarkably similar to the case at bar, with the exception that *Benn* involved a petitioner represented by appointed counsel in a capital case. Benn filed a timely petition. After the filing of his petition, Benn attempted to file an amendment to his original petition. This court denied the amendment, holding that the defendant was not seeking a waiver of a court rule, but rather a waiver of statute of limitation, and "RAP 18.8(a) does not allow the court to waive or alter statutes." *Id.* This court also concluded that an amendment was procedurally impossible because "[t]here 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.

As in *Benn*, counsel for petitioner sought to avoid the one year time bar by moving to allow an amendment to the petition pursuant to RAP 18.8(a), arguing that it should be granted under the "interest of justice" provision. But as this court held in *Benn*, the rule's language is inapplicable to statutory provisions, such as the timelines set forth in RCW 10.73.090:

The appellate court may, on its own initiative or on motion of a party, waive or alter the provisions of any of these *rules* and enlarge or shorten the time within which an act must be done in a particular case in order to serve the ends of justice
...

RAP 18.8 (a) (emphasis added).

In *Shumway*, the petitioner pressed for a way around the one year time bar because he could not seek relief in federal court without first exhausting all state remedies. Inexplicably, the appellate attorney did not seek the issue currently before the federal court in his petition for review to the Supreme Court. In holding that all direct and personal restraint timelines had passed, this court declined the defendant's invitation to create some kind of "waiver" or "good cause" exception to the timelines. Instead, this court remained committed that the "time limit" is a constitutionally permissible way of controlling post-conviction relief and was a "mandatory restriction on the time period." 136 Wn.2d at 399-400. The court did not analyze the timeline provision as whether the petition could be filed, but whether the court could hear or consider the matter. This court expressed that the time restraints of RAP 16.4(d) and RCW 10.73.090 "prevent the court from *considering* a personal restraint petition that does not meet this standard." 139 Wn.2d at 400.

Having no way to argue around *Benn* or *Shumway*, the Court of Appeals and defendant looked to the rarely and sparingly invoked doctrine of equitable tolling. The court erred in applying this doctrine to a jurisdictional statute. The structure of the statute, as well as case law examining the timeline provisions of RCW 10.73.090, point to a jurisdictional statute and not to just a mere statute of limitations.

“PRPs are special proceedings over which the Court of Appeals has original jurisdiction (concurrent with the Supreme Court) and are governed by the Rules of Appellate Procedure.” *In re Carlestad*, 150 Wn.2d 583, 590, 80 P.3d 587 (2003) (RAP 1.1(e), 16.3(c), 16.17). “The Legislature has authority to determine the jurisdiction of the Court of Appeals.” *In re Johnson*, 131 Wn.2d 558, 565, 933 P.2d 1019 (1997). “Appellate jurisdiction . . . often depends upon compliance with procedural rules that the legislature creates [and] this court has long considered filing an appeal within the statutory time limit as prerequisite for an appellate court to acquire jurisdiction.” *Dougherty v. Department of L & I*, 150 Wn.2d 310, 322, 76 P.3d 1183 (2003) (citing *Cogswell v. Hogan*, 1 Wash. 4, 4-5, 23 P.3d 835 (1890)). This court has recognized the jurisdictional nature of the time limitations outlined in RCW 10.73.090. See *In re Turay*, 150 Wn.2d 71, 76, 74 P.3d 1994 (2003) (rejecting defendant’s claim that the one year time bar did not apply to individuals restrained under the sexual violent predator act because such an argument “reflects a misunderstanding of the appellate courts’ jurisdiction over habeas corpus petitions and the function of the rules of appellate procedure.”).

The structure of RCW 10.73.090 is rigid, and starts with the threshold requirement that all petitions must be filed in one year, and beyond that in only certain limited circumstances. This court has strictly construed the timeliness of filing. *See Shumway v. Payne, supra*. For

example, in considering whether the court should apply the federal mail box rule¹ to personal restraint petitions, this court held that while the language in RAP 18.6(c) permitted the more liberal mailbox rule in some contexts (e.g. appellate briefs), the rule was not enacted for personal restraint petitions. This court acknowledged that a mailbox rule may be desirable but “foisting the rule upon courts and parties by judicial fiat could lead to unforeseen consequences.” *In re Carlstad*, 150 Wn.2d 583, 592, n. 4, 80 P.3d 587 (2003).² The legislature, when enacting RCW 10.73.090, built in certain limited exceptions. Within these exceptions, the legislature could have very easily built in an equitable tolling provision. It did not.

The nature of the timing provision in RCW 10.73.090 also speaks to its jurisdictional nature. Unlike other areas where statute of limitations may be looked to for when a lawsuit should be originated, the time limit in RCW 10.73.090 looks to when a petition should be filed for an already *final judgment*. Statutes of limitations are primarily designed to assure fairness to defendants, and whether they are drafted to dictate the inception of a case, or the outmost limits upon which a person may attack a final judgment, such provisions serve an important purpose:

¹ See *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (the federal mail box rule is a judicially created doctrine).

² Later, the rules were amended to permit a form of the mailbox rule. See RAP 18.5 (e) and GR 3.1.

[Statute of Limitations] “promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.” *Burnett v. New York C. R. Co.*, 380 U.S. 424, 428, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965), (quoting, *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349).

These considerations become even more important when the statute of limitations in question is outlining when a collateral attack may be brought. Treating the one year time limit outlined in RCW 10.73.090 as a jurisdictional bar is also consistent with how the courts have treated the bar on subsequent petitions under RCW 10.73.140. “The Legislature enacted RCW 10.73.140 restricting the *jurisdiction* of the Court of Appeals with respect to petitions for personal restraint, and divesting the Court of Appeals of *jurisdiction* to decide PRPs that raise the “same grounds for review.” *In re Johnson*, 131 Wn.2d 558, 565, 933 P.2d 1019 (1996) (emphasis added). When an appellate court examines petitions filed past the one year time bar, or that meet the definition of successive petitions, they act without jurisdiction.

A recent United States Supreme Court³ decision highlights the error in the Court of Appeal's approach in this matter, and holds that equitable tolling may not be used to circumvent jurisdictional statutes. *See Bowles v. Russell*, 127 S. Ct. 2360, 2366, 168 L.Ed.2d 96 (2007). In *Bowles*, the habeas petitioner failed to file a timely notice of appeal from the Federal District Court's denial of habeas relief and petitioner moved to reopen the filing period which allows for only a 14-day extension. The Court granted the motion, but inexplicably authorized a 17-day extension. The Circuit court held that the notice was untimely and that it therefore lacked jurisdiction to hear the case. 127 S. Ct. 2362. The United States Supreme Court affirmed the Sixth Circuit, holding that a "timely filing of a notice of appeal in a civil case⁴ is a jurisdictional requirement[.]" and "[the courts] ha[ve] no authority to create equitable exceptions to jurisdictional requirements." 127 S. Ct. 2366. The court noted the rigidity of the rule and that some may find it inequitable, but determined it was for Congress to authorize courts to promulgate rules that excuse compliance with statutory time limits, and that while these rules would

³ The U.S. Supreme Court has yet to reach whether equitable tolling is applicable to AEDPA's (Antiterrorism and Effective Death Penalty Act of 1996 – which establishes a one year statute of limitations to federal habeas corpus petitions) statute of limitations. *Pace v. DiGuglielmo*, 544 U.S. 408, 418, f.n. 8, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005) (citing *Pliler v. Ford*, 542 U.S. 225, 124 S. Ct. 2441, 159 L.Ed.2d 338, (2004)).

⁴ Both habeas corpus petitions and personal restraint petitions are civil proceedings. *Castillo v. Kincheloe*, 43 Wn. App. 137, 715 P.2d 1358 (1986); *State v. Labeur*, 33 Wn. App. 762, 657 P.2d 802, review denied, 99 Wn.2d 1013 (1983).

“give rise to litigation testing their reach and would no doubt detract from the clarity of the rule . . . [such rulemaking] would likely lead to less litigation than court-created exceptions.” 127 S. Ct. at 2367.

The same here is true and the Court of Appeals’ authority was limited to that authorized under statute. RCW 10.73.090 creates jurisdictional requirements, and thus equitable remedies may not be turned to in the event the prescribed timelines are not met. As stated by this court over a century ago, “At the expiration of the time limit the cause of action is an adjudicated matter, and no consent of parties nor willingness of courts can recall a controversy thus wisely, by limitation of law, passed into the realm of ended suits.” *Cogswell v. Hogan*, 1 Wash. 4, 23 P. 835 (1890). *See Also, Dougherty v. Dept. of L & I*, 150 Wn.2d 310, 76 P.3d 1183 (2003), Fairhurst dissenting, (“This court has long considered filing an appeal within the statutory time limit as a prerequisite for an appellate court to acquire jurisdiction).

2. ASSUMING, *ARGUENDO*, THAT EQUITABLE TOLLING MAY BE INVOKED TO WAIVE THE JURISDICTIONAL TIME PROVISIONS OF RCW 10.73.090, THE DOCTRINE IS NOT SATISFIED IN THIS CASE WHERE ITS APPLICATION IS INCONSISTENT WITH PERSONAL RESTRAINT PETITION LAW AND WHERE NOTHING PREVENTED THE TIMELY FILING OF A PETITION.

Equitable tolling is a sparingly used remedy. 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 at 593, quoting *State v. Duvall*, supra at 874.
The remedy is “generally used . . . when the plaintiff exercises diligence
and there is evidence of bad faith, deception, or false assurances by the
defendant.” *Id.*

The United States Supreme Court recently had the opportunity to
review whether a habeas petitioner was entitled to use of the doctrine in a
factual scenario bearing a marked resemblance to the case at bar.⁵
Lawrence v. Florida, 127 S. Ct. 1079, 166 L.Ed.2d 924 (2007).

In *Lawrence*, at issue was whether petitioner had met the one year
deadline under AEDPA for the filing of federal habeas relief. The court
examined when did the one year start ticking under AEDPA – was it after
the State Supreme Court’s mandate issued, or was the period tolled during
the pendency of a certiorari petition to the U.S. Supreme Court. 127 S.Ct.
at 1081-82. All but one day of the limitations period had passed during
the 364 days between the time his conviction became final and when he
filed for state postconviction relief. The Court concluded that the former

⁵ The court did not consider whether equitable tolling could be used in the AEDPA
context, but assumed for purposes of the opinion that the doctrine applied where both
parties agreed to the examination of the equitable doctrine. 127 S.Ct. at 1085.

interpretation applied to the statute and that his habeas petition was properly dismissed as untimely.

The Court then considered whether petitioner demonstrated that equitable tolling should be applied. Petitioner argued that the doctrine applied because: (1) there was legal confusion surrounding time periods for filing petitions under AEDPA, (2) his attorney was mistaken in miscalculating the limitations period, and (3) his case presented special circumstances because the state court appointed and supervised his counsel.⁶ In rejecting these arguments the court held:

Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel. . . .

But State's effort to assist prisoners in postconviction proceedings does not make the State accountable for a prisoner's delay. Lawrence has not alleged that the State prevented him from hiring his own attorney or from representing himself. It would be perverse indeed if providing prisoners with postconviction counsel deprived States of the benefit of the AEDPA statute of limitations. See, e.g., *Duncan*, 533 U.S., at 179, 121 S. Ct. 2120, 150 L.Ed.2d 251.

Lawrence v. Florida, 127 S. Ct. 1079, 1085-86 (citations omitted).

Similarly here, nothing falls under the extraordinary circumstances necessary to establish equitable tolling. As in *Lawrence*, nothing

⁶ It was in the record that the appellate court delayed the appointment of an attorney by 296 days. 127 S. Ct. 1079, 1082, f.n.1.

prevented the defendant from representing himself. He could have, at the outset, timely raised the issue of courtroom closure. His attorney was not assigned to brief the issue of courtroom closure, and defendant was not under any false impression or assurances that counsel had the duty to do so. *See*, CP (Appendix A - Order Referring Petition to Panel); *See Also*, *United States v. Kenneth Ray Martin*, 408 F.3d 1089 (8th Cir. May 27, 2005) (Petitioners are expected to diligently pursue their own post-conviction cases). The Court of Appeals placed the blame on itself,⁷ but nothing in the Court of Appeals appointment of counsel prevented petitioner from timely filing a petition himself either before or after appointment.

The problem with the Court of Appeals' analysis is that it assumes petitioner had a right to have appointed counsel renew issues which could have been addressed in a direct appeal format. Assume that the Court of Appeals instead found petitioner's initial claim – hearsay – frivolous and dismissed the petition.⁸ There is no question that if defendant filed a

⁷ In its opinion, the Court of Appeals also looks to the wrong timeframe. It states that the court sat on the briefing for ten months before appointing counsel or determining that the petition is frivolous. *See In re Bonds*, at *3063. RAP 16.11 provides that the "Chief Judge will consider the petition promptly after the time has expired to file petitioner's *reply brief*." The reply brief in this case was filed on 12/19/05, and the order referring petition to panel and appointment of counsel was made on 5/4/06, thus, only a little over four months had elapsed. (Brief of Respondent – Appendix A).

⁸ This was the original position the State took in its pleadings, given that the issue was a garden variety hearsay claim and *Bruton* was addressed in the direct appeal. Inexplicably, the Court of Appeals felt that counsel was warranted to analyze *Bruton* in light of *Crawford*.

second petition, post the one year time, raising the courtroom closure issue, the petition would be dismissed as untimely.

When analyzing whether the equitable tolling doctrine should apply to personal restraint petitions, some commentators have framed the question as whether invocation of the doctrine would be “consistent with the purposes of the specific statute of limitation as well as the general purposes of the statute.” *State v. Duvall*, 86 Wn. App. 871, 904 P.2d 671 (1997); *See generally*, Mark A. Wilner, Notes and Comments, Justice at the Margins: Equitable Tolling of Washington's Deadline for Filing Collateral Attacks on Criminal Judgments, 75 WASH. L. REV. 675, 695 (2000). However, this framework was meant to be used in a case by case basis, after it is already established that the doctrine should be invoked at all. *See Duvall, supra*. Also, when looking into equitable tolling, courts should apply traditional equitable principles. *Greyhound Corp v. Mt. Hood Stages*, 437 U.S. 322, 339, 98 S. Ct. 2370; 57 L.Ed.2d 239 (1978), *citing*, 2 J. Pomeroy, *Equity Jurisprudence* 90-143 (5th ed. 1941). This should include the general principle found in equitable estoppel that one cannot rely on equity doctrines when the petitioner always had the facts before him to raise his claim:

If, at the time when he acted, such party had knowledge of the truth, or had the means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant by not using those means, he cannot claim to have been misled by relying upon the representation or concealment.

2 J. Pomeroy, Equity Jurisprudence at § 810; *C.f. In re Pers. Restraint of Jeffries*, 114 Wn.2d 485, 492, 789 P.2d 731 (1990) (it is an abuse of writ to raise a “new claim” under RCW 10.73.140 if “when the prior petition was filed counsel was fully aware of the facts supporting the ‘new’ claim when the prior petition was filed.”)

Turning to this framework, it supports the argument that the equitable doctrine should not be used in this particular case because it would not be consistent with the purpose of RCW 10.73.090 and its time limitation. As previously argued, the purpose of personal restraint petitions is for a petitioner to call to a court’s attention an unlawful restraint and generally requires a showing of a violation of a personal constitutional right that affected the outcome of the proceeding. *See* RCW 7.36.130. The purpose of the timeline provisions is to encourage finality and promote justice.

Taking the facts here, the court was faced with a petitioner who knocked on its door with a claim of hearsay. Petitioner never properly alleged that his *personal* right to a public trial was violated, or that any such violation affected the outcome of his proceeding. In fact, petitioner specifically waived his right to a public trial or acquiesced to a closed courtroom (*See*, 2/21/02, RP 70-77, 221; 3/7/02, RP 411-412; 3/13/02, 944-46), therefore, defendant can only be raising a violation of a public right to trial verses a private right. *Compare*, Art. 1, § 22 of the

Washington Constitution (private right to public trial), with *Art. 1, §10 of the Washington Constitution* (public right to public trial).

Irregardless of this, the Court of Appeals invoked the doctrine of equitable tolling to open up a final case and permit the personal restraint petition to turn into a form of a direct appeal. This ruling does not serve the purpose of either the one year time bar or personal restraint petitions. Instead, it is an abuse of the process and was done outside RAP 18.8(a) and RCW 10.73.090. Nor is invocation of the doctrine warranted where defendant could have exercised diligence in amending the petition himself, at any time. Having raised the *Bruton* issue which relied on transcripts from the trial, defendant could have similarly raised the public trial issue from those transcripts. He chose not to do so and the action of the Court of Appeals (or alleged inaction as the case may be) did not prevent this filing.

3. RCW 10.73.150 LIMITS THE APPOINTMENT OF COUNSEL IN THE PERSONAL RESTRAINT CONTEXT TO CASES WHERE PETITIONER REQUESTS THAT APPOINTMENT AND THE CHIEF JUDGE HAS SCREENED THE ISSUE RAISED BY PETITIONER FOR FRIVOLITY.

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 where the petitioner:

(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) (emphasis added). 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).

Here, petitioner (1) never requested the assistance of an attorney in the pursuit of his hearsay claim, and (2) the chief judge never screened the claim of courtroom closure for frivolity. *See* PRP and Brief of Petitioner; Order Referring Petitioner to Panel – Appendix A. Thus, the appointment was done in violation of RCW 10.73.150. The Court of Appeal’s ruling permits appointed counsel to raise issues in its opening brief that (1) were not raised by the petitioner, (2) were not screened to determine whether they had merit, and (3) were not screened for frivolity. Indeed, had a frivolity screening been done with the proper personal restraint lens, the Chief Judge may have very well have concluded that the courtroom closure issue was frivolous. Instead, the court embarked on a direct appeal adventure, reaching the merits of the unscreened issue, which ran afoul of

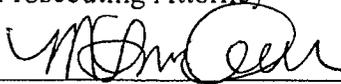
the legislature's express determination that any right to attorney post trial and appeal is limited.

D. CONCLUSION.

Courts cannot condone the use of a personal restraint petition as a second direct appeal. *In re Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). The untimely amendment of the petition in this case flies in the face of this court's ruling in *Benn*, and *Shumway supra*, and allows a court to act without jurisdiction. Turning to the equitable doctrine of tolling in this case is inappropriate where petitioner can only allege a violation of a public right and where there was nothing that prevented the defendant from timely filing a petition. For these reasons, the State requests reversal of the Court of Appeals and dismissal of this petition.

DATED: May 2, 2008.

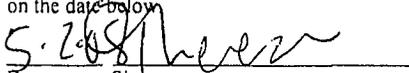
GERALD A. HORNE
Pierce County
Prosecuting Attorney


MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

**FILED AS ATTACHMENT
TO EMAIL**

Certificate of Service:

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

5.26.08 
Date Signature


Collins

APPENDIX “A”

*Order Referring Petition to Panel, Appointing Counsel
and Setting Briefing Schedule*

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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

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

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

33704-5-II/3

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