Cause No. 87650-9

WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN CONTRERAS-REBOLLAR,

Petitioner.

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PETITION FOR REVIEW

ADRIAN CONTRERAS-REBOLLAR
(Print Your Name)
Petitioner, *Pro se*.
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I. IDENTITY OF PETITIONER

Adrian Contreras-Rebollar (Petitioner) for now acting pro se, asks this Court to respectfully accept and grant this motion for Discretionary Review of the Court of Appeals in its decision of State v. Adrian Contreras-Rebollar. Its decision is designated in Part II of this motion.

II. COURT OF APPEALS DECISION

Hereby Petitioner respectfully asks this Honorable Court, to grant discretionary review of his PRP under case #: 41672-7-II, which said Court of Appeals is either failing in granting its motions, or it is failing to recognize its own motions, that have been formerly granted by its very own Court.

Either way, it is adversely prejudicial to its clients, as well as Petitioner, in that, there is a lack of transparency and effective review upon its decision on/of this case, and potentially other cases as well. Thereby, petitioner should be allowed to receive effective, and tangible review

by this Honorable Court, and in allowing him to proceed in this Court via the representation of counsel appointed at public expense based on his indigency/financial burden.

A copy of that decision is attached to this petition as Appendix A at p.g. 18-22.

III. ISSUES PRESENTED FOR REVIEW

A. Assignments of Error

1. The Court of Appeals either failed in granting or, refusing to acknowledge its own court's granted motion when dismissing petitioner's PRP as untimely.
2. The Court of Appeals unproperly denied petitioner's PRP opening brief issues when it misinterpreted petitioner's concededment to those claims, in and of petitioner's response to respondants brief.

B. Issues Pertaining to Assignments of Error

1. Did the COA commissioner and court clerk properly allow for equitable tolling to be applied to petitioner's case? (Assignments of Error 1)

2. Did the COA wrongly deny petitioner's PRP claim of the exclusion of his co-counsel from trial when deciding to state that a trial court discretional error is the same as that of a direct structural defect of a magnitude which critically denied him a constitutional right? (Assignments of Error 2)

3. If the COA decided to deny petitioner's timely filed PRP on basis that he raised the same issues on direct review, but nonetheless argued that said issues warranted a re-examination of the facts, did the COA fail to overlook his argument for the re-examination based on this miniscule concedement? (Assignment of Error 2)

4. Where appellate counsel rendered ineffective assistance of counsel on direct review and petitioner received prejudice thereof on his direct appeal, may and should this Court allow for new representation to argue this ineffectiveness before this Court? (Assignment of Error 2)

INTRODUCTION

This Petition For Review is presented under RAP 16. of public interest due to the distinguished facts in petitioner's case that although petitioner had previously been granted a motion to supplement grounds on his PRP in, by, and through, the special granting of equitable tolling of the time, of all but 2 weeks to thus, and then, timely be allowed to file said, U.S. constitutional violations supplemental grounds of his PRP.

The Court of Appeals, Div. 2 nonetheless dismissed said grounds as untimely, making no mention of petitioner's previously granted motion to supplement grounds on his PRP, or potentially any other motions granted before jumping the gun into dismissing Petitioners Personal Restraint Petition. Unlike the COA judges, or any other judge, I don't have clerks who handle my records, or are in charge of my record keepings, and unlike a millionare or celebrity I don't have the money to simply pay for an arsenal of lawyers, yet alone, a single lawyer to take care of my court matters.

Nonetheless, I take my legal research and drafting very seriously, to the point that I've developed "young arthritis" pains on my right hand wrist and elbow in carefully, legibly, and in as small print as I can get, drafting my previous briefs to the Court of Appeals. Thus, as a pro se litigant I take this (my life, the court deadlines and briefs implied, very seriously).

The COA however, have left me to believe that no matter how serious I am and may be, the 4th and 14th U.S. CONST. Amend. of and under equal protection of the law, does not apply to everybody. In being a pro se litigant, I understand that on top of that I am a so called "convicted felon." However, with the well founded knowledge, that [redacted] my case curtailed a very strong self-defense claim, I figured the Judges deciding my case would have at least taken the time to (before going to libel and then or thereby dismissing my PRP as untimely) they would've at least look at the previous[redacted] granted motions (for continuance and the like) granted to me by their very own court commissioner and clerk.

Hence, I hereby, wish to prove how the COA judges happen to, get lost in the 'paper trail' and thereby, after citing certain libelious language dismissed my PRP (supplemental grounds) as untimely.

Instead of trying to waste this Court's time in being libelious towards the COA wrongful and erroneous determination in calculation of the actual court deadline which I was actually imposed under, and, which can easily be determined by the Court of Appeals response to and letter in Appendix-A-1

I, hereby, present my simple and record proven 'paper trail'.

1.) On 4-14-10 the COA issued its mandate to resentence. (Appendix-A-2)

2.) Resentencing was held on 6/29/10 and actual order given for and on that resentencing hearing was on 7/2/10 (Appendix-A-2) and a screen printout from LINX of petitioner's superior court case #:06-1-01643-4; as well as cover p.g.'s of those Report of Proceedings.

3.) Going by the COA calculation that 4/14/10 being the commencing date for the 1 yr statutory limitation for collateral relief, cited in the

decision. (Appendix-A p.g. 21)

4.) Thus bringing the 1 yr collateral relief deadline to 4/14/11.

5.) Petitioner's PRP was filed by the COA clerk timely at/on 3/22/11 (Appendix-A-3), as shown in cover p.g. by Court Deputy Clerk's signature and stamp).

6.) After 2 continuances state responded/filed its response as evidenced (Appendix-A-4) cover letter of its response stamped as filed by COA clerk.

7.) I, appellant, requested and was granted one extension of time to file my reply to the state's response which I timely did (Appendix-A-5).

8.) On 10/26/11 and before the previous court imposed deadline of 11/10/11 the COA granted me my timely filed motion, in full, asking for my allowement of supplemental grounds through discretionarily granted and proper equitable tolling for all but 2 weeks from the previous 11/10/11 court deadline. (Appendix-A-6; "Motion to Supplement").

My sentiment was that my asking of all but 2 weeks, to supplement my grounds on my PRP through equitable tolling, both timely and before

any decision or ruling on the briefs by the commissioned Chief Judge had been reached (among other things), was not the biggest thing to ask for scince certainly the state would've then been allowed to file its response thereto, before the briefs reached their final destination, to the commissioned Chief Judge. The state didn't object to appellant's motion to supplement 3 grounds to his PRP.

9.) Both the Ruling Commissioner and Court Clerk granted appellant's motion. Whether they were right or wrong in their decision, given the relevency of petitioner's errors being all of constitutional magnitute, petitioner hereby leaves it up to this court to decide.

10.) However, given the fact that the COA denied petitioner's supplemental grounds as untimely, and further gives a date of my filing those grounds of/on 11/22/11, which all but happens to be within the actual court imposed deadline, happens to leave in the mind of this petitioner, that the State Court of Appeals, with its 3 Judges who decided (yet all overlooked this fact) and happened to reach their decision of dismissal under untimely

filing based on an erroneous date, or on untenable grounds and therefore should and may well be as void, to which this Court should and could then, reach a decision on said supplemental grounds, or, my 4th and 14th U.S. CONST. Amend. rights of and under equall protection of the law did not apply.

V. STATEMENT OF THE CASE

A. Substantive Facts

Petitioner hereby conforms to the substantive Facts given on his original action, to wit his timely Filed "Petitioner's Opening Brief" of his Personal Restraint Petition.

B. Procedural History

Prosecution charged Mr. Contreras by Information to 2 counts of First degree assault (RCW 9A.36.011 (1)(a)), while armed (RCW 94A.310/510), and one count of 2° unlawful possession of a Firearm (RCW 9.41.040 (2)(a)(i)). (CP 1-2) The empaneled Jury convicted Mr. Contreras of the 2 counts 1° assault and found he was armed in the commission of those charges. (RPS 1046-47; CP 108-13)

Personal Restraint Petition was timely brought Forth in the State Court of Appeals, Div. 2. The matter was

consolidated at state's request to his direct appeal based on continual errors being committed on the resentencing of petitioner, to wit the COA decided to remand once again to resentence petitioner on the overbroad calculation of his community custody term. The COA dismissed petitioner's original claims of his PRP as being the same issues argued on direct review; and then dismissed his supplemental PRP grounds, under the COA calculation, as being untimely.

Appellant now respectfully petitions this Honorable Court to grant 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 to further argue the issues presented by petitioner.

ARGUMENT & AUTHORITIES

1. THE Court of Appeals either failed in granting or, refusing to acknowledge its own court's granted motion when dismissing petitioner's PRP as untimely.

Petitioner presents the aforementioned issue to this Honorable Court pursuant to RAP 13.4(b)(4).

As stated in the brief, but concise introduction to this petition, petitioner beliefs the Court of Appeals erred in denying petitioner's supplemented grounds of his PRP as untimely in refusing to acknowledge or mention appellant's motion, granted by the Commissioner and Court Clerk to thereby allow appellant to supplement said grounds as timely via the granting of equitable tolling of 2 weeks in which to file those grounds.

Relying on the language of the standard form sent to petitioner by the clerk of this Court, "The introduction need not contain citations to the record." Petitioner has done so as it does not specifically prohibit him from doing so and thus relies on the record citations listed in his introduction in and for the brief representation of those facts.

Petitioner is persuaded that this issue is an issue of substantial public interests that should be determined by this Court for several reasons:

1.) the recent decision of In re Personal Restraint of Bonds, 165 Wn.2d 135, 196 P.3d 672 (2008), being overtly restrictive in allowing

appellants the precurement and allowement to supplement grounds on PRP, it is overtly restrictive in that the case does not give concise examples or avenues in which the terms: "another's malfeasance" "bad faith, deception, or false assurances," apply. Or, in what cases/examples do they apply, therefore the Court of Appeals is mainly given instructions as to that which is restricted, how and why it is restricted box nox as to what is allowed and how, why or when it is allowed, and thereby, placing not only the burdens of Bonds in and on the appellant, but further placing the burden of, and by pro se means, essentially having to make an argument otherwise not given or allowed by this Court under Bonds.

The vagueness of the terms: "malfeasance, bad faith, deception, or false assurances.", as well as the [redacted] language applied to those already vague terms such as: "due to another's" who? Bonds doesn't say, and "including" bad faith..... or false assurances., given in Bonds, at 141-42, only further complicates the decipherment of said caselaw by judges, clerks, commissioners, appellants

and the like. Therefore, further restricting, or overtly restricting the application of In re Bonds, 165 Wn.2d at 141-42.

Lastly, overtly restricting the fluidity of harmonious procedural justice to be applied, as to those cases which seek equitable tolling, but also as to when the COA judges are justified in applying said equitable tolling.

It is petitioner's sentiment that this Court should grant discretionary review of this issue because the only exemption to the 1 yr collateral relief timeline under Bonds: equitable tolling; petitioner's sentiment is that even after said exemption is met, (as petitioner was granted a motion granting said equitable tolling for a mere 2 weeks) even when the COA judges are overlooking this exemption and simply denying petitioner a hearing on those supplemented grounds.

Petitioner argues, the COA judges erred in denyig those supplement PRP grounds as untimely in that they didn't even mention (at all) petitioner's previously granted motion to the equitable tolling of 2 weeks on its decision.

Before going further in his argument petitioner wishes to direct this Honorable Court to read and carefully examine not only the motion but the argument and authorities given/listed in the motion presented to the COA. A copy of that motion is found in Appendix A-6.

Now, as previously mentioned on this argument Bonds only arguable exemption, concerning the timeliness of supplemental briefs for PRP, is equitable tolling, this is precisely what I had asked for on my motion filed with the COA, and which the COA granted in full.

Both the COA commissioner Schmidt as well as the court clerk agreed as thus to the 2 weeks sought as well as to the resons by which said 2 weeks were sought, and granted petitioner's motion to supplement.

However, the 3 empaneled judges either apparently overlooked or decided to overlook such fact and decided instead to dismiss said PRP grounds as untimely based on an erroneous deadline court date. It is erroneous in the sense that going by the appellate record continuances and motions granted, the actual court deadline for timeliness was

11/30/11, after appellant's granted motions for continuances and supplemental motion was granted. Hence, petitioner argues equitable tolling to the 1yr timeline should further be applied in the application of motions for continuances on the given case.

Lastly, in In re Personal Restraint of Wiatt, 211 P.3d 1030, 151 Wash. App. 22 (2009), it is said that: "even if the original petition was timely, a petitioner must demonstrate that his supplemental brief is not time barred if (1) he filed it after the time bar elapsed and (2) the supplemental brief adds a new claim that was not included in the original petition." (citing In re Bonds, 165 Wn.2d 135.)

Petitioner contends his supplemental brief was not time barred, and that he did indeed file it timely within the time alloted with the continuances of the case and the 2 weeks alloted to him. And, his filled supplemental brief did add not one, but 3 new constitutional claims, which were not in any way included in the original petition.

Finally, due to the bad faith and false assurances I derrived from being a pro se litigant on the PRP matter, I could not have identified the issues

raised on my supplemental grounds, because I was unaware that my original grounds would or could be dismissed based on my suppoused, essentially raising the same issues during direct review.

It was only after this fact, in receiving respondent's brief arguing that my original timely PRP claims should be dismissed, that I proceeded to file my pro se motion to supplement those grounds through equitable tolling, which the COA granted.

2. The COA unproperly denied petitioner's PRP opening brief issues when it misinterpreted petitioner's concededment to those claims, of petitioner's response to respondants brief.

For this 2nd issue petitioner relies on the argument given in his "Response to Respondants Brief" of his PRP. Thereby, wishing to direct the Court to that brief not attached to that brief for the sake of turmoil in the excesive briefs that are likely already excesive in nature.

Basically, petitioner relies on In re Haverty, 101 Wn.2d 498, 681 P.2d 835 (1984)., which said caselaw dictates in part: applying the analysis used requires that the reviewing Court determine whether Petitioner's grounds for relief have been "heard and determined" in a previous petition and if petitioner is abusing this PRP process.

An analysis that petitioner would like this Court to address. Also the language of In re Taylor, 105 Wn.2d 683, 717 P.2d 755 (1986)., specifically In re Taylor, 105 Wn.2d at 683 and 687-88 should further be applied by this Court in petitioner's case.

As evidenced on p.g. 4 of petitioner's response to respondant's brief, he never conceded that that argument was the same as the issue examined on direct review. He only conceded as thus to the 2nd issue of his original PRP opening brief. However, on its decision, the COA on p.g. 19 said that: "The interests of justice are served by reexamining an issue.... if some other justification for having failed to raise a crucial point or argument in the prior application." In re. Pers. Restraint of Stenson, 142 Wn.2d 710, 720, 16 P.3d 1 (2001).

Thus, is correct, and is certainly, and is certainly something petitioner already knew, however, because the language of said caselaw is very strict on what "other justification for having failed to raise..." most appellants duable chief argument on that is Ineffective Assistance of Appellate Counsel. An argument which I, as a pro se petitioner are not duably vested or able to make by pro se means,

I am already stating that my trial counsel was ineffective in failing to propose an otherwise crucial jury instruction, to wit "Defense of Another" for me to then further try to focus my attention on the ineffectiveness of my appellate counsel, quite frankly, makes me look like I'm just trying to blame everyone else for my being in prison.

However, I know thus is not true, and thus is not my personal viewpoint, but because of the difficulty in being a pro se litigant I simply do not possess the much needed knowledge in winning such a claim.

However, the aforementioned said, I hereby wish to raise the dictating caselaw of Sxenson, 142 Wn.2d at 720., and In re Pers. Restraint of Orange, 152 Wn.2d 759, 814, 100 P.3d 291 (2004), in arguing that indeed my appellate counsel fell below an objective standard of my reasonableness and rendered ineffective during my direct review for not raising an argument that would otherwise ~~nox~~ have required the application of a harmless error analysis by the reviewing court, and chose to instead argue on the grounds of a mere discretional error when it denied petitioner's motion

for a mistrial, as opposed to, a structural defect in the rendering of petitioner's co-counsel through direct arbitrary action and, in which the trial court did not (at first) give its reasons for doing so.

Hence petitioner was prejudiced during his direct review when appellate counsel rendered ineffective assistance of appellate counsel. In re Orange, 152 Wn.2d at 814; see also Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. CONST. amend. VI; WASH. CONST. art. 1, §. 22 (amend. X)

Thereby petitioner seeks discretionary review pursuant to RAP 13.4(b)(1) for petitioner certainly, at least tried to bring this argument before the COA, which simply decided to overlook said argument raised by petitioner as it was not even talked about on the COA decision. As well as pursuant to RAP 13.4(b)(3), as the issue which petitioner originally seeks relief for, the exclusion of his co-counsel, is a significant question of law under both the Const. of the State of WA., and the Const. of the United States to the otherwise absolute right to the representation of one's choice derived from the otherwise guaranteed effective assistance of counsel. U.S. CONST. Amend. VI; WASH. CONST. art. 1, §. 22 (amend. X); see also United

Saxes v. Laura, 607 F.2d 52 (3rd Cir. 1979).

CONCLUSION

Appellant respectfully asks this Honorable Court to grant this petition for discretionary review. Petitioner should be allowed to, in and for the furtherance of justice, as it would serve the public's interest to have concise and further clarifying language as to the reasons for granting equitable tolling, and, when equitable tolling should apply. Petitioner was resentenced, by which the COA begins the calculation of the 1 yr collateral relief timeline from the date of its mandate.

However, further questions arise, as, should equitable tolling automatically apply upon the seeking and granting of a continuance in the matter by either party?

Lastly, in the furtherance of justice, the unlawful nature of restraint cited in and pursuant to RAP 16.4(c)(2), petitioner ought have his 3 supplemented grounds to his PRP addressed by this Court.

Finally, petitioner should be afforded a chance to be represented by counsel to further advance his claim that he received ineffective assistance of appellate counsel during direct review, and, to represent him on his issues raised to this Court.

DATED: December 2, 2012

Respectfully Submited,
Adrian Contreras-Rebollar

CERTIFICATE OF MAILING

I certify that on 12/2/2012, I caused to be placed in the mails of the United States, and through the internal mailing system of WCC, First class postage pre-paid, a original copy of this document addressed to:

WA. State Supreme Ct.
Susan L. Carlson/Deputy Clerk
PO BOX 40929
Olympia, WA. 98504

Kathleen Proctor, DPA
Prosecuting Attorney's Office
930 Tacoma Ave. S. Rm. 946
Tacoma, WA. 98402

Adrian Contreras-Rebollar
DOC #819639

APPENDIX

A

confidence in the outcome.'" *Grier*, 171 Wn.2d at 34 (quoting *Strickland*, 466 U.S. at 694). Failure to demonstrate *both* prongs of the test defeats a defendant's ineffective assistance of counsel argument on appeal. *Grier*, 171 Wn.2d at 33 (citing *Thomas*, 109 Wn.2d at 225-26 (adopting the test from *Strickland*, 466 U.S. at 687)).

Contreras-Rebollar does not meet the first prong of the test because he fails to show that counsel's performance was deficient. The resentencing court performed its community custody calculation in the presence of counsel, Contreras-Rebollar, and the State. And when the resentencing court determined that Contreras-Rebollar's community custody had expired on April 15, 2006, counsel, who had studied the judgments and sentences from Contreras-Rebollar's previous convictions, replied, "It does sound right." RP (June 29, 2010) at 11. These facts show that counsel was informed and prepared and, thus, negate Contreras-Rebollar's argument that counsel's performance "f[ell] 'below an objective standard of reasonableness.'"[24] *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688). Because Contreras-Rebollar fails to meet the first prong of the ineffective assistance of counsel test, we need not address the second prong. We hold, therefore, that Contreras-Rebollar has failed to show that his counsel rendered ineffective assistance at resentencing.

IV. Personal Restraint Petitions

A. Primary Personal Restraint Petition

In his primary PRP, Contreras-Rebollar argues that (1) his trial counsel back in early 2007 rendered ineffective assistance of counsel by failing to propose the "[d]efense of [a]nother" jury instruction; and (2) the trial court erroneously excluded co-counsel from the trial. PRP at

22. Contreras-Rebollar previously advanced, and we rejected, these same arguments in his first direct appeal. *Contreras-Rebollar*, 2009 WL 448902, at *3, *7 ("[Contreras-Rebollar] claims that he did not receive a fair trial because . . . the trial court removed [co-counsel] from the proceedings" and "Contreras[-Rebollar] also argues that he received ineffective assistance of counsel because defense counsel . . . failed to propose a 'defense of another' instruction.")

"The petitioner in a personal restraint petition is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671, 101 P.3d 1 (2004) (footnotes omitted). "An issue is considered raised and rejected on direct appeal if the same ground presented in the petition was determined adversely to the petitioner on appeal and the prior determination was on the merits." *Davis*, 152 Wn.2d at 671 n.14 (citing *In re Pers. Restraint of Taylor*, 105 Wn.2d 683, 687, 717 P.2d 755 (1986)). "The interests of justice are served by reexamining an issue if there has been an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application." *Davis*, 152 Wn.2d at 671 n.15 (citing *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001)).

Contreras-Rebollar concedes that his ineffective assistance of counsel argument is "the same underlying previously heard and determined issue" from his first direct appeal, but he argues that we, nevertheless, should "allow for relitigation" under RAP 16.4(c)(3). Pet'r Resp.

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[24] That the record does not contain more complete information about these calculations does not show that counsel was deficient in his representation.

to Resp't Br. at 17. RAP 16.4(c)(3) provides that a restraint is unlawful if "[m]aterial facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction." But Contreras-Rebollar does not provide any new "[m]aterial facts" with his petition[25]; instead, he merely provides additional copies of the record.

Contreras-Rebollar also argues that his exclusion of co-counsel issue in his petition differs from the exclusion issue he argued in his first direct appeal because (1) "on his direct appeal the fundamental underlying principle issue argued was that of a mere trial court discretional error"; and (2) in contrast, the exclusion issue in his petition is "of the magnitude of a direct structural defect in which [he] was critically denied his [constitutional] rights." Pet'r Resp. to Resp't Br. at 9. Contrary to Contreras-Rebollar's argument, (1) we considered his constitutional rights in his first direct appeal; and (2) in his petition, he presents essentially the same issue that he presented in his first direct appeal. *Contreras-Rebollar*, 2009 WL 448902, at *5. He cannot avoid this problem by merely "'couching his argument in different language.'" *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 329, 868 P.2d 835 (1994) (quoting *Campbell v. Blodgett*, 982 F.2d 1321, 1326 (9th Cir. 1992), *reh'g denied, amended and superseded*, 997 F.2d 512 (1993)). Accordingly, we deny his petition.

[25] Contreras-Rebollar attached an affidavit to his supplemental petition and another affidavit to his reply brief. But neither of these affidavits present "[m]aterial facts . . ., which in the interest of justice require vacation of the conviction." RAP at 16.4(c)(3).

B. Supplemental Personal Restraint Petition

Contreras-Rebollar also filed a supplemental personal restraint petition, which we deny as untimely and, therefore, do not further consider.[26] Personal restraint petitions may not be filed "more than one year after the judgment becomes final."[27] RCW 10.73.090(1). A "judgment becomes final" on the last of the following dates: (1) the date the judgment is filed with the trial court clerk, (2) the date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction, or (3) the date that the United States Supreme Court denies a timely certiorari petition to review a decision affirming the conviction on direct appeal. RCW 10.73.090(3). Because we previously remanded for resentencing, this case was not final for purposes of petitioning the United States Supreme Court for certiorari review; thus, this third option does not apply here.

Thus, the later of the two possible remaining dates (first and second options) for finality of the judgment is April 14, 2010, when we issued our mandate of Contreras-Rebollar's direct appeal. *See* CP at 56. Accordingly, the last day on which he could have filed a timely PRP was one year later. But he did not file his supplemental PRP until November 22, 2011, more than

[26] "'Though the appellate rules do not expressly authorize or prohibit amendment to PRPs, we have accepted amendments to a PRP made within the statutory time limit.'" *In re Pers. Restraint of Davis*, 151 Wn. App. 331, 336, 211 P.3d 1055 (2009) (quoting *In re Pers. Restraint of Bonds*, 165 Wn.2d 135, 140, 196 P.3d 672 (2008)), *review denied*, 168 Wn.2d 1043 (2010). Contreras-Rebollar, however, filed his supplemental petition outside the statutory time limit.

[27] RCW 10.73.100 provides exceptions to this time bar, none of which apply here.

seven months after the one-year limit time had expired.[28] Holding, therefore, that his supplemental petition is untimely, we deny it.

We remand for yet another resentencing, at which the State may produce evidence of Contreras-Rebollar's community custody status. We also deny Contreras-Rebollar's PRP and supplemental PRP.

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 in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Penoyar, J.

Johanson, A.C.J.

[28] The only exception that arguably might apply to Contreras-Rebollar's supplemental PRP is the fifth exception: "The sentence imposed was in excess of the court's jurisdiction." RCW 10.73.100(5). It is true that Contreras, in his direct appeal presently before us, challenges the sentencing court's calculation of his community custody term. But his argument that a trial court miscalculated a community custody term does not implicate "jurisdiction" of the trial court. *See In re Pers. Restraint of Vehlewald*, 92 Wn. App. 197, 201, 963 P.2d 903 (1998).

APPENDIX

A-1

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, Issue Summaries, and General Information at http://www.courts.wa.gov/courts

October 26, 2011

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CASE #: 40962-3-II
State of Washington, Respondent v Adrian Contreras-Rebollar, Appellant

Mr. Contrerass-Rebollar & Counsel:

On the above date, this court entered the following notation ruling:

A RULING SIGNED BY COMMISSIONER SCHMIDT:

Petitioner Contreras-Rebollar's motion to supplement personal restraint petition is granted. Petitioner has until 11/30/11 to file a supplemental petition.

Very truly yours,

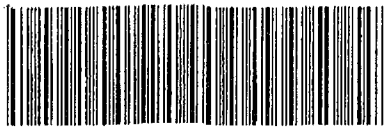
David C. Ponzoha
Court Clerk

APPENDIX

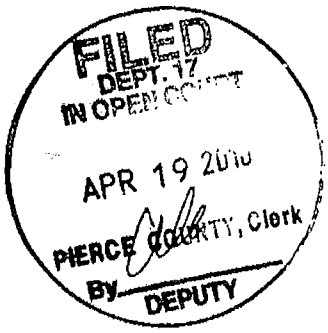
A-2

4-14-10 = is date shown in Appellate Div. 2 website for mandate being "Filed"

0214 4/20/2010 40131



06-1-01643-4 34154030 MND 04-20-10



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

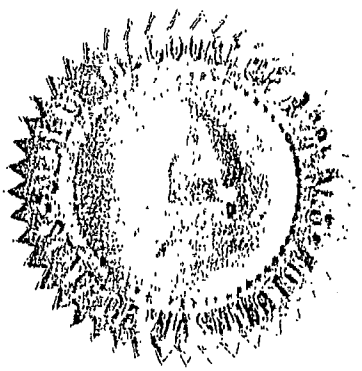
STATE OF WASHINGTON, Respondent, v. ADRIAN CONTRERAS-REBOLLAR, Appellant.	No. 35962-6-II MANDATE Pierce County Cause No. 06-1-01643-4 ***Court Action Required***

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

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on February 24, 2009 became the decision terminating review of this court of the above entitled case on March 29, 2010. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount:

Judgment Creditor; State of Washington, Pierce Co.; $6.40
Judgment Creditor; Appellate Indigent Defense Fund; $7,531.52
Judgment Debtor; Adrian Contreras-Rebollar; $7,537.92

Court Action Required: The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 14th day of April, 2010.

Clerk of the Court of Appeals,
State of Washington, Div. II

Stephanie C Cunningham
Attorney at Law
4616 25th Ave NE # 552
Seattle, WA, 98105-4183

Karen Anne Watson
Pierce County Prosecutor's Office
930 Tacoma Ave S Rm 946
Tacoma, WA, 98402-2102

Adrian Contreras-Rebollar
DOC# 819636
Clallam Bay Corr Ctr
1830 Eagle Crest Way E-B-2
Clallam Bay, WA 98326

Indeterminate Sentence Review Board
P. O. Box 40907
Olympia, WA 98502

WSP Identification & Criminal History Section
ATTN: Quality Control Unit
PO Box 42633
Olympia, WA 98504-2633

Hon. Ronald Culpepper
Pierce Co Superior Court Judge
930 Tacoma Ave South
Tacoma, WA 98402

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintff, vs. ADRIAN CONTRERAS-REBOLLAR, Defendant.	COA NO. 40962-3-II SC NO. 06-1-01643-4 RESENTENCING and PRESENTATION

REPORT OF PROCEEDINGS

TUESDAY, JUNE 29, 2010

FRIDAY, JULY 2, 2010

Pierce County Courthouse

Tacoma, Washington

Before the

HONORABLE RONALD E. CULPEPPER

[Appearances on next page]

Reported by: Karla A. Johnson, RPR
Official Court Reporter, #82191

COPY

01/17/2007 08:30 AM	CRIMINAL DIVISION-PRESIDING JUDGE	CDPJ	JURY TRIAL	CANCELLED
01/17/2007 08:30 AM	RONALD E. CULPEPPER	17	JURY TRIAL	HELD
01/22/2007 01:30 PM	CRIMINAL DIVISION-PRESIDING JUDGE	CDPJ	BAIL HEARING-MATERIAL WITNESS	CANCELLED
02/02/2007 01:30 PM	RONALD E. CULPEPPER	17	SENTENCING DATE	CONTINUED
02/16/2007 01:30 PM	RONALD E. CULPEPPER	17	SENTENCING DATE	HELD
05/09/2007 09:00 AM	CRIMINAL DIVISION 1	CD1	RESTITUTION HEARING	CONTINUED
06/06/2007 09:00 AM	RONALD E. CULPEPPER	17	RESTITUTION HEARING	HELD
11/28/2007 09:00 AM	RONALD E. CULPEPPER	17	EXPARTE ACTION WITH ORDER HELD	HELD
01/23/2009 01:30 PM	RONALD E. CULPEPPER	17	RESTITUTION HEARING	HELD
07/24/2009 01:30 PM	RONALD E. CULPEPPER	17	RESTITUTION HEARING	CONTINUED
07/27/2009 01:30 PM	RONALD E. CULPEPPER	17	RESTITUTION HEARING	CONTINUED
07/28/2009 01:30 PM	CRIMINAL DIVISION-PRESIDING JUDGE	CDPJ	RESTITUTION HEARING	HELD
06/04/2010 09:00 AM	CRIMINAL DIVISION 2	CD2	HEARING	HELD
06/25/2010 01:30 PM	RONALD E. CULPEPPER	17	SENTENCING DATE	CONTINUED
06/29/2010 09:00 AM	RONALD E. CULPEPPER	17	RESENTENCING	HELD
07/02/2010 01:30 PM	RONALD E. CULPEPPER	17	PRESENTATION OF ORDER	HELD

Incidents

Incident Number	Law Enforcement Agency	Offense Date
061020028	TACOMA POLICE DEPARTMENT	04/12/2006

Superior Court Co-Defendants

Cause Number	Defendant

Judgments

Cause #	Status	Signed	Effective	Filed
07-9-02173-7	OPEN as of 02/16/2007	RONALD E. CULPEPPER on 02/16/2007	02/16/2007	02/16/2007

- Hearing and location information displayed in this calendar is subject to change without notice. Any changes to this information after the creation date and time may not display in current version.
- Confidential cases and Juvenile Offender proceeding information is not displayed on this calendar. Confidential case types are: Adoption, Paternity, Involuntary Commitment, Dependency, and Truancy.
- The names provided in this calendar cannot be associated with any particular individuals without individual case research.
- Neither the court nor clerk makes any representation as to the accuracy and completeness of the data except for court purposes.

Created: Friday April 15, 2011 12:06PM

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APPENDIX

A-3

Date re-imposed but may be verified.
Date re-imposed due to poor quality
photocopy machines used in DOC

11 MAR 22
STATE OF WASHINGTON
BY
DEPUTY

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal

Restraint Petition of:

ADRIAN CONTRERAS-REBOLLAR,

Petitioner.

PETITIONER'S OPENING BRIEF

ADRIAN CONTRERAS-REBOLLAR
Acting Pro Se

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

APPENDIX

A-4

RECEIVED
JUL 11 2011
BY: 12

NO. 40962-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ADRIAN CONTRERAS-REBOLLAR, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle
and
The Honorable Ronald E. Culpepper

No. 06-1-01643-4

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

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

COPY

APPENDIX

A-5

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, Issue Summaries, and General Information at http://www.courts.wa.gov/courts

September 15, 2011

Barbara L. Corey (via email)
Attorney at Law
902 S 10th St
Tacoma, WA, 98405-4537

Adrian Contreras-Rebollar (via USPS)
#819639 / IMU / FNB-20
Stafford Creek Corr. Ctr.
191 Constantine Way
Aberdeen, WA 98520

Jason Paul Ruyf (via email)
Pierce County Prosecutor's Office
930 Tacoma Ave S Rm 946
Tacoma, WA 98402-2102

CASE #: 40962-3-II
State of Washington, Respondent v Adrian Contreras-Rebollar, Appellant

Counsel:

On the above date, this court entered the following notation ruling:

A RULING SIGNED BY THE CLERK:

Petitioner is granted an extension of time to and including 11/10/11 to file a reply to the State's response to the personal restraint petition. Petitioner's reply must be limited to a response to the personal restraint issue(s). If the reply addresses issues related to the appeal, it will be rejected. In view of the length of this extension, the court will not grant petitioner any further continuance requests for filing a reply. A reply filed after the above date will be placed in the case file without action.

Very truly yours,

David C. Ponzoha
Court Clerk

APPENDIX

A-6

~~IN THE COURT OF APPEALS APPEL~~

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON FOR DIVISION 2

Adrian Contreras-Rebollar, Plaintiff / Petitioner, v. State of Washington. Defendant / Respondent.	No. 41672-7 MOTION TO SUPPLEMENT GROUNDS ON PRP.

COMES NOW Adrian Contreras-Rebollar, appearing pro se, and moves the court for an order to allow him to supplement 3 grounds into his timely filed PRP and to allow the state to respond thereto, and before any decision is reached on the PRP by this Court.

This motion is based upon the records and files herein, and upon the attached declaration.

DATED THIS 11 day of October, 2011.

Adrian Contreras-Rebollar

DOC# 819639, Unit FNB
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, WA 98520-9504

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON FOR DIVISION 2

Adrian Contreras-Rebollar, Plaintiff / Petitioner,	)	No. 41672-7
v.	)	
state of Washington, Defendant / Respondent.	)	DECLARATION IN SUPPORT OF MOTION TO SUPPLEMENT GROUNDS ON PRP.

I, Adrian Contreras-Rebollar, declare and say:

1. I am the moving party in the above-captioned action, over the age of majority, and competent to be a witness herein.
2. I have personal knowledge of the facts herein.
3. I make this declaration in support of my motion to Supplement PRP.
4. FACTS RELEVANT TO THIS MOTION
   (Please reffer to page 3)
5. GROUNDS FOR RELIEF AND ARGUMENT
   (Please reffer to page 4)

(4) FACTS RELEVANT TO MOTION:

1. Petitioner's/Movant's PRP and Opening Brief was filed timely on 3-21-11 by this Court under: In re PRP of: Adrian Contreras-Rebollar No. 41672-7-II.
2. To wit, at State's request, was consolidated to movant's direct appeal in State v. Adrian Contreras-Rebollar, No. 40962-3-II.
3. Respondent thereto filed its response to the consolidated matter on its dated response on July 8, 2011.
4. Due to necess[redacted]ary continuances movant's response to respondent's brief is due on 11/10/11.
5. The consolidated matter is yet to be placed on this Court's motion docket to be heard by the magistrate Judge.
6. Movant's case is yet to be presented to the Chief Judge per RAP 16.11 (b).
7. Movant's case has not been heard, determined, nor presented for its initial consideration by and to the designated Chief Judge per RAP 16.11 (b).

5. GROUNDS FOR RELIEF AND ARGUMENT:

Movant hereby respectfully moves the Court and/or commissioning clerk of the Court to rule upon this motion under RAP 17.4 (b) - Emergency Motion due to the current court deadline of 11-10-11 in which movant is currently under obligation by the Court. If movant's motion is granted promptly, he does not anticipate additional time in order to file his additional supplemented grounds and will file them under i.e., within his currently imposed court deadline.

Movant believes this Court and/or its commissioned clerk may proceed to rule and decide upon this motion on its merits under RAP 17.4 (c)(1) to a summary Determination and without oral argument. Also, because movant has complied with RAP 17.4 (b)(1) and (b)(2) of that rule, to wit via a "DECLARATION OF SERVICE BY MAIL" sworn under oath, has mailed a copy of this motion and all relevant documents to the Plaintiff/Prosecutor. Thereby, meeting that requirement, the commissioner should and may rule on the motion pursuant to RAP 17.4 (b) and 17.4 (c)(1).

RAP 16.10(c) states: "The appellate court may call for additional briefs at any stage of the consideration of the petition." Also, RAP 2.5 (a)(3) - Errors Raised for First Time on Review, stating "However, a party may raise the following claimed errors for the first time in the appellate court: (3) manifest error affecting constitutional right."

(See Appendix-A)., were movant the following documents in order to show previous and recent issues raised for review, so that the court may see, the issues he wishes to supplement are, different in their totality to those recently and previously raised. Those documents are...:

The documents in (Appendix A) appear in the following order: "TABLE OF CONTENTS" of movant's current PRP errors; followed by "TABLE OF CONTENTS" of movant's current errors concerning only the sentencing argued on the current consolidated matter; and finally, a copy of the previous errors heard and determined by this Court's "UNPUBLISHED OPINION" p.g.'s 1 (one), 12, and 13, clearly stating errors/issues there.

Those errors are important to look at as, movant intends to show that the errors he wishes to timely and properly supplement ■ are errororo being raised for the First Time on appeal, as well as first time for review by this Court. And are important and relevant errors manifestly affecting a constitutional rights of the Petitioner/Movant. To wit, the errors Movant moves to supplement are:

A. The State violated Petitioner's Due Process Clause of the 14th Amendment when it purposefully elicited, commented, and exploited his Constitutional right to remain silent.

B. Defense counsel rendered ineffective when it failed to propose a Jury instruction after raising the issue of involuntariness per CrR 3.5, thereby depriving defendant of a fair trial.

C. The prosecutor posed comments which constitute prosecutorial misconduct, denying the defendant of his right to a fair trial, when he attempted to have the Jury draw adverse inferences from the defendant's exercise of his constitutional right to confront witnesses.

Both under RAP 2.5 (a) and Saxe v. Tolias, 135 Wn.2d 133,

140, 954 P.2d 907 (1998)., issues may be raised for the 1st time on appeal when they affect a "manifest error affecting a constitutional right." Tolias, 135 Wn.2d at 140. Each of the errors Movant seeks to supplement, include manifest errors affecting a constitutional right. Petitioner has indeed identified such errors, but due to his lack of understanding of the law (as opposed to a certified lawyer) only recently became aware of them.

There are actually caselaws which protect the rights of such pro se litigants. One such law derived by the U.S. Supreme Court is: Haines v. Kerner, 404 U.S. 519, 30 L.Ed.2d 652 (1972). There, the U.S. Supreme Court states: "Allegations of pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers." (See highlighted parts of/on copies of the case on (Appendix-B)).

Movant asserts equitable tolling could and should be applied by this Court to grant his motion to supplement. RCW 10.73.090 allocates the one year time period in which collateral attack to a conviction may be timely initiated for review.

However, RCW 10.73.100 allots exceptions to when that one year time limit may not be applicable. One of those exceptions is: RCW 10.73.100(2), which states: "The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct."

Petitioner contends, he falls under the exception of RCW 10.73.100(2) because: in legal question form, if he was thereto convicted, of the criminal statutes to which he is convicted of, were obtained in violation of his U.S. CONST. rights, as well as his Due Process rights, is not a Judgment that should be rendered "invalid on its Face" thereupon faling under RCW 10.73.100(2) petitioner therefore doesn't Know what is.

"The doctrine of equitable tolling permits a court to allow an action to proceed when Justice requires it, even though a statutory time period has elapsed." State v. Duvall, 86 Wn. App. 871, 874, 940 P.2d 671 (1997).

Here, Justice requires that equitable tolling be applied as movant raises trial court errors which if proven true, manifestly and adversly prejudiced the petitioner through a violation of his constitutional rights.

"Generally, a litigant seeking equitable tolling bears the burden of establishing 2 elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005).

Petitioner fulfills these elements. He has diligently and timely filed his PRP in and with this Court. Extraordinary circumstances which stood in his way are: the lack of degree of education movant has compared to a liscense attorney. WA. State rules and laws which RAP 16.11(b)

and RCW 10.73.1500, only allow the entitlement of a lawyer until after the case has gone up for determination on the merits to the Judge. On movants PRP (Appendix-C), he indeed sought and seeks for the appointment of counsel to ensure everything is done properly, and to [redacted] pursue his claims. Movant understands he won't [redacted] get an attorney until after the Chief Judge reviews his PRP, but, because the Judge has not done so as of yet and per RAP 16.11(b). He moves this court to allow him to supplement his other relevant claims of errors. As a pro se litigant, movant does not posses the skills of law, knowledge or education of a lawyer to recognize all the errors all of which are occurred at trial, extraordinary circumstances which stand, and stood in his way. Thus, having found new errors, movant wishes to proceed and supplement the grounds to his timely filed PRP, and to allow the state to file a Response Brief, to which when the interest of Justice could be met and thus have all the relevant issues decided by the Chief Judge. Equitable tolling should apply.

And, under the U.S. Supreme Court authority of Haines v. Kerner this court should exersise its authority and accept those facts of law.

Further, Petitioner cites RCW 10.73.140 and RAP 16.4(d), as extraordinary circumstances because, if his motion is not granted, could very well, both preclude and stand in the way of raising these serious claims. Something this Court should take into [redacted] consideration.

To further assert, equitable tolling should apply in the granting and application of movants motion, via one of the bad faith; deception; or false assurance doctrine by the defendant and his exercise of diligence. First, movant has, and is, exercising due diligence, by asking this Court to allow movant to supplement onto the grounds of his timely filed PRP, to errors of constitutional magnitutes and, thereto, allow the State to then respond to those errors before the PRP is decided upon by the designated Chief Judge of this Court.

And, movant contends he was indeed comprised of bad faith and the false assurances wich often occur with a pro se litigant, such as a lack of understanding of the law, a lack of education, as well of [redacted] the lack of representation and the false assurances, which come thereof. All which play key detriments to petitioner. Such detriments are understood by the U.S. Supreme Court in Haines v. Kerner.

In re Cook, 114 Wn.2d 802, at 812, 792 P.2d 506 (1990)., and In re Hews, 99 Wn.2d 80, at 87, 660 P.2d 263 (1983), are both cases which speak on, in part: The Petitioner may raise new issues, for the first time on appeal if they are errors of constitutional magnitude that cause actual prejudice, and non-constitutional errors that constitute a fundamental defect and inherently result in a complete miscarriage of Justice.

All the errors movant seeks to supplement in his timely filed

PRP are errors of a constitutional magnitude.
Thus, and thereby, petitioner asserts, that only through and by the granting of this motion may he adequately present these errors and all the authorities pertinent to them and asserts are errors, which if proven, caused the petitioner actual prejudice. Which only by the granting of this motion may be proved.
In granting movants motion to supplement, petitioner is not attempting to seek any more enlargement of the time to file his 'petitioner's response to respondent's brief' already due in this Court by 11-10-11. However, movant hereby, in and of the case of the granting of this motion and per RAP 18.8 which allows this Court, on its own initiative or on motion of a party, enlarge the time in which an act must be done in order to serve the ends of Justice, here, and in the granting of this motion, the ends of Justice would best be served by, and movant seeks a 17 (seventeen) day extension from the 11-10-11 date, in which to file: ONLY THOSE 3 new supplemented grounds for PRP review thereof. Movant will not ask nor seek any more extensions thereof and therefrom. Should this Court deny movant this motion, he hereby, moves to have the state waive the exhaustion requirement to the 3 grounds mentioned on p.g. 5 of this motion concerning the 5th, 6th, and 14th Amendments to those Fed. U.S. Constitutional errors pursuant to 28 U.S.C. sec. 2254(b)(1).

6. CONCLUSION

Movant respectfully asks the Court to grant his motion in full. To wit, allowing him to supplement his grounds for review on PRP, before the case goes before the Chief Judge for review, and in the interest of Justice, allowing the State to respond to these errors. Therefore, equitable tolling could and should be applied in the addendum of his grounds from the date his PRP was timely filed on 3-21-11, to the date the Chief Judge rules on the petition. And, granting petitioner his one and single enlargement of time of 17 days ONLY FOR THOSE 3 new supplemented grounds to be filed. 17 days only for those grounds from his current deadline of 11-10-11. Should this Court deny movant his motion, the Court should thus, move to have the State waive the exhaustion requirement to the constitutionality, to the 3 grounds mentioned on p.g. 5 of this motion pursuant to 28 U.S.C. sec. 2254(b)(1), one.

7. OATH

The undersigned hereby declares underthe penalty of perjury pursuant to those WA. State Laws, that he has read the foregoing motion and its declaration in support of, knows its contents, and believes the same to be true, correct and complete to the best of his firsthand knowledge and belief.

SWORN to this 11th day of October, 20 11.

Signature

Adrian Contreras 819639
Printed Name DOC#

Stafford Creek Corrections Center
191 Constantine Way, Unit # FNB
Aberdeen, WA. 98520

NOTARY or WITNESS
Unavailable

Subscribed and Sworn to before me,
this _____ day of _____, 20____.

Notary Public in and for the State of Washington,
My Commission expires: _____.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ADRIAN CONTRERAS-REBOLLAR, Appellant.	No. 40962-3-II (consolidated with) 41672-7-II
In re Personal Restraint Petition of, ADRIAN CONTRERAS-REBOLLAR, Petitioner.	UNPUBLISHED OPINION

Hunt, J. — Adrian Contreras-Rebollar appeals his resentencing on remand following his earlier appeal of his jury convictions for two counts of first degree assault and one count of second degree unlawful firearm possession. He argues that (1) the resentencing court erred in denying his request to procure new counsel; (2) he was entitled to have a jury, rather than the resentencing court, determine whether he had been on community custody when he committed the assaults and unlawful firearm possession; (3) the resentencing court miscalculated the date on which his community custody had ended; and (4) his counsel at resentencing hearing was

ineffective for failing to conduct an independent determination of when Contreras-Rebollar's community custody ended. We remand for resentencing to consider Contreras-Rebollar's community custody status at the time of the charged offenses.

Contreras-Rebollar also filed a personal restraint petition (PRP) and a supplemental personal restraint petition, which we consolidated with his direct appeal. We deny his first petition because it reiterates issues that we rejected in his previous direct appeal in 2009; we dismiss his supplemental petition because it was not timely filed.

FACTS

Contreras-Rebollar previously appealed his convictions and sentence in 2007.[1] We affirmed his convictions and remanded for resentencing, which he now appeals.[2]

I. Previous Convictions, Sentencing, and Appeal

On July 15, 2004, Adrian Contreras-Rebollar pled guilty to one count of third degree assault; the trial court sentenced him to 9 months of incarceration, with credit for 91 days of time served, plus 12 months of community custody. A year later, after his release from incarceration, but while still on community custody for the 2004 assault, Contreras-Rebollar committed second degree unlawful possession of a firearm on July 21, 2005. He pled guilty, and on August 29 the trial court sentenced him to 3 months of incarceration, with credit for 40 days of time served.[3]

---

[1] *State v. Contreras-Rebollar*, noted at 149 Wn. App. 1001 (2009).

[2] *Contreras-Rebollar*, noted at 149 Wn. App. 1001, 2009 WL 448902, at *1.

[3] He received no additional community custody for this new unlawful firearm possession conviction.

This new conviction tolled[4] the earlier incomplete community custody for his 2004 assault conviction.

The following year, on April 12, 2006, Contreras-Rebollar committed two counts of first degree assault and one count of second degree unlawful possession of a firearm, for which a jury convicted him in February 2007. At sentencing, the State alleged, but did not offer documentary proof, that he had prior convictions and had been on community custody when he committed these most recent April 12, 2006 crimes.[5] Contreras-Rebollar "refused to sign any documents at his sentencing, including the stipulation on prior record and offender score and the judgment and sentence." *Contreras-Rebollar*, 2009 WL 448902, at *3. The trial court sentenced him to 380 months of incarceration.[6]

Contreras-Rebollar appealed. In a 2009 unpublished opinion, we affirmed Contreras-Rebollar's convictions but remanded for resentencing "so that the State [could] produce evidence of Contreras[-Rebollar]'s prior convictions and community custody status."[7]

---

[4] Former RCW 9.94A.171(3) (2000), which was then in effect, provided, "Any period of community custody . . . shall be tolled during any period of time the offender is in confinement for any reason."

[5] *Contreras-Rebollar*, 2009 WL 448902, at *6.

[6] *Contreras-Rebollar*, 2009 WL 448902, at *3.

[7] *Contreras-Rebollar*, 2009 WL 448902, at *6.

II. Resentencing on Remand

A. Request for New Counsel

At the 2010 resentencing hearing on remand, Contreras-Rebollar was represented by one of two counsel who had represented him at trial. Counsel advised the resentencing court that Contreras-Rebollar had "retained [prospective new counsel] to come in and handle the resentencing on this issue, and they would like to move the Court to substitute counsel and set [re]sentencing over for a week or two so that [prospective new counsel] can come up to speed on the case." Report of Proceedings (RP) (June 29, 2010) at 3. The State objected, asserting (1) "The only issue is whether [Contreras-Rebollar] has the prior convictions mentioned in the [judgment and sentence] and whether he was on community custody status at the time of the offense"; and (2) "[T]here's no real issue that involves being brought up to speed. It's a pure issue of proving the [Contreras-Rebollar]'s prior convictions." RP (June 29, 2010) at 4.

When the resentencing court asked prospective new counsel how long he needed to prepare, he replied that he would need until August 6, more than four weeks away. When the resentencing court responded that it was "looking at today or Friday," prospective new counsel replied, "There's no way I can do it as early as Friday." RP (June 29, 2010) at 5. Skeptical about requesting this much time to prepare for the resentencing, the court ruled, "I'm going to decline then to allow [prospective new counsel] to substitute for [current counsel] for purposes of the [re]sentencing." RP (June 29, 2010) at 7.

Contreras-Rebollar then said, "I would like to fire [current counsel] at this time as my attorney." RP (June 29, 2010) at 7. The resentencing court responded, "I'm willing to let

[prospective new counsel] substitute if he can be ready by next week. I'm not going to wait until August 6th." RP (June 29, 2010) at 8-9. When prospective new counsel stated that he "[couldn't] make that commitment," the resentencing court ruled, "So I'm going to decline to allow [prospective new counsel] to substitute for [current counsel]. I'm going to decline to allow [current counsel] to withdraw." RP (June 29, 2010) at 9. Contreras-Rebollar then interjected, "I don't have an attorney at this time. I fired both my attorneys at this time." RP (June 29, 2010) at 9. The resentencing court then responded, "I'm not allowing you to fire [current counsel]. He'll be representing you at this hearing. This is late notice." RP (June 29, 2010) at 9.

B. Community Custody Calculation

The resentencing court and the parties then discussed whether Contreras-Rebollar had been on community custody on April 12, 2006. The resentencing court calculated that his community custody (from his 2004 third degree assault conviction) had begun on January 15, 2005, and that, absent any intervening periods of confinement, it would have ended on January 15, 2006. The State explained that Contreras-Rebollar had been "held" for three months on his subsequent second degree unlawful possession of a firearm conviction in 2005, which had tolled his community custody term. RP (June 29, 2010) at 11. The resentencing court then added three months to the original community custody end date of January 15, 2006, for a new end date of April 15, 2006, and asked the parties whether "that sound[ed] about right." RP (June 29, 2010) at 11. Defense counsel replied, "It does sound right." RP (June 29, 2010) at 11. The resentencing court then stated, "Plus or minus a few days[,] [Contreras-Rebollar] still would have been on community custody until approximately April 15, 2006." RP (June 29, 2010) at 11.

Contreras-Rebollar did not object.

The State then provided the resentencing court with certified copies of the judgment and sentences of Contreras-Rebollar's three prior convictions.[8] When the resentencing court asked for its resentencing recommendation, the State responded, "[M]y understanding is the Court just had to, as opposed to resentence, recalculate and affirm that the prior [judgment and sentence from Contreras-Rebollar's February 2007 convictions] was accurate." RP (June 29, 2010) at 12. Defense counsel responded:

> Your Honor, I've been back through the Division II Court of Appeals opinion [that affirmed Contreras-Rebollar's February 2007 convictions but remanded for resentencing]. I've been back through [the judgments and sentences for Contreras-Rebollar's prior convictions] provided by the State. It [the original judgment and sentence from Contreras-Rebollar's February 2007 convictions] does appear to be correct as to sentencing.
> [. . .]
> My analysis [a]s the attorney concurs with [the State]; however, my client still takes issue and wishes to make a record that he disagrees with the calculation, he disagrees with the community custody calculation, and he disagrees with me being [his] attorney, and make a record and renew all his prior objections to sentencing and make sure there's a record of that for appeal should that come up.

RP (June 29, 2010) at 13.

When the resentencing court asked whether Contreras-Rebollar wanted to make any other statements before resentencing, he objected (1) that the resentencing court should have allowed him to substitute new counsel for resentencing; and (2) that the jury, not the resentencing court, should have been the fact-finder about whether he had been on community custody on April 12,

[8] These three prior convictions included the 2005 conviction for one count of second degree unlawful possession of a firearm; the 2004 conviction for third degree assault; and one count of unlawful possession of an imitation controlled substance with intent to distribute, to which Contreras-Rebollar had pled guilty as a minor in 2003. This 2003 juvenile adjudication has no bearing on the community custody timing issue here.

2006. The resentencing court rejected these arguments.

C. Resentencing Order Presentation

On July 2, 2010, the State presented its resentencing order, and the resentencing court stated, "[Counsel], I know Mr. Contreras-Rebollar wants a new attorney, but we dealt with that the other day." RP (July 2, 2010) at 18. Defense counsel responded:

> Your Honor, as a preliminary matter, as we come on the record today, Mr. [Contreras-]Rebollar asked me to make a new motion that I be allowed to withdraw as his attorney prior to presentation of findings of fact and conclusions of law. As his attorney I would voice his request to the Court and make a motion.

RP (July 2, 2010) at 18-19. The resentencing court replied:

> I said the other day if [prospective new counsel] could be here, I would allow that. He said he can't be here until August. The remand was to see if the State could prove the offender score at the time of sentencing. They did so. It's not, quote, administerial, but it's something like that.

RP (July 2, 2010) at 19. Defense counsel then said, "If the Court is ordering me to proceed, I will." RP (July 2, 2010) at 19. The resentencing court did not say whether it was "ordering" current counsel to continue. RP (July 2, 2010) at 19.

Defense counsel next explained that he had reviewed the resentencing order's findings and conclusions but that he did not know "the extent to which [Contreras-Rebollar] approves or disapproves" of the resentencing order. RP (July 2, 2010) at 19. Contreras-Rebollar then interjected:

> And I would like to make a further record on that. I just want Your Honor to know for the record that a defendant is entitled to representation of his choice. That is a Sixth Amendment right at all major stages of a criminal proceeding including sentencing.
>
> Sentencing is a major stage of a criminal proceeding and I am entitled to an attorney by law. I have fired my attorney.

RP (July 2, 2010) at 20. The resentencing court replied, "[W]e debated this a few days ago. It's kind of a nonissue today." RP (July 2, 2010) at 20. Contreras-Rebollar responded:

> Then I would like to put something else further on the record for those findings. Those findings are incorrect.
>
> [The findings] are against my Sixth Amendment constitutional rights to a jury trial, which I have not waived. I have a right to a jury trial.
>
> [A] defendant is entitled to have a jury decide whether an actual portion should be added for the community custody. I have not waived my right for a jury trial, and I object to Your Honor's finding that I was on community custody at the time of the event.

RP (July 2, 2010) at 21.[9]

The resentencing court then signed the resentencing order, which stated that Contreras-Rebollar had been on community custody as of April 12, 2006, and that "the sentence imposed on February 16, 2007, is hereby re-imposed in all and every respect." CP at 90. Contreras-Rebollar appeals this resentencing order.

ANALYSIS

I. Request for New Counsel

Contreras-Rebollar first argues that the resentencing court violated his right to counsel under the Sixth Amendment to the United States Constitution by denying his requests to "fire" his then current counsel and to retain new counsel for the resentencing hearing. Br. of Appellant at 17. We agree with the State that the resentencing court did not err because (1) the Sixth Amendment guarantees a defendant only the right to effective counsel, not the right to any particular counsel he chooses; and (2) Contreras-Rebollar's last-minute request would have

[9] The sentencing court did not explicitly rule on this objection and did not explain why it disagreed with Contreras-Rebollar. *See* RP (July 2, 2010) at 22.

required a one-month continuance, which would have been unreasonable for a resentencing on remand where the only issues for the resentencing were the existence of Contreras-Rebollar's prior convictions and whether he had been on community custody as of April 12, 2006.

A. Standard of Review

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant the right to assistance of counsel at any critical stage in a criminal prosecution. *State v. Roberts*, 142 Wn.2d 471, 515, 14 P.3d 713 (2000). The "'essential aim [of this right] is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.'" *Roberts*, 142 Wn.2d at 515 (quoting *Wheat v. United States*, 486 U.S. 153, 158-59, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)). Accordingly, "[t]he right to retained counsel of choice is [ ] not a right of the same force as other aspects of the right to counsel; a criminal defendant does not have an absolute, Sixth Amendment right to choose any particular advocate." *State v. Price*, 126 Wn. App. 617, 631-32, 109 P.3d 27 (2005) (citing *State v. Roth*, 75 Wn. App. 808, 824, 881 P.2d 268 (1994)).

When a defendant requests a continuance to obtain new counsel, the trial court must balance the defendant's interest in counsel of his choice against the public's interest in the prompt and efficient administration of justice. *Price*, 126 Wn. App. at 632. The factors that the trial court should consider include: (1) whether prior defense-requested continuances were granted, (2) the defendant's reasons for requesting a change of counsel, (3) "whether denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial

nature," and (4) whether preferred counsel is available and prepared. *Price*, 126 Wn. App. at 632.

We review a trial court's denial of a request for new counsel for an abuse of discretion. *Price*, 126 Wn. App. at 632.

> A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons; an abuse of discretion also occurs when the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.

State v. Ramirez-Estevez, 164 Wn. App. 284, 289-90, 263 P.3d 1257 (2011), *review denied*, 173. Wn.2d 1030 (2012). The trial court did not abuse its discretion here.

B. Denial of New Counsel Request Not Erroneous under *Price* Factors

The first *Price* factor[10] weighed against Contreras-Rebollar's request for new counsel. The resentencing court had already granted one continuance of the original resentencing from June 25, 2010, to June 29 because counsel did not appear on June 25.

The second *Price* factor[11] also weighed against Contreras-Rebollar's request for new counsel. Contreras-Rebollar's reason for requesting a change of counsel was his allegation that there was "a conflict of interest in [counsel's] representing [Contreras-Rebollar] at [the] resentencing,"[12] but Contreras-Rebollar fails to articulate why he had a "conflict of interest" with

[10] *Price*, 126 Wn. App. at 632.

[11] *Price*, 126 Wn. App. at 632.

[12] RP (June 29, 2010) at 7.

counsel.[13] Instead, Contreras-Rebollar baldly asserts that he was entitled to new counsel under Rules of Professional Conduct (RPC) 1.7 and 1.9, which concern "concurrent conflict[s] of interest" and duties to former clients, respectively. RPC 1.7(a). Again, Contreras-Rebollar fails to explain how counsel's representation of him during the resentencing hearing violated these rules. Accordingly, we do not further address this argument.[14]

Similarly, the third and fourth *Price* factors[15] weighed against substitution of counsel on the day of Contreras-Rebollar's rescheduled resentencing. New counsel was available but unable to be prepared to take over the hearing that day or even the next week. By new counsel's own admission, substitution would have required yet another continuance to prepare, causing a significant delay. Prospective new counsel was requesting a five-week continuance to study and to dispute Contreras-Rebollar's prior convictions, if necessary. He rejected the resentencing court's offer of an alternative shorter one-week continuance and insisted on a continuance of more than one month, which the resentencing court was not willing to grant.

Yet there were only two relatively simple issues for the resentencing hearing: the existence of Contreras-Rebollar's prior convictions and whether he had been on community

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[13] This alleged conflict of interest was apparently related to Contreras-Rebollar's first direct appeal in which he had argued that his two trial co-counsel were ineffective; we previously rejected this ineffective assistance argument. *See* RP (June 29, 2010) at 8; *Contreras-Rebollar*, 2009 WL 448902, at *7-9.

[14] "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *State v. Hathaway*, 161 Wn. App. 634, 650 n.10, 251 P.3d 253, *review denied*, 172 Wn.2d 1021 (2011).

[15] *Price*, 126 Wn. App. at 633.

custody on April 12, 2006. The community custody question, for example, essentially turned on a mathematic date calculation, not on the skill of any particular attorney. Contreras-Rebollar failed to show that the difference between the new and current counsel would have had a significant impact on the resentencing hearing; thus, Contreras-Rebollar did not show that denial of his motion to substitute counsel was likely to result in identifiable prejudice to his case of a material or substantial nature." *Price*, 126 Wn. App. at 632.

Taken together, all four *Price* factors supported that the public's interest in the prompt and efficient administration of justice outweighed Contreras-Rebollar's interest in counsel of his choice. *Price*, 126 Wn. App. at 632. We hold, therefore, that the resentencing court did not abuse its discretion by denying Contreras-Rebollar's last minute request for new counsel.

II. Community Custody

A. Fact-Finder

Contreras-Rebollar next argues that the resentencing court denied his Sixth Amendment right to a jury trial because a jury, rather than the sentencing court, should have determined whether he had been on community custody as of April 12, 2006. He contends that committing a crime while on community custody is a "sentencing enhancement[]," which requires a finding by a jury. Br. of Appellant at 18. Again, we agree with the State that, under existing United States Supreme Court and Washington Supreme Court precedent, Contreras-Rebollar was not entitled to have a jury determine his community custody status.

Our Washington Supreme Court has squarely addressed and rejected this same argument:

> [B]ecause the community placement sentence determination is a determination about a defendant's status as recidivist, does not require the independent judgment

> of a fact finder about facts related to a defendant's commission of the current offense, and can be readily determined by a limited examination of the record flowing from the prior conviction, we conclude that a court, rather than a jury, may, pursuant to *Almendarez-Torres*,[16] make, constitutionally, the . . . community placement determination.

State v. Jones, 159 Wn.2d 231, 247, 149 P.3d 636 (2006), *cert. denied*, *Thomas v. Washington*, 549 U.S. 1354 (2007). Until and unless our Supreme Court overrules *Jones*, we are bound to follow it. *See State v. McKague*, 159 Wn. App. 489, 514, 246 P.3d 558, *aff'd*, 172 Wn.2d 802 (2011).

Contreras-Rebollar also argues that, because the resentencing court, and not the jury, determined his community custody status, the resentencing court "simultaneously denied him the requirement of proof beyond a reasonable doubt." Br. of Appellant at 19. But our Supreme Court has previously rejected this argument. *Jones*, 159 Wn.2d at 240-241. In *Jones*, our Supreme Court (1) followed *Almendarez-Torres*, in which the United States Supreme Court declined to hold that the State must prove, and that a jury must determine, a defendant's prior convictions beyond a reasonable doubt;[17] and (2) reasoned that "the *Almendarez-Torres* prior conviction exception . . . encompass[es] facts that follow necessarily or as a matter of law from the fact of a prior conviction, such as the defendant's community placement status." *Jones*, 159 Wn.2d at 243, 247. Following *Jones* here, we hold that the Sixth Amendment[18] did not require the State to prove Contreras-Rebollar's community custody status beyond a reasonable doubt.

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[16] *Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

[17] *See McKague*, 159 Wn. App. at 513.

[18] U.S. Const. amend. VI.

Accordingly, we hold that the resentencing court did not violate Contreras-Rebollar's Sixth Amendment[19] jury trial right when it determined that he had been on community custody on April 12, 2006, when he committed the charged crimes.

[19] U.S. Const. amend. VI.

B. Status at Time of Charged Crimes

Contreras-Rebollar also argues that the trial court erred as a matter of fact by determining that he had been on community custody on April 12, 2006, the date of the charged crimes.[20] We previously remanded to the sentencing court "for resentencing so that the State [could] produce evidence of Contreras[-Rebollar]'s prior convictions and community custody status." *Contreras-Rebollar*, 2009 WL 448902, at *6. But the record before us on appeal does not contain sufficient information for us to review the accuracy of the resentencing court's determination of Contreras-Rebollar's community custody status at the time of the charged crimes. Therefore, we must remand for yet another resentencing.

Contreras-Rebollar asserts that he was *not* on community custody as of April 12, 2006, because he had been released from his unlawful firearm possession incarceration on September 19, 2005 (based on his "assuming the customary 1/3 good time awarded by the Pierce County Jail.") Br. of Appellant at 26. In his direct appeal, he cites no part of the record to support his assertion that he received such good time credit or that he was actually released on that date. And the record before us shows only that (1) Contreras-Rebollar had been previously sentenced for his unlawful firearm possession conviction to three months of incarceration, with credit for 40 days of time served, and (2) this incarceration period ended, and his community custody term

[20] Contreras-Rebollar argues that the sentencing court's "'off the cuff'" calculations violated his right to have his community custody status proved beyond a reasonable doubt. Br. of Appellant at 27. But the standard of proof for a community custody determination is "preponderance of the evidence," not beyond a reasonable doubt. *See McKague*, 159 Wn. App. at 517; *Jones*, 159 Wn.2d at 243, 247. Nevertheless, the record on appeal is insufficient for our review under even this "preponderance of the evidence" standard of proof.

recommenced, on October 20, 2005, not September 19, 2005.[21] And in his PRP, Contreras-Rebollar makes no assertions to matters potentially outside the record that might support his assertions.

Similarly, in his direct appeal, Contreras-Rebollar also assumes that his community custody was tolled on August 29, 2005 (when he *was sentenced for* unlawful firearm possession), instead of July 21, 2005 (when he *was presumably taken into custody for* unlawful firearm possession).[22] Again, he cites nothing in the record to support this assumption or to show that his community custody was tolled on August 29, 2005, rather than on July 21, 2005. Nor does he allege supporting facts outside the record in his PRP.

Nothing in the record before us refers to any good-time credit—whether Contreras-Rebollar had earned it or whether the resentencing court considered such credit in reviewing his community custody status during our previous remand for resentencing. Nor does the record on appeal show, as Contreras-Rebollar asserts, that his community custody began on December 11, 2004, was tolled from August 28, 2005 thru September 18, 2005, began again on September 19, 2005, and finally expired on December 31, 2005. We usually do not consider arguments that lack

[21] Contreras-Rebollar committed unlawful firearm possession on July 21, 2005, and likely was taken into custody on the same day. The record does not actually state whether Contreras-Rebollar was taken into custody on the same date that he committed unlawful firearm possession. But, when Contreras-Rebollar was sentenced on August 29, 2005, he received credit for 40 days of time served, which means Contreras-Rebollar was in confinement for 40 days before he was sentenced. There are 40 days from and including July 21, 2005, to and also including August 29, 2005. He was sentenced on August 29, 2005. If he served 3 months with credit for 40 days of time served, then his incarceration ended on October 20, 2005.

[22] Contreras-Rebollar's assumption contradicts his own brief where, on page 11, he asserts that he was on community custody from January 15, 2005 to July 20, 2005. *See* Br. of Appellant at 11.

citations to the record. *State v. Nelson*, 131 Wn. App. 108, 117, 125 P.3d 1008 (2006); RAP 10.3(a)(5). Moreover, here, the record does not show that the resentencing court actually miscalculated Contreras-Rebollar's community custody tolling and recommencement.

Nevertheless, the record suggests that the resentencing court may not have taken into account any good time credit to which Contreras-Rebollar may have been entitled and that might have affected its determination of whether he had been on community custody at the time he committed the charged crimes. We reiterate that we specifically remanded "for resentencing so that the State can produce evidence of Contreras[-Rebollar]'s . . . community custody status." *Contreras-Rebollar*, 2009 WL 448902, at *6. In our view, the directives of our previous remand were not fully satisfied. Therefore, we must remand once more because we cannot tell on the record before us whether Contreras-Rebollar's community custody status was accurately determined, despite the specific terms of our previous remand for resentencing and determination of community custody.

Accordingly, we remand again for resentencing, at which the State should put on the record all facts pertinent to Contreras-Rebollar's community custody status at the time he committed the charged crimes, including any good time credit calculation to which he may have been entitled.

III. Effective Assistance of Counsel

Next, Contreras-Rebollar argues that his resentencing hearing counsel rendered ineffective assistance because he failed to "independently calculate" whether Contreras-Rebollar had been on community custody as of April 12, 2006. Br. of Appellant at 30. This argument fails.

To succeed on an ineffective assistance of counsel claim, the defendant bears the burden of showing (1) that trial counsel's performance was deficient and (2) trial counsel's deficient performance prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting the test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Trial counsel's performance is deficient if it "falls 'below an objective standard of reasonableness.'" *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688). Because of the "deference afforded to decisions of defense counsel in the course of representation,"[23] there exists a "'[s]trong presumption that counsel's performance was reasonable.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Legitimate trial strategy or tactics do not count as deficient performance, but "a criminal defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Ano*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999)).

Once the defendant shows deficient performance, he then must establish prejudice by showing that "'there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Grier*, 171 Wn.2d at 34 (quoting *Kyllo*, 166 Wn.2d at 862). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Grier*, 171 Wn.2d at 34 (quoting *Strickland*, 466 U.S. at 694). Failure to

[23] *Grier*, 171 Wn.2d at 33.

demonstrate *both* prongs of the test defeats a defendant's ineffective assistance of counsel argument on appeal. *Grier*, 171 Wn.2d at 33 (citing *Thomas*, 109 Wn.2d at 225-26 (adopting the test from *Strickland*, 466 U.S. at 687)).

Contreras-Rebollar does not meet the first prong of the test because he fails to show that counsel's performance was deficient. The resentencing court performed its community custody calculation in the presence of counsel, Contreras-Rebollar, and the State. And when the resentencing court determined that Contreras-Rebollar's community custody had expired on April 15, 2006, counsel, who had studied the judgments and sentences from Contreras-Rebollar's previous convictions, replied, "It does sound right." RP (June 29, 2010) at 11. These facts show that counsel was informed and prepared and, thus, negate Contreras-Rebollar's argument that counsel's performance "f[ell] 'below an objective standard of reasonableness.'"[24] *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688). Because Contreras-Rebollar fails to meet the first prong of the ineffective assistance of counsel test, we need not address the second prong. We hold, therefore, that Contreras-Rebollar has failed to show that his counsel rendered ineffective assistance at resentencing.

IV. Personal Restraint Petitions

A. Primary Personal Restraint Petition

In his primary PRP, Contreras-Rebollar argues that (1) his trial counsel back in early 2007 rendered ineffective assistance of counsel by failing to propose the "[d]efense of [a]nother" jury instruction; and (2) the trial court erroneously excluded co-counsel from the trial. PRP at 22.

[24] That the record does not contain more complete information about these calculations does not show that counsel was deficient in his representation.

Contreras-Rebollar previously advanced, and we rejected, these same arguments in his first direct appeal. *Contreras-Rebollar*, 2009 WL 448902, at *3, *7 ("[Contreras-Rebollar] claims that he did not receive a fair trial because . . . the trial court removed [co-counsel] from the proceedings" and "Contreras[-Rebollar] also argues that he received ineffective assistance of counsel because defense counsel . . . failed to propose a 'defense of another' instruction.")

"The petitioner in a personal restraint petition is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671, 101 P.3d 1 (2004) (footnotes omitted). "An issue is considered raised and rejected on direct appeal if the same ground presented in the petition was determined adversely to the petitioner on appeal and the prior determination was on the merits." *Davis*, 152 Wn.2d at 671 n.14 (citing *In re Pers. Restraint of Taylor*, 105 Wn.2d 683, 687, 717 P.2d 755 (1986)). "The interests of justice are served by reexamining an issue if there has been an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application." *Davis*, 152 Wn.2d at 671 n.15 (citing *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001)).

Contreras-Rebollar concedes that his ineffective assistance of counsel argument is "the same underlying previously heard and determined issue" from his first direct appeal, but he argues that we, nevertheless, should "allow for relitigation" under RAP 16.4(c)(3). Pet'r Resp.

to Resp't Br. at 17. RAP 16.4(c)(3) provides that a restraint is unlawful if "[m]aterial facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction." But Contreras-Rebollar does not provide any new "[m]aterial facts" with his petition[25]; instead, he merely provides additional copies of the record.

Contreras-Rebollar also argues that his exclusion of co-counsel issue in his petition differs from the exclusion issue he argued in his first direct appeal because (1) "on his direct appeal the fundamental underlying principle issue argued was that of a mere trial court discretional error"; and (2) in contrast, the exclusion issue in his petition is "of the magnitude of a direct structural defect in which [he] was critically denied his [constitutional] rights." Pet'r Resp. to Resp't Br. at 9. Contrary to Contreras-Rebollar's argument, (1) we considered his constitutional rights in his first direct appeal; and (2) in his petition, he presents essentially the same issue that he presented in his first direct appeal. *Contreras-Rebollar*, 2009 WL 448902, at *5. He cannot avoid this problem by merely "'couching his argument in different language.'" *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 329, 868 P.2d 835 (1994) (quoting *Campbell v. Blodgett*, 982 F.2d 1321, 1326 (9th Cir. 1992), *reh'g denied, amended and superseded*, 997 F.2d 512 (1993)). Accordingly, we deny his petition.

[25] Contreras-Rebollar attached an affidavit to his supplemental petition and another affidavit to his reply brief. But neither of these affidavits present "[m]aterial facts . . ., which in the interest of justice require vacation of the conviction." RAP at 16.4(c)(3).

B. Supplemental Personal Restraint Petition

Contreras-Rebollar also filed a supplemental personal restraint petition, which we deny as untimely and, therefore, do not further consider.[26] Personal restraint petitions may not be filed "more than one year after the judgment becomes final."[27] RCW 10.73.090(1). A "judgment becomes final" on the last of the following dates: (1) the date the judgment is filed with the trial court clerk, (2) the date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction, or (3) the date that the United States Supreme Court denies a timely certiorari petition to review a decision affirming the conviction on direct appeal. RCW 10.73.090(3). Because we previously remanded for resentencing, this case was not final for purposes of petitioning the United States Supreme Court for certiorari review; thus, this third option does not apply here.

Thus, the later of the two possible remaining dates (first and second options) for finality of the judgment is April 14, 2010, when we issued our mandate of Contreras-Rebollar's direct appeal. *See* CP at 56. Accordingly, the last day on which he could have filed a timely PRP was one year later. But he did not file his supplemental PRP until November 22, 2011, more than seven months after the one-year limit time had expired.[28] Holding, therefore, that his

[26] "'Though the appellate rules do not expressly authorize or prohibit amendment to PRPs, we have accepted amendments to a PRP made within the statutory time limit.'" *In re Pers. Restraint of Davis*, 151 Wn. App. 331, 336, 211 P.3d 1055 (2009) (quoting *In re Pers. Restraint of Bonds*, 165 Wn.2d 135, 140, 196 P.3d 672 (2008)), *review denied*, 168 Wn.2d 1043 (2010). Contreras-Rebollar, however, filed his supplemental petition outside the statutory time limit.

[27] RCW 10.73.100 provides exceptions to this time bar, none of which apply here.

[28] The only exception that arguably might apply to Contreras-Rebollar's supplemental PRP is the fifth exception: "The sentence imposed was in excess of the court's jurisdiction." RCW

supplemental petition is untimely, we deny it.

We remand for yet another resentencing, at which the State may produce evidence of Contreras-Rebollar's community custody status. We also deny Contreras-Rebollar's PRP and supplemental PRP.

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 in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Penoyar, J.

Johanson, A.C.J.

10.73.100(5). It is true that Contreras, in his direct appeal presently before us, challenges the sentencing court's calculation of his community custody term. But his argument that a trial court miscalculated a community custody term does not implicate "jurisdiction" of the trial court. *See In re Pers. Restraint of Vehlewald*, 92 Wn. App. 197, 201, 963 P.2d 903 (1998).