

RRP

NO. 80995-0

FILED
COURT OF APPEALS
DIVISION II

07 DEC 16 PM 3:24

STATE OF WASHINGTON
BY _____
DEPUTY

**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

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FILED
SUPREME COURT
STATE OF WASHINGTON
2001 DEC 18 A 10:13
BY RONALD R. ROBERTSON
CLERK

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A. IDENTITY OF PETITIONER.

The State of Washington, respondent below, asks this court to accept review of the Court of Appeals decision designated in part B of this petition.

B. COURT OF APPEALS DECISION.

Petitioner, State of Washington seeks review of the unpublished opinion, filed on November 14, 2007, on In re Personal Restraint Petition of Robert Charles Bonds, COA 33704-5-II, in which the Court of Appeals granted defendant's personal restraint petition and reversed his convictions and remanded for a new trial.

C. ISSUES PRESENTED FOR REVIEW.

1. Did the Court of Appeals act without jurisdiction and contrary to this court's decision in In re PRP of Benn, by allowing an untimely amendment of a personal restraint petition where, (1) the time limitations for personal restraint petitions is statutory and jurisdictional, and (2) the equitable tolling doctrine does not apply because a court has no authority to invoke equitable exceptions to jurisdictional requirements?

2. Did the Court of Appeals err in applying the doctrine of equitable tolling in this case where (1) Bonds did not exercise due diligence in the filing of his amended petition and there is no evidence of bad faith, deception or false assurances?

3. Is it inappropriate to apply the doctrine of equitable tolling to a personal restraint petition where the petitioner is arguing that there has been a violation of a public constitutional right, rather than a personal constitutional right which was prejudicial to defendant?

4. Did the Court of Appeals improperly allow the amendment of a personal restraint petition where the rules governing personal restraint petitions do not allow for amendments to petitions?

5. Did the Court of Appeals err in allowing a court appointed counsel to reopen the entire trial record in this case and brief not only the issue that the court directed counsel to brief pursuant to RCW 10.73.150(4), but also an issue that fell outside the scope of the court's directive?

D. STATEMENT OF THE CASE.

Robert Bonds is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 01-1-06020-3 for the offenses of attempted first degree murder, two counts, and unlawful possession of a

firearm in the first degree.¹ (Unpublished Opinion at 1 – Appendix A). Defendant’s convictions were affirmed by an unpublished decision issued on July 15, 1999 and a mandate was issued on May 9, 2005. (Appendix B).

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). (Opinion 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 C). 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

¹ For a recitation of the facts underlying these charges the court is referred to the statement of facts in the Court of Appeals Decision. (Appendix L).

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. (Opinion at 15-16).

The State filed an objection to the amendment of the petition. (Opinion at 16).

A commissioner granted the motion to file an amended petition. (Opinion at 16).

The State filed a motion to modify the commissioner’s ruling and the motion was denied. (Opinion at 16).

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, citing In re Pers. Restraint of Carlstad, 150 Wn.2d 583, 593, 80 P.3d 587 (2003). (Appendix D).

The Court of Appeals granted Bond's petition, finding that the doctrine of equitable tolling applied to the amended petition. (Appendix A). Judge Penoyer issued a dissent. Id.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The Supreme Court will accept review of a decision of the court of appeals terminating review only if:

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

RAP 13.4(b).

The Court of Appeals ruling allowing an untimely amendment to a personal restraint petition is contrary to In re Pers. Restraint of Benn, 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998), and Shumway v. Payne, 136 Wn.2d 383, 397-98, 964 P.2d 349 (1998). Whether the courts should allow amendments to personal restraint petitions or permit the use of the doctrine of equitable tolling is also a matter of substantial public importance since the public has a right to finality of convictions and for this reason the court should accept review. This court should also accept

for review as a matter of public importance the Court of Appeals' ruling that permits court appointed attorney's to reopen a trial record and expand the scope of review in a petition.

1. THE COURT OF APPEALS ACTED WITHOUT JURISDICTION IN ALLOWING AN UNTIMELY AMENDMENT OF A PERSONAL RESTRAINT PETITION WHERE THE TIME LIMITATIONS OF RCW 10.73.090 ARE JURISDICTIONAL AND THE DOCTRINE OF EQUITABLE TOLLING CANNOT BE INVOKED TO GET AROUND A JURISDICTIONAL BAR.

A court's authority to reopen a criminal case is derived from either a statute or the constitution. When a court operates outside the statutory timeline provisions for personal restraint petitions, it does so without jurisdiction or authority. By allowing the Bonds to file an untimely amendment to his personal restraint petition the Court of Appeals acted without jurisdiction and this court should accept review to reverse this misapplication of appellate procedure.

"The statute of limitation set forth in RCW 10.73.090(1)² is a mandatory rule that acts as a *bar* to appellate court consideration of personal restraint petitions filed after the limitation period has passed,

² § 10.73.090. Collateral attack -- One year time limit

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

unless the petitioner demonstrates that the petition is based solely on one or more . . .” of the grounds listed in RCW 10.73.100.³ Shumway v. Payne, 136 Wn.2d 383, 398, 964 P.2d 349 (1998) (emphasis added).

In this case the Court of Appeals was faced with an untimely petition. Having already accepted review and appointed counsel on the limited issue of hearsay, it acknowledged that Bonds did not assert any of RCW 10.73.100’s exceptions to the one year time bar when he presented the amended petition. (Opinion at 15, f.n. 3). Irrespective of this, the court accepted the amended petition for filing and in so doing it acted

³ § 10.73.100. Collateral attack -- When one year limit not applicable

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
- (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
- (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;
- (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
- (5) The sentence imposed was in excess of the court's jurisdiction; or
- (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

directly contrary to this court's opinion in In re Pers. Restraint of Benn, 134 Wn.2d 868.

In Benn, supra, like the instant case, Benn filed a timely petition but then attempted to file an amendment to his petition raising the LeFaber, issue⁴ after the one year statute of limitation had expired. This court held, "There is no provision in the rules of appellate procedure similar to CR 15(c) which allows amendments to relate back to the date of the original pleading; indeed, there is no provision at all regarding amendments to personal restraint petitions." 134 Wn.2d at 939. The Benn court noted that the defendant was not seeking a waiver of a court rule, but rather a waiver of a statute of limitation and "RAP 18.8(a) does not allow the court to waive or alter statutes." Id. The court went on to find that there was no exception under RCW 10.73.100 for the challenge to the self-defense instruction under either a direct theory, or an ineffective assistance of counsel theory. Id.

Here, the Court of Appeals, contrary to Benn, supra and Payne, supra, waived the timeline provisions of RCW 10.73.090 for defendant

⁴ The instruction in Benn allowed the jury to find self-defense if the defendant reasonably believed the victim intended to inflict death or great personal injury and there was imminent danger of such harm being accomplished even though Washington law requires only that the defendant have a reasonable fear of imminent danger. In re Benn, 134 Wn.2d at 938, n.21 (citing State v. LeFaber, 128 Wn.2d 896, 901-02, 913 P.2d 369 (1996)).

under the mistaken assumption that it had the inherent authority to alter such statutory provisions. In doing so it undermined principles of finality, and upset the legislatively defined limitations in personal restraint petition procedure. This court should accept review pursuant to RAP 13.4(b)(1) to remedy this decision.

The Court of Appeals also erred in invoking the doctrine of equitable tolling where such a doctrine may not be applied to jurisdictional statutes. See e.g. Hazel v. Van Beek, 135 Wn.2d 45, 61, 54 P.2d 1301 (1998). While two Court of Appeals decisions⁵ have applied equitable tolling to RCW 10.73.090, this Court has never held that equitable tolling may be used to relieve a petitioner of the one-year time bar contained in RCW 10.73.090. In re Carlstad, 150 Wn.2d 583, 593, 80 P.3d 587 (2003).

A recent United States Supreme Court 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

⁵ In re the Personal Restraint Petition of Hoisington, 99 Wn. App. 423, 993 P.2d 296 (2000); State v. Littlefair, 112 Wn. App. 749, 760 51 P.3d 116 (2002), review denied, 149 Wn.2d 1020 (2003).

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 case⁶ is a jurisdictional requirement[,]” and “[the courts] ha[ve] no authority to create equitable exceptions to jurisdictional requirements.” 127 S. Ct. 2366.

The same here is true, the Court of Appeals authority was limited to that authorized under statute. This statute creates jurisdictional requirements and thus equitable remedies may not be turned to in the event the prescribed timelines are not met. This court should accept review under RAP 13.4(b)(3) and (4) to correct the Court of Appeals hearing of a case without jurisdiction.

⁶ 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).

2. THE COURT OF APPEALS ERRED IN APPLYING THE DOCTRINE OF EQUITABLE TOLLING IN THIS CASE WHERE BONDS DID NOT EXERCISE DUE DILIGENCE IN THE FILING OF HIS AMENDED PETITION AND THERE IS NO EVIDENCE OF BAD FAITH, DECEPTION OR FALSE ASSURANCES; MOREOVER THE DOCTRINE SHOULD NOT BE APPLICABLE TO A PERSONAL RESTRAINT PETITION WHERE THE PETITIONER IS COMPLAINING ABOUT A VIOLATION OF A PUBLIC CONSTITUTIONAL RIGHT, RATHER THAN A PERSONAL CONSTITUTIONAL RIGHT.

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. “Appropriate circumstances generally include ‘bad faith, deception, or false assurances by the [party opposing application of the doctrine], and the exercise of diligence by the [party seeking its use.]’” State v. Duvall, 86 Wn. App. 871, 874, 940 P.2d 671 (1997), review denied, 134 Wn.2d 1012, 954 P.2d 276 (1998) (quoting Finkelstein v. Sec. Props., Inc., 76 Wn. App. 733, 739-40, 888 P.2d 161 (1995)). The remedy is “generally used . . . when the plaintiff exercises diligence and there is evidence of bad faith, deception, or false assurances by the defendant.” Carlstad, 150 Wn.2d at 593.

Here, the Court of Appeals erred when it concluded that the Bonds exercised diligence. Bonds did file an original, timely petition, which the Court of Appeals accepted for filing. Nothing prevented Bonds from attempting to amend his petition on his own volition or from filing a second timely petition after his first original filing as long as it was done prior to the expiration of the time bar in RCW 10.73.090. On May 4, 2006, the Court gave notice to Bonds via order that it was appointing counsel, but only to brief the issue of hearsay. (Appendix E). Thus Bonds was put on notice of what the attorney's obligations were. The appointment was to address the only issue that Bonds had ever presented to the court and Bonds only had a statutory right to appointment of counsel "after the chief judge has determined that the issues raised by the petition are not frivolous." RCW 10.73.150(4). If Bonds wished to raise additional issues then those in his petition, he had to do so himself. There is no constitutional right, nor statutory right to an appointed attorney to review the trial transcripts and file a personal restraint petition on Bonds' behalf. Bonds chose not to file any further motions or pleadings with the court. The Court of Appeals' decision wrongly focuses on whose actions it should look to for exercise of diligence; treating the attorney and the petitioner as if they are one and the same. Counsel's scope of representation was very limited as authorized under RAP 16.11(b) and

16.15(h); RCW 10.73.150. (See Argument *Infra*). Thus, it was Bonds' burden all along to pursue any other avenues of this collateral attack as he saw fit. He chose not to and, thus, did not exercise diligence. As Judge Penoyer aptly stated in his dissent:

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.

(Opinion at 30-31).

The Court of Appeals also erred in finding that their own actions caused delay. Opinion of Court of Appeals at 21. The Court hypothesizes that its delay in appointment of counsel hindered Bonds' ability to motion the court. As argued above, the responsibility for raising issues in a collateral attack is the petitioner's and not his appointed counsel, whose representation is limited to pursuing the claims that petitioner has already raised. Also, nothing in the Court of Appeals actions amounted to bad faith, deception, or false assurances. See State v. Littlefair, 112 Wn. App. 749, 774, 51 P.3d 116 (2002) (failure on the party of the attorney to

inform client about consequences of guilty plea, such as deportation, is neglect, not bad faith, deception, or false assurances).

The Court of Appeals decision suggests that the application of the doctrine of equitable tolling turns on the legal complicity of the issue presented. There is no authority for this premise. Petitioners are held to the same standards as an attorney and complex legal issues do not get petitioners around the time bar statute. See In re Pers. Restraint of Connick, 144 Wn.2d 442, 455, 28 P.3d 729 (2001).

The Court of Appeals also erred in applying the doctrine of equitable tolling in a case where no personal constitutional rights are at issue. The doctrine of equitable tolling should not apply in a case where a petitioner raises a claim that the constitutional rights of others were violated, rather than his own rights. Equitable tolling is designed to apply that in very limited circumstances, where *justice* requires, that this court waive or alter the timelines for appeal. Littlefair, 112 Wn. App. at 759. In this case, Bonds never proffered in his petition that it was his right to a public trial that was violated and that he suffered prejudice as a result of this. Without this claim, *justice* is not served by considering an untimely issue that does not affect the defendant's right to a fair trial.

This court should accept review under RAP 13.4(b)(4) to resolve these issue public importance.

3. THE COURT OF APPEALS IMPROPERLY
ALLOWED THE AMENDMENT OF A
PERSONAL RESTRAINT PETITION WHERE
THE RULES GOVERNING PERSONAL
RESTRAINT PROCEDURE DO NOT ALLOW
FOR AMENDMENTS TO THE PETITIONS.

“There is no provision in the rules of appellate procedure similar to CR 15(c) which allows amendments to relate back to the date of the original pleading; indeed, there is no provision at all regarding amendments to personal restraint petitions.” Benn, 134 Wn.2d at 939. “RAP 18.8(a) does not allow the court to waive or alter statutes.” Id.

The Court of Appeals erred when it granted counsel’s motion to file an amended petition. There is nothing that allows a defendant to reopen what types of claims are being brought under a petition once that original petition is filed. Requiring petitioner to State all their claims within the original petition allows for a streamline approach to the consideration and determination of claims. This court should accept review under RAP 13.4(b)(1) to correct the Court of Appeals decision which impermissibly authorized an amendment to a personal restraint petition.

4. THE COURT OF APPEALS ERRED IN ALLOWING A COURT APPOINTED COUNSEL TO REOPEN THE ENTIRE TRIAL RECORD IN THIS CASE AND BRIEF NOT ONLY THE ISSUE THAT THE COURT DIRECTED COUNSEL TO BRIEF PURSUANT TO RCW 10.73.150(4), BUT ALSO AN ISSUE THAT FELL OUTSIDE THE SCOPE FO THE COURT'S DIRECTIVE.

A personal restraint petitioner has no constitutional right to court-appointed counsel. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999). RCW 10.73.150 provides a limited statutory right to appointment of counsel at public expense:

Counsel shall be provided at state expense to an adult offender convicted of a crime . . . when the offender is indigent or indigent and able to contribute as those terms are defined in RCW 10.101.010 and the offender:

(4) Is not under a sentence of death and requests counsel to prosecute a collateral attack after the chief judge has determined that the issues raised by the petition are not frivolous, in accordance with the procedure contained in rules of appellate procedure 16.11. . .

RCW 10.73.150(4).

In enacting this provision the legislature stated it was ““appropriate to extend the right to counsel at state expense beyond constitutional requirements in certain *limited* circumstances to persons who are indigent(.) . . .”” State v. Mills, 85 Wn. App. 285, 290, 932 P.2d 192 (1997) (emphasis added) (quoting LAWS OF 1995, ch. 275, sec. 1). The right to appointment of counsel for issues raised in a personal restraint

petition comes only after a finding by the chief judge that the issue raised is not frivolous. RCW 10.73.150(4); State v. Winston, 105 Wn. App. 318, 323, 19 P.3d 495 (2001) (first the chief judge reviews the petition to determine whether the issues have any merit and “[o]nly if the chief judge determines that his issues raised are not frivolous will counsel be appointed.”).

The Court of Appeals’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 (2) were not screened for frivolity. This ruling permits that at any time counsel is appointed to brief the merits of a petition under RCW 10.73.150, the court appointed attorney may also review the entire record and present additional issues to the court. This completely undermines the finality of direct review and grants petitioner’s representation not envisioned by the statute. In essence, this ruling permits petitioner to have the opportunity to have appointment of counsel at public expense to review his entire trial record twice – once on direct review and once in the personal restraint petition process. This is a matter of substantial public interest and review should be granted under RAP 13.4(b)(4) to correct such error.

E CONCLUSION.

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

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

Connick, 144 Wn.2d at 455.

The departure from the normal course of procedure in this case flies in the face of this court's ruling in Benn, supra, and allows a court to act without jurisdiction. It forces the State to expend resources for the filing of a response to an original petition as well as an amended petition raising new untimely issues. It also permits a publicly funded attorney to twice review a large record and brief issues that are time barred. Such a ruling completely undermines finality, goes against the carefully drafted,

statutory based, personal restraint procedure, and is a waste of judicial time and resources.

For all of these reasons, the State respectfully requests this court accept review, reverse the Court of Appeals, and dismiss the amendment to the petition as untimely.

DATED: DECEMBER 14, 2007

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WSB # 27088

Certificate of Service:
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APPENDIX “A”

Unpublished Opinion

1 of 2 DOCUMENTS

In the Matter of the Personal Restraint Petition of Robert Charles Bonds, Jr.

No. 33704-5-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2007 Wash. App. LEXIS 3042

November 14, 2007, Filed

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PRIOR HISTORY: *In re Pers. Restraint of Bonds*, 2007 Wash. App. LEXIS 3078 (Wash. Ct. App., Nov. 14, 2007)

JUDGES: [*1] Armstrong, J. I concur; Van Deren, A.C.J. Penoyar, J., dissents.

OPINION BY: Armstrong

OPINION

¶1 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

¶2 In 2002, a jury convicted Robert Bonds and two codefendants, [*2] 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 Wash. App. LEXIS 1902, 2004 WL 1835092 (Aug. 17, 2004), review denied, 154 Wn.2d 1002 (2005).

¶3 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.

¶4 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.

¶5 Edwards, Harrell, and several friends later went to the AM/PM, where Bonds, Andre, [*3] 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.

¶6 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.

¶7 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 [*4] 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.

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

¶8 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.

¶9 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. [*5] 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.

¶10 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

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.

¶11 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 [*6] 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

¶12 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 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

¶13 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). [*7] We disagree.

A. *Crawford*

¶14 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).

¶15 Although [*8] 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*

¶16 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* [*9] 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

¶17 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 [*10] that the redactions were flawed.

¶18 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

¶19 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.

¶20 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) [*11] (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)).

¶21 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*

¶22 But Bonds asserts that *Crawford* changed the *Bruton* [*12] analysis. He reasons that *Bruton's* notion

that the *confrontation clause* is not violated where the trial is otherwise fair is inconsistent with *Crawford*.

¶23 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 [*13] on pragmatic considerations.

¶24 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.

¶25 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 [*14] in the properly admitted confessions of non-testifying codefendants, 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.

¶26 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 [*15] against him by admitting the redacted co-defendant statements.

III. Amendment of PRP

¶27 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.

¶28 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

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.

¶29 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 [*16] 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.

¶30 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 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.

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 [*17] revisory powers.

¶31 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.

¶32 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 [*18] 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 variety claim of excusable neglect." *Littlefair*, 112 Wn. App. at 759-60 (quoting *Duvall*, 86 Wn. App. at 875).

¶33 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.

¶34 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 [*19] 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.

¶35 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 [*20] 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.

¶36 This case, like *Littlefair* 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 [*21] 16.11" if the chief judge determines that the petition is not frivolous.

¶37 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

¶38 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.

¶39 Both the *Sixth Amendment to the United States Constitution* [*22] 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).

¶40 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 [*23] 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)).

¶41 The right to a public trial extends to pretrial proceedings. *Easterling*, 157 Wn.2d at 177-78 (hearing on codefendant's motion [*24] 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.

¶42 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 [*25] public trial right as *Bone-Club* requires, we cannot determine whether the closure was warranted. *Brightman*, 155 Wn.2d at 518.

¶43 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.

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.

¶44 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).

¶45 In [*26] 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.

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

¶47 We grant Bonds's [*27] personal restraint petition, reverse his convictions, and remand for retrial.

¶48 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.

Van Deren, A.C.J., concurs.

DISSENT BY: PENOYAR

DISSENT

¶49 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.

¶50 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) [*28] (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).

¶51 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 [*29] "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).

¶52 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*.

¶53 Equitable tolling is to be used only sparingly. *In re Pers. Restraint of Carlstad*, 150 Wn.2d 583, 593, 80 P.3d 587 (2003). [*30] 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.

¶54 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 [*31] 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.

¶55 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 [*32] 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).

¶56 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.

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930 TACOMA AVE S RM 946
TACOMA, WA 98402-2171

APPENDIX “B”

Mandate



01-1-05478-9 23054162 MND 05-17-05

FILED
IN COUNTY CLERK'S OFFICE
A.M. MAY 16 2005 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

SPENCER LEROY MILLER,
Appellant,

STATE OF WASHINGTON,
Respondent,

v.

ROBERT CHARLES BONDS, JR.,
Appellant,

STATE OF WASHINGTON,
Respondent,

v.

TONYA ROCHELLE WILSON,
Appellant.

No. 28847-8-II
(cons. w/28935-1-II and 28964-4-II)

MANDATE

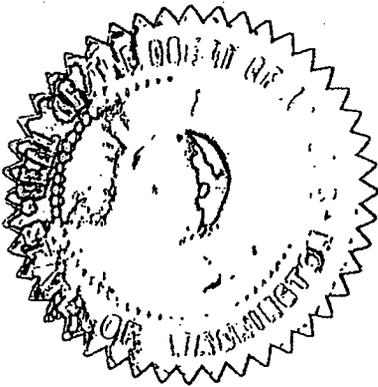
Pierce County Cause Nos.
01-1-05476-9, 01-1-06020-3
01-1-06021-1

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on August 17, 2004 became the decision terminating review of this court of the above entitled case on May 3, 2005. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount:

MANDATE
 28847-8-II (cons.)
 Page Two

Judgment Creditor Respondent State: \$38.07
 Judgment Creditor A.I.D.F.: \$31,896.86
 Judgment Debtor Appellant Miller: \$10,915.35
 Judgment Debtor Appellant Bonds: \$9,370.72
 Judgment Debtor Appellant Wilson: \$11,572.72



IN TESTIMONY WHEREOF, I have hereunto set
 my hand and affixed the seal of said Court at
 Tacoma, this 9th day of May, 2005.


 Clerk of the Court of Appeals,
 State of Washington, D/v. II

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MANDATE
28847-8-II
Page Three

Hon. Frank E. Cuthbertson
Pierce Co Superior Court Judge
930 Tacoma Ave So
Tacoma, WA 98502

Indeterminate Sentence Review Board

APPENDIX “C”

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

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON



01-1-08020-3 25442382 CPRM 05-11-08

In re the
Personal Restraint Petition of

ROBERT BONDS,

Petitioner.

DIVISION II

IN COUNTY CLERK'S OFFICE

FILED
A.M. MAY 10 2006 P.M.

PIERCE COUNTY, WASHINGTON
BY KEVIN STOCK, County Clerk
DEPUTY

No. 33704-5-II

01-1-06020-3
ORDER REFERRING PETITION
TO PANEL, APPOINTING
COUNSEL, AND SETTING
BRIEFING SCHEDULE

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

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

After initial consideration under RAP 16.11(b), the Acting Chief Judge has determined that the issue of whether redacted statements of co-defendants admitted at a joint trial under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and its progeny constitute a violation of *Crawford* is not frivolous.

Accordingly, it is hereby ordered that this petition is referred to a panel of judges for determination on the merits. Under RAP 16.11(b) and 16.15(h), this court appoints David Donnan to represent Petitioner in this court's consideration of the petition at public expense, including briefing of the issues raised by Petitioner. This court also orders that under RAP 16.15(h), any necessary preparation of the record of prior proceedings shall be at public expense and waives charges for reproducing briefs or motions in this appellate cause. At public expense, this court will provide to Petitioner's appointed lawyer a copy of the verbatim report of the prior proceedings provided to this court during Petitioner's direct appeal.

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

Petitioner's opening brief is due within 45 days of the designation of clerk's papers. If Petitioner files an additional statement of arrangements, he may move for an extension of this deadline. Respondent's brief is due 45 days after service of Petitioner's brief. Petitioner may file a reply brief within 30 days after service of Respondent's brief. After the opening briefs are filed, this court will determine under RAP 16.11(c) whether to decide the Petition with or without oral argument.

DATED this 4th day of May, 2006.

Van Deren, A.C.J.
Acting Chief Judge

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

APPENDIX “D”

Denial of Motion for Discretionary Review

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint
Petition of

ROBERT BONDS,
Petitioner.

CLERK

NO. 79575-4

RULING

FILED
SUPREME COURT
STATE OF WASHINGTON
2007 JAN 29 P 2:15
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Robert Bonds was convicted with others of attempted first degree murder. Division Two of the Court of Appeals affirmed the conviction on direct appeal, issuing its mandate in May 2005. Acting pro se, Mr. Bonds filed a personal restraint petition in the Court of Appeals in July 2005, arguing that a co-defendant's out-of-court statements were admitted at trial in violation of his right of confrontation. On May 5, 2006, the acting chief judge of the Court of Appeals ruled that the petition was not frivolous, referred the petition to a panel of judges for determination on the merits, and appointed counsel for Mr. Bonds at public expense. The acting chief judge also set a briefing schedule.

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

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

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

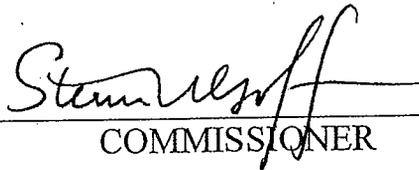
Here, as indicated, Mr. Bonds moved to amend his petition more than one-year after his judgment and sentence became final, beyond the time limit on collateral attack. RCW 10.73.090(1). And the ground for relief he asserts—that the trial court unlawfully closed the courtroom to the public—does not appear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

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

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

The motion for discretionary review is therefore denied.

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


COMMISSIONER

January 29, 2007