

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

IN RE THE PERSONAL RESTRAINT PETITION OF:

HOYT WILLIAM CRACE,

PETITIONER.

**SURREPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
DEPUTY

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A. INTRODUCTION

This Court previously permitted Petitioner to file an amended opening brief, expanding his argument arising from the fact that Crace was required to wear jail-issued sandals in court to include an ineffectiveness of assistance of counsel claim. The Court held that “(b)ecause the amendment pertains to issues raised in his initial petition, *In re Benn* does not bar the petition.” The Court then directed the State to file a response within 60 days of the ruling. The State sought an extension of time, but ultimately filed a response on December 23, 2008.

In that response, the State asks this Court to reconsider its October 20, 2008, order granting Petitioner’s motion to amend. This Court should not consider a motion that is both untimely (RAP 17.7) and contained within a brief. RAP 17.4 (d).¹

Counsel was aware that Mr. Crace was required to wear jail sandals in court. In addition, at least one juror notes that she saw the sandals—and there is no reason to conclude that her view was different than any other juror. In any event, this is precisely why the court rules require evidentiary hearings where the claim “cannot be determined solely on the record.”

¹ In any event, *Restraint Petition of Bonds*, __ Wn.2d __, 196 P.3d 672 (2008), does not require a different outcome. *Bonds* involved a completely new issue raised after expiration of the time bar, as opposed to a closely related issue raised in response to new facts asserted in the State’s response. In addition, the Court in *Bonds* cited with approval to *Benn*, noting that *Benn* had not raised an equitable tolling argument.

Thus, Crace seeks a remand for an evidentiary hearing, if this Court does not grant relief on his first claim (failure to submit a lesser included instruction).

B. ARGUMENT

2. THIS COURT SHOULD ORDER AN EVIDENTIARY HEARING TO DETERMINE WHETHER CRACE WAS COMPELLED TO DRESS IN ORANGE JAIL SANDALS; HOW MANY JURORS KNEW THE SANDALS WERE FROM THE JAIL; WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT; AND TO DETERMINE WHETHER CRACE WAS PREJUDICED.

Crace has consistently requested an evidentiary hearing in order to resolve this issue. In response, the State, resorts to hyper-technicality and now argues that because Crace's extra-record declarations do not explicitly state that Crace's counsel knew the man who was brought shackled at his legs to court and who sat next to him every day during trial wore jail-issued sandals, Crace has fatally failed to prove an element of his claim.

Of course, the PRP rules both permit the State to file its own declarations and burden the State with the same requirement of proof. In response, the State has presented absolutely no proof of any kind contesting Crace's facts about his appearance in court. In any event, Crace now submits a declaration stating that counsel was aware and failed to object to the requirement that Crace wear the jail issued sandals. Once again, Crace asks for an evidentiary hearing. At that hearing, the parties should be given an opportunity to fully explore what Crace's counsel knew

about the requirement that his client wear jail-issued sandals and why he failed to object.

The State next argues there is no proof any juror saw Crace's sandals while he was seated in court. To the contrary, the juror's newspaper article appended to Crace's PRP, which she references in her signed declaration, notes that she recognized Crace in the courtroom as the prisoner she had seen earlier in shackles being escorted by jail officers *because* she noticed in court that he was wearing the same orange, jail-issued sandals. In her article, she notes that Crace was "(o)bviously, an accused prisoner in street clothes, sans real shoes..." She later described Crace as "Mr. Sandal Foot." This is hardly the lack of proof claimed by the State.

If *other* jurors also saw the sandals (and the State has failed to demonstrate or even surmise why the sandals would be visible to one juror and not others), the unfair prejudice suffered by Crace was increased. However, Crace has certainly crossed the necessary threshold in order to obtain an evidentiary hearing. RAP 16.11. At that hearing, the parties should be given the opportunity to question all jurors about whether they were aware of Crace's footwear and its significance.

Defense counsel's failure to object to requiring defendant to wear visible jail-issued garments or restraints, where there is no compelling state interest justifying the garment or restraint, can support an

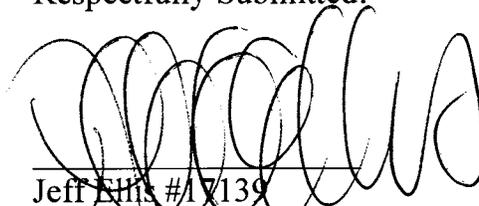
ineffectiveness claim. *See Personal Restraint of Elmore*, 162 Wn.2d 236, 172 P.3d 335 (2007).² However, in order to decide whether such a conclusion applies here, a fact-finding hearing should take place where the Court hears from the witnesses and evaluates credibility. In addition to exploring how many jurors saw Crace's jail-issued sandals, the Court should take testimony on what trial counsel knew, when he knew it, and why he did not object.

C. CONCLUSION

Based on the above, this Court should either grant Crace's petition on his first claim or should remand this case for an evidentiary hearing.

DATED this 21st day of January, 2009.

Respectfully Submitted:



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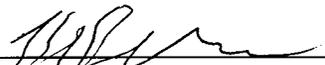
² The State's citation to *United States v. Cronin*, 466 U.S. 648, 656 (1984), is curious, dubious, or both, given that *Cronin* holds that in certain conflict cases the traditional two-part ineffectiveness test does not apply. Crace does not raise a *Cronin* claim. Thus, the traditional *Strickland* two-part test applies.

DECLARATION OF HOYT WILLIAM CRACE

I, Hoyt Crace, declare:

1. I am the petitioner in this Personal Restraint Petition.
2. During trial, my attorney was aware that I was forced to wear jail sandals to court because I told him and because he saw them on my feet.
3. I sat right next to Mr. DePan every day during trial. When I got to court the jail officers would escort me to counsel table, once my attorney was there and trial was ready to begin. Then, after I sat down next to my attorney, they would take the shackles off my legs. The shackles were right next to my jail-issued bright orange sandals. My attorney was able to see this happen every day during trial.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY INFORMATION AND BELIEF.



Hoyt Crace

1-16-09

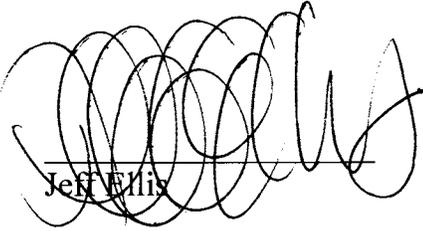
Date and Place

CERTIFICATE OF SERVICE

I, Jeff Ellis, certify that on January 21, 2009, I served the party, court reporters, and Petitioner listed below with a copy of the attached *Surreply in Support of PRP* by mailing it, postage pre-paid to:

Kathleen Proctor
Pierce County Prosecutor's Office
930 Tacoma Avenue South, Room 946
Tacoma WA 98402-2171

1/21/09 Seattle, WA
Date and Place



Jeff Ellis

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