

Supreme Court No. 80995-0
(COA No. 33704-5-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: THE PERSONAL RESTRAINT OF ROBERT BONDS,
STATE OF WASHINGTON,

Petitioner,

v.

ROBERT BONDS,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

ANSWER TO PETITION FOR REVIEW

FILED APPEALS DIV. # RECEIVED
COURT OF APPEALS SUPREME COURT
STATE OF WASHINGTON
2008 JAN 11 PM 4:54
08 JAN 17 AM 8:02
FILED APPEALS
COURT OF APPEALS
DIVISION II
08 JAN 15 AM 11:59
STATE OF WASHINGTON
BY DEPUTY
CLERK
JY RONALD REARDEN ENTER

NANCY P. COLLINS
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF RESPONDENT	1
B. COURT OF APPEALS DECISION.....	1
C. ISSUE PRESENTED FOR REVIEW.....	1
D. STATEMENT OF THE CASE	2
E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED	4
1. THIS COURT SHOULD DENY REVIEW BECAUSE THE STATE DID NOT TIMELY FILE ITS MOTION FOR DISCRETIONARY REVIEW	4
a. The Rules of Appellate Procedure strictly mandate that a motion for discretionary review must be received by the Court within 30 days of the decision appealed	4
b. The prosecution did not comply with the strict provisions of the Rules of Appellate Procedure	5
c. The State should not be given the extraordinary remedy of an extended deadline for filing a motion for discretionary review.....	6
2. THE UNPUBLISHED COURT OF APPEALS DECISION DOES NOT MEET THE CRITERIA FOR REVIEW BY THIS COURT.....	8
a. The unpublished discretionary determination by the Court of Appeals does not meet the criteria for review by this Court.....	8
b. The State misrepresents the basic facts of the case.	9
c. The unpublished Court of Appeals decision is not contrary to decisions by this Court	11
d. The violation of the defendant's right to a public trial is a right by closing the courtroom to the public during	

witness testimony is a violation of Mr. Bonds's rights,
not simply a nebulous public right 17

F. CONCLUSION..... 18

TABLE OF AUTHORITIES

Washington Supreme Court

Douchette v. Bethel School District, 117 Wn.2d 805, 818 P.2d 1362 (1991) 15

In re Pers. Restraint of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998) 8, 12, 13

In re Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). 14

Shumway v. Payne, 136 Wn.2d 383, 964 P.2d 349(1998). 8, 11, 12

State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) ... 10, 11, 13

State v. Duvall, 86 Wn.App. 871, 940 P.2d 671 (1997), rev. denied, 134 Wn.2d 1012 (1998)..... 15

State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) 14

State v. Littlefair, 112 Wn.App. 749, 51 P.3d 116 (2002), rev. denied, 149 Wn.2d 1020 (2003)..... 15, 17

State v. Robinson, 104 Wn.App. 657, 17 P.3d 653, rev. denied, 145 Wn.2d 1002 (2001)..... 15

Washington Court of Appeals

In re Personal Restraint of Hoisington, 99 Wn.App. 423, 993 P.2d 296 (2000) 15, 17

United States Supreme Court

Bowles v. Russell, __ U.S. __, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) 17

Delaware v. Ardsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) 10

Federal Decisions

<u>Benn v. Lambert</u> , 283 F.3d 1040 (9 th Cir. 2002), <u>cert. denied</u> , 537 U.S. 942 (2002)	8
<u>Stevens v. Delaware Corr. Ctr.</u> , 295 F.3d 361(3 rd Cir. 2002)	11
<u>Whitney v. Horn</u> , 280 F.3d 240(3 rd Cir. 2002)	12

Statutes

28 U.S.C. section 2254.....	11
RCW 10.73.150.....	9

Court Rules

RAP 1.2	4
RAP 13.3	1
RAP 13.4	1, 4, 5, 8, 18
RAP 13.5	1, 4, 5, 8, 18
RAP 13.5A.....	1, 8, 18
RAP 16.11	9
RAP 18.6	5
RAP 18.8	4, 7

A. IDENTITY OF RESPONDENT

Robert Bonds, respondent here and petitioner below, asks this Court to deny the State's request for discretionary review of the unpublished Court of Appeals decision terminating review designated in Part B of this answer pursuant to RAP 13.3(d); RAP 13.4(b); RAP 13.5(a); and RAP 13.5A(b), (c).

B. COURT OF APPEALS DECISION

The State seeks review of the unpublished Court of Appeals decision dated November 14, 2007, a copy of which is attached as Appendix A. No party filed a motion to publish or motion for reconsideration.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review of the unpublished Court of Appeals decision solely on the grounds that the Court of Appeals erred by allowing Mr. Bonds to amend his timely filed personal restraint petition and add an uncontestedly meritorious issue, when the amendment occurred two months after the one year deadline for filing a personal restraint petition had passed, and when the Court of Appeals reasoned that the doctrine of equitable tolling permitted an amendment as Mr. Bonds acted with reasonable diligence and the Court contributed to the delay by failing to

promptly review and appoint counsel as required by statute and court rule?

2. Should the State's motion for discretionary review be dismissed when it was not filed in the Supreme Court or Court of Appeals within the 30 days required by court rule?

D. STATEMENT OF THE CASE

On May 9, 2005, the Court of Appeals issued a mandate ending Robert Bonds's direct appeal and affirming his convictions for two counts of attempted murder in the first degree. On July 22, 2005, Mr. Bonds filed a personal restraint petition, arguing his appellate counsel rendered ineffective assistance by failing to challenge the admission of testimonial statements by his co-defendants in violation of the Confrontation Clause of the Sixth Amendment. Along with his timely filed personal restraint petition, Mr. Bonds asked the Court to appoint counsel to assist him.

The Court of Appeals did not appoint counsel or issue any rulings on the personal restraint petition until May 5, 2006, when it ruled the petition raised a non-frivolous issue that merited review and appointed counsel. This ruling was issued almost ten months after Mr. Bonds filed his personal restraint petition and four days shy of one year after the mandate was issued.

On July 26, 2006, Mr. Bonds's attorney filed a brief in support of the personal restraint petition, and also filed a motion asking the Court of Appeals for permission to add an additional issue for consideration. The Commissioner granted this motion. The Court of Appeals affirmed the Commissioner's ruling and denied the State's motion to modify. The Court of Appeals stayed the case so the State could file a motion for discretionary review. This Court denied the prosecution's motion for discretionary review and stated it could raise its claim of an improper amendment of the petition in the Court of Appeals.

The Court of Appeals heard oral argument in the case after the State filed its brief. The State's brief did not address the merits of Mr. Bonds's claim that the trial court impermissibly closed the courtroom several times during trial, but instead argued only that Mr. Bonds should not be allowed to raise this issue in his personal restraint petition. The Court of Appeals issued its unpublished ruling on November 14, 2007, finding that Mr. Bonds should be permitted to amend his petition and ruled the trial court improperly closed the courtroom during his trial. The Court of Appeals reversed Mr. Bonds's convictions due to the improper courtroom closure in an unpublished decision.

The facts are further set forth in the Court of Appeals opinion, pages 2-4, Brief of Petitioner, pages 4-7, 33-37; and Petitioner's Reply, pages 11-21. The facts as outlined in each of these pleadings is incorporated by reference herein.

E. ARGUMENT

1. THIS COURT SHOULD DENY REVIEW BECAUSE THE STATE DID NOT TIMELY FILE ITS MOTION FOR DISCRETIONARY REVIEW

a. The Rules of Appellate Procedure strictly mandate that a motion for discretionary review must be received by the Court within 30 days of the decision appealed. After the Court of Appeals issues a decision terminating review, a party has 30 days in which to file a motion for discretionary review or petition for review. RAP 13.4(a); RAP 13.5(a). Although many rules of appellate procedure are to be interpreted liberally, with the court's focus on the exercise of justice rather than strict adherence to the rules, the deadline for filing a petition for review or motion for discretionary review are not among those rules that may be liberally applied. RAP 1.2(a), (c); RAP 18.8(b). RAP 18.8(b) provides,

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration. The appellate court will ordinarily

hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section. The motion to extend time is determined by the appellate court to which the untimely notice, motion or petition is directed.

RAP 13.5(a) states that a motion for discretionary review must be filed in the Supreme Court and a copy served in the Court of Appeals within 30 days after the date of the decision. Similarly, RAP 13.4(a) states that a petition for review must be filed in the Court of Appeals within 30 days after the decision is filed.

Motions for discretionary review and petitions for review are timely filed only if actually received by the appropriate appellate court within the time for filing; they are not timely filed if simply mailed within the time for filing. RAP 18.6(c). RAP 18.6(c) states that unlike some other pleadings such as appellate briefs, a petition for review "is timely filed only if it is received by the appellate court within the time for filing."

b. The prosecution did not comply with the strict provisions of the Rules of Appellate Procedure. In the case at bar, the Court of Appeals issued its unpublished decision on November 14, 2007. Friday, December 14, 2007, was the due date for the State's petition for review.

The State filed its motion for discretionary review, incorrectly

labeled a petition for review, in the Supreme Court on December 18, 2007. Letter from Supreme Court (copy attached as App. B). The undersigned counsel also received a copy of the petition on December 18, 2007. Receipt stamped cover sheet (copy attached as App. C). The Court of Appeals ACORDS computer system indicates it received a copy on December 17, 2007. ACORDS (copy of computer entry attached as App. D).

The State has not explained that any extraordinary circumstances prevented it from filing the petition by the December 14, 2007, due date. The State neither filed the petition in the Court of Appeals nor in the Supreme Court by the mandatory deadline.

c. The State should not be given the extraordinary remedy of an extended deadline for filing a motion for discretionary review. At not time has the State mounted any challenge to the merits of Mr. Bonds's claim that the trial court repeatedly and improperly closed the courtroom to the public. Opinion at 15-18. The prosecution has not suggested in any of its pleading that the trial court had some legitimate basis for repeatedly closing the courtroom repeatedly during Mr. Bonds's trial.

Instead, the State argues only that Mr. Bonds should not be given any equitable relief and allowed to amend his timely filed personal restraint petition to add this issue. The State unforgivingly

demands no relief be accorded Mr. Bonds, even if his original appellate counsel provided ineffective assistance and even though the Court of Appeals found he was entitled to equitable tolling as a matter of its discretionary authority.

The State has not presented any explanation for its failure to comply with the Rules of Appellate Procedure and file its motion for discretionary review within the mandatory timeframe. As RAP 18.8(b) dictates, when a party seeks to appeal a final Court of Appeals decision, the mandatory deadlines will not be extended unless there are extraordinary circumstances. No extraordinary circumstances are present here because counting 30 days and filing a motion under the Rules of Appellate Procedure is not a complicated endeavor for an attorney and the State has not suggested that any extraordinary circumstances prevented it from timely filing its motion. Any effort by the prosecution to concoct an extraordinary circumstance at this late date would simply be an acknowledgement that the State disregarded its mandatory obligations under the Rules of Appellate Procedure. The State's motion for discretionary review should be denied as untimely filed.

2. THE UNPUBLISHED COURT OF APPEALS
DECISION DOES NOT MEET THE CRITERIA FOR
REVIEW BY THIS COURT

a. The unpublished discretionary determination by the Court of Appeals does not meet the criteria for review by this Court. RAP 13.4(b) sets forth the criteria for review governing motions for discretionary review from a decision terminating review after a personal restraint petition. See RAP 13.5(a); RAP 13.5A(c); RAP 16.14(c). RAP 13.4(b) states:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The State contends this case meets RAP 13.4(b)(1) because it is in conflict with Shumway v. Payne, 136 Wn.2d 383, 398, 964 P.2d 349 (1998); and In re Pers. Restraint of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998), rev'd sub. nom Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002), cert. denied, 537 U.S. 942 (2002). But neither case is even on point, because they do not discuss the legal reasoning used in the Court of Appeals decision. The State's remaining arguments are similarly baseless, and because the

unpublished, fact-specific, and discretionary determination by the Court of Appeals does not present issues of substantial public importance, review should be denied.

b. The State misrepresents the basic facts of the case. The prosecution's argument hinges on its misrepresentation of the procedural history of the case. Two months after the Court of Appeals issued its mandate ending Mr. Bonds's direct appeal, he filed a personal restraint petition arguing that his appellate counsel provided ineffective assistance by failing to raise a claim that the prosecution violated his right to confront witnesses by introducing unopposed statements by co-defendants and relying on those statements during closing argument as evidence implicating Mr. Bonds.

Contrary to the requirement in RAP 16.11 and RCW 10.73.150(4) that the Court of Appeals "promptly" review any personal restraint petition and appoint counsel, the Court of Appeals did not review Mr. Bonds's petition or appoint counsel for ten months. Upon review, the Court found he presented a nonfrivolous issue, appointed counsel, and ordered counsel to file a supplemental brief on the Sixth Amendment issue presented in the petition.

Because an alleged violation of the confrontation clause is

subject to harmless error analysis, appointed counsel necessarily read the trial testimony before filing the briefing ordered by the Court of Appeals. Delaware v. Ardsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (discussing harmless error analysis for violation of confrontation rights). In the course of reviewing the trial testimony, counsel discovered four separate occasions where the trial court had closed the courtroom to the public during the testimony of witnesses without undertaking the analysis required by State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) and mandated by numerous additional cases. See Opinion at 16.

Mr. Bonds then asked the Court of Appeals for permission to add this issue to the personal restraint petition. The Court of Appeals granted this motion over the prosecution's objection.

The prosecution's motion for discretionary review misrepresents these facts and suggests appointed counsel entered into an inappropriate frolic by reading the thousands of pages of trial testimony to search for additional issues so Mr. Bonds could have two appeals. This depiction of events is untrue and unfair, as counsel simply read the portion of the record necessary to present the briefing ordered by the Court of Appeals. The trial court's improper, repeated courtroom closures were an obvious error that

should have been plain to any competent attorney reviewing the trial proceedings. See Bone-Club, 128 Wn.2d at 257.

Furthermore, Mr. Bonds did not skirt the requirement that the Court of Appeals review issues in a personal restraint petition for frivolousness. Mr. Bonds asked the permission of the Court of Appeals to add this issue to the petition. By granting that motion, the Court of Appeals implicitly determined the issue was not frivolous. This vein of argument on behalf of the prosecution is entirely specious, as the prosecution has never, in this Court or in the Court of Appeals, attempted to concoct any ground on which the violation of the right to a public trial could be viewed as anything less than mandatory reversible error.

c. The unpublished Court of Appeals decision is not contrary to decisions by this Court. In Shumway, the petitioner filed a habeas petition in federal court without asking this Court to review the Court of Appeals decision, and therefore had not exhausted her state court remedies.¹ 136 Wn.2d at 388-89. The federal court asked the Supreme Court whether Shumway was procedurally barred from presenting her claims. Id. at 387. The

¹ A federal court may not grant a writ of habeas corpus unless the petitioner has "exhausted the remedies available in the courts of the State." 28 U.S.C. section 2254(b)(1)(A). Exhaustion means a petitioner must "fairly present" all federal claims to the highest state court before bringing them in federal court." Stevens v. Delaware Corr. Ctr., 295 F.3d 361, 369 (3rd Cir. 2002) (quoting Whitney v. Horn,

Supreme Court ruled that Shumway could not simply be excused from ignoring the requirement that final Court of Appeals rulings be timely presented to the Supreme Court, especially when she did not contend that there was any extraordinary circumstance that kept her from following the established avenues of appeal. Id. at 396-97. The Shumway Court did not discuss equitable tolling. Id.

Similarly, in Benn, the doctrine of equitable tolling was never even broached by the petitioner, and likely for good reason, as Benn did not seemingly have equitable grounds for extending his deadline for adding claims to a petition four years after counsel was appointed. In Benn, court-appointed counsel reviewed the record and filed a personal restraint petition. Id. at 880. Approximately one year later, the Supreme Court remanded the case for an evidentiary hearing on certain specified issues. Id. at 882. After the reference hearing, Benn filed a supplemental brief, challenging the trial court's findings during the reference hearing and adding additional issues supported by evidence from the reference hearing. Id. at 884. The Court accepted the supplemental brief and considered these newly added issues pertaining to the reference hearing. Id. But later, Benn filed an additional motion to add another issue to the personal restraint petition relating to the

280 F.3d 240, 250 (3rd Cir. 2002)).

self-defense jury instruction used at trial. Id. The Benn Court rejected Benn's final motion to add the jury instruction issue, filed four years after counsel was appointed, on the grounds it was both untimely and unmeritorious. 134 Wn.2d at 938-41. The Court noted that Benn had counsel throughout this time period, the instructional issue was one that should have been reasonably available to him earlier, and would not lead to reversal in any event. Id.²

The Court of Appeals ruling in the case at bar rests on reasoning different from Benn, not to mention the distinctly different circumstances of the case, and therefore the ruling is not contrary to Benn. Mr. Bonds acted diligently throughout the proceedings, sought equitable relief within two months of the deadline expiring, and did not have counsel to assist him even though the Court of Appeals was required to appoint counsel promptly upon the filing of his petition ten months earlier. The Court of Appeals considered also that the nature of the error is one that deprives a defendant of the opportunity to object, as the court closed the courtroom without explaining the defendant's right to a public trial. Opinion at 14, citing Bone-Club, 128 Wn.2d at 261.

² Benn was reversed by the Ninth Circuit Court of Appeals, based on its erroneous application of law relating to the prosecution's failure to disclose

Furthermore, the State repeatedly asserts that Mr. Bonds is receiving some entirely unacceptable benefit by having counsel assist him in the personal restraint petition while he already had his statutorily-entitled counsel on appeal. The State never mentions the fact that the trial court neglected its fundamental duty to ensure open court proceedings and that the original appellate counsel was *per se* ineffective, performing below the bare level of competence required by the constitution, in ignoring the numerous courtroom closures in the direct appeal. See *In re Restraint of Orange*, 152 Wn.2d 795, 813, 100 P.3d 291 (2004) (“we agree with Orange that the failure of his appellate counsel to raise the issue [of courtroom closure] on appeal was both deficient and prejudicial and therefore constituted ineffective assistance of counsel.”); see also *State v. Easterling*, 157 Wn.2d 167, 180-81, 137 P.3d 825 (2006) (rejecting State’s argument that courtroom closures without appropriate trial court analysis could be de minimus error). While ineffective assistance of appellate counsel may not alone be a basis for extending the deadline to add an issue to a personal restraint petition, it is not a factor that should simply be ignored when considering whether there are equitable reasons for extending a deadline.

pertinent impeachment information. 283 F.3d at 1054.

Furthermore, the prosecution suggests that equitable tolling is inapplicable to extend the deadline for filing a personal restraint petition. Washington has long applied the doctrine of equitable tolling to extend the statute of limitations when the opposing party or court has engaged in some harmful action, by bad faith, deception, or false assurance and the plaintiff has been diligent. Douchette v. Bethel School District, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991); State v. Littlefair, 112 Wn.App. 749, 758, 51 P.3d 116 (2002), rev. denied, 149 Wn.2d 1020 (2003); State v. Duvall, 86 Wn.App. 871, 874, 940 P.2d 671 (1997), rev. denied, 134 Wn.2d 1012 (1998); In re Personal Restraint of Hoisington, 99 Wn.App. 423, 430-31, 993 P.2d 296 (2000) (applying equitable tolling to extend deadline in RCW 10.73.090); see also State v. Robinson, 104 Wn.App. 657, 667, 17 P.3d 653, rev. denied, 145 Wn.2d 1002 (2001).

Here, the Court of Appeals found its own actions in disregarding the requirement that it act promptly in reviewing any personal restraint petition and appoint counsel served as the harmful act that allowed Mr. Bonds to seek equitable tolling. Opinion at 14-15. The Court of Appeals acknowledged that both Mr. Bonds and counsel acted diligently in presenting issues to the court and in reviewing an extremely large and complex case in a

short amount of time. Id. The Court of Appeals further acknowledged that it disregarded its obligation to promptly assess a personal restraint petition, decide whether it merited review, and appoint counsel. Because it took the Court of Appeals almost ten months to perform this initial screening, the Court of Appeals majority felt its dilatory actions were the principle factor in taking Mr. Bonds's personal restraint petition outside of the one-year time limit in which he could have sought review of any issues he wanted.

The dissenting judge in the Court of Appeals reasoned that the purposes of equitable tolling did not apply to the case at bar because the importance of finality could not be overcome by Mr. Bonds's failure to raise the public trial violation earlier. Opinion at 19-20 (Penoyar, J., dissenting). While the purposes of finality are served by strictly enforcing mandatory deadlines for challenging a court ruling, Mr. Bonds timely and promptly challenged the underlying judgment, filing a personal restraint petition within three months of the mandate's issuance. Accordingly, the interested parties were not lulled into a false sense that the decision would not be challenged.

Finally, the prosecution cites a recent decision by the United States Supreme Court and asserts that the timeline for filing a personal restraint petition is a jurisdictional bar and cannot be

equitably tolled in any instance. See Bowles v. Russell, __ U.S. __, 127 S.Ct. 2360, 2366, 168 L.Ed.2d 96 (2007) (finding notice of appeal deadline required under federal statute was jurisdictional). But unlike the notice of appeal provisions at issue in that case, RCW 10.73.090 “functions as a statute of limitation, and not as a jurisdictional bar,” and “is subject to the doctrine of equitable tolling.” Littlefair, 112 Wn.App. at 757-59 (quoting Hoisington, 99 Wn.App. at 431).

d. The violation of the defendant’s right to a public trial is a right by closing the courtroom to the public during witness testimony is a violation of Mr. Bonds’s rights, not simply a nebulous public right. In an apparent effort to assert an issue of public importance, the prosecution incorrectly frames the constitutional violation in the case at bar as a violation of the public’s right to access court proceedings and not Mr. Bonds’s right to an open public trial. Both entities were deprived of their separate rights to a public trial in the case at bar when the trial court repeatedly and baselessly closed the courtroom during the proceedings. But the State takes no issue with the substance of the Court of Appeals decision or its legal reasoning in finding the right to a public trial was violated. Therefore, the public nature of the legal violation does not provide grounds for overturning the Court of Appeals

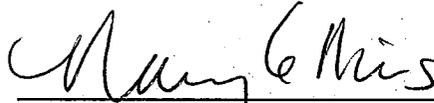
decision.

F. CONCLUSION

For the reasons stated above, this Court should deny the State's motion for discretionary review under RAP 13.4(b); RAP 13.5(a) and RAP 13.5A(c).

Dated this 11th day of January 2008.

Respectfully submitted,



NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

FILED
COURT OF APPEALS
DIVISION II

07 NOV 14 AM 9:44

STATE OF WASHINGTON

BY _____

DEPUTY

RECEIVED

NOV 15 2007

Washington Appellate Project

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Personal Restraint Petition of
ROBERT CHARLES BONDS, JR.

No. 33704-5- II

UNPUBLISHED OPINION

ARMSTRONG, J. -- Robert Charles Bonds, Jr. seeks relief from personal restraint imposed following his conviction of two counts of first degree attempted murder and one count of unlawful possession of a firearm. He argues that the trial court (1) violated his right to confront the witnesses against him when it admitted his non-testifying codefendants' statements, and (2) violated his right to a public trial when it closed the courtroom to the public on four occasions. Because the trial court redacted the codefendants' statements to remove any reference to Bonds and instructed the jury not to consider them as evidence against him, admission of the statements did not violate Bonds's confrontation rights. But because the trial court did not conduct the required balancing analysis or make the required findings before closing the courtroom, the trial court violated Bonds's and the public's right to an open trial. And because

this is a structural error, which we presume prejudiced Bonds, we grant his petition, reverse his convictions, and remand for a new trial.

FACTS

In 2002, a jury convicted Robert Bonds and two codefendants, Spencer Miller and Tonya Wilson, of two counts of attempted first degree murder; it also convicted Bonds of one count of unlawful possession of a firearm. We affirmed. *State v. Miller*, No. 28847-8-II, 2004 WL 1835092 (Aug. 17, 2004), *review denied*, 154 Wn.2d 1002 (2005).

The charges arose from a shooting in the parking lot of a Tacoma AM/PM store. Bonds, Miller, and Bonds's cousin, Andre Bonds, were members of a Tacoma street gang called the Hilltop Crips. Wilson, although not a member of the gang, was a Crips associate. Daron Edwards, who was injured in the shooting, was not a gang member but grew up in Compton, California, where a rival street gang, the Bloods, originated. At the time, Edwards was living with Keith Harrell, another victim of the shooting.

The afternoon before the shooting, Andre and Edwards confronted each other in front of Harrell's residence; Andre displayed a gun. Later, the confrontation escalated when Edwards went to a nightclub that the Crips frequented. Andre and Edwards fought, with Edwards getting the better of Andre. Bonds displayed a gun and threatened Edwards and his friends.

Edwards, Harrell, and several friends later went to the AM/PM, where Bonds, Andre, Miller, Wilson, and others were already gathered. Several individuals on both sides of the dispute were armed. Edwards briefly confronted Andre. Andre then got in his car and, as he drove out of the parking lot, gunfire erupted from multiple locations. Witnesses testified that gunshots came from the car Wilson was driving with Bonds as her passenger and from behind

the AM/PM where Miller was standing. Edwards and Harrell were both shot.

During the investigation, Miller gave two taped statements to police and Wilson gave one taped statement. Following a CrR 3.5 hearing, the trial court admitted the statements subject to redaction of all references to Bonds. The State submitted proposed redactions. Bonds agreed to the State's proposed redactions and proposed several additional redactions. The trial court removed several additional references to Bonds from both statements.

During Bonds's trial, the trial court closed the courtroom to the public on four occasions. The first closure occurred during a hearing on Harrell's competency to testify. Just before the hearing, the trial court ruled on the defendants' motion to exclude witnesses from the courtroom during both witness testimony and arguments by counsel. The trial court granted the defense motion, but it also ruled sua sponte that it would fully close the courtroom during Harrell's testimony.¹ The trial court was concerned about protecting Harrell's privacy because the testimony could touch on health care issues.

The trial court closed the courtroom again before Cory Thomas testified on behalf of the State. During the closed session, Thomas testified that he intended to invoke his Fifth Amendment privilege against self-incrimination concerning questions about whether he had possessed a firearm and testified about whether a detective had exerted any improper influence over him. The trial court granted him immunity on a possible charge of possessing a firearm and informed him of a court ruling limiting his testimony. The trial court closed this hearing at the State's request; Bonds concurred in the closing.

¹ The trial court granted the State's request to permit Harrell's wife to remain in the courtroom during his testimony.

The third closure occurred during Salena Daniels's testimony. When she answered a question by complaining about police harassment, the trial court ordered the jury and the public out of the courtroom. The court admonished Daniels that she was bordering on being in contempt of court and that she needed to respond to the questions she was asked. The trial court then brought the jury back in and permitted the public to reenter the courtroom.

Finally, the trial court closed the courtroom during counsel's argument on whether to admit hearsay testimony from Judith Harrell, Keith Harrell's wife. The court had heard testimony on the issue during the previous session without closing the court. But before counsel began arguing the issue, the court cleared the courtroom. Neither party requested the closure.²

Bonds timely filed this personal restraint petition challenging his convictions based on a violation of his right to confrontation. Over the State's objection, we permitted Bonds to amend his petition more than one year after his conviction became final to add the claim that the trial court violated his right to a public trial. The Supreme Court denied discretionary review of our decision permitting Bonds to amend his petition.

ANALYSIS

I. PERSONAL RESTRAINT PETITION STANDARDS

A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). A personal restraint petitioner must prove either constitutional error that results in actual prejudice

² The record does not show when the trial court permitted the public to return to the courtroom, but it called in the jury after it ruled on the evidence issue, lifted a gag order it had imposed on a detective, admitted several exhibits, heard argument on redacting an exhibit, and discussed an alleged threat against a witness.

or nonconstitutional error that results in a miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petitioner must state the facts on which he bases his claim of unlawful restraint and state the evidence available to support the allegations; conclusory allegations alone are insufficient. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988).

II. RIGHT TO CONFRONTATION

Bonds first contends that the trial court's admission of his codefendants' statements violated his right to confront the witnesses against him under *Crawford v. Washington*, 541 U.S. 36, 60-61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We disagree.

A. Crawford

The Sixth Amendment to the United States Constitution grants criminal defendants the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. In *Crawford*, the United States Supreme Court held that the confrontation clause "applies to 'witnesses' against the accused--in other words, those who 'bear testimony.'" *Crawford*, 541 U.S. at 51 (quoting 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). The State can therefore present prior testimonial statements of an absent witness only if the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68. In so holding, the Court rejected its prior confrontation framework, which required only that hearsay evidence fall within a firmly rooted hearsay exception or have other particularized guarantees of trustworthiness. *Crawford*, 541 U.S. at 60-61 (citing *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)). Because the *Crawford*

court issued its opinion while Bonds's direct appeal was pending, its rule applies to his case. *State v. Evans*, 154 Wn.2d 438, 444, 114 P.3d 627, cert. denied, 546 U.S. 983 (2005).

Although the *Crawford* Court declined to provide a comprehensive definition of "testimonial" hearsay, it did say that statements made during police interrogations are testimonial. *Crawford*, 541 U.S. at 68. The admission of Miller's and Wilson's statements to the police therefore implicates the confrontation clause.

B. *Bruton*

In *Bruton v. United States*, 391 U.S. 123, 126, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the Court recognized that admitting a non-testifying codefendant's confession that implicates the defendant may be so damaging that even instructing the jury to use the confession only against the codefendant is insufficient to cure the resulting prejudice. But admitting a non-testifying codefendant's confession that is redacted to omit all references to the defendant, coupled with an instruction that the jury can use the confession against only the codefendant, does not violate the confrontation clause. *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). This is true even where the codefendant's confession, although not facially incriminating, becomes incriminating when linked with other evidence introduced at trial. *Richardson*, 481 U.S. at 208-09. The *Richardson* Court noted that "[o]rdinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." *Richardson*, 481 U.S. at 206. Redaction of a codefendant's references to the defendant, coupled with an instruction, creates the same situation with respect to a non-testifying codefendant's confession.

Richardson, 481 U.S. at 211.

1. Form of Redaction

Here, Bonds agreed with the State's proposed redactions of Miller's and Wilson's statements, and the trial court further redacted the statements in response to Bonds's additional proposals. He now contends, however, that the trial court erred by leaving in Miller's reference to "a guy named Bobby" and his description of the disposal of multiple guns. Br. of Petitioner at 15-16. Under the doctrine of invited error, Bonds cannot set up an error at trial and then complain of it on appeal. *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 312-13, 979 P.2d 417 (1999). And Bonds makes no claim that his counsel was ineffective for failing to request that these statements be redacted. Accordingly, Bonds has waived any claim that the redactions were flawed.

In addition to redacting references to Bonds from Miller's and Wilson's statements, the trial court instructed the jury not to consider one defendant's admission or incriminating statement against another defendant. The trial court therefore properly admitted the codefendants' statements under *Bruton*.

2. Use of Redaction

Bonds also asserts that, in spite of the *Bruton* redactions, the State used Miller's and Wilson's statements as evidence against him. He points out that the prosecutor, in his closing argument, urged the jury to look at the evidence as a whole rather than telling the jury that it could not use Miller's and Wilson's statements against Bonds. And he asserts that the prosecutor linked Bonds with Miller's statements that the earlier altercations mattered to him and with Wilson's statement that she called Andre from the AM/PM shortly before the shooting.

Although he does not frame his argument in these terms, Bonds is asserting that the prosecutor committed misconduct in his closing. To make this argument, Bonds must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). Prejudice exists if there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Where, as here, a defendant does not object or request a curative instruction, the defendant has waived the error unless we find the remark "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." *McKenzie*, 157 Wn.2d at 52 (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

Admission of a codefendant's statement is not improper even where it becomes incriminating when linked to other evidence. *Richardson*, 481 U.S. at 208-09. Here, the prosecutor was highlighting the links between other evidence (e.g., Bonds's gang affiliation) and the codefendant's statement (e.g., Miller's statement that it upset him when Edwards insulted the gang). Bonds has not shown that these statements, if improper, were so flagrant that a curative instruction could not have cured any prejudice.

C. *Crawford's Effect on Bruton*

But Bonds asserts that *Crawford* changed the *Bruton* analysis. He reasons that *Bruton's* notion that the confrontation clause is not violated where the trial is otherwise fair is inconsistent with *Crawford*.

Bonds relies on *United States v. Gonzalez-Lopez*, 548 U.S. ___, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). In that case, the Court held that depriving the defendant of the right to counsel of choice, also a Sixth Amendment right, is structural error and not subject to harmless error analysis. *Gonzalez-Lopez*, 126 S. Ct. at 2564-65. The Court compared the government's argument to the contrary to the now-rejected *Roberts* framework, stating that it "abstracts from the right to its purposes, and then eliminates the right." *Gonzalez-Lopez*, 126 S. Ct. at 2562 (quoting *Maryland v. Craig*, 497 U.S. 836, 862, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (Scalia, J., dissenting)). Bonds notes that *Bruton* is based on the presumption that juries follow their instructions, a "pragmatic" approach that "represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." *Richardson*, 481 U.S. at 211. It follows, according to Bonds, that *Crawford* prohibits admission of codefendant statements based on pragmatic considerations.

We have recently held, however, that although *Crawford* heightened the standard under which a trial court can admit hearsay statements, it did not overrule *Bruton* and its progeny. *In re Pers. Restraint of Hegney*, 138 Wn. App. 511, 546, 158 P.3d 1193 (2007). We recognized that a *Bruton* redaction answers "the threshold question posed in *Crawford* of when an admission by one defendant can be considered a 'witness[] against' another defendant in a joint trial." *Hegney*, 138 Wn. App. at 546 (quoting *Mason v. Yarborough*, 447 F.3d 693, 699 (9th Cir. 2006) (Wallace, J., concurring)). Under *Bruton* and its progeny, if a statement is properly redacted and the jury is instructed not to use it against the defendant, the declarant is not a "witness against" the defendant. *Hegney*, 138 Wn. App. at 546-47. If a codefendant is not a "witness against" the

defendant, admitting the codefendant's statement does not implicate the confrontation clause. *Hegney*, 138 Wn. App. at 547.

Other courts have reached the same conclusion. *See, e.g., Commonwealth v. Whitaker*, 2005 PA Super. 241, 878 A.2d 914 (“Were we to find that *Crawford* bars the ‘contextual implication’ of criminal defendants in the properly admitted confessions of non-testifying co-defendants, we would be extending the principles espoused in *Crawford* to an improper degree.”), *appeal denied*, 586 Pa. 738, 891 A.2d 732 (2005); *United States v. Le*, 316 F. Supp. 2d 330, 338 (E.D. Va. 2004) (properly redacted codefendant statements are not admitted against the defendant); *McCoy v. United States*, 890 A.2d 204, 215-16 (D.C. Ct. App. 2006) (same); *see also Mason*, 447 F.3d at 699 (Wallace, J., concurring). In the one case Bonds cites to the contrary, the court asserts without any analysis that *Crawford* “broadened” *Bruton*. *Trevino v. State*, 218 S.W.3d 234, 238 (Tex. App. 2007). But that court held that the confrontation clause did not apply in a parole revocation hearing and, thus, did not actually apply either *Bruton* or *Crawford*. *Trevino*, 218 S.W.3d at 239.

Because the trial court properly redacted Miller's and Wilson's statements to remove all references to Bonds and instructed the jury not to consider the statements as evidence against Bonds, Miller and Wilson were not “witnesses against” Bonds, and the confrontation clause was not at issue. The trial court did not violate Bonds's right to confront the witnesses against him by admitting the redacted co-defendant statements.

III. AMENDMENT OF PRP

The State asserts that we erred in permitting Bonds to amend his petition after RCW

10.73.090's one-year time limit had passed and that Bonds's counsel impermissibly briefed an issue at public expense for which this court did not appoint counsel. Bonds contends that this court should equitably toll the statute of limitations and consider the issue on its merits.

We issued our mandate in Bonds's direct appeal and his conviction became final on May 9, 2005. On July 22, 2005, Bonds filed a timely personal restraint petition, raising the witness confrontation issue under *Crawford*. We referred Bonds's petition to a panel of judges and appointed counsel on May 4, 2006, nine-and-a-half months after he filed his petition and just five days before the one-year time limit on collateral attack expired. *See* RCW 10.73.090(1).³

On July 25, 2006, Bonds's counsel moved under RAP 16.4 to amend the petition to add a claim that the trial court denied Bonds his right to a public trial. The State objected, but a commissioner of this court granted Bonds's motion and also denied the State's motion to reconsider the ruling. A panel of this court denied the State's motion to modify the commissioner's ruling.

The State sought discretionary review of this court's ruling in our Supreme Court. A commissioner of that court observed that, even if equitable tolling applies to personal restraint petitions, Bonds had not asserted that bad faith, deception, or false assurances prevented him from timely filing the amendment, and this court may have erred in permitting the amendment. The commissioner denied review, however, finding that this court's ruling did not merit

³ RCW 10.73.100 provides an exception to the one-year time limit in certain cases, but Bonds does not assert that any of them apply here.

interlocutory review under RAP 13.5(b)(2) or (3).⁴ The commissioner noted that the State was free to argue before this court, as it has done, that the issue is time-barred.

The State relies primarily on *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 952 P.2d 116 (1998). In that case, the Supreme Court appointed counsel to represent Benn in his personal restraint petition one month after his conviction became final. *Benn*, 134 Wn.2d at 880. Four years later, Benn moved to amend his petition to add a claim relating to improper jury instructions. *Benn*, 134 Wn.2d at 938. The Court denied leave to amend, finding that no provision in the rules of appellate procedure permits an amendment to relate back to the date of the pleading and that RAP 18.8(a), which permits the court to waive or alter the provisions of the rules of appellate procedure, does not allow the court to waive or alter statutes. *Benn*, 134 Wn.2d at 938-39. But Benn did not ask the court to equitably toll RCW 10.73.090's one-year time limit.

We have held that RCW 10.73.090 can be subject to equitable tolling in a proper case because it is a statute of limitations and not jurisdictional. *State v. Littlefair*, 112 Wn. App. 749, 759, 51 P.3d 116 (2002). Equitable tolling “permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed.” *Littlefair*, 112 Wn. App. at 759 (quoting *State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671 (1997)). Appropriate circumstances for equitable tolling usually include bad faith, deception, or false assurances by one party and the exercise of diligence by the other. *Littlefair*, 112 Wn. App. at 759. Courts typically apply equitable tolling sparingly, and should not apply it to a “garden

⁴ RAP 13.5(b)(2) permits discretionary review if this court has committed probable error that substantially alters the status quo or limits a party's freedom to act. RAP 13.5(b)(3) permits discretionary review if this court has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's revisory powers.

No. 33704-5-II

variety claim of excusable neglect.” *Littlefair*, 112 Wn. App. at 759-60 (quoting *Duvall*, 86 Wn. App. at 875).

In *Littlefair*, the defendant was unaware that deportation was a consequence of his guilty plea until the Immigration and Naturalization Service notified him that it was seeking his deportation two years after he entered his plea. *Littlefair*, 112 Wn. App. at 762-63. His attorney and the court did not follow the procedures that would have notified him of this consequence. *Littlefair*, 112 Wn. App. at 762. We equitably tolled RCW 10.73.090’s one-year limit and permitted him to withdraw his plea. *Littlefair*, 112 Wn. App. at 763.

Similarly in *In re Pers. Restraint of Hoisington*, 99 Wn. App. 423, 431-32, 993 P.2d 296 (2000), Division Three also applied equitable tolling to RCW 10.73.090’s one-year time limit. In that case, Hoisington pleaded guilty based on the prosecutor and defense counsel’s mistaken belief that the maximum term for the crime charged was 10 years. *Hoisington*, 99 Wn. App. at 425. When the attorneys realized the mistake, defense counsel advised Hoisington to proceed with sentencing without informing him that he could specifically enforce the plea agreement, and the trial court imposed 325 months. *Hoisington*, 99 Wn. App. at 426-27. Hoisington raised the issue in two unsuccessful appeals and a prior personal restraint petition, but the court failed to address it each time. *Hoisington*, 99 Wn. App. at 430. In his second petition, the court found the circumstances appropriate for equitable tolling because “[t]he fault is with the court for not addressing his claim when he first raised it in his direct appeal.” *Hoisington*, 99 Wn. App. at 431-32.

And in *State v. Robinson*, 104 Wn. App. 657, 667, 17 P.3d 653 (2001), Division One recognized that equitable tolling applies to RCW 10.73.090, but declined to apply it. There, the defendant mailed a motion to withdraw her guilty plea three days before the one-year time limit

had passed. *Robinson*, 104 Wn. App. at 661. The county clerk file stamped it three days after the time limit ended. *Robinson*, 104 Wn. App. at 661. The court reasoned that postal delay, the most likely explanation, is a common experience and a litigant with a looming statute of limitations should know to file in person or by facsimile transmission or mail the document early enough to account for some delay. *Robinson*, 104 Wn. App. at 668-69.

This case, like *Littlefield* and *Hoisington*, is appropriate for equitable tolling. Bonds was diligent in filing his personal restraint petition, filing it less than three months after his conviction became final. And once we appointed counsel, only four days before expiration of the one-year time limit, counsel moved to file the amended petition two-and-a-half months later. Given the voluminous record in this case, counsel acted with diligence in filing that motion. Additionally, although Bonds requested the assistance of counsel in his petition, we did not rule on his request for almost 10 months. RAP 16.11 requires us to promptly review a timely personal restraint petition. And RCW 10.73.150(4) requires that we appoint counsel "in accordance with the procedure contained in rules of appellate procedure 16.11" if the chief judge determines that the petition is not frivolous.

Moreover, although we hold pro se petitioners like Bonds to the standards of an attorney, *In re Pers. Restraint of Connick*, 144 Wn.2d 442, 455, 28 P.3d 729 (2001), our Supreme Court has recognized the difficulty of identifying the nature of a violation of the public trial right when the trial court has not informed potential objectors of the asserted interests. See *State v. Bone-Club*, 128 Wn.2d 254, 261, 906 P.2d 325 (1995) (closure of a pretrial proceeding without informing defendant of the nature of the asserted interests deprived the defendant of a meaningful opportunity to object). We find that, as in *Hoisington*, the fault for the delay lies

with the court; accordingly, we equitably toll the one-year statute of limitations of RCW 10.73.090 and consider Bonds's public trial issue.

IV. RIGHT TO PUBLIC TRIAL

Bonds asserts that the trial court violated his right to an open trial under *Bone-Club*, 128 Wn.2d at 256, and the public's right to access his trial under *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982), when it closed the courtroom to the public on four occasions.

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). Similarly, article I, section 10 of the Washington Constitution guarantees the public the right to openly administered justice, including a right of access to court proceedings. *Ishikawa*, 97 Wn.2d at 36. A public trial "serves to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *Brightman*, 155 Wn.2d at 514 (citing *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996)). We review a claimed violation of the right to a public trial de novo. *State v. Easterling*, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006).

Neither the defendant's nor the public's right to a public trial is absolute, and a court may limit the public's access to protect other interests. *Bone-Club*, 128 Wn.2d at 259; *Ishikawa*, 97 Wn.2d at 36. To protect this basic constitutional right, however, the trial court must "resist a closure motion except under the most unusual circumstances." *Bone-Club*, 128 Wn.2d at 259. The trial court may not close the courtroom to the public without first weighing the five *Bone-Club* factors and entering specific findings justifying the closure order. *Easterling*, 157 Wn.2d at

175. The *Bone-Club* factors, which mirror the requirements to protect the public's right of access, are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

The right to a public trial extends to pretrial proceedings. *Easterling*, 157 Wn.2d at 177-78 (hearing on codefendant's motion to sever); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (voir dire of jury panel); *Bone-Club*, 128 Wn.2d at 257 (suppression hearing). Thus, the trial court must ensure that "all stages of courtroom proceedings remain open unless the trial court identifies a compelling interest to be served by closure." *Easterling*, 157 Wn.2d at 178. Here, the court closed Bonds's trial to the public for a pretrial hearing on a witness's competency to testify, an inquiry of a witness as to his expected testimony, an admonishment of a witness, and argument on the admissibility of hearsay testimony. These closures implicate Bonds's and the public's right to a public trial.

A defendant's failure to object does not constitute a waiver of the right to a public trial. *Bone-Club*, 128 Wn.2d at 261. The opportunity to object has no "practical meaning" unless the trial court has informed the potential objector of the nature of the asserted interests. *Bone-Club*, 128 Wn.2d at 261. A summary closure therefore deprives a defendant of a meaningful

opportunity to object. *Bone-Club*, 128 Wn.2d at 261. And where the record contains nothing to show that the trial court considered the defendant's public trial right as *Bone-Club* requires, we cannot determine whether the closure was warranted. *Brightman*, 155 Wn.2d at 518.

Here, the trial court did not weigh the *Bone-Club* factors or make specific findings justifying any of the closures. In the first closure, during the hearing on Keith Harrell's competency, the court did not separately balance the need for complete courtroom closure during Harrell's testimony.⁵ The court based the closure on Harrell's heightened privacy interest in his health care issues but it did not find a serious or imminent threat to that interest and did not weigh that interest against Bonds's or the public's interest in an open trial.

In the second closure, during Thomas's testimony, the trial court again failed to weigh the *Bone-Club* factors or make any findings about the closure on the record. But because Bonds concurred in the closing, he has waived the error. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

In the third and fourth closures, during the court's admonishment of Daniels and the argument on Judith Harrell's testimony, the trial court summarily ordered the public out of the courtroom without considering any of the *Bone-Club* factors. No party requested these closures and the court made no findings as to why they were necessary. The court did not give Bonds or the public the opportunity to object.

The constitutional right to a public trial is a fundamental right not subject to harmless

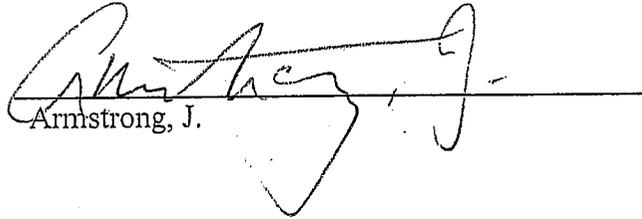
⁵ The trial court did, however, engage in a balancing analysis when it decided to close the court to potential witnesses, including the victims, during both testimony and argument. This partial closure, which Bonds does not challenge, was designed to protect Bonds's right to a fair trial.

No. 33704-5-II

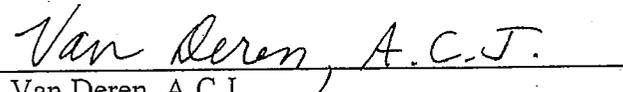
error analysis. See *Bone-Club*, 128 Wn.2d at 261-62; *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). We presume prejudice where a violation of the public trial right occurs. *Bone-Club*, 128 Wn.2d at 261-62 (citing *State v. Marsh*, 126 Wash. 142, 146-47, 217 P. 705 (1923)). And although the closures here were brief, a majority of our Supreme Court has never found a public trial right violation to be de minimis. *Easterling*, 157 Wn.2d at 180. Accordingly, the appropriate remedy for the trial court's constitutional error is reversal of Bonds's conviction and remand for new trial.

We grant Bonds's personal restraint petition, reverse his convictions, and remand for retrial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


Armstrong, J.

I concur:


Van Deren, A.C.J.

PENOYAR, J. — While I agree with the majority that Bonds’s confrontation rights were not violated, I disagree with the conclusion that we should address the public trial issue that Bond raised in his amended personal restraint petition (PRP). Thus, I respectfully dissent.

State law prohibits PRPs from being filed more than a year after a judgment is final. *See* RCW 10.73.090. A court cannot waive the requirements of a statute. The time limitation 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 an exception applies." *Shumway v. Payne*, 136 Wn.2d 383, 397-98, 964 P.2d 349 (1998); *see also State v. Robinson*, 104 Wn. App. 657, 662, 17 P.3d 653 (2001); *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998) (finding that RAP 18.8(a) does not allow court to waive or alter statutes). The only exceptions to this one-year time bar are enumerated in RCW 10.73.100, and these exceptions do not include a violation of the right to a public trial. Additionally, there is no rule that allows amendments to a PRP. *Benn*, 134 Wn.2d at 938-39. Nevertheless, the majority is allowing Bonds’s amendment more than a year after judgment by applying the doctrine of equitable tolling, which “permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed.” *State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671(1997).

Equitable tolling is only appropriate when it is consistent with the general purposes of the statute and of the statute of limitation. *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991) (citing *Hosogai v. Kadota*, 145 Ariz. 227, 231, 700 P.2d 1327 (1985)); *Duvall*, 86 Wn. App. at 875. The purpose of RCW 10.73.090 is to prevent delay by encouraging “prisoners to bring their collateral attacks promptly.” *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 450, 853 P.2d 424 (1993). Additionally, the time limit controls “the

flow of post-conviction collateral relief petitions” and promotes the finality of litigation. *In re Pers. Restraint of Well*, 133 Wn.2d 433, 441-42, 946 P.2d 750 (1997). The one-year statute of limitation allows prisoners a “[one]-year window of opportunity” in which to raise any issues without the assistance of counsel. *Runyan*, 121 Wn.2d at 451. Petitioners do not have any constitutional right to appointed counsel for such post-conviction proceedings. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999).

Bonds failed to amend his petition within the one-year window of opportunity, and we should deny review of his additional issues. To allow amendment after the one-year period results in delay, changes the normal flow of post-conviction collateral relief, and interferes with finality. It also grants Bonds more than other petitioners are entitled to — the right to raise issues for a one-year period without the assistance of counsel. The majority’s decision here — allowing equitable tolling — does not advance, and is indeed inconsistent with, the purposes behind RCW 10.73.090.

Equitable tolling is to be used only sparingly. *In re Pers. Restraint of Carlstad*, 150 Wn.2d 583, 593, 80 P.3d 587 (2003). The doctrine is extremely limited; it should not apply to “a garden variety claim of excusable neglect.” *State v. Duvall*, 86 Wn. App. at 875 (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990)). In fact, a court should only extend equitable tolling in circumstances where there was “bad faith, deception, or false assurances by the [State], and the exercise of diligence by the [Petitioner].” *In re Pers. Restraint of Hoisington*, 99 Wn. App. 423, 430-31, 993 P.2d 296 (2000) (quoting *Duvall*, 86 Wn. App. at 875). Thus, justice requires equitable tolling only if Bonds exercised diligence and there is evidence of bad faith, deception, or false assurances by the State that

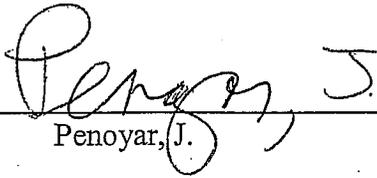
prevented a timely filing. *See Hoisington*, 99 Wn. App. at 430-31.; *Douchette*, 117 Wn.2d at 812.

Bonds may have been diligent in submitting his PRP, completing it within three months after his conviction was finalized, but this filing is no more diligent or timely than any petitioner who completes his or her petition within the one-year limitation. There is no reason to distinguish between a petitioner who files his petition nine months after conviction from a petitioner that files his petition a month after conviction; both petitions are timely. At what point is a petitioner so "diligent" that the court will allow equitable tolling? The timing of Bonds's filing does not make him unusual or exceptional. He should not receive the benefit of the rarely invoked equitable tolling doctrine simply because ten months passed between when Bonds completed his petition and when an attorney was appointed to review his petition.

Bonds attributes his failure to amend the petition within the one-year time period to our delay in appointing counsel. Bonds has a statutory right to appointed counsel for a PRP "after the chief judge has determined that the issues raised by the petition are not frivolous." RCW 10.73.150(4). Even if the ten months that passed between the filing of the petition and the appointment of counsel is not considered prompt, this delay was not bad faith, and did not involve deception or false assurances. The rule for applying equitable tolling does not require merely that the State acted in neglect or that the petitioner not be at fault; instead it requires bad faith, deception, or false assurances. None of these circumstances are present in Bonds's case. *See State v. Littlefair*, 112 Wn. App. 749, 774, 51 P.3d 116 (2002) (Bridgewater, J. dissenting) (failure on the part of the attorney to inform client about consequences of guilty plea, such as deportation, is neglect, not bad faith, deception, or false assurances).

No. 33704-5-II

Therefore, equitable tolling should not apply to Bonds's amendments to his petition and we should not determine whether Bonds was deprived of his right to a public trial.



Penoyar, J.

APPENDIX B

RONALD R. CARPENTER
SUPREME COURT CLERK

THE SUPREME COURT
STATE OF WASHINGTON



SUSAN L. CARLSON
DEPUTY CLERK / CHIEF STAFF ATTORNEY

TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

(360) 357-2077
e-mail: supreme@courts.wa.gov
www.courts.wa.gov

December 18, 2007

Michelle Luna-Green
Pierce Co Pros Attorney's Office
930 Tacoma Ave S Room 946
Tacoma, WA 98402-2171

Nancy P. Collins
Washington Appellate Project
1511 3rd Ave Suite 701
Seattle, WA 98101-3635

David Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
MS TB-06
Tacoma, WA 98402-4427

RECEIVED

DEC 19 2007
Washington Appellate Project

Re: Supreme Court No. 80995-0 - Personal Restraint Petition of Robert Charles Bonds, Jr.
Court of Appeals No. 33704-5-II

Clerk and Counsel:

The Petitioner's "PETITION FOR REVIEW", which seeks review of the Court of Appeals opinion in the above referenced cause number, was received and filed on this date. The Court of Appeals file in the matter was also received. The pleading has been assigned the above referenced Supreme Court cause number.

The pleading will be considered a motion for discretionary review because additional review in the matter is only available through the use of a motion for discretionary review. See RAP 16.14(c).

Any answer to the motion for discretionary review should be served and filed by not later than January 18, 2008. Any reply to any answer should be served and received by this Court for filing by not later than February 19, 2008. The matter will be deemed submitted to the Court Commissioner upon receipt of the reply or the expiration of the time for filing the same, whichever is sooner.

As stated above, the Clerk of Division II previously forwarded the entire file in the above referenced Court of Appeals cause number.

Sincerely,

Susan L. Carlson
Supreme Court Deputy Clerk

SLC:alb

APPENDIX C

NO.

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER

v.

ROBERT BONDS, RESPONDENT

Court of Appeals No. 33704-5
Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 01-1-06020-3

PETITION FOR REVIEW

GERALD A. HORNE
Prosecuting Attorney

By
MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

COPY

RECEIVED
DEC 18 2007
Washington Appellate Project

APPENDIX D

CASE EVENTS # 337045

Date	Item	Action	Participant
12/17/2007	Court of Appeals case file (pouch) <i>Comment: to SC along w/Petition for Review</i>	Sent by Court	
11/14/2007	Decision Filed	Status Changed	

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

IN RE THE PERSONAL RESTRAINT PETITION OF)		
ROBERT BONDS,)		
Petitioner.)		NO. 33704-5-II

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 11TH DAY OF JANUARY, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **ANSWER TO PETITION FOR REVIEW** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|---|-------------------|-------------------------------------|
| [X] MICHELLE LUNA-GREEN
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE S, RM 946
TACOMA, WA 98402-2171 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] ROBERT BONDS
WA 967315
NORTH FORK CORRECTIONAL FACILITY
1605 EAST MAIN
SAYRE, OK 73662 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF JANUARY, 2008.

x _____ 

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 JAN 11 PM 4:55



Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711