

87850-9

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II

IN RE:

NO. 41672-7

Adrian Contreras-Rebollar,

PERSONAL RESTRAINT  
PETITION  
RAP 16 et seq.

**A. STATUS OF PETITIONER.**

I, Adrian Contreras-Rebollar, Apply for relief from confinement. I am x am not     now in custody serving a sentence upon conviction of a crime. (If not serving a sentence upon conviction of a crime) I am now in custody because of the following court order: Judgment & Sentenced filed on 02/16/07.

1. The court in which I was sentenced is: Pierce County Superior Court.
2. I was convicted of the crime(s) of: 2 Assault in First degree both with firearm enhancements, and UPOF 2nd degree.



**B. GROUNDS FOR RELIEF:**

(If I claim more than one reason for relief from confinement, I will attach sheets for each separately, in the same way as the first one. The attached sheets should be numbered "First Ground", "Second Ground", "Third Ground", etc.). I claim that I have 2 reason(s) for this court to grant me relief from the conviction and sentence described in Part A.

\_\_\_\_\_ Ground  
(First, Second, etc.)

1. I should be given a new trial or released from confinement because (State legal reasons why you think there was some error made in your case which gives you the right to a new trial or release from confinement): See Attached  
"Petitioner's Opening Brief"
2. The following facts are important when considering my case. (After each fact statement put the name of the person or person who know the fact and will support your statement of the fact. If the fact is already in the record of your case, indicate that also) See Attached
3. The following reported court decisions (indicate citations) in cases similar to mine show the error I believed happened in my case: See Attached
4. The following statutes and constitutional provisions should be considered by the court: See Attached
5. This petition is the best way I know to get the relief I want, and no other way will work as well because:  
I believe is the proper avenue to obtain relief

**C. STATEMENT OF FINANCES:**

I cannot afford to pay the \$250 filing fee or cannot afford to pay an attorney to help me fill out this form. I have attached a certified copy of my prison finance statement (trust account).

1. I do  do not  ask the court to file this without making me pay the \$250 filing fee because I am so poor and cannot pay the fee.
2. I have \$ 0.00 in my prison or institution account. (Attach *certified* six month statement of inmate trust account, available from inmate accounting.)
3. I do  do not  ask the court to appoint a lawyer for me.
4. I am  am not  employed. My salary or wages amount to \$ \_\_\_\_\_ a month. My employer is:

N/A

(Name and address of employer)

5. During the past 12 months I did  did not  get any money from a business, profession or other form of self-employment. (If I did, I got a total of \$ \_\_\_\_\_.)
6. During the past 12 months I:  
Did  did not  receive any rent payments. If so, the total I received was \$ 100.  
Did  did not  receive any interest. If so, the total I received was \$ \_\_\_\_\_.  
Did  did not  receive any dividends. If so, the total I received was \$ \_\_\_\_\_.  
Did  did not  receive any other money. If so, the total I received was \$ \_\_\_\_\_.  
Did  did not  have any cash except as noted in (C)(2) above. If I do, the total cash I have is: \$ \_\_\_\_\_.  
Did  did not  have savings or checking account. If so, total in all accounts is \$ 100.  
Did  did not  own stocks, bonds, or notes. If so, their total value is \$ \_\_\_\_\_.  
7. List all real estate and other property or things of value which belong to you or in which you have an interest. Tell what each item or property is worth and how much you owe on it. Do not list household furniture, furnishings, and clothing which you or your family own.

Items

Value

N/A

N/A

8. I am  am not  married. If I am, my wife or husband's name and address is:  
Karina Evangelista 7865 E. Morton St.  
Tacoma, WA. 98404

9. All of the persons who need me to support them are listed below:

Name & Address	Relationship	Age
Baby brother 7810 S. Alaska ST. Tacoma, WA. 98408	brother	14

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10. All the bills I owe are listed here:

Name & Address of creditor	Amount
DOC Miscellaneous debts	Unlimited

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**D. REQUEST FOR RELIEF:**

I want this court to:

Vacate my conviction and give me a new trial.

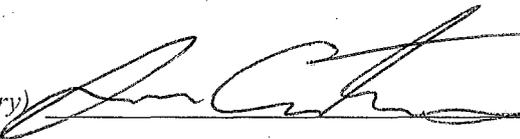
Vacate my conviction and dismiss the criminal charges against me without a new trial.

Other: and/or appoint an attorney to pursue my Grounds at public expense. (Please specify)

**E. OATH OF PETITIONER**

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF GRAY'S HARBOR )

After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents and I affirm the contents of this petition are true and correct under penalty of perjury of the laws of the State of Washington.

(sign before a Notary)   
Print name:

DOC #  
Stafford Creek Correction Center, Unit:  
191 Constantine Way  
Aberdeen, WA 98520

SUBSCRIBED AND SWORN to before me this 16 day of March, 2011.

\_\_\_\_\_  
Notary Public in and for the State of Washington  
Residing at Gray's Harbor

PLRA IN FORMA PAUPERIS STATUS REPORT  
FOR DEFINED PERIOD : 09/01/2010 TO 02/28/2011

DOC : 0000819639      NAME : CONTRERASREBOLLAR ADRIAN      ADMIT DATE : 02/22/2007  
DOB : 06/18/1981      ADMIT TIME : 00:00

AVERAGE MONTHLY RECEIPTS	20% OF RECEIPTS	AVERAGE SPENDABLE BALANCE	20% OF SPENDABLE
61.92	12.38	2.05	0.41

**RECEIVED**  
MAR 22 2011  
CLERK OF COURT OF WA. LAKE COUNTY  
STATE OF WASHINGTON

STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS  
OFFICE OF CORRECTIONAL OPERATIONS  
STAFFORD CREEK CORRECTION CENTER  
CERTIFIED BY: *[Signature]*

GLHARE

OTRTASTA

TRUST ACCOUNT STATEMENT

6.03.1.0.1.2

DOC: 0000819639 Name: CONTRERASREBOLLAR, ADRIAN  
LOCATION: S01-315-H2044U

DOB: 06/18/1981

ACCOUNT BALANCES Total: 69.34 CURRENT: 39.34 HOLD: 30.00

	09/01/2010	02/28/2011
SUB ACCOUNT	START BALANCE	END BALANCE
SPENDABLE BAL	0.00	31.45
SAVINGS BALANCE	0.00	33.89
WORK RELEASE SAVINGS	0.00	0.00
EDUCATION ACCOUNT	0.00	0.00
MEDICAL ACCOUNT	0.00	0.00
POSTAGE ACCOUNT	0.00	0.24
COMM SERV REV FUND ACCOUNT	0.00	0.00

STATE OF WASHINGTON  
 DEPARTMENT OF CORRECTIONS  
 OFFICE OF CORRECTIONAL OPERATIONS  
 STAFFORD CREEK CORRECTION CENTER  
 CERTIFIED BY: [Signature]

DEBTS AND OBLIGATIONS

TYPE	PAYABLE	INFO NUMBER	AMOUNT OWING	AMOUNT PAID	WRITE OFF AMT.
CVCS	CRIME VICTIM COMPENSATION/07112000	02222007	UNLIMITED	17.12	0.00
COIS	COST OF INCARCERATION /07112000	02222007	UNLIMITED	67.78	0.00
COPD	COPY COSTS DEBT	03282008	5.20	0.00	0.00
DEND	DENTAL COPAY DEBT	06232008	3.00	0.00	0.00
COI	COST OF INCARCERATION	02222007	UNLIMITED	0.00	0.00
CVC	CRIME VICTIM COMPENSATION	02222007	UNLIMITED	17.97	0.00
SPHD	STORES PERSONAL HYGIENE DEBT	05112007	1.54	0.00	0.00
TVD	TV CABLE FEE DEBT	05122007	0.50	0.00	0.00
TVD	TV CABLE FEE DEBT	08112007	7.62	0.00	0.00
COSFD	COS - FELONY DEBT (206)	06262010	84.90	52.22	0.00
COSFD	COS - FELONY DEBT (206)	05102007	0.00	180.00	0.00
LFO	LEGAL FINANCIAL OBLIGATIONS	20070309	UNLIMITED	36.78	0.00
POSD	POSTAGE DEBT	02032011	0.34	0.00	0.00
POSD	POSTAGE DEBT	02112009	2.30	0.00	0.00
POSD	POSTAGE DEBT	05092007	0.82	0.00	0.00
POSD	POSTAGE DEBT	03102008	32.55	0.00	0.00
HYGA	INMATE STORE DEBT	01252011	8.24	0.00	0.00
HYGA	INMATE STORE DEBT	02012008	8.92	2.03	0.00
LMD	LEGAL MAIL DEBT	10082008	0.42	0.00	0.00
MISCD	MISCELLANEOUS DEBT	08032009	2.64	0.00	0.00
MISCD	MISCELLANEOUS DEBT	01102008	0.80	0.00	0.00

TRANSACTION DESCRIPTIONS --

SPENDABLE BAL SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
01/31/2011	AD	INTERFACE-I03	0.00	0.00
02/03/2011	POSD	POSTAGE DEBT	0.17	0.17
02/03/2011	POS	POSTAGE	( 0.17)	0.00
02/08/2011	POSD	POSTAGE DEBT	0.17	0.17
02/08/2011	POS	POSTAGE	( 0.17)	0.00

GLHARP

STA. CREEK CORRECTIONS CENTER

OTRTASTA

## TRUST ACCOUNT STATEMENT

6.03.1.0.1.2

DOC: 0000819639 Name: CONTRERASREBOLLAR, ADRIAN

DOB: 06/18/1981

LOCATION: S01-315-H2044U

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
02/08/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	23.29	23.29
02/12/2011	TV	I05 - TV CABLE FEE	( 0.50)	22.79
02/15/2011	TVRNT	TV RENTAL FEE	( 5.00)	17.79
02/17/2011	HOA	HOLD-TO SHIP RADIO	( 15.00)	2.79
02/23/2011	CRS	CRS SAL ORD #6190800STR	( 2.23)	0.56
02/24/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	30.89	31.45

## TRANSACTION DESCRIPTIONS -- SAVINGS BALANCE SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
02/08/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	33.89	33.89
02/24/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	33.89

## TRANSACTION DESCRIPTIONS -- WORK RELEASE SAVINGS SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
02/08/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00
02/24/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00

## TRANSACTION DESCRIPTIONS -- EDUCATION ACCOUNT SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
02/08/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00
02/24/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00

## TRANSACTION DESCRIPTIONS -- MEDICAL ACCOUNT SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
02/08/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00
02/24/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00

## TRANSACTION DESCRIPTIONS -- POSTAGE ACCOUNT SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
02/08/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	5.24	5.24
02/11/2011	RPOST	RECEIPT FOR POSTAGE-CONTRERAS, ROSARIO	10.00	15.24
02/17/2011	HOA	HOLD-TO SHIP TYPEWRITER	( 15.00)	0.24
02/24/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.24

## TRANSACTION DESCRIPTIONS -- COMM SERV REV FUND ACCOUNT SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
02/08/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00
02/24/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00

GLHARP

STAFFORD CREEK CORRECTIONS CENTER

OIRPLRAR  
6.03.1.0.1.2

PLK 1. FORMA PAUPERIS STATUS REPORT  
FOR DEFINED PERIOD : 09/01/2010 TO 02/28/2011

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61.92	12.38	2.05	0.41

STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS  
OFFICE OF CORRECTIONAL OPERATIONS  
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CERTIFIED BY: D. Harp

TRUST ACCOUNT STATEMENT

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 09/01/2010 02/28/2011

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SAVINGS BALANCE	0.00	33.89
WORK RELEASE SAVINGS	0.00	0.00
EDUCATION ACCOUNT	0.00	0.00
MEDICAL ACCOUNT	0.00	0.00
POSTAGE ACCOUNT	0.00	0.24
COMM SERV REV FUND ACCOUNT	0.00	0.00

STATE OF WASHINGTON  
 DEPARTMENT OF CORRECTIONS  
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 STAFFORD CREEK CORRECTION CENTER  
 CERTIFIED BY: D. Harp

DEBTS AND OBLIGATIONS

TYPE	PAYABLE	INFO NUMBER	AMOUNT OWING.	AMOUNT PAID	WRITE OFF AMT.
CVCS	CRIME VICTIM COMPENSATION/07112000	02222007	UNLIMITED	17.12	0.00
COIS	COST OF INCARCERATION /07112000	02222007	UNLIMITED	67.78	0.00
COPD	COPY COSTS DEBT	03282008	5.20	0.00	0.00
DEND	DENTAL COPAY DEBT	06232008	3.00	0.00	0.00
COI	COST OF INCARCERATION	02222007	UNLIMITED	0.00	0.00
CVC	CRIME VICTIM COMPENSATION	02222007	UNLIMITED	17.97	0.00
SPHD	STORES PERSONAL HYGIENE DEBT	05112007	1.54	0.00	0.00
TVD	TV CABLE FEE DEBT	05122007	0.50	0.00	0.00
TVD	TV CABLE FEE DEBT	08112007	7.62	0.00	0.00
COSFD	COS - FELONY DEBT (206)	06262010	84.90	52.22	0.00
COSFD	COS - FELONY DEBT (206)	05102007	0.00	180.00	0.00
LFO	LEGAL FINANCIAL OBLIGATIONS	20070309	UNLIMITED	36.78	0.00
POSD	POSTAGE DEBT	02032011	0.34	0.00	0.00
POSD	POSTAGE DEBT	02112009	2.30	0.00	0.00
POSD	POSTAGE DEBT	05092007	0.82	0.00	0.00
POSE	POSTAGE DEBT	03102008	32.55	0.00	0.00
HYGA	INMATE STORE DEBT	01252011	8.24	0.00	0.00
HYGA	INMATE STORE DEBT	02012008	8.92	2.03	0.00
LMD	LEGAL MAIL DEBT	10082008	0.42	0.00	0.00
MISCD	MISCELLANEOUS DEBT	08032009	2.64	0.00	0.00
MISCD	MISCELLANEOUS DEBT	01102008	0.80	0.00	0.00

TRANSACTION DESCRIPTIONS --

SPENDABLE BAL SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
01/31/2011	AD	INTERFACE-103	0.00	0.00
02/03/2011	POSD	POSTAGE DEBT	0.17	0.17
02/03/2011	POS	POSTAGE	( 0.17)	0.00
02/08/2011	POSD	POSTAGE DEBT	0.17	0.17
02/08/2011	POS	POSTAGE	( 0.17)	0.00

DOC: 0000819639

Name: CONTRERASREBOLLAR, ADRIAN

DOB: 06/18/1981

LOCATION: S01-315-H2044U

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
02/08/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	23.29	23.29
02/12/2011	TV	I05 - TV CABLE FEE	( 0.50)	22.79
02/15/2011	TVRNT	TV RENTAL FEE	( 5.00)	17.79
02/17/2011	HOA	HOLD-TO SHIP RADIO	( 15.00)	2.79
02/23/2011	CRS	CRS SAL ORD #6190800STR	( 2.23)	0.56
02/24/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	30.89	31.45

TRANSACTION DESCRIPTIONS -- SAVINGS BALANCE SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
02/08/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	33.89	33.89
02/24/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	33.89

TRANSACTION DESCRIPTIONS -- WORK RELEASE SAVINGS SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
02/08/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00
02/24/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00

TRANSACTION DESCRIPTIONS -- EDUCATION ACCOUNT SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
02/08/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00
02/24/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00

TRANSACTION DESCRIPTIONS -- MEDICAL ACCOUNT SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
02/08/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00
02/24/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00

TRANSACTION DESCRIPTIONS -- POSTAGE ACCOUNT SUB-ACCOUNT

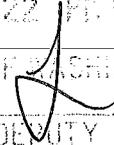
DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
02/08/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	5.24	5.24
02/11/2011	RPOST	RECEIPT FOR POSTAGE-CONTRERAS, ROSARIO	10.00	15.24
02/17/2011	HOA	HOLD-TO SHIP TYPEWRITER	( 15.00)	0.24
02/24/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.24

TRANSACTION DESCRIPTIONS -- COMM SERV REV FUND ACCOUNT SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
02/08/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00
02/24/2011	TIR	Transfer In Reg, Sav, Ed, Med from AB1	0.00	0.00

COURT OF APPEALS  
DIVISION II

11 MAR 22 PM 12:12

STATE OF WASHINGTON  
BY   
DEPUTY

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

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In re the Personal  
Restraint Petition of:  
ADRIAN CONTRERAS-REBOLLAR,  
Petitioner.

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PETITIONER'S OPENING BRIEF

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ADRIAN CONTRERAS-REBOLLAR  
Acting Pro Se

Stafford Creek Corr. Center  
191 Constantine Way  
Aberdeen, WA. 98520

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## I. ASSIGNMENTS OF ERROR

### A. Assignments of Error

1. The trial court erred when it took direct arbitrary action prohibiting use of Petitioners co-counsel.
2. Petitioner was not granted "counsel" guaranteed him by the 6th Amendment U.S. Const. when lead-counsel rendered ineffectively, thus depriving him of his right to a fair trial.

### B. Issues Pertaining to Assignments of Error

1. Was Petitioner's rights under the sixth and Fourteenth Amendments to the Constitution of the United States "to have the Assistance of Counsel for his defense" infringed upon when the trial court took arbitrary action and excluded Mr.Contreras' co-counsel from further participation at his trial, with no explanation given for its action? (Assignments of Error 1)
2. Was lead counsel deficient when failing to propose the crucial and pertinent "Defense of Another" jury instruction for the jury, when there was sufficient and substantial evidence to warrant the giving of such instruction for

the jury to decide upon to establish self-defense? (Assignments of Error 2)

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3. Was Petitioner's rights under the sixth and Fourteenth Amendments to the United States Const. to a fair trial denied when lead counsel rendered ineffective assistance of counsel in Petitioners defense? (Assignments of Error 2)

## II. STATEMENT OF THE CASE

### A. Substantive Facts

The charges in this case stem from a shooting in the early morning hours of April 12, 2006. (RP3 120)<sup>1</sup> Adrian Contreras-Rebollar (Contreras/Petitioner) declared that he was forced to act in self-defense because he feared Nicholas Solis was going to shoot him and his passenger Regina Hernandez. (01/22/07 RP 162, 164, RP7 859-61, 872, 875-76; RP8 1006, 1008)

On the afternoon of April 11, 2006 the day before the shooting, which occurred around midnight per the police reports, Contreras accompanied Solis to a court appearance Solis had in Puyallup. (RP4 404, 406; RP7 840) At first, Solis testified he simply said good-by and went to a friends home to take drugs. (RP4 407) But later testified: after his court appearance, he went to a friends house and traded half a gram of meth to obtain a .50 caliber rifle. (RP4 410-11) According to him: it did not work because he'd tried to fire it at a location he would

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<sup>1</sup> Citations to the trial transcripts contained in volumes 1-8 will be to the volume number followed by the page number (RP# ##). Citations to the remaining volumes will be to the date of the proceeding followed by the page number (DATE RP ##).

not disclose. (RP4 424-25) To which State witness Regina testified: she saw Solis trying to shoot his rifle in an alley at her and Contreras. (RP4 272-73)

Petitioner testified: after Solis' Court appearance, (while in Solis' car) Mr.Solis, drove him to the house of Solis' friend, Regina Hernandez. (RP7 841-42) This was due to Mr.Contreras having had parted company with his vehicle, which he left parked at a store parking lot, so that he may ride together with Mr.Solis to Solis' Court appearance out to Puyallup. (RP4 403-06)

As Contreras tried to part company from Solis and Regina, Regina got into Contreras' car and said Solis was trying to touch her. (RP7 846) Contreras, now with Regina, simply kept driving, however Solis followed. (RP7 846-47) Contreras tried to get away from Solis but Solis tailed them close behind. (RP7 848) Contreras eventually parked while Solis parked right behind him. Solis looked mad, and Contreras felt he was upset about Regina having had left with him. (RP7 848-50)

Contreras stated: Regina got out of his car and went to talk to Solis. (RP7 850) She and Solis argued, when she returned, she told Contreras Solis had

tried to hit her with a crowbar. (RP7 850-51)

Contreras then drove to his friend Shawna's house. (RP7 851) While there, Regina wanted Contreras to drop her back off were Solis had picked her up at. (RP7 854) Regina was driving back to were Solis picked her up at, but drove to a 'Concretes' house instead to try and spend the night there. (RP7 855) Ahria Kelley, a close friend of Solis was there and insisted at being driven to a certain alley a few block's away. (RP5 526-27; RP7 856-57) Both Contreras and Mr. Kelley testified: Regina indeed had driven them both to the alley in order to drop Kelley off. (RP5 486; RP7 856)

It was night time now and as they were approaching the alley, Regina testified that Solis was there, appeared angry, had a bandana covering his face, and the sun visor to his car in a downed position. (RP4 270-71) Knowing all this, Regina testified: She was the first one to exit Contreras' vehicle once Kelley got out. (RP4 271)

Contreras testified: once Regina was out, Solis aimed what appeared to be a shotgun directly at Regina. (RP7 859) Contreras tried to be protective of Reginas life at that point in which he stated he got

out to approach Solis in a temperate manner to question Solis about his rash and irrational behaviour. (RP4 268-69, 271-73, 309) Kelley testified: he did not witness nor see a confrontation take place between Solis and Contreras in the alley. (RP5 492-93) However, once out his vehicle, thereafter, Solis came after Contreras. (RP4 268-69, 273, 312; RP7 860)

State witness Regina testified: she got back in the drivers seat of Contreras' car because "I had to get out of there," and "I was scared." (RP4 276) Solis claimed that he does not remember whether he talked to Contreras in said alley. (RP4 410, 412)

After that incident, Regina drove to Yessica Rosas' house. (RP4 276; RP7 865) They quickly had to leave Rosas house due to Regina getting loud and arguing with Yessica. (RP4 288; RP5 537, 566-67; RP7 869) Almost immediately, as they were pulling out, Solis' vehicle was now approaching them. (RP4 288, 414)

Contreras, afraid of his person being shoot, ducked and fired towards Solis' car. (RP7 875) He testified: he was only trying to protect himself and "especially" the life of Regina Hernandez. (RP7 872) He further felt there was no alternative to his use

of force because he was caught in the dead-end of a cul-de-sack. (RP7 879)

When police arrived at the scene, they testified: the drivers door window to Solis' vehicle was rolled down. (RP5 665) That the sun visor was in a down position. (RP5 666-67) This while it was or it had been raining outside. (RP7 875) Police also found a rifle tucked under Solis' arm. (RP3 191, 217) The barrel of the rifle, aimed forward, towards the dashboard. (RP3 192)

#### **B. Procedural History**

Prosecution charged Mr. Contreras by Information to two counts of first degree assault (RCW 9A.36.011 (1)(a)), while armed with a firearm (RCW 9.94A.310/510), and one count of second degree unlawful possession of a firearm (RCW 9.41.040(2)(a)(i)). (CP 1-2) The jury convicted Mr. Contreras of both counts of first degree assault and found he was armed with a firearm during commission of those charges. (RP8 1046-47; CP 108-13)

Appeal of convictions was brought forth in the State Court of Appeals Div. 2. Previous mandate was issued by the Appeals Court affirming Petitioner's convictions but remanding back for resentencing.

Petitioner now respectfully petitions this Honorable Court to retain his petition and deem the issues presented as non-frivolous and find that the Petitioner is indigent so that the Court may provide for the appointment of counsel at public expense to further argue the issues presented by Petitioner.

### III. ARGUMENT & AUTHORITIES

1. The trial court denied Petitioner his 6th Amend. U.S. Constitutional right when it took direct arbitrary action excluding his co-counsel attorney while in trial with no explanation given for its action.

The Personal Restraint Petition is an original action. **RAP 16.1(c)**. The Petitioner does not seek review of another court's decision, but rather sets forth allegations detailing the unlawfulness of detention. The courts grant relief by PRP when a person is being restrained unlawfully. **RAP 16.4(a)**.

A person is under "restraint" if he or she "has limited freedom because of a court decision in a civil or criminal proceeding." **RAP 16.4(b)**. Petitioner is under restraint due to his imprisonment at a DOC facility serving a term of confinement pursuant to a court order in a criminal proceeding. However, **RAP 16.4(c)(2)** provides that a restraint is unlawful if a

sentence "was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington."

Petitioner hereby argues to prove to this Court that an injustice was done on his case during trial that directly impacted his defense presented at trial, due to such injustice thereof, his convictions for which he is sentenced were obtained through a direct violation of his 5th, 6th, and 14th Federal U.S. Constitutional Amendments.

The Petitioner may obtain relief by demonstrating either a Constitutional violation or a violation of State law. **RAP 16.4(c)(2), (6); In re Cashaw, 123 Wn. 2d 138, 148, 866 P.2d 8 (1994)**). Under the rule therefore, Petitioner is entitled to collateral review of his sentence and conviction therein if he can show that a decision "was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington." **RAP 16.4(c)(2).**

Petitioner hereby points out to this Court that his argument here, differentiates, in regards to the Constitutional nature of his argument argued on

direct appeal, as well as, differentiates the moral legal argument brought forth on direct appeal.

The 6th U.S. CONST. Amend., guarantees criminal defendants the qualified right to select and to be represented by one's preferred attorney. Wheat v. U.S., 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Additionally, a criminal defendant, who pays for his own attorney, generally has a right to counsel of his choice. State v. Roth, 75 Wn. App. 808, 824, 881 P.2d 268 (1994), as this Court previously interpreted from, U.S. v. Washington, 797 F.2d 1461, 1465 (9th Cir. 1986)., It is settled law that under the 6th Amend. criminal defendants "who can afford to retain counsel have a qualified right to obtain counsel of their choice."

"while the right to select a particular person as counsel is not an absolute right, the arbitrary dismissal of a defendant's attorney of choice violates a defendant's right to counsel. U.S. v. Laura, 607 F.2d 52 (3rd Cir. 1979) at 33.<sup>2</sup>

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<sup>2</sup> Research conducted for U.S. v. Laura, 607 F.2d 52 (3rd Cir. 1979) case is derived from the VersusLaw, Inc. computer "Law Search Engine" program. At ## being the numbered paragraph of language and/or law provided therein.

Embodied within the 6th Amendment is the conviction that a defendant has the right to decide, the type of defense he wishes to mount. See Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Brooks v. Tennessee, 406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972).

It is from this principle and belief that the defendant's right to select a particular individual to serve as his attorney is derived. Laura at 34.

In the instant case, well ahead before trial commenced, Mr. Jay Berneburg was retained by Mr. Contreras' Family to join in Petitioners case as co-counsel representative. (01/17/07 RP 3; CP 18) At trial, Regina testified: she saw Solis' vehicle coming, saw that his car headlights were turned off and only the running lights were turned on. (RP4 289) A central issue in the in Mr. Contreras assertion of self-defense. However, issues arose, when in her statement to police a day after the incident, she stated she had not seen the car until after it had passed by them. (RP4 399) Trial was recessed, at which point the prosecutor, goes up to the witness stand and confers with Regina. (RP6 787-88) The record shows: it was after this recess that Ms. Hernandez gives the adverse testimony stating: Mr. Berneburg told her to say that Solis' headlights were turned off. (RP4 305-06)

This, while Mr. Berneburg was not present during the examination of Ms. Regina. (RP6 790 at 14; 787 at 3) This completely contradictory statement made by State witness had the prosecution ask the trial court that Mr. Berneburg, be excluded from further defending Mr. Contreras. (RP5 453) The overriding issue here is, neither Regina nor Mr. Berneburg were ever charged nor accused by anybody of committing perjury. (RP6 682) Nonetheless, the trial court excluded and dismissed Mr. Berneburg from further representing his client, and Petitioner, for his defense. (RP5 460-61)

This, after Berneburg had given opening statement on the case. (01/22/07 Rp 159) And, having had crossed examined 3 of the State witnesses, and which lead-counsel, Schoenberger, was not, and had not been present to hear of their testimony. (RP3 147-96)

Thus, by this point in the proceedings, exclusion of defendant's attorney from further being able to represent him at his criminal trial, Petitioner's **6th Amend.** rights had matured at and by the time of said exclusion. See Kirby v. Illinois, 406 U.S. 682, 688-89, 32 L. Ed. 2d 411, 92 S. Ct. 1877 (1972)

Nonetheless, direct arbitrary action was taken against Mr. Contreras' defense and, upon his defense team composed of

2 very separate and distinct attorney's.

Not only does the selection of an attorney demark the sphere of defense strategies a defendant will have presented to him; with his selection he may also give his attorney the authority to make decisions for him. For once a lawyer has been selected "law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas." Faretta v. California, 422 U.S. at 820, 95 S. Ct. at 2534. See also ABA Standards Relating to the Administration of Criminal Justice, The Defense Function (1971), quoted in Faretta, Section 1.1(a) provides: Counsel for the accused is an essential component of the administration of criminal Justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused. Section 5.2(b) states: The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and all tactical decisions are the exclusive province of the lawyer after consultation with his client.

"We would reject reality if we were to suggest that lawyers are a homogeneous group. Attorneys are not fungible,

as are eggs, apples and oranges. Attorneys may differ as to their strategy, their oratory style, or the importance they give to particular legal issues. The differences, all within the range of effective and competent advocacy, may be important in the development of his defense. Given this reality, a defendant's decision to select a particular counsel becomes critical to the type of defense he will make and thus falls within the ambit of the 6th amendment." Laura, 607 F.2d at 38.

As noted by the 3rd Cir. Federal Court in Laura, "the ability of a defendant to select his own counsel permits him to choose an individual in whom he has confidence." With this choice, the intimacy and confidentiality which are important to an effective attorney-client relationship can be nurtured. Laura, 607 F.2d at 40. As it certainly was nurtured in Petitioner's case.

Thus, if a defendant chooses a particular counsel, the 6th Amendment prevents a court from taking any "arbitrary action prohibiting the effective use of (a particular) counsel." See United States ex rel. Carey v. Rundle, 409 F.2d 1210, 1215 (3rd Cir. 1969), Cert. denied, 397 U.S. 946, 90 S. Ct. 964, 25 L. Ed. 2d 127 (1970).

Nonetheless, direct arbitrary action was taken against Mr. Contreras' defense and, upon his defense team composed of 2 very separate and distinct attorney's. Further, this direct arbitrative action was taken without a proper colloquy, per **RPC 3.7(d)**, or an evidentiary hearing conducted on this very sensitive issue.

Before disqualification, and thus, exclusion of Petitioner's counsel, the trial court erred, in that, it did not decide or adjudicate it's decisions for doing so. As per **RPC 3.7(d)**, if a proper colloquy would have been conducted, the trial court would impedingly have had to make the decision of whether said disqualification would be a hardship upon the defendant; or whether available counsel was readily prepared to continue without the help from co-counsel; and whether the exclusion is likely to result in indentifiable prejudice to the defendant's case of a material or substantial nature.

The trial court did not make any of those findings before it took direct arbitrary action when excluding Mr. Berneburg from the courtroom as well as from further representing Petitioner during his trial.

Thus, the trial court abused its discretion when it took direct arbitrary action against Petitioners defense team he

had composed when it excluded Petitioners retained co-counsel of choice. Thus, infringing upon Petitioner's **6th Amend. Federal Constitutional** right to be represented by an attorney of his choice, thereby, denied Petitioner his due process of law guaranteed by the **14th U.S. CONST. Amend.**

The State Court of Appeals however, fails to recognize that Mr.Berneburg was excluded from further representing his client, Mr.Contreras, before the adjudication of the trial court was given to place Mr.Berneburg on the defense witness list.

The trial court however, didn't even consider the possibility of placing Mr.Berneburg on the defense witness list until Mr.Schoenberger filed a defendant's motion to disqualify, a motion for mistrial, along with the amended witness list. (RP6 673-75) Schoenberger asked to be disqualified to attest that Berneburg did not induce Hernandez to commit perjury. (RP6 684)

The trial court denied both motions and adjudicated: that only Mr.Berneburg be excluded from representing Mr.Contreras at his trial and was excluded from the actual courtroom itself. (RP6. 683-84)

On p.g. 5, the court of appeals relies on RP6, January 25, 2007. "Now a witness, the trial court excluded Berneburg from

the courtroom." (AP-A 5)<sup>3</sup>

Petitioner however, relies on the arbitrary action taken by the trial court the previous day, January 24, 2007. "THE COURT: I've heard enough on this...I am going to exclude Mr.Berneburg from participating in the trial..." (RP5 460) Mr. Berneburg, still part of the defense, certainly objected to this exclusion. (RP5 455-56, 460) Lead-counsel Schoenberger certainly objected after this arbitrary action was taken by the trial court. (RP5 464) And, even do on this date Mr.Schoenberger proposed putting Mr.Berneburg on the witness stand. (RP5 459) The court, clearly saw no reason to do so stating: "IT doesn't do anything...so it's unnecessary to do that." (RP5 459-60)

Nonetheless, the court excludes Mr.Berneburg from participating in Mr.Contreras' defense, while giving absolutely no reason, none which may be discernible from the record, for its direct arbitrary action taken against Petitioner's defense and, against his defense team composed. (RP5 460)

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<sup>3</sup> Citations to the Appendix will be AP (Appendix) followed by the letter of the Appendix, with the page number. (AP-\_\_ #)

An unimportant morass here: Schoenberger stating Mr. Bern-  
enburg's role is limited and his role would be in the background.  
(RP5 452) However, all co-counsel's roles are limited. You're  
either lead-counsel on a case, or co-counsel, and that's  
precisely what Schoenberger was referring to. Even do Berne-  
burg's role was to be in the background, his role there was to  
subsidize and advocate critical functions to Mr. Contreras'  
defense.

Berneburg was in charge of 4 crucial witness's for the  
defense, including that of Benito Cervantes. (RP6 793, 795;  
AP-C 1-2) As well as the jury instructions on Petitioner's  
case. (RP5 452 at 10; 456 at 13)

Authority Petitioner relies on for his argument is in  
United States v. Laura, 607 F.2d 52 (3rd Cir. 1979)., along  
(Cases cited therein). Stated in Laura, "a judge cannot  
dismiss local counsel because of counsel's participation was,  
in the eyes of the judges, modest or miniscule. Laura, 607  
F.2d at 45.<sup>4</sup>

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<sup>4</sup> Research conducted for U.S. v. Laura, 607 F.2d 52 (3rd Cir.  
1979) case is derived from the VersusLaw, Inc. computer "Law  
Search Engine" program. At ## being the numbered paragraph of  
language and/or law provided therein.

Every criminal defendant shall enjoy the right to have assistance of counsel for his defense. **U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22 (amend. X)**

It is generally the defendant's right to make a choice from the available counsel in the development of his defense. Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense he will make and thus falls within the ambit of the sixth amendment. **Laura, 607 F.2d at 38.** Thus, if a defendant chooses a particular counsel, the sixth amendment prevents a court from taking any "arbitrary action prohibiting the effective use of (a particular) counsel." **Laura, 607 F.2d at 41 (citing United States ex. rel. Carey v. Rundle, 409 F.2d 1210, 1215 (3rd Cir. 1969), Cert. denied, 397 U.S. 946, 90 S. Ct. 964, 25 L. Ed. 2d 127 (1970)).**

"Nor do we consider it decisive that after the dismissal of her local counsel Laura continued to have the services of Casteleiro." [lead-counsel] "By the time of her hearing, she had a defense team composed of two attorneys who may have served distinct and important functions on her behalf. As she wished to retain both attorneys we can only presume that she felt that she needed both attorneys." **Laura, 607 F.2d at 48.**

"Moreover, as long as Rothstein [excluded attorney] performed a defense function, we do not believe that the defendant should be faced with the burden of proving the importance of his assistance. Therefore, Laura need not show that the dismissal was prejudicial." Laura, 607 F.2d at 49, (emphasis added).

"The right to counsel is among those "constitutional rights (which are) so basic to a fair trial that their infraction can never be treated as harmless error." Laura, 607 F.2d at 49 (citing Chapman v. California, 386 U.S. 18, 23 and n.8, 87 S. Ct. 824, 828 17 L. Ed. 2d 705 (1967)).

Petitioners case is on par with Laura, 607 F.2d at 48, in that Mr. Berneburg served very distinct and important functions in preparing and establishing Mr. Contreras' defense.

Petitioner's Federal due process claim is in that: he was denied his **5th Amend.** due process right when the trial court denied and violated his **6th Amend. CONST.** right to a fair trial when the trial court excluded and, took direct arbitrary action, without proper cause findings, against his retained attorney of choice, and, thus denied him his qualified right to be represented by an attorney of his choice. And thus, his **14th Amend.** Due Process rights applied to the States through the Federal CONST. was also denied.

Thus, Petitioner should be entitled to a new trial because denial of a defendant's qualified right to retain counsel of his choice for his defense is reversible error regardless whether prejudice is shown. See U.S. v. Greger, 657 F.2d 1109, 1113 (9th Cir. 1981), cert. denied, 461 U.S. 913, 77 L.Ed.2d 281, 103 S. Ct. 1891 (1983).

2. Petitioner was provided Ineffective Assistance of Counsel when counsel failed to propose a crucial jury instruction to substantiate the defense theory of the case.

This second issue is a Personal Restraint Petition original action. **RAP 16.1(c)**. The Petitioner does not seek review of another court's decision, but rather sets forth allegations detailing the unlawfulness of detention. The courts grant relief by PRP when a person is being restrained unlawfully. **RAP 16.4(a)**.

A person is under "restraint" if he or she "has limited freedom because of a court decision in a civil or criminal proceeding." **RAP 16.4(b)**. Petitioner is under restraint due to his imprisonment at a DOC facility serving a term of confinement pursuant to a court order in a criminal proceeding. However, **RAP 16.4(c)(2)** provides that a restraint is unlawful if a sentence "was imposed or entered in violation of the Constitution of the United States or the Constitution or laws

of the State of Washington." The Petitioner may obtain relief by demonstrating either a Constitutional violation or a violation of State law. RAP 16.4(c)(2), (6); In re Cashaw, 123 Wn.2d 138, 148, 866 P.2d 8 (1994)). Under the rule therefore, Petitioner is entitled to collateral review of his sentence and conviction therein if he can show that a decision "was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington." RAP 16.4(c)(2).

Mr. Contreras hereby points out to this Court that his argument here, differentiates, in regards to the Constitutional nature of his argument on direct appeal, as well as, differentiates the moral legal argument there.

On p.g. 14 of the Appellate Courts decision they state: "In this case, defense counsel's decision not to propose a 'Defense of Another' instruction to the jury **could have** been a tactical decision to focus Contreras' self defense case theory." (emphasis added) They then explained irrelevant facts such as: Hernandez having been a witness for the State, which is wrong. She's being called as a witness by the State, but nonetheless, she's still a witness in a criminal accusation case in which the defendant has the right to cross-examine and to confront the witness's against him. **U.S. CONST. and.**

VI; WASH. CONST. art. 1, § 22 (amend. X)

~~Both during cross-examination, and also during her direct~~  
examination by the prosecution, she gave testimony extremely helpful for the defense. The defense had been, and was trying to contact her through investigators and subpoenas. The State itself however, was not able to contact her until a day before the trial started. (RP6 784) So, the pretense that Ms.Hernandez was being called by the State as a witness does not have anything to do with defense counsels ineffectiveness in failing to propose the "Defense of Another" jury instruction for the jury.

This conclusion of "**could have**" by the appellate court is unsupported by the record. What is supported by the trial transcribed record is, the plain ineffective assistance. When the State and defense counsel sat down to discuss the proposed jury instructions, defense counsel simply deffered to the State's instruction's if the prosecutor would incorporate the defense's instructions for the final redraft being presented to the jury. (RP7 939)

Even during closing arguments this counsel was relying on the 'Defense of Another' theory of Mr.Contreras' self-defense claim. (RP8 1006, 1008) Apart from Regina Hernandez's own testimony, Petitioners testimony alone that he feared

for Hernandez's life was enough to suffice a "Defense of Another" instruction to and for the jury to decide. (RP7 875-76)

Due process of law requires the State to prove every element of the crime charged beyond a reasonable doubt. **U.S. CONST. amend. XIV; WASH. CONST. art 1, § 3; In re Winship, 397 U.S. 358, 90 S. CT. 1068, 25 L.Ed.2d 368 at 364 (1970).** Where the issue of self-defense is raised, the absence of self-defense becomes another element of the offense, which the State must prove beyond a reasonable doubt. **State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984).**

Under Washington law, an actor must use force to defend another if he subjectively believes the other is in danger and, considering only the circumstances known to the actor, a reasonable person would share his belief. **State v. Penn, 89 Wn.2d 63, 66, 568 P.2d 797 (1977).** Mr. Contreras testified he was trying to protect himself and "especially" the life of Regina. (RP7 872) He feared Solis was going to shoot them with what he subjectively believed to be a shotgun. (RP7 873)

Every criminal defendant is entitled to a fair trial by an impartial jury. **WASH. CONST. art. 1, § 3,21,22.** A defendant is also guaranteed effective assistance of counsel. **U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22 (amend. X); State v.**

McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

~~With his testimony and that of Regina's, Petitioner was~~  
certainly entitled to a "Defense of Another" jury instruction  
as provided in State v. Penn, 89 Wn.2d at 66.

However, without this instruction, the jury was unable to  
decide on this theory of the defense. Thus, relieving the  
prosecution of its proper burden of proof. Here, trial counsel  
fell "below an objective standard of reasonableness based on  
consideration of all the circumstances" when: Shoenberger did  
not type the final redraft of the jury instructions himself,  
had the prosecutor type them for him, and through this inne-  
ffective assistance failed to propose the "Defense of Another"  
jury instruction, which struck at the heart of Petitioners  
line of defense. (quoting McFarland, 127 Wn.2d at 334-35)

Petitioner understands that a defendant must demonstrate  
the absence of a legitimate or tactical reason(s) for the  
challenged conduct. McFarland, 127 Wn.2d at 336. However, other  
than the deficient conduct above, there's nothing on the record  
for which Schoenberger gives any legitimate or tactical reason(s)  
for failing to propose this critical jury instruction.

During the case's Opening Statement, both defense attor-  
neys were present when Mr. Berneburg addressed the jury that  
Petitioner was acting in the lawful defense of Ms. Hernandez.

(01/22/07 RP 162, 164)

~~As was the case during Closing Argument to the jury~~

Schoenberger: "There can be no doubt that Adrian was defending... Regina, his passenger." And, "It is the States burden not mine," (RP8 1006, 1008; AP-B 1006)

According to State v. Thomas, 109 Wn.2d 222, 223, 743 P.2d 816 (1987), Petitioner argues Schoenberger rendered ineffective assistance when he failed to completely and competently present his self-defense theory that he acted in the lawful defense of another.

On par with Thomas, Petitioner asserts that a "Defense of Another" jury instruction would have better enabled counsel to present the defense theory of Mr. Contreras' case. Thomas, 109 Wn.2d at 228-29.

And, an attorney of reasonable competence would not have failed to offer the instruction mandated by RCW 9A.16.020(3); WPIC 17.02. Thomas, 109 Wn.2d at 227.

Adopting the 2-prong test in Strickland v. Washington, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), Petitioner contends Schoenberger's performance was deficient and fell below an objective standard of reasonableness as: previously aforementioned above. For the 2nd-prong of this test, defendant must show that this deficient performance prejudiced the defense and, this prejudice was so serious to

deprive him of a fair trial. Strickland, at 687.

~~Here, Petitioner was prejudiced in that: Counsels failure~~  
in not proposing this pertinent and crucial 'Defense of Another' jury instruction, relieved the prosecution of its proper burden of proof regarding Contreras' subjective self-defense theory that he acted in the defense of Hernandez.

And, was prejudiced in that: without the instruction, the jury may have never considered the subjective component that Mr. Contreras indeed presented and testified to the fact that he acted in the defense of another, his passenger, Regina Hernandez. As it was instructed to "disregard any remark, statement, or argument that is not supported...in my instructions.", in Instruction # 2 p.g.2 of the 'Court's Instructions To The Jury'. And thus, thereby, indirectly effecting Mr. Contreras' testimony and credibility.

All this, in conjunction to the prejudice incurred by counsels deficient performance in not proposing this very pertinent **WPIC 17.02** "Defense of Another" Jury instruction, deprived Petitioner of his **6th Amend. CONST.** right to have the Assistance of Counsel for his defense, his **5th Amend. CONST.** right to due process of law guaranteed by the **14th Amend. CONST.** Thereby further denying Petitioner his **6th Amend. CONST.** right to a fair trial.

#### IV. CONCLUSION

For the foregoing reasons, the Petitioner respectfully asks this court to grant his personal restraint petition and reverse Petitioners conviction to remand his case back to the trial court for a New trial.

Petitioner was denied his right to counsel when the trial court took direct arbitrary action in excluding Petitioners retained co-counsel Mr. Jay Berneburg. Thus, prohibiting the effective use of Mr. Berneburg and thereby directly impacted Contreras' line of defense he had established with his attorney, along with, directly impacting the defense team he had composed. The trial judge excluded Petitioners co-counsel, without setting forth, nor making any findings to justify that dismissal. This dismissal, along with its inadequate findings, infringed upon, and thus violated Petitioner's right to counsel embodied within the **sixth amendment**.

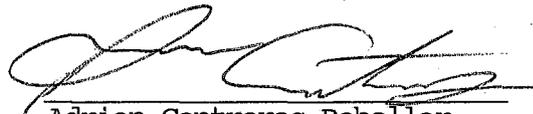
Alongside this, Petitioners remaining counsel did not perform as counsel when he rendered Ineffective assistance of Counsel. In failing to propose a vital and critical jury instruction to rightly attest Petitioners defense strategy, which he was entitled to, that he acted in the lawful defense of another, his passenger, the prosecution was

relieved from its proper burden of proof in having to  
~~disprove that Petitioner indeed had acted to defend another.~~

Due to this ineffectiveness, Petitioners right to a fair trial was violated as he was not provided the adequate effective assistance mandated by the Constitution of the United States.

Petitioner respectfully asks this court to grant his personal restraint petition and appoint him counsel at public expense to further and readily argue his petition.

DATED: March 16, 2011

  
Adrian Contreras-Rebollar

**CERTIFICATE OF MAILING**

I certify that on 03/16/2011, I caused to be placed in the mails of the United States, first class postage pre-paid, a original of this document addressed to:

Washington Court of Appeals  
Division II  
950 Broadway, Suite 300  
Tacoma, WA. 98402-4454

  
Adrian Contreras-Rebollar

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**APPENDIX "A"**

1           assuming -- Mr. Berneburg just told me he didn't say  
2           this. I'm assuming that's what he'll say. What do I  
3           learn from that? Nothing that I don't already know, so  
4           it's unnecessary to do that.

5                   MR. BERNEBURG: Your Honor, one of the  
6           problems we have here is with this instruction and Mr.  
7           Greer trying to call attention -- this is what he's  
8           trying to do, is color this evidence. This witness has  
9           given inconsistent statements at various times on a  
10          number of different issues.

11                   THE COURT: I've heard enough on this. I'm  
12          not going to give this proposed instruction at this  
13          time. We can take it up, I guess, at the end of the  
14          trial if you think it's still appropriate, Mr. Greer.  
15          I am going to exclude Mr. Berneburg from participating  
16          in the trial unless prior court permission has been  
17          granted. If I'm given some good reason why he needs to  
18          participate, then we'll discuss it again. I'm not  
19          going to order him out of the courtroom.

20                   If he wants to sit and watch as a member of the  
21          public, he can, but not at counsel table without prior  
22          court permission. So anything else before we bring in  
23          the jury for Mr. Kelley?

24                   MR. GREER: We just need Mr. Kelley here.

25                   MR. BERNEBURG: Your Honor, there is an issue

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**APPENDIX "B"**

1 hard to miss. Ahria does the right thing after the  
2 vehicle comes to a halt. He gets out and he goes  
3 around to the driver's side to try and help his friend.  
4 He still doesn't see this rifle that's in plain sight  
5 and sitting right there. The officers sure saw it  
6 immediately. How could Ahria miss it and why didn't he  
7 allow that he saw it, especially now that he has a  
8 grant of immunity from prosecution for anything that he  
9 might have done wrong, but he still doesn't admit that  
10 he saw the rifle.

11 There can be no doubt that Adrian was defending  
12 himself and Regina, his passenger, but in order to find  
13 that Adrian is not guilty of self-defense, you must  
14 decide if his use of force was reasonable in light of  
15 the actual or perceived threat. It is the State's  
16 burden, not mine, to prove that it was not. I don't  
17 have to prove that it was reasonable. Mr. Greer has to  
18 prove that it wasn't reasonable, and he hasn't done  
19 that.

20 Nothing has been offered in evidence to suggest  
21 that Adrian was not justified in using a firearm to  
22 defend himself and Regina Hernandez. But even if you  
23 believe that his use of force was excessive or was  
24 unreasonable, under the circumstances it's not the  
25 assault 1 because there's no intent to inflict great

**APPENDIX "C"**



06-1-01643-4 26871158 NOTE 01-29-07

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

PIERCE COUNTY, WASHINGTON  
BY ASTIN BOON County Clerk  
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STATE OF WASHINGTON, )  
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 Plaintiff, )  
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 vs. )  
 )  
 ADRIAN CONTRERAS-REBOLLAR, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

NO. 06-1-01643-4  
PROPOSED TESTIMONY  
OF BENITO CERVANTES

Benito Cervantes is licensed as a private investigator in the State of Washington. Mr. Cervantes has been licensed in Washington for more than five years. Mr. Cervantes is fluent in both English and Spanish.

Mr. Cervantes works primarily with criminal defense attorneys on serious felony cases often where the witnesses do not speak English. Consequently, Mr. Cervantes has acquired extensive professional knowledge of Surrenor and Nortenos, rival hispanic gangs.

Mr. Cervantes may provide historical background of the gangs and their reputation for drug dealing and for violent behavior.

In *State v. Ocampo*, Pierce County Cause No. 03-1-03985-5, Mr. Cervantes worked with attorney Berneburg for over a year investigating Surrenos activity on Tacoma's east side. Mr. Cervantes is intimately aware of Surreno drug activity and violence. Mr. Cervantes is previously familiar with and/or interviewed a number of the witnesses in this

PROPOSED TESTIMONY OF BENITO CERVANTES

ORIGINAL

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case; namely, Nick Solis (Smiley), Ricardo Ruiz (Wolfy), and Yessica Rojas. As Mr. Cervantes is an authority on Hispanic gang activity in the State of Washington, California and Tacoma's east side. He will help the jury understand why Smiley's involvement in the Surrenos is an important fact in this case.

DATED 26 day of January, 2007.

  
Jay Berneburg WSBA 27165  
Co-Counsel for Defendant.