

82567-0

NO. 38124-9-II

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

STATE OF WASHINGTON,

v.

SCHAWN JAMES CRUZE, Petitioner

STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

03 OCT 14 PM 1:05

FILED  
COURT OF APPEALS  
DIVISION II

FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 97-1-00428-4

RESPONSE TO PERSONAL RESTRAINT PETITION

Attorneys for Respondent:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869  
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### Cases

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### Statutes

RCW 9.94A.125 .....1

RCW 9A.04.110(6).....2

I. STATEMENT OF THE CASE

The defendant was found guilty by a jury of Assault in the Second Degree on June 11, 1997. He was sentenced as a persistent offender having had two prior serious offenses: two counts of Assault in the Second Degree from Clark County in 1991 under Clark County Cause No. 91-1-00850-7 and one count of Possession of Controlled Substance-Methamphetamine with a firearm in Clark County in January 1997 under Clark County Cause No. 96-1-01536-9.

II. RESPONSE TO ASSIGNMENT OF ERROR

The claim by the defense appears to be that because the definition of "most serious offense" in effect at the time of the defendant's crime only refers to felony offenses with a deadly weapon special verdict under RCW 9.94A.125 a conviction with a "firearm" enhancement is not considered a "most serious offense".

The defendant claims that this is his first Personal Restraint Petition. However, that is not accurate. It is true that the defendant appealed his conviction and, under Court of Appeals No. 22153-5-II, his conviction was affirmed with Mandate issuing on September 13, 2000.

After that date, the defendant filed a Personal Restraint Petition in Division II under number 33757-6-II. That petition was dismissed as

being untimely and thus time barred. Certificate of Finality on that matter issued on October 19, 2006. A copy of the Order Dismissing Petition and Certificate of Finality concerning the Personal Restraint Petition are attached hereto and by this reference incorporated herein. Further, a copy of the Judgment and Sentence (Prison- Persistent Offender) under 97-1-00428-4 is also attached and incorporated by this reference.

The State submits that this particular issue being raised by the defendant is nonsense. As the statute makes quite clear a firearm is a form of deadly weapon. The fact that the concept of deadly weapon was refined for the purposes of a jury instruction in a previous case to just a firearm does not change that fact.

RCW 9A.04.110(6) is the definition of a deadly weapon.

“Deadly Weapon” means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a “vehicle” as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.”

As explained in State v. Taylor, 97 Wn. App. 123, 982 P.2d 867 (1999):

This provision [RCW 9A.04.110(6)] creates two categories of deadly weapons. The first includes

explosives or firearms, which are deemed deadly per se regardless of whether they are loaded. (cite omitted). The second category includes any other weapon or instrument that may be deadly in fact if it is “readily capable of causing death or substantial bodily harm,” depending on “the circumstances in which it is used, attempted to be used, or threatened to be used.” (cites omitted).

-(State v. Taylor, 97 Wn. App. at 126).

The defendant, through his attorney in the Personal Restraint Petition, at the bottom of page 3 and the top of page 4 indicates “the question posed by this PRP is whether a firearm enhancement is the same as or is distinct from a deadly weapon.” Based on the case law previously provided, and the definitions, it is obvious that a firearm is a form of deadly weapon. This is not an area of ambiguity or area where lenity can be given to a defendant nor is there any necessity for any type of statutory construction or interpretation. A firearm is a deadly weapon per se. That case law is undisputed and is adequate to explain all the areas necessary for this Personal Restraint Petition.

With that in mind, there is no facial invalidity to the defendant’s Judgment. He has already had his Personal Restraint Petition, has waited over a year from that date, and has now filed a second Personal Restraint Petition trying to claim something different. The State submits that this one should also be time barred.

III. CONCLUSION

The State submits that this matter is wholly without merit and should be dismissed.

DATED this 9 day of Oct, 2008.

Respectfully submitted:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

By:

  
MICHAEL C. KINNIE, WSBA#7869  
Senior Deputy Prosecuting Attorney

**APPENDIX "A"**

**JUDGMENT AND SENTENCE (PRISON – PERSISTENT OFFENDER)**

**FILED**  
JUL 02 1997

JoAnne McBride, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,  
Plaintiff,

vs.

SCHAWN JAMES CRUZE,  
Date of Birth: 02/24/73  
SID#: WA14987772  
Defendant.

No. 97-1-00428-4

**97 9 02823 9**

JUDGMENT AND SENTENCE  
(PRISON - PERSISTENT  
OFFENDER)

**I. HEARING**

1.1 A sentencing hearing was held this date, the defendant appearing in person, and with his counsel, the undersigned attorney, the State being represented by the undersigned Deputy Prosecuting Attorney, and the Court having afforded each counsel the right to speak, and having asked the defendant if he wished to make a statement in mitigation of punishment, and having heard and considered the arguments presented, the Court now enters the following:

**II. FINDINGS**

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 **CURRENT OFFENSE(S):** The defendant was found guilty on the 11th day of JUNE, 1997 by [ ] plea of guilty [XX] verdict of the jury [ ] bench trial of the crimes of:

Count I: **ASSAULT IN THE SECOND DEGREE**  
in violation of RCW 9A.36.021 (1) (a), a Class B Felony  
Committed on or about MARCH 20, 1997

as charged in the Information.

[X] The offense charged in Count I is a Domestic Violence offense as that term is defined in RCW 10.99.020 (3).

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1 2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating  
2 the offender score are as set forth in the Declaration of Criminal History attached hereto.

3 2.3 SENTENCING DATA:

4 2.3.1 The maximum terms for the above crimes are:

5 Count I: 10 years years and/or \$ 20,000.00  
6 Count II: except as provided in years and/or \$ \_\_\_\_\_  
7 Count III: Revised 9.94A.120 (4) years and/or \$ \_\_\_\_\_  
8 Count IV: which becomes life in years and/or \$ \_\_\_\_\_  
9 prison

10 2.3.2 The offender score, seriousness level, standard range without the enhancements,  
11 enhancements and presumptive sentencing range which includes the applicable enhancements for this  
12 defendant, all in months, based upon the criminal history related above are as follows:

13 COUNT NO.	OFFENDER SCORE	SERIOUS -NESS LEVEL	STANDARD RANGE	ENHANCE-MENTS (F, DW, SZ)	TOTAL RANGE WITH ENHANCE-MENTS
14 I:	<u>9</u>	<u>IV</u>	<u>63-84 months</u>		<u>Mrs</u>
15 II:			<u>see subject to 9.94A.120(4)</u>		<u>Mrs</u>
16 III:			<u>paragraph 4.6 below</u>		<u>Mrs</u>
17 IV:					<u>Mrs</u>

18 2.3.3 The following crimes encompass the same criminal conduct and count as one crime in  
19 determining criminal history: Counts: \_\_\_\_\_

20 2.3.4 [ ] Other current convictions listed under different cause numbers used in calculating the  
21 offender score are (list offense and cause number): \_\_\_\_\_

22 2.4 [ ] EXCEPTIONAL SENTENCE. Circumstances found to exist which justify an exceptional  
23 sentence [ ] above [ ] below the presumptive sentencing range are attached as Attachment A and  
24 incorporated by reference as if fully set forth herein. The Prosecuting Attorney [ ] did [ ] did not  
recommend a similar sentence.

[ ] An exceptional sentence is stipulated to by the parties.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The Court has considered the  
defendant's past, present and future ability to pay legal financial obligations, including the defendant's

1 financial resources and the likelihood that the defendant's status will change. The Court finds that the  
2 defendant (has) (does not have) the ability to pay legal financial obligations as imposed below.

3 **III. JUDGMENT**

4 3.1.1 The Court has jurisdiction over the defendant and the subject matter.

5 3.1.2 The defendant is GUILTY of the Counts and Offenses listed in Paragraph 2.1.

6 3.4 There do (not) exist substantial and compelling reasons justifying an exceptional sentence outside  
7 the presumptive sentencing range.

8 **IV. SENTENCE AND ORDER**

9 The court, having determined that no legal cause exists to show why sentence should not be  
10 pronounced, now, therefore,

11 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

12 4.1 The defendant shall pay the following to the Clerk of the Superior Court:

13 \$ To be set

Restitution. RCW 9.94A.142

[ ] To be Paid to: \_\_\_\_\_

Victim(s) and amounts to be set by separate court order.  
The addresses of the victims shall be withheld and provided confidentially to the Clerk.

15 \$ 500.00

Victim's Assessment, RCW 7.68.035

16 \$ 110.00

Criminal Filing Fee (Court Costs) RCW 9.94A.120

17 \$ 550.00

Appointed Attorney Fees, after credit of \$ \_\_\_\_\_ prepaid to  
Indigent Defense Cost Recovery, RCW 9.94A.120

18 \$ \_\_\_\_\_

Court Appointed Defense Investigator/Expert and other defense  
costs, RCW 9.94A.120

19 \$ \_\_\_\_\_

Fine. RCW 9A.20.021

20 \$ \_\_\_\_\_

Drug Fund Contribution. RCW 9.94A.120

To be paid within \_\_\_\_\_ years.

21 \$ \_\_\_\_\_

Crime Lab Fee. RCW 43.43.690

22 \$ \_\_\_\_\_

Other Costs for: \_\_\_\_\_

23 \$ \_\_\_\_\_

Costs of Incarceration. RCW 9.94A.145

1 The Court specifically finds that the defendant [ ] does [ ] does not have the means to pay for the  
2 cost of incarceration at the rate of \$ 50.00 per day.

3 The above total may not include any or all the restitution, which may be set by later order of the court.  
4 An agreed restitution order may be entered. The restitution is joint and several with \_\_\_\_\_

5 Payment shall not be less than \$ \_\_\_\_\_ per month or if left blank, the amount shall be set by the  
6 Department of Corrections. Payments shall commence on \_\_\_\_\_ and shall continue [ ] weekly  
7 [X] monthly or as set by the Department of Corrections and shall be paid in full prior to expiration of  
8 legal financial supervision. All payments shall be in accordance with the policies of the Clerk.

9 An award of the costs on appeal and collateral attacks imposed on a defendant may be added to the total  
10 legal financial obligations above. RCW 10.73.

11 [X] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW  
12 36.18.190.

13 Pursuant to RCW 10.82.090, the financial obligations imposed in this Judgment shall bear interest from  
14 the date of the Judgment until payment in full, at the rate applicable to civil judgments.

15 [XX] DNA TESTING. The defendant shall have a blood sample drawn for purposes of DNA  
16 identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency,  
17 the county or Department of Corrections, shall be responsible for obtaining the sample prior to the  
18 defendant's release from confinement. RCW 43.43.754

19 4.3 The defendant shall not have any contact with the victim(s), \_\_\_\_\_  
20 including but not limited to personal, verbal, written, electronic, telephonic or through a third person.

21 [ ] This condition is for the statutory maximum sentence of \_\_\_\_\_ years.

22 [ ] DOMESTIC VIOLENCE: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE  
23 UNDER CHAPTER 10.99 RCW AND WILL SUBJECT A VIOLATOR TO ARREST;  
24 ANY ASSAULT OR RECKLESS ENDANGERMENT THAT IS A VIOLATION OF THIS  
ORDER IS A FELONY.

A Domestic Violence Protection Order is separately entered and the clerk of the court shall forward a copy of the Domestic Violence order on or before the next judicial day following filing to the Clark County Sheriff's Department.

[ ] HARASSMENT: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER CHAPTER 9A.46 RCW AND WILL SUBJECT A VIOLATOR TO ARREST.

A Harassment No Contact Order is separately entered and the clerk of the court shall forward a certified copy of the order to the victim. The Clerk shall contact the Clark County

1 Prosecuting Attorney's Victim/ Witness unit to obtain the address for mailing.

2 **4.6 Persistent Offender.**

3 [XX] The court finds that the crime of which Defendant has been convicted in Count I is a most  
4 serious offense and that before the commission of the crime in Count I, the defendant had been  
5 convicted on at least two separate occasions of felonies which are "most serious offenses" as define  
6 by RCW 9.94A.030(23), and of the two or more previous convictions for most serious offenses, at least  
7 one conviction occurred before the commission of the other most serious offense(s) for which the  
8 defendant was previously convicted.

9 The prior convictions are listed in the attached declaration of Criminal History. The defendant is  
10 sentenced as follows:

11 4.6.1 Pursuant to RCW 9.94A.120(4), the defendant is sentenced to a term of total confinement  
12 in the custody of the Department of Corrections as follows:

13 **Count I: Life in Prison Without Possibility of Parole or Early Release**

14 The term of confinement herein imposed is consecutive to the sentence in Clark County Cause  
15 Number(s) 96-1-01536-9.

16 4.6.2 The actual number of months of total confinement is: life in prison months. (The mandatory  
17 firearm and deadly weapons enhancement term or terms shall be served consecutively to each other and  
18 consecutively to all other sentencing provisions.)

19 4.6.3 Credit for time served prior to this date of 0 days is given, said confinement being solely  
20 related to the crimes for which the defendant is being sentenced.

21 4.7 This case shall not be placed on inactive or mail-in status until all financial obligations are paid in  
22 full.

23 4.8 Other: \_\_\_\_\_  
24 \_\_\_\_\_

4.9 The bail or release conditions previously imposed are hereby exonerated and the Clerk shall  
disburse any bail previously posted to the appropriate person.

**V. NOTICES AND SIGNATURES**

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Except as otherwise provided, no petition or  
motion for any form of post-conviction relief, other than a direct appeal, may be filed more than one

1 year after the date of this Judgment and Sentence or, if a direct appeal is filed, the date the appellate  
2 court issues a mandate disposing of the appeal pursuant to RCW 10.73.

3 5.4 RESTITUTION HEARING. [ ] Defendant waives any right to be present at any restitution  
4 hearing (sign initials): \_\_\_\_\_

5 5.6 FIREARMS. You must immediately surrender any concealed pistol license and you may  
6 not own, use or possess any firearm unless your right to do so is restored by a court of record. (The  
7 court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable  
8 identification, to the Department of Licensing along with the date of conviction or commitment). RCW  
9 9.41.040, 9.41.047

10 DONE in Open Court and in the presence of the defendant this 2 day of <sup>July</sup> June, 1997.

11 Barbara D. Johnson  
12 JUDGE OF THE SUPERIOR COURT  
13 Print Name: Barbara D. Johnson

14 [Signature]  
15 Attorney for Defendant  
16 WSBA # 14882  
17 Print Name: PERRY BULL

18 [Signature]  
19 Deputy Prosecuting Attorney  
20 WSBA # 8246  
21 Print Name: Philip A. Meyers

22 Refused signature - destroyed  
23 Defendant first document prepared



1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
2 IN AND FOR THE COUNTY OF CLARK

3 STATE OF WASHINGTON, )  
4 Plaintiff, )

No. 97-1-00428-4

5 vs. )

WARRANT OF COMMITMENT  
TO STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

6 SCHAWN JAMES CRUZE, )

7 Date of Birth: 02/24/73 )

8 Defendant. )

9 STATE OF WASHINGTON )  
10 :ss  
11 COUNTY OF CLARK )

12 THE STATE OF WASHINGTON, to the Sheriff of Clark County, Washington, and the State of  
13 Washington, Department of Corrections, Officers in charge of correctional facilities of the State of  
14 Washington:

14 GREETING:

15 WHEREAS, the above-named defendant has been duly convicted in the Superior Court of the State  
16 of Washington for the County of Clark of the crime(s) of:

16 Count I: ASSAULT IN THE SECOND DEGREE

17 Count II: \_\_\_\_\_

18 Count III: \_\_\_\_\_

19 Count IV: \_\_\_\_\_

20 and Judgment has been pronounced and the defendant has been sentenced to a term of imprisonment  
21 in such correctional institution under the supervision of the State of Washington, Department of  
22 Corrections, and shall be designated by the State of Washington, Department of Corrections pursuant  
23 to RCW 72.13, all of which appears of record; a certified copy of said judgment being endorsed hereon  
24 and made a part hereof,

23 NOW, THIS IS TO COMMAND YOU, said Sheriff, to detain the defendant until called for by the  
24 transportation officers of the State of Washington, Department of Corrections, authorized to conduct  
defendant to the appropriate facility, and this is to command you, said Superintendent of the appropriate  
facility to receive defendant from said officers for confinement, classification and placement in such  
correctional facilities under the supervision of the State of Washington, Department of corrections, for

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a term of confinement of :

Count I: **Life in Prison Without Possibility of Parole or Early Release**

Count II: \_\_\_\_\_ months

Count III: \_\_\_\_\_ months

Count IV: \_\_\_\_\_ months

The defendant has credit for 0 days served.

And these presents shall be authority for the same. **HEREIN FAIL NOT.**

WITNESS, Honorable *Subara*

JUDGE OF THE SUPERIOR COURT AND THE SEAL THEREOF THIS 2 day  
of July, 1997.

JOANNE McBRIDE, Clerk of the  
Clark County Superior Court

By: *Jennifer Olson*  
Deputy



1 I, JoAnne McBride, Clerk of the Clark County Superior Court, certify that the foregoing is a full,  
2 true and correct copy of the Judgment and Sentence in the above-entitled action, now on record  
in this office.

3 WITNESS my hand and seal of the said Superior Court affixed this \_\_\_\_\_ day  
4 of \_\_\_\_\_, 19\_\_\_\_\_.

5 Clerk of said County and State,

6 by: \_\_\_\_\_,  
7 Deputy Clerk

8 OFFENDER IDENTIFICATION

9 OFFENDER'S NAME: SCHAWN JAMES CRUZE

10 DOB: 02/24/73 SEX: MALE RACE: WHITE

11 SID # WA14987772

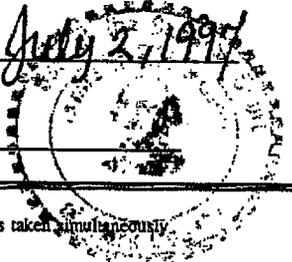
12 FBI # 55809NA1

13 JUDGE: BARBARA D. JOHNSON

14 FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix  
his or her fingerprints and signature thereto.

15 Clerk of the Court: Jennifer Olson, Deputy Clerk. Dated: July 2, 1997

16 DEFENDANT'S SIGNATURE: refused to sign



Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously

*Ring & Small  
Bundaged  
JL/3/97*

**APPENDIX "B"**

**ORDER DISMISSING PETITION  
COA 33757-6-II**

3  
**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

**FILED**

**MAR 27 2006**

JoAnne McBride, Clerk, Clark Co. No. 33757-6-II

FILED  
COURT OF APPEALS  
06 MAR 24 PM 1:05  
SIA  
JTY

In re the  
Personal Restraint Petition of  
  
**SCHAWN J CRUZE,**  
  
Petitioner.

**ORDER DISMISSING PETITION**

**97-1-00428-4**

Schawn J. Cruze seeks relief from personal restraint imposed following his 1997 conviction of second degree assault. Petitioner was sentenced to life in prison as a habitual offender under RCW 9.92.090. Relying on *State v Alexander*, 10 Wn. App. 942 (1974), he argues that the sentencing court erred by considering a conviction that was pending on direct appeal when determining whether RCW 9 92.090 applied. Without reaching the merits of this argument, this petition is dismissed as time barred.

RCW 10.73.090(1) provides:

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

Petitioner's judgment and sentence became final when his direct appeal mandated in 2000. See RCW 10.73.090(3)(b). When petitioner filed the present petition in August 2005, more than one year had elapsed. Thus, this court cannot reach the merits of petitioner's argument unless petition establishes that (1) the time bar does not apply because the judgment and sentence is facially invalid or was not rendered by a court of

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ca

competent jurisdiction, or (2) one or more of the exceptions to the time bar enumerated in RCW 10.73.100 applies.

Petitioner does not allege that the judgment and sentence is facially invalid or that the judgment was not rendered by a court of competent jurisdiction. Instead, petitioner argues that two exceptions to the time bar apply.<sup>1</sup>

Petitioner first argues that RCW 10.73.100(2) applies. That provision states that the time bar does not apply if “[t]he statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant’s conduct.” But petitioner does not state *how* RCW 9.92.090 is unconstitutional, and this court need not, and does not, consider conclusory allegations. *In re Cook*, 114 Wn.2d 802, 813-14 (1990).

Petitioner next argues that RCW 10.73.100(5) applies. That provision states that the time bar does not apply if “[t]he sentence imposed was in excess of the court’s jurisdiction.” As to RCW 10.73.100(5), “a court has ‘subject matter jurisdiction where the court has the authority to adjudicate the type of controversy in the action, and . . . it does not lose subject matter jurisdiction merely by interpreting the law erroneously.’” *In re Vehlewald*, 92 Wn. App. 197, 201-02 (1998) (quoting *State v. Moen*, 129 Wn.2d 535, 545 (1996)). Petitioner’s sentence “was rendered by a court of competent jurisdiction.” RCW 10.73.090. That court had “subject matter jurisdiction” over the class of felonies of which he was convicted, and petitioner’s current claim amounts to an assertion that the court merely misapplied the law. Thus, RCW 10.73.100(5) does not apply.

Petitioner has failed to establish that any exception to the time bar applies in this case and consideration of this petition is therefore time barred.

Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 24<sup>th</sup> day of March, 2006.

  
Chief Judge

cc: Schawn J. Cruze  
Clark County Clerk  
County Cause No(s). 97-1-00428-4  
Arthur D. Curtis  
Michael C. Kinnie

---

<sup>1</sup> Apart from asserting that petitioner has not overcome the time bar, the State does not address petitioner's time bar arguments.

**APPENDIX "C"**

**CERTIFICATE OF FINALITY  
COA 33757-6-II**

2

**FILED**

**OCT 23 2006**

JoAnne McBride, Clerk, Clark Co.

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

**DIVISION II**

In re the  
Personal Restraint Petition of

SCHAWN J. CRUZE,

Petitioner.

No. 33757-6-II

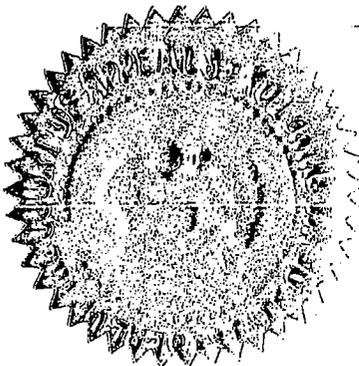
CERTIFICATE OF FINALITY

Clark County

Superior Court No. 97-1-00428-4

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington in and for Clark County.

This is to certify that the decision of the Court of Appeals of the State of Washington, Division II, filed on March 24, 2006, became final on September 6, 2006.



**IN TESTIMONY WHEREOF**, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 19th day of October, 2006.

David C. Ponzoha  
Clerk of the Court of Appeals,  
State of Washington, Division II

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Ch

CERTIFICATE OF FINALITY

Page 2 of 2

33757-6-II

Michael C. Kinnie  
Attorney at Law  
1200 Franklin  
Po Box 5000  
Vancouver, WA, 98666-5000

Schawn J Cruze  
#992201  
Stafford Creek Corr Cntr  
191 Constantine Way  
Aberdeen, WA, 98520

**APPENDIX "D"**

**MANDATE  
COA 22153-5-II**

KD  
**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
SCHAWN JAMES CRUZE,  
  
Appellant.

No. 22153-5-II

MANDATE

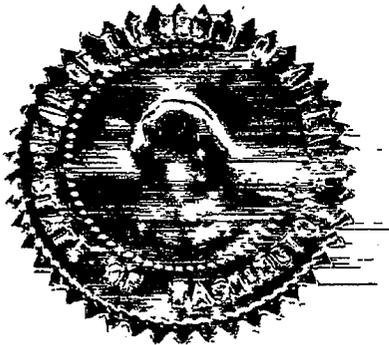
Clark County Cause No.  
97-1-00428-4

**FILED**  
SEP 15 2000  
JoAnne McBride, Clerk, Clark Co.

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

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on January 7, 2000 became the decision terminating review of this court of the above entitled case on September 6, 2000. 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 have been awarded in the following amount:

Judgment Creditor State: \$114.00  
Judgment Creditor A.I.D.F.: \$4,448.55  
Judgment Debtor Appellant Cruze: \$4,562.55



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 13<sup>th</sup> day of September, 2000.

*[Signature]*  
Clerk of the Court of Appeals,  
State of Washington, Div. II

James Hudson Dunn  
Attorney At Law  
408 West 9th Street  
PO Box 1016  
Vancouver, WA. 98666

Philip A. Meyers  
Clark Co Deputy Pros Atty  
P.O. Box 5000  
Vancouver, WA. 98668

Barbara D Johnson  
Clark Co Superior Court Judge  
P O Box 5000  
Vancouver, WA. 98668

Indeterminate Sentence Review Board

*[Handwritten initials]*

**APPENDIX "E"**

**UNPUBLISHED OPINION  
COA 22153-5-II**

100

**FILED**  
SEP 15 2000  
JoAnne McBride, Clerk, Clark Co.

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

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
SCHAWN JAMES CRUZE,  
  
Appellant.

No. 22153-5-II

UNPUBLISHED OPINION

Filed: JAN 07 2000

MORGAN, J. – Schawn James Cruze was convicted of second degree assault and sentenced to life in prison without possibility of parole. He appeals the admission of inconsistent witness statements, the giving of an aggressor instruction, and other matters. We affirm

Schawn Cruze is the son of Katherine Strickland and the brother of Jason Cruze. Katherine’s husband is Willard Strickland, and her neighbor is Collette Rusk. At the times material here, Schawn, Jason, and apparently Schawn’s wife were living with the Stricklands.<sup>1</sup>

On March 20, 1997, at approximately 5:30 a.m., the neighbor, Rusk, heard “slamming noises and moaning” coming from a travel trailer that the Stricklands had parked outside their home. Rusk looked out her window and saw Schawn emerge from the trailer. She thought he looked agitated or upset. The noises ceased while he was outside the trailer, but resumed when he re-entered the trailer.

After awhile, Rusk saw Schawn come out of the trailer again. He went into the Stricklands’ house. A short time later, the Stricklands came out of the house and entered the

<sup>1</sup> Because so many of the persons involved here have the same surname, we identify each person by his or her first name.

trailer. Katherine said, "[H]e's bad, call 911."<sup>2</sup> An ambulance soon arrived and took Jason to a hospital, where he was found to have a skull fracture and bruising of the brain. He underwent immediate surgery.

About 8:00 p.m. that night, Detective John Chapman spoke to the Stricklands. They both said that Schawn had told them that Schawn had injured Jason in the trailer. Chapman arrested Schawn.

About 11:50 p.m. that night, at the hospital, Chapman took written statements from the Stricklands. According to Katherine, Schawn had "threatened to beat Jason's ass" the previous day; then, about 5:30 a.m., Schawn had awakened her and said that he and Jason had gotten into a fight and that she should go check on Jason.<sup>3</sup> According to Willard, Schawn had "said that he had hit and kicked [Jason] [too] much but [Jason] would not call [him] a snitch [again]."<sup>4</sup> Neither statement was notarized, but each witness declared, "I certify (or declare) under penalty of perjury under the laws of the State of Washington that the preceding is true and correct."

Chapman spoke to Jason at the hospital, and Jason said that Schawn had assaulted him.

On March 21, 1997, the State charged Schawn with second degree assault. On June 9, 1997, a jury trial commenced. Witnesses included the Stricklands, Rusk, Jason, and Chapman. Schawn did not testify.

When Katherine took the stand, she claimed that Schawn did not make the statements she had earlier attributed to him. Instead, she said, he had indicated that Jason threatened him with a knife. When the prosecutor asked her about her written statement, she admitted writing and

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<sup>2</sup> Report of Proceedings I at 17.

<sup>3</sup> Exh. 13.

<sup>4</sup> Exh. 14.

signing it, but she denied its truth. Schawn objected to the statement's admission, but did not address how it should be handled after admission. Relying on ER 801(d)(1)(i), the court admitted the statement and later allowed it to go to the jury room as a tangible exhibit.

When Chapman took the stand, he testified that he had been told by Katherine that Schawn had threatened Jason for calling Schawn a "snitch." He had also been told by Katherine that Schawn had said Schawn would "beat Jason's ass."

When Willard took the stand, he testified that he had been told by Schawn that when Schawn first entered the trailer, Jason had threatened Schawn with a knife. Schawn then struck Jason and took the knife. Willard equivocated when asked whether Schawn had said that Schawn hit and kicked Jason too much, and when asked whether Schawn had said that he had kicked Jason's head so that Jason's head hit the corner of the wall. Willard denied saying that he had been told by Schawn that Jason had called Schawn a "snitch." When the prosecutor asked about Willard's written statement, Willard admitted writing and signing it, but denied it was true. As with Katherine's statement, the defense objected to admission but did not address how the statement should be handled following admission. The trial court admitted the statement under ER 801(d)(1)(i) and later allowed it to go to the jury room as a tangible exhibit.

When Jason took the stand, he testified that he was assaulted by three Mexican males who entered the travel trailer. Schawn came into the trailer after the assault, and he, Jason, threatened Schawn with a knife. Schawn took the knife away.

At the end of the State's case, the trial court denied Schawn's motion to dismiss. At the end of the evidence, the trial court gave self-defense and "aggressor" instructions. The aggressor instruction stated:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.<sup>[5]</sup>

The trial court also instructed the jury to take the law from the court's instructions and not from the statements of counsel.

The jury convicted on second degree assault. At sentencing, defense counsel told the court that he had not interviewed Collette Rusk until the morning of trial. Schawn told the court that he had wanted to testify but defense counsel had kept him from doing so. The court found Schawn to be a persistent offender and sentenced him to life without possibility of parole.

I

Schawn contends that the trial court erred by admitting the Stricklands' written statements. He argues (A) that the statements were inadmissible hearsay, and (B) that even if they were admissible nonhearsay, they should not have been sent to the jury room as exhibits.

A.

ER 801(d)(1)(i) provides:

A statement is not hearsay if...[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (1) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."

Thus, a pretrial statement is not hearsay if (1) the declarant testifies at trial subject to cross, (2) the pre-trial statement is inconsistent with the declarant's trial testimony, (3) the pre-trial

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<sup>5</sup> Clerk's Papers at 51.

statement is given under oath subject to penalty of perjury, and (4) the pre-trial statement is made at a trial, hearing, deposition or "other proceeding."

The first two requirements are met here. The Stricklands were subject to cross-examination, and the statement of each was inconsistent with his or her trial testimony.

The third requirement is also met here. Under RCW 9A.72.085, a statement equates to one made under oath if the declarant "certif[ies] under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct."<sup>6</sup>

The fourth requirement is the one really in issue, but it also is met. In *State v. Smith*, an assault victim gave a handwritten statement at the police station immediately after the assault.<sup>7</sup> She stated, under oath before a notary, that the defendant had assaulted her. At trial, however, she inconsistently testified that someone other than the defendant had assaulted her. The prosecutor then sought to admit her handwritten statement under ER 801(d)(1)(i). In light of the particular circumstances, the Supreme Court ruled that the statement met the "other proceeding" requirement of ER 801(d)(1)(i).

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<sup>6</sup> RCW 9A.72.085 states in pertinent part:

Whenever, under any law of this state . . . any matter in an official proceeding is required or permitted to be . . . proved by a person's sworn written statement [or] . . . oath . . . the matter may . . . be . . . proved . . . by an unsworn written statement . . . which:

- (1) Recites that it is certified or declared by the person to be true under penalty of perjury;
- (2) Is subscribed by the person;
- (3) States the date and place of its execution; and
- (4) States that it is so certified or declared under the laws of the state of Washington.

See also *State v. Nelson*, 74 Wn. App. 380, 389-90, 874 P.2d 170, review denied, 125 Wn.2d 1002 (1994).

<sup>7</sup> *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982)

Similarly, in *State v. Nelson*, a witness said in a statement given at the police station that the defendant was her pimp.<sup>8</sup> She signed a “*Smith* affidavit” under penalty of perjury pursuant to RCW 9A.72.085. Division One ruled that the statement was admissible under ER 801(d)(1)(i).

Applying *Smith* and *Nelson* here, we hold that each element of ER 801(d)(1)(i) is met. Accordingly, the Stricklands’ statements were admissible nonhearsay, and the trial court did not err by admitting them.

B.

A separate question is how the statements should have been handled following admission. On appeal for the first time, Cruze claims they should have been read aloud like pre-trial depositions, *not* sent to the jury room as tangible exhibits. That well may be true, but the error (if any) has not been preserved for review. The error is evidential, not constitutional, and may not be raised on appeal for the first time.

II.

Schawn argues that an aggressor instruction was improper because there was no credible evidence that he was the aggressor. A trial court may give such an instruction when “there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense.”<sup>9</sup> The provocation must be intentional but cannot be the charged assault itself.<sup>10</sup>

Schawn was angry with Jason, to the point of saying that he wanted to “beat Jason’s ass.” Rusk heard sounds that inferentially were Schawn beating Jason before Schawn emerged from

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<sup>8</sup> *Nelson*, 74 Wn. App. at 380.

<sup>9</sup> *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 629 (1999).

<sup>10</sup> *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847, *review denied*, 115 Wn.2d 1010 (1990).

the trailer, and again after Schawn went back into the trailer. At some point during these events, Jason, according to Jason, pulled a knife on Schawn. Reasonable jurors could have inferred that Schawn was aggressive toward Jason before Jason pulled the knife, and giving an aggressor instruction was not error.

### III.

Schawn argues that the evidence is insufficient to support the verdict.<sup>11</sup> Evidence is sufficient to support a verdict if, viewed in the light most favorable to the prosecution, it is such that a rational trier of fact could find beyond a reasonable doubt each essential element of the crime charged.<sup>12</sup> Circumstantial evidence and direct evidence are equally reliable.<sup>13</sup>

The evidence here is sufficient. Rusk testified that she heard slamming and moaning coming from the Stricklands' travel trailer. She saw Schawn leave the trailer looking agitated and upset. She heard the slamming and moaning noises resume when Cruzé returned to the trailer. Schawn had verbalized both a motive and a desire to assault Jason, as recently as the preceding day. Schawn's parents told the police, in admissible statements, that he had admitted to assaulting Jason. A rational trier given this evidence could rationally have inferred, beyond a reasonable doubt, that Schawn was the perpetrator of Jason's injuries.

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<sup>11</sup> Schawn also argues that the evidence was insufficient at the end of the State's case in chief. He is not entitled to review of that contention for reasons explained in *State v. Jackson*, 82 Wn. App. 594, 608-09, 918 P.2d 945 (1996), *review denied*, 131 Wn.2d 1006 (1997); *see also State v. Ramirez*, 46 Wn. App. 223, 225, 730 P.2d 98 (1986).

<sup>12</sup> *State v. Salmas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

<sup>13</sup> *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

IV.

In his pro se brief, Schawn argues ineffective assistance of trial counsel. To succeed, he must show (1) deficient representation (i.e., that the representation fell below an objective standard of reasonableness), and (2) resulting prejudice (i.e., that a reasonable probability exists that, but for the errors of counsel, the result of the proceeding would have been different).<sup>14</sup>

Schawn's specific claims are that trial counsel was confused during jury selection; that counsel failed to properly cross-examine Rusk; that counsel was tardy in providing him copies of the Stricklands' written statements; that counsel failed to show certain pictures of the crime scene to the jury, that counsel failed to play Rusk's 9-1-1 call for the jury, that counsel failed to call Schawn's grandmother as a witness; that counsel failed to fingerprint Jason's knife; that counsel failed to offer proof of purchase of the knife; that counsel tardily interviewed Rusk; that counsel failed to present medical testimony about Jason's injuries; and that counsel failed to present expert testimony about Jason's methamphetamine use.<sup>15</sup> The present record does not show that any of these matters constituted deficient performance, or, even assuming it did, that any of these matters resulted in such prejudice that the outcome of the proceeding would likely have been different.

V.

In his pro se brief, Schawn contends that the trial court failed to inquire sufficiently into his dissatisfaction with trial counsel and, as a result, that the trial court erred by not appointing

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<sup>14</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).

<sup>15</sup> Many of these contentions are difficult to evaluate from the record. This Court will not consider matters outside the trial record where the defendant claims ineffective assistance on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

different counsel. A defendant does not have an absolute Sixth Amendment right to choose any particular advocate.<sup>16</sup> Rather, a defendant who seeks different counsel must show good cause, “such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.”<sup>17</sup> Although a trial court must inquire carefully into a defendant’s reasons for requesting different counsel,<sup>18</sup> the decision to substitute ultimately rests within the sound discretion of the trial court.<sup>19</sup>

The trial court did not abuse its discretion here. Schawn verbalized his concerns on the second morning of trial. The court considered what he said and evaluated counsel.<sup>20</sup> The court would have had to declare a mistrial if it had appointed new counsel.<sup>21</sup> The record does not show good cause to remove existing counsel, and we find no error.

VI.

In his pro se brief, Schawn contends that the prosecutor misstated the law of self-defense during rebuttal closing argument. The prosecutor argued, “If Jason Cruze had been assaulted by someone else and was laying on the floor of the trailer and points the knife, it’s not necessary for

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<sup>16</sup> *Wheat v. United States*, 486 U.S. 153, 159 n.9, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

<sup>17</sup> *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), *cert. denied*, 525 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998).

<sup>18</sup> *State v. Lopez*, 79 Wn. App. 755, 765, 904 P.2d 1179 (1995).

<sup>19</sup> *Wheat*, 486 U.S. at 164.

<sup>20</sup> See Report of Proceedings II at 2-7.

<sup>21</sup> *State v. Jones*, 26 Wn. App. 1, 5-6, 612 P.2d 404, *review denied*, 94 Wn.2d 1013 (1980); see also *State v. Chase*, 59 Wn. App. 501, 505-07, 799 P.2d 272 (1990).

Schawn to have used any force against him in order to prevent Schawn from being injured. All he had to do was back up.”<sup>22</sup> Defense counsel did not object or request other relief.

Counsel must argue the law as set forth in the jury instructions.<sup>23</sup> An appellate court will grant relief, however, only if a misstatement of law constitutes “misconduct so flagrant and ill intentioned that no curative instruction could have obviated the prejudice.”<sup>24</sup> At least generally, a defendant suffers no prejudice if the court has instructed the jury to take the law from the jury instructions, notwithstanding statements of counsel.<sup>25</sup>

Here, it is not clear that the prosecutor misstated the law; he seems merely to have been responding to Jason’s implausible story about the three Mexican males. Even if he did, however, the trial court instructed the jury to take the law from the instructions. Additionally, defense counsel did not object or request a curative instruction, even though the error (if any) would have been cured by such an instruction. It follows that relief is not warranted.

## VII

Finally, Schawn claims that defense counsel prevented him from testifying in his own behalf. A criminal defendant has a constitutional right to testify in his or her own behalf<sup>26</sup> A defendant may claim that his attorney prevented him from testifying even if he remained silent

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<sup>22</sup> Report of Proceedings III at 159.

<sup>23</sup> *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984).

<sup>24</sup> *State v. Kendrick*, 47 Wn App. 620, 638, 736 P.2d 1079, review denied, 108 Wn.2d 1024 (1987).

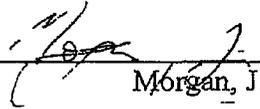
<sup>25</sup> *State v. Kearney*, 75 Wn.2d 168, 173-74, 449 P.2d 400 (1969).

<sup>26</sup> *State v. Thomas*, 128 Wn.2d 553, 556, 910 P.2d 475 (1996) (citing *Rock v. Arkansas*, 483 U.S. 44, 49, 107 S.Ct. 2704, 97 L. Ed. 2d 37 (1987)).

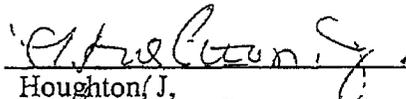
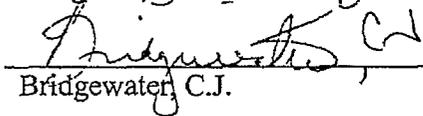
during trial <sup>27</sup> "The defendant must, however, produce more than a bare assertion that the right [to testify] was violated; the defendant must present substantial, factual evidence in order to merit an evidentiary hearing or other action."<sup>28</sup> This record lacks such evidence. Accordingly, we conclude that this last claim fails, and that the conviction should not be disturbed.

Affirmed.

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.

  
Morgan, J.

We concur:

  
Houghton, J.  
  
Bridgewater, C.J.

<sup>27</sup> Thomas, 128 Wn.2d at 561.

<sup>28</sup> Thomas, 128 Wn.2d at 561.

