FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

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

IN RE THE PERSONAL RESTRAINT PETITION OF: ERNEST A. CARTER, Petitioner.	NO. 37048-4 STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. May defendant raise an issue of shackling at trial where this issue was litigated on direct appeal and there is no significant change in the law? In the alternative, has defendant failed to show a constitutional error which affected the outcome of the trial where he agreed to the shackling, failed to object to the shackling, failed to request a voir dire of jurors, and where the evidence of guilt was overwhelming?

2. May the defendant ask this court to reconsider the comparability of an out of state conviction and whether such conviction washes where this issue was litigated on direct appeal and there is no significant change in the law on comparability?

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B. STATUS OF PETITIONER:

Petitioner, ERNEST A. CARTER, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 97-1-04547-1 on two counts of robbery in the first degree. (PRP – Appendix A).[1]

Defendant was sentenced as a persistent offender to life in prison. Id.

Defendant filed a direct appeal. In his appeal he raised the issues of: (1) the evidence was insufficient to prove that he displayed a deadly weapon during one of the robberies; (2) the trial court improperly commented on the evidence; (3) the trial court erred in denying his motion for a mistrial when a juror saw him wearing shackles; (4) the trial court erred in admitting evidence that he had been seen at a nearby 7-Eleven store before one of the robberies; (5) prosecutorial misconduct prejudiced his defense; (6) he received ineffective assistance of counsel; (7) the cumulative effect of trial errors requires reversal; (8) a prior California conviction was wrongly counted as a strike under the Persistent Offender Accountability Act (POAA); and (9) the California conviction should not count in calculating his standard range offender score because the conviction washed out. (PRP Appendix C). The court affirmed his conviction and sentence. Id.

A mandate was issued on October 18, 2000. Appendix A.

Defendant files this, his first personal restraint petition. The State has no information regarding indigency.

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[1] "PRP – Appendix *" – these may be found as appendices to defendant's personal restraint petition.

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C. GENERAL PERSONAL RESTRAINT PETITION LAW.

Personal restraint procedure has its origins in the State's habeas corpus remedy, guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal. In re Hagler, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders. These are significant costs, and they require that collateral relief be limited in state as well as federal courts. Hagler, Id.

In this collateral action, the petitioner has the duty of showing constitutional error and that such error was actually prejudicial. The rule that constitutional errors must be shown to be harmless beyond a reasonable doubt has no application in the context of personal restraint petitions. In re Mercer, 108 Wn.2d 714, 718-21, 741 P.2d 559 (1987); Hagler, 97 Wn.2d at 825.

The petition must include a statement of the facts upon which the claim of unlawful restraint is based and the evidence available to support the factual allegations. RAP 16.7(a)(2); Petition of Williams, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). If the petitioner fails to provide sufficient evidence to support his challenge, the petition must be dismissed. Williams at 364.

Because of the costs and risks involved, there is a time limit in which to file a collateral attack. The statute that sets out the time limit provides:

> No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes

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final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

RCW 10.73.090(1).

In addition to the exceptions listed within that statute, there are other specific exceptions to the one-year time limit for collateral attack. RCW 10.73.100.[2]

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[2] 10.73.100. Collateral attack -- When one year limit not applicable

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

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;

(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction; or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

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D. ARGUMENT.

Summary of Argument:

This petition puts before this court issues that were addressed and rejected in petitioner's direct appeal. Because the issues of shackling and sentencing were previously decided in the direct appeal, and because this petition comes over seven years after the mandate was issued, this court must dismiss the petition as untimely.

1. DEFENDANT'S CLAIM OF UNLAWFUL SHACKLING IS TIME BARRED WHERE DEFENDANT BROUGHT THIS CLAIM IN HIS DIRECT APPEAL.

a. This issue is time barred where the defendant was properly advised of his right to collateral attack and there is no significant change in the law requiring that this issue be revisited.

A mandate in this case was issued on October 18, 2000, thus defendant's petition is time barred unless he can show an exception under RCW 10.73.100. See RCW 10.73.090 3(b).

Defendant alleges that (i) he was not advised of his advice to right to collateral attack, and (ii) that there is a significant change in shackling law. Both of these claims are without merit.

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i. **Defendant was advised of his right to collateral attack**

The trial court is required to notify a defendant at sentencing of the time limits specified in RCW 10.73.090 and RCW 10.73.100. RCW 10.73.110. While the trial court must make such advisement, the statute does not indicate any specific language that must be used, nor does it require that the advisement be in writing. The advisement in this case properly referred the petitioner to RCW 10.73.090 and RCW 10.73.100, and notified him that his right to file a collateral attack may be limited to one year. (PRP Appendix A – Judgment and Sentence at 7). Contrary to defendant's assertion, he was advised of the one year time bar and may not seek a way around that with the claim of failure to advise.

ii. **Defendant litigated the shackling issue in his direct appeal and there is no significant change in the law.**

Petitioner may not raise in a personal restraint petition an issue which "was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue." In re Pers. Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). "Simply 'revising' a previously rejected legal argument . . . neither creates a 'new' claim nor constitutes good cause to reconsider the original claim." In re Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). "[I]dentical grounds may often be proved by different factual allegations. So also, identical grounds may be supported by different legal arguments, . . . or be couched in different language, . . . or vary in immaterial respects." Thus, for example, "a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on physical coercion." Jeffries, 114 Wn.2d at 488 (citations omitted). A

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petitioner may not create a different ground for relief merely by alleging different facts, asserting different legal theories, or couching his argument in different language. Lord, 123 Wn.2d at 329.

One test to determine whether an appellate decision represents a significant change in the law is whether the defendant could have argued [the] issue before publication of the decision." In Re Stoudmire, 145 Wn.2d 258, 36 P.3d 1005 (2001) (Stoudmire II). An opinion does not constitute a significant change in the law where the opinion merely applies settled case law to new facts. Id. at 265, (citing State v. Olivera-Avila, 89 Wn. App. 313, 321, 949 824 (1997)). Significant change has been defined as:

> While litigants have a duty to raise available arguments in a timely fashion and may later be procedurally penalized for failing to do so . . . they should not be faulted for having omitted arguments that were essentially unavailable at the time, as occurred here. We hold that where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a "significant change in the law" for purposes of exemption from procedural bars.

In re Pers. Restraint of Greening, 141 Wn.2d 687, 697, 9 P.3d 206 (2000).

Deck v. Missouri, 544 U.S. 622, 125 S. Ct. 2007, 161 L.Ed.2d 953 (2005), was not a significant change in the law. Deck merely applied existing constitutional review standards (beyond a reasonable doubt), as identified in Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)), to a new set of facts (shackling). Nothing prevented the defendant from making this argument in his original briefing on direct review. In fact, a survey of Washington law shows that this has long been the standard that applies to shackling. In State v. Finch, the court stated:

> Generally, an error that violates a constitutional right of the accused is presumed to be prejudicial. See State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980). The appellate court determines

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> whether the State has overcome the presumption from an examination of the record, from which it must affirmatively appear the error is harmless beyond a reasonable doubt. See State v. Belmarez, 101 Wn.2d 212, 676 P.2d 492 (1984)

137 Wn.2d 792, 859-860, 975 P.2d 967 (1999). Defendant makes no mention of why he did not avail himself to this analysis. The court should reject his significant change in the law argument.

b. Alternatively, defendant failed to object to the shackling below and cannot show prejudice.

Generally, because visible shackling or handcuffing a defendant during trial is likely to prejudice a defendant, it should be "'permitted only where justified by an essential state interest specific to each trial.'" In re Davis, 152 Wn.2d 647, 695, 101 P.3d 1 (2004) (citing Holbrook v. Flynn, 475, U.S. 560, 568-69, 106 S. Ct. 1340, 89 L.Ed.2d 525 (1986)). A decision on whether to shackle should be based on evidence that the defendant poses an imminent risk of escape, a threat to injury someone, or that the defendant cannot behave in an orderly manner while in the courtroom. Id. at 695 (citing State v. Finch, 137 Wn.2d 792, 850, 975 P.2d 967 (1999).

To conclude whether there is a due process violation the test is:

> '[W]hether what [the jurors] saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a a fair trial.' The United States Supreme Court has stated that 'whenever a courtroom arrangement is challenged as inherently prejudicial . . . . the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'"

Davis, at 695 (citing Rhoden v. Rowland, 10 F.3d 1457, 1459, 1460, (9th Cir. 1993); Holbrook v. Flynn, 475 U.S. 560, 568, 106 S. Ct. 1340, 89 L.Ed.2d 525 (1986)).

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"A jury's brief or inadvertent glimpse of a defendant in restraint inside or outside the courtroom does not necessarily constitute reversible error." Davis, 152 Wn.2d at 697-98. "Such circumstances are not inherently or presumptively prejudicial and do not rise to the level of a due process violation absent a showing of actual prejudice." Id. (citing State v. Clark, 143 Wn.2d 731, 776, 24 P.3d 1006 (2001).

While it is the preference that courts perform a weighing of the reasons for restraint on the record, "defense counsel are not relieved `of the obligation to object [t]o shackling.'" In re Elmore, 162 Wn.2d 236, 259, 172 P.3d 335 (2007)(quoting Davis, 152 Wn.2d at 699. Thus, a defendant may also waive a constitutional challenge to shackling by either agreeing to the shackling or failing to object. Id.

Turning to the facts of this case, the judge made a record that this was a three strikes case and that defendant posed a flight risk. RP IX 345-46. The record shows that defendant (1) agreed to the shackling, (RP VII 171-72) (2) was shackled to and from court and possibly on the first day of trial, (RP IX 354) (defendant was observed first day of voir dire), (3) that the one juror who had the potential to observe defendant in shackles outside of court was removed, and he did not discuss with the other jurors the shackling (RP IX 351-353), (4) defendant failed to voir dire the remaining jurors on the subject or ask for their removal, (RP IX 356), and (5) measures were taken to block any view of the shackles with a garbage can (RP VIII 171-172). Given the record below, defendant cannot at this time assert that there was a constitutional error affecting the outcome of the trial.

Having failed to request the voir dire or removal of any more jurors, the defendant should be precluded from arguing a constitutional violation. Davis,152 Wn.2d at 259. At the time the prosecutor called the shackling to the court's attention, defendant remains entirely

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silent on the issue. (RP VII 171-173). It is not until it is pointed out that one juror possibly observed defendant in the shackles that defendant makes any kind of objection. (VII RP 344-45) Even then, counsel was not objecting to the *use* of shackles, but that defendant had a constitutional right to "not be *viewed* in shackles." RP IX 345 (see also RP IX 356 "Mr. Carter does have a constitutional right not to be viewed in shackles."). Defendant does not bring an ineffective assistance of counsel claim to this court.

This case may be likened to Clark and Elmore where the court declined to reverse a conviction based on the use of shackles. In Clark, the court held that the defendant was not prejudiced when the jury saw him shackled on the first day of voir dire and on the day the verdict was returned, but the defendant sat unrestrained throughout the trial. State v. Clark, 143 Wn.2d at 776. In Elmore, the defendant raised the issue of shackling in a personal restraint petition, alleging ineffective assistance of counsel for failure to object to the shackling. The court looked at the fact that defendant was shackled only on the first day of sentencing, and that viewing the evidence as a whole, defendant failed to carry his burden of demonstrating that the outcome would have be different absent the shackles. 162 Wn.2d at 261.

Here, the defendant fails to meet his burden in this personal restraint petition of showing prejudice. The rule that constitutional errors must be shown to be harmless beyond a reasonable doubt has no application in the context of personal restraint petitions. In re Mercer, 108 Wn.2d at 718-21. Defendant agreed to the use of shackles, did not object, and the record only bears out that a single juror saw the shackles. Defendant should not be rewarded for sitting back at trial and agreeing to this process with the use of a reference hearing at this time. He attaches two affidavits to his personal restraint petition alleging that the shackles were visible to the jurors. (PRP Appendix G and H). Neither defendant nor his wife are competent

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to speak for the jurors. The affidavits fall short of what is required for a reference hearing. Only competent, admissible evidence may be considered at a reference hearing. See In re Pers. Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994) (to obtain an evidentiary hearing, a personal restraint petitioner must present competent, admissible evidence to establish facts entitling him to relief). The defendant cannot opine what the jurors may, or may not have seen. The main problem with this information is that his objection and any record should have been made at trial when the judge could have acted on the information – not ten years later in a personal restraint petition. This is precisely why it is the defendant's high burden to show a constitutional error affecting the outcome of the trial; and why here, he has failed to meet that high burden.

The evidence at trial was also overwhelming. Defendant asserts that the issue of whether he carried a firearm at the time of the offense was at issue and so the shackling had to impact the outcome of the trial. A review of the record shows that defendant was convicted of not one, but two counts of first degree robbery based on the use of a weapon. (PRP Appendix A). The robberies stemmed from two separate incidents (Subway, and AM/PM). RP IX 283-84, VIII 231. It should be noted that in his direct appeal he conceded there was sufficient evidence to establish he was guilty of the robbery, but disputed only the use of a weapon. The court of appeals accurately summarized the overwhelming evidence of guilt:

> Although he did not actually see Carter display a weapon, Arnold testified that: Carter was acting suspiciously inside the AM/PM store; Carter's hand 'never moved from under the shirt'; Carter 'demanded' that he open the cash drawer; Arnold thought Carter possibly had a weapon; and Arnold held up his hands when Carter ordered him to turn around.

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> Further, Dupery testified that Carter had his hand under his shirt at the Subway restaurant when he said, 'I'm going to blow you away if you don't give me all the money.' Duperry was robbed roughly five hours before Arnold; Carter wore the same flannel shirt during both robberies, holding his hand and possibly something else under the shirt both times.
>
> Schnoor testified he saw Carter 'stuff[] what appeared to be an L-frame revolver into his pants' before entering the 7-Eleven store, only five minutes before Carter entered the AM/PM Mini-Mart. Finally, Leroy testified he was with Schnoor and saw a black male exit Raulins' car outside the 7-Eleven and 'stuff[] something underneath his shirt.'

Unpublished opinion at 3.

Given defendant's threats, the way he carried his arm, the eyewitnesses to defendant carrying an L'Frame revolver, the perceived threat of victims based on the use of the firearm, it is unlikely that a brief glimpse of defendant in shackles affected the outcome of the trial and defendant has failed to meet his burden.

2. THE DEFENDANT LITIGATED THE COMPARABILITY AND WASHOUT ISSUES OF HIS PRIOR OFFENSES IN HIS DIRECT APPEAL AND THERE IS NO SIGNIFICANT CHANGE IN THE LAW WARRANTING A RECONSIDERATION OF THESE ISSUES.

The State incorporates by reference what constitutes a significant change in the law as outlined in section one of this brief and whether a defendant may file a petition raising the same issues as raised in his direct appeal.

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a. *People v. Williams* is not a significant change in the law.

Comparability of defendant's California assault conviction was previously litigated in the direct appeal. (See PRP Appendix B). Defendant may not relitigate this issue and it is time barred.

Defendant seeks to revisit the issue, contending that the California Supreme Court's decision in People v. Williams, 26 Cal.4th 779, 29 P.3d 197 (2001), was a departure from existing caselaw. The flaw in petitioner's argument is contained in his brief, which provides: "[U]nder California law, 'assault' was (***and still is and has been since 1872***) defined as 'an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.' Cal. Penal Code sec. 240 (Deering 1983)." (PRP at 14, emphasis added). Petitioner's brief acknowledges that the definition of assault has not changed since 1872, and it is this definition that the Court of Appeals relied on in the unpublished decision, affirming defendant's sentence. People v. Williams was not a departure from this definition. The Williams court went on in the body of its opinion to clarify that its holding was not a departure from previous interpretations and was consistent with the court's opinion in Rocha, a 1971 case, People v. Rocha, 3 Cal. 3d 893, 899, 479 P.2d 372 (1971); and People v. Colantuono, 7 Cal.4th 206, 215-216 (1994). 29 P.3d at 199. The Court cautioned: "In adopting this knowledge requirement, we do *not disturb our previous holdings.*" 29 P.3d at 203, emphasis added (citing Colantueno, at 215-216, and Rocha, at 899). The Williams court thus made clear that for someone in petitioner's position, he always had the argument available to him that the California conviction was not comparable to Washington assault.

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b. Sentence in excess of jurisdiction.

Defendant also seeks a way around the one year time limit by arguing that the sentence imposed was in excess of the court's jurisdiction. Defendant does not argue how the sentence is in excess of the court's jurisdiction. Without argument and citation to authority this court should not accept this argument. See State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995).

c. Equitable Tolling does not apply.

The equitable tolling doctrine "'permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed.'" In re Carlstad, 150 Wn.2d at 593. "Appropriate circumstances generally include 'bad faith, deception, or false assurances by the [party opposing application of the doctrine], and the exercise of diligence by the [party seeking its use.]'" State v. Duvall, 86 Wn. App. 871, 874, 940 P.2d 671 (1997), review denied, 134 Wn.2d 1012, 954 P.2d 276 (1998) (quoting Finkelstein v. Sec. Props., Inc., 76 Wn. App. 733, 739-40, 888 P.2d 161 (1995)). The remedy is "generally used . . . when the plaintiff exercises diligence and there is evidence of bad faith, deception, or false assurances by the defendant." Carlstad, 150 Wn.2d at 593.

The doctrine of equitable tolling cannot apply in this case for two reasons. First, petitioner fails to establish bad faith, deception, or false assurances made to him. Second, defendant has not exercised due diligence in the filing of this petition. If, as defendant claims, the Williams' decision is a departure from established law, then defendant should have filed a petition within reasonable proximity to the issuance of the 2001 decision. Waiting over six

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years to file a petition is not an exercise of due diligence and should count against the invocation of this rarely and carefully used doctrine.

d. Actual innocence exception.

Defendant poses to this court the novel legal doctrine of "actual innocence" for a reason to invoke equitable tolling. While defendant launches into a long excerpt on "actual innocence" doctrine, he omits almost entirely from his analysis why petitioner should fall into that category. The POAA is a sentencing act, not a substantive offense, and petitioner cannot lay claim that he is "actually innocent" of a sentencing statute. Washington has also explicitly declined to invoke this federal doctrine. In re Turay, 153 Wn.2d 44, 54, 101 P.3d 854 (2004).

e. Merits of comparability claim.

Even if this court were to reach the merits of defendant's comparability claim, he has failed to establish a fundamental defect resulting in a miscarriage of justice where Washington and California assaults are comparable.

Out-of-state convictions are classified according to the comparable offense definitions and sentences provided by Washington law. RCW 9.94A.525(3). Generally, the State bears the burden of proving the existence and classification of prior out-of-state convictions by a preponderance of the evidence. State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). The sentencing court then compares the ***elements*** of the out-of-state offense with the ***elements*** of potentially comparable Washington crimes. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999).

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The law on comparability is an ever evolving process. As our Supreme Court has noted, "[l]egal comparability analysis is not an exact science." State v. Stockwell, 159 Wn.2d 394, 397-98, 150 P.3d 82 (2007). In State v. Berry, the Supreme Court considered California's assault with a deadly weapon statute, and whether it qualified as a strike under the POAA. 141 Wn.2d 121, 130, 5 P.3d 658 (2000). The issue considered one of whether a stayed matter could count as a prior conviction, but the court noted that, "it is undisputed that the assault convictions, absent the stay provisions, would be included in Berry's offender score under RCW 9.94A.360." 141 Wn.2d at 130.

There are several alternative means of committing second degree assault, and many include a requirement of intent, but assault with a deadly weapon does not. In Washington in 1983, a person could be convicted of assault in the second degree with a deadly weapon if he:

(1) knowingly

(2) assault[ed] another

(3) with a weapon or other instrument or thing likely to produce bodily harm.

RCW 9A.36.020 (c); State v. Mauer, 34 Wn.App. 573,576, 663 P.2d 152 (1983).
Thus, as codified, assault with a deadly weapon does not require specific intent. The Washington element of "knowingly" is satisfied by the California element of "criminal intent" which has been defined as "the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another." People v. Rocha, 3 Cal.3d 893, 899, 479 P.2d 372, 376-77 (1971); See also, People v. Williams, 26 Cal.4th at 787-788 (explaining that a defendant is guilty of assault if he intends to commit an act "which would be indictable [as a battery[, if done either from its own character

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or that of its natural and probable consequences . . . . a defendant cannot have such an intent unless he actually *knows* those facts sufficient to establish that his act by its nature will probably .. . . result . . . in a battery).

Defendant mistakenly puts before the court the different manners of assault and treats them as elements of the crime. However, different *manners* in which a person may commit assault are not elements of the offense, but rather a definition. State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007). These definitions are not *elements* of the offense and should not come into play in a comparability test.

Defendant suggests that because the defense of voluntary intoxication was unavailable, his assault crime is not comparable. Defendant overlooks that he pled guilty. Defendant waived any possible defenses available in either Washington or California. "A plea of guilty, voluntarily made, waives the right to trial and all defenses other than that the complaint, information, or indictment charges no offense." Garrison v. Rhay, 75 Wn.2d 98, 101, 449 P.2d 92 (1968):

Also, when one looks to the facts of the crime, it is clear that defendant's actions would constitute second degree assault in Washington. Defendant fired shots at and hit a police vehicle with occupants. (PRP Appendix I) It is absurd to suggest that including this crime as a "most serious offense" under the POAA results in a complete miscarriage of justice. For a more through examination of comparability law and facts, please refer to the State's original brief on this issue in the direct appeal, attached as Appendix B.

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f. Washout.

Petitioner contends that the assault conviction should not count because it washes out under RCW 9.94A.535. This argument was previously presented and rejected in his direct appeal, and this court should decline to reconsider this argument. (Opinion at 13).

In support of his argument as to why this most serious offense washes out he states that it washes out because the conviction is "comparable to aiming a firearm in violation of RCW 9.41.230. That crime is a gross misdemeanor, meaning that it serves to interrupt wash out periods, but does not constitute criminal history." PRP at 25.

Based on the above language included in petitioner's brief, his argument is not one of "washout" but that the offense does not count as a most serious offense at all because it is classified as a misdemeanor. This has nothing to do with washout provisions. The State agrees, hypothetically speaking, that if defendant were only convicted of a gross misdemeanor, this would not be included as a "most serious offense."

E. CONCLUSION:

For the foregoing reasons, the State respectfully requests that this court dismiss this petition as time barred.

DATED: March 17, 2008.

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STATE OF WASHINGTON
BY_____
DEPUTY

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.17.08 [signature]
Date Signature

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"APPENDIX A"

MANDATE

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BY _____ DEPUTY

STATE OF WASHINGTON, Respondent, v. ERNEST ALVIN CARTER, JR., Appellant.	No. 23940-0-II MANDATE Pierce County Cause No. 97-1-04547-1

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

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on April 14, 2000 became the decision terminating review of this court of the above entitled case on October 11, 2000. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs have been awarded in the following amount:

Judgment Creditor: State of Washington, in the amount of $22.96
Judgment Creditor 2: Appellate Indigent Defense Fund, in the amount of $4,396.54
Judgment Debtor: Ernest A. Carter, Jr., in the amount of $4,419.50

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 18th day of October, 2000.

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

Indeterminate Sentence Rev. Bd.

Sentencing Guideline Commission

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"APPENDIX B"

STATE'S RESPONSE TO MOTION FOR ACCELERATED REVIEW

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

STATE OF WASHINGTON, Respondent, v. ERNEST A. CARTER, Appellant.	)	NO. 23940-0-II STATE'S RESPONSE TO MOTION FOR ACCELERATED REVIEW

I. IDENTITY OF MOVING PARTY:

Respondent, State of Washington, requests the relief designated in part II.

II. STATEMENT OF RELIEF SOUGHT:

Respondent requests that this court refuse to review this sentencing issue on an accelerated basis as defendant will not be prejudiced by review under the normal procedures. The State further requests this court to affirm the trial court's finding that the

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defendant's California conviction for assault was properly included in his criminal history and that it constituted a most serious offense thereby making the defendant a persistent offender.

III. STATEMENT OF THE CASE:

Appellant, ERNEST CARTER, was found guilty by a jury of two counts of robbery in the first degree. RP XII 493-494. At sentencing the State argued that the court should find the defendant to be a persistent offender because he had prior conviction out of Oregon for attempted murder and a prior conviction in California for assault with a firearm against a police officer. RP XIII 504-505. The State presented testimony from a fingerprint expert that the fingerprints corresponding to these convictions were the defendant's. RP XIII 500-504.[1] There was no dispute that the attempted murder conviction counted as a most serious offense. RP XIII 516. It was argued that the California conviction did not qualify as a most serious offense. RP XIII 507-508. The court

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[1] At two points in his motion, defendant asserts that there was a factual issue regarding whether the prior convictions belonged to him because of a discrepancy in the names. While acknowledging that the law says such factual questions can be resolved by fingerprint analysis, defendant fails to acknowledge that such was done in the trial court. His assertion that the case be remanded to prove identity of the prior convictions is frivolous.

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found that defendant had prior out of state convictions from Oregon of attempted murder with a firearm, attempted assault in the first degree, and from California a conviction of assault of a police officer with a firearm. CP 97-104; RP XIII 516-517. The court found that the Oregon attempted murder and the California assault were equivalent to most serious offenses under Washington law and, therefore, found defendant to be a persistent offender. RP XIII 517-518. The court sentenced defendant to life without possibility of parole. CP 97-104; RP XIII 519. Defendant filed a timely appeal. CP 105. On appeal, defendant does not challenge the determination that the Oregon attempted murder conviction constitutes a prior conviction of a most serious offense, but asserts error to the court's determination regarding the California conviction.

IV. ARGUMENT:

A. THIS COURT SHOULD DENY DEFENDANT'S MOTION FOR ACCELERATED REVIEW AS EVEN IF DEFENDANT'S ARGUMENTS ARE MERITORIOUS, THE COURT WILL HAVE COMPLETED ITS REVIEW UNDER THE USUAL PROCEDURES LONG BEFORE DEFENDANT COMPLETES WHAT HE CONTENDS IS HIS STANDARD RANGE SENTENCE.

RAP 18.15 provides for accelerated review of adult sentences which are beyond the standard range. Defendant has moved for accelerated review pursuant to this rule contending that the

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trial court's allegedly erroneous determination that he was a persistent offender resulted in a erroneous sentence beyond the standard range. The State contends that this is an inappropriate case for review under accelerated procedures.

Defendant's sought for relief for the court to remand for a sentence within a standard range of 87 to 116 months, or 7+ to 19+ years. This court normally completes review within a two year time period. Thus, there is no showing that defendant will be prejudiced by having this issue reviewed within normal procedures. Defendant will have a determination of whether the trial court properly found him to be a persistent offender long before the low end of his asserted proper standard range is reached. He will not be effectively denied relief by use of the normal procedures. Moreover, it makes far more efficient use of judicial resources to engage in one review process rather than two.

B. THE TRIAL COURT DID NOT ERR IN INCLUDING THE DEFENDANT'S ASSAULT CONVICTION FROM CALIFORNIA IN THE OFFENDER SCORE OR IN FINDING THAT IT WAS COMPARABLE TO A MOST SERIOUS OFFENSE.

A persistent offender is defined as a person who is to be sentenced on a most serious offense and "has before the commission of [his current most serious offense]... been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be

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considered most serious offenses and would be included in the offender score under RCW 9.94A.360." RCW 9.94A.030(27). The statute reflects a two step process requiring, first, the determination of the convictions included in the offender score and, second, a determination whether any of those convictions qualify as prior "most serious offenses." State v. Morley, 134 Wn.2d 588, 605, 952 P.2d 167 (1998).

Once a person has been found guilty of a most serious offense, the next step is to determine that person's criminal history and offender score under 9.94A.360. In addressing whether an out-of-state conviction should be counted in an offender's criminal history, RCW 9.94A.360(3) provides that "[o]ut-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." Courts have interpreted the purpose of this provision as to treat a person convicted outside the state as if he had been convicted in Washington at the time the out-of-state offense was committed. State v. Weiand, 66 Wn. App. 29, 34, 831 P.2d 749 (1992). This involves three steps: 1) identify the comparable Washington offense; 2) classify the comparable Washington offense; and 3) treat the out-of-state conviction as if it were a conviction for the comparable

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Washington offense. Weiand, at 31-32, *citing* State v. Franklin, 46 Wn. App. 84, 87-89, 729 P.2d 70 (1986).

Identifying the comparable Washington offense requires the comparison of the elements of the out-of-state crime with the elements of potentially comparable Washington crimes, as defined on the date the out-of-state crime was committed. Id. at 31-33. If the elements are not identical, or if the foreign statute is broader than the Washington definition of that particular crime, then the sentencing court may look at the defendant's conduct to determine whether the conduct would have violated the comparable Washington statute. Morley, at 606. If the trial court looks to the record to examine the defendant conduct, care must be taken in what information the court considers. "Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial." Morley, at 606. Once the comparable Washington offense is identified, its classification as a misdemeanor or felony will be attributed to the out-of-state conviction. If a felony, the out-of-state conviction will also adopt the A, B, or C classification level of the comparable Washington offense. Weiand, at 31-33. When this determination is made, then the parties or court can apply the usual rules to determine whether the out-of-state conviction should be

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included in the offender score under the other provisions of RCW 9.94A.360.

But while RCW 9.94A.360 governs what prior convictions are included in an offender score, it does not control in the determination of what constitutes a most serious offense. A "most serious offense" is defined by RCW 9.94A.030(23); the full text of this provision is attached as Appendix "A". The relevant portion to out-of-state convictions is subsection (u) which provides:

> Any felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection, or **any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection**;

(emphasis added). This provision requires a separate comparison of the out-of-state or pre-POAA Washington conviction to the **current** laws of Washington in order to determine whether the conviction qualifies as a "most serious offense." The reason for this is obvious. The Persistent Offender Accountability Act ("POAA") was designed to punish repeat offenders who commit the most serious crimes with a mandatory life sentence. State v. Thorne, 129 Wn.2d 736, 764-769, 921 P.2d 514 (1996). The clear legislative intent behind RCW 9.94A.030(23(u) was for crimes committed prior to the act or outside the state to be considered in determining whether an

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offender is a "persistent offender." Morley, 134 Wn.2d at 597. However, the Legislature had to insure that the nature of the prior crime was assessed and not merely its label. The purpose behind comparing the elements of the pre-POAA or out-of-state offense to the current laws is to insure that the substance of the prior offense is consistent with the nature of the crimes determined to be most serious offenses under the act. As stated by the court in Morley:

> A defendant's repeat offender status does not depend on *where* the defendant's prior criminal acts occurred. The status of a repeat offender hinges on the *substance* of a defendant's prior criminal acts: Are the defendant's prior convictions, regardless of venue or jurisdiction, comparable to most serious offenses in this state?

Morley, 134 Wn.2d at 605(emphasis in the original). This legislative intent is also seen by the wording of the initial sentence defining a most serious offense as meaning "any of the following felonies or a felony attempt to commit any of the following felonies, **as now existing or hereafter amended."** RCW 9.94A.030(23)(emphasis added). This language specifically excludes the listed felonies as they existed prior to the adoption of the POAA. Thus, in determining whether an out-of-state or pre-POAA conviction qualifies as a most serious offense, the comparison must be to the current law.

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These separate comparisons are not redundant. For example[2], suppose an offender had been convicted out-of-state in 1979 of an assault that under 1979 Washington law would have been an assault in the second degree, classified as Class B felony, but that in 1988 the Washington Legislature redefined the assault crimes in so that his same conduct would now be equivalent to an assault in the third degree. By using the two step comparison this conviction would be treated under RCW 9.94A.360 as a Class B felony with a ten year wash out period. However, under the analysis required by RCW 9.94A.030(23)(u) it would not constitute a "most serious offense", despite its label of assault in the second degree, because it is not comparable to a most serious offense as defined by the POAA. Similarly, an assault committed in 1979 that would have been an assault in the third degree and a Class C felony under 1979 Washington law will, under the analysis of RCW 9.94A.360, have a 5 year wash out period; however if that same assault would now compare to an assault in the second degree, it would qualify as a most serious offense under the analysis of RCW 9.94A.030(23)(u). As can be seen from these examples, while both 9.94A.360 and RCW 9.94A.030(23)(u) require comparisons, the purpose of the comparison

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[2] These hypotheticals are truly hypothetical. They do not necessarily reflect any actual changes to the assault laws in Washington.

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is not identical and, thus, slightly different procedures must be used.

It should be noted that while the decision in Morley, supra, discusses the procedures to use in determining whether out-of-state convictions constitute most serious offenses, it did not expressly address this precise issue of what version of the laws should be used when making the comparison under RCW 9.94A.030(23)(u).[3] The State could find no case law addressing this precise issue. The analysis proposed by the State is consistent with the analysis in Morley.

a. Using the analysis appropriate for RCW 9.94A.360, defendant's California convictions are equivalent to assault in the second degree under the former assault law, RCW 9A.36.020.

The defendant pleaded guilty to a violation of California Penal Code Sec. 245(c) for an assault which occurred on March 4, 1983. CP Exhibit 8[4]; CP 38-39, 48-50 (see Appendix "B"). The full wording of Section 245 may be found in Appellant's Appendix B-5 attached to the

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[3] The court, in determining whether a prior court martial for attempted rape constituted a most serious offense, did discuss that "[f]irst and second degree rape are *now* both classified as class A felonies." Morley, at 612 (emphasis added). This supports the conclusion that the court was looking at the current laws rather than the ones in existence when the prior offense was committed.

[4] A copy of this exhibit is found as an appendix to appellant's motion at A-30 to A-37.

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motion for accelerated review, but the relevant portion reads as follows:

> Every person who commits an assault with a firearm upon the person of a peace officer or fireman, and who knows or reasonably should know that the victim is a peace officer or fireman engaged in the performance of his or her duties, when the peace officer or fireman is engaged in the performance of his or her duties shall be punished by imprisonment in the state prison for four, six or eight years.

Cal. Penal Code Sec. 245(c)(as in effect 3/4/83). While there is little case law on this particular subsection, many decisions address what must be shown under California law to prove a violation of subsections(a), an assault with a deadly weapon. The California Supreme Court held:

> An assault is an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another, or in other words, it is an attempt to commit a battery. Accordingly the intent for an assault with a deadly weapon is the intent to attempt to commit a battery, a battery being 'any willful and unlawful use of force or violence upon the person of another.' We conclude that the criminal intent which is required for assault with a deadly weapon and set forth in the instructions in the case at bench, is the general intent to wilfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another. Given that intent it is immaterial whether or not the defendant intended to violate the law or knew that his conduct was unlawful. The intent to cause any particular injury, to severely injure another, or to injure in the sense of inflicting bodily harm is not necessary.

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People v. Rocha, 3 Cal.3d 893, 899, 479 P.2d 372, 376-377 (1971)(citations and footnotes omitted). The court approved an instruction which listed the essential elements as: 1) the unlawful attempt; 2) with criminal intent; 3) to commit a violent injury upon the person of another; 4) the use of a deadly weapon in that attempt; and, 5) the then present ability to accomplish the injury. Rocha, 479 P.2d at 377, n.13. Using this law as a guide, the elements of a violation of California Penal Code Section 245(c) would then be: 1) the unlawful attempt; 2) with criminal intent; 3) to commit a violent injury upon a peace officer; 4) the use of a firearm in that attempt; 5) knowing (or should reasonably know) that the peace officer was engaged in the performance of his duties; 6) while the peace officer was engaged in the performance of his duties; and, 7) the then present ability to accomplish the injury. While it has held that assault with a weapon is a general intent crime, the California Supreme Court has stated that the conventional general intent/specific intent analysis has been inadequate to address the question of the requisite intent for assault with a weapon under Section 245. See, People v. Colantuono, 865 P.2d 704, 707-708 (1994)

In Washington in 1983, a person could be convicted of assault in the second degree if he "[1] knowingly [2] assault[ed] another

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[3] with a weapon or other instrument or thing likely to produce bodily harm." RCW 9A.36.020(c). The long standing definition of assault in Washington includes "an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented". Howell v. Winters, 58 Wash. 436, 438, 108 P. 1077 (1910). See also, Guffey v. State, 103 Wn.2d 144, 149, 690 P.2d 1163 (1984); State v. Stewart, 73 Wn.2d 701, 703, 440 P.2d 815 (1968); State v. Alvis, 70 Wn.2d 969, 971, 425 P.2d 924 (1967); State v. Rush, 14 Wn.2d 138, 139, 127 P.2d 411 (1942). As can be seen, elements 1, 3 and 7 (see above) of the California offense are comparable to the Washington definition of assault. The Washington element of "knowingly" is satisfied by the California element of "criminal intent" which has been defined as "the general intent to *wilfully commit* an act the direct, natural and probable consequences of which if successfully completed would be the injury to another." Rocha, supra, at ??. Under Washington law, "wilfully" and "knowingly" are treated as equivalent terms. RCW 9A.08.010(4). The remaining element of a "weapon or other instrument or thing likely to produce bodily harm" is satisfied by the California element of a firearm. Thus, under RCW 9.94A.360, the comparable 1983 Washington offense to defendant's

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California assault conviction is assault in the second degree, a Class B felony. RCW 9A.36.020.

Defendant asserts that the offense is comparable to assault in the third degree, a Class C felony, and that the this conviction washes out. The State contends that even if the wash out period were 5 years, the conviction would not wash out. The wash out time period begins from the last date of release from confinement pursuant to a felony conviction. RCW 9.94A.360(2). In his argument, defendant begins the wash out period from the date he was sentenced in California, or June 20, 1983, and argues that over five years had elapsed when he committed a new crime in Oregon five years and nine days later on June 29, 1988. Motion for Accelerated Review at p. 24. However, it is clear from the record before the court that June 20, 1983 was not the last day defendant spent in confinement pursuant to the California conviction. A transcript of the sentencing hearing on the California conviction was submitted to the trial court as Exhibit No. 8. CP EXHIBIT 8[5]. While defendant was given probation, one of the conditions of his probation was that he spend 365 days in the county jail. Exhibit 8 at p.6 (A-35). On his sentencing date he was given credit for 163 days already served

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[5] See appendices to defendant's motion at pages A-30 to A-37.

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and his tentative release date was set at November 2, 1983. CP Exhibit 8 (Motion Appendix A-35, A-37); see also, CP 48-50 (response Appendix "B"). Thus the record shows that defendant had not spent five years in the community since his release before committing his next crime on June 29, 1988. Thus, even if the court agrees with defendant that his California conviction is comparable to a Class C felony, the trial court properly included it in the offender score.

b. Using the analysis appropriate for RCW 9.94A.030(23), defendant's California convictions are equivalent to the most serious offense of assault in the second degree, RCW 9A.36.021.

A person commits the crime of assault in the second degree under the current statute if he "assaults another with a deadly weapon." RCW 9A.36.021(c). The definition of a deadly weapon includes any "loaded or unloaded firearm." RCW 9A.04.110(6). The elements of the California crime[6] satisfy these elements. Elements 1, 3 and 7 (see footnote below) of the California offense are comparable to the Washington definition of assault. The element pertaining to the peace officer fulfills the Washington element of

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[6] As stated earlier in the brief, the elements of California Penal Code Section 245(c) are: 1) the unlawful attempt; 2) with criminal intent; 3) to commit a violent injury upon a peace officer; 4) the use of a firearm in that attempt; 5) knowing (or reasonably should know) that the peace officer was engaged in the performance of his duties; 6) while the peace officer was engaged in the performance of his duties; and, 7) the then present ability to accomplish the injury.

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"another" and the use of a firearm fulfills the element of a deadly weapon. The defendant's prior crime is comparable to current crime of assault in the second degree which is a most serious offense. RCW 9.94A.030(23)(b).

The trial court did not err in finding that defendant's 1983 California conviction for assault of a police officer with a firearm should be included in the defendant's criminal history or that it was comparable to a most serious offense. Defendant does not challenge the trial court's finding that his 1998 Oregon convictions also qualified as a prior most serious offenses. Consequently, the defendant's sentence as a persistent offender should be affirmed.

V. CONCLUSION:

For the foregoing reasons, the State respectfully requests that the trial court's sentence be affirmed.

DATED: August 25, 1999.

JOHN W. LADENBURG
Pierce County
Prosecuting Attorney

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8-27-99 [signature]

Date Signature

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APPENDIX "A"

(23) "Most serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies, as now existing or hereafter amended:

(a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;

(b) Assault in the second degree;

(c) Assault of a child in the second degree;

(d) Child molestation in the second degree;

(e) Controlled substance homicide;

(f) Extortion in the first degree;

(g) Incest when committed against a child under age fourteen;

(h) Indecent liberties;

(i) Kidnapping in the second degree;

(j) Leading organized crime;

(k) Manslaughter in the first degree;

(l) Manslaughter in the second degree;

(m) Promoting prostitution in the first degree;

(n) Rape in the third degree;

(o) Robbery in the second degree;

(p) Sexual exploitation;

(q) Vehicular assault;

(r) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

(s) Any other class B felony offense with a finding of sexual motivation, as "sexual motivation" is defined under this section;

(t) Any other felony with a deadly weapon verdict under RCW 9.94A.125;

(u) Any felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection;

(v)(i) A prior conviction for indecent liberties under RCW 9A.88.100(1) (a), (b), and (c), chapter 260, Laws of 1975 1st ex. sess. as it existed until July 1, 1979, RCW 9A.44.100(1) (a), (b), and (c) as it existed from July 1, 1979, until June 11, 1986, and RCW 9A.44.100(1) (a), (b), and (d) as it existed from June 11, 1986, until July 1, 1988;

(ii) A prior conviction for indecent liberties under RCW 9A.44.100(1)(c) as it existed from June 11, 1986, until July 1, 1988, if: (A) The crime was committed against a child under the age of fourteen; or (B) the relationship between the victim and perpetrator is included in the definition of indecent liberties under RCW 9A.44.100(1)(c) as it existed from July 1, 1988, through July 27, 1997, or RCW 9A.44.100(1) (d) or (e) as it existed from July 25, 1993, through July 27, 1997.

APPENDIX "B"

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

Date	Dept. No.:	Judge:	Clerk:	Reporter:	Case Number:
5/20/83	13	Stephen R. Henry	G. Lauria	B. Tracy	293727-4

Plaintiff: PEOPLE OF THE STATE OF CALIFORNIA

Counsel: ☒ Present ☐ Not present — W. Crossland — ☒ District Attorney

Defendant (True name): ☒ Present ☐ Not Present — Ernest Garnett Carter

Counsel: ☒ Present ☐ Not present — R. Rainwater — ☒ Public Defender

AKA (As shown in the information or indictment):

Probation Officer (Name): S. Oswald

Probation number:

FILMED JUL 27 1983

1. DISPOSITION OF CHARGES ☐ CONTINUED ATTACHMENT 1.

a. Convicted by: J=Jury; C=Court; P=Plea; D=Dismissal; O=Other (Specify).	P					
b. Date of disposition of charge.	5/20/83					

2. DETERMINATION OF CRIME WITH GREATEST PRINCIPAL TERM.

	Count 1	Count	Count	Count	Count	Count
a. Criminal offense (Code title abbreviation followed by section number and degree, if any. Include counts of prior uncompleted sentence: principal county and any consecutive counts.)	PC 246(c)					
b. Penalty range (Lower, middle and upper term. Strike boxes for counts dismissed, etc.)						
c. Base term computation (1) Circumstance in aggravation (A) or mitigation (M) found	☐A ☐M ☐NONE	☐A ☐M ☐NONE	☐A ☐M ☐NONE	☐A ☐M ☐NONE	☐A ☐M ☐NONE	☐A ☐M ☐NONE
(2) Base term (Enter middle term unless aggravation or mitigation found.)	BASE TERM	BASE TERM	BASE TERM	BASE TERM	BASE TERM	BASE TERM

d. Enhancement clauses (Check all clauses charged and found for each count. Enter greatest term where directed and stay or strike others. If actual or attempted rape, robbery or burglary, may include 12022.7 and either 12022 or 12022.5)

	Add	Count 1	Count	Count	Count	Count	Count
		√Chrg'd & Found / X Stayed / X Stricken	√Chrg'd & Found / X Stayed / X Stricken	√Chrg'd & Found / X Stayed / X Stricken	√Chrg'd & Found / X Stayed / X Stricken	√Chrg'd & Found / X Stayed / X Stricken	√Chrg'd & Found / X Stayed / X Stricken
(1) 12022 - Armed (Firearm) or Use (Weapon)	1 year	(1) Enter Term	(1) Enter Term	(1) Enter Term	(1) Enter Term	(1) Enter Term	(1) Enter Term
(2) 12022.5 - Use (Firearm)	2 years	(2)	(2)	(2)	(2)	(2)	(2)
(3) 12022.7 - GBI	3 years	(3)	(3)	(3)	(3)	(3)	(3)
(4) 12022.6(a) - $25,000-$100,000	1 year	(4) One Only	(4) One Only	(4) One Only	(4) One Only	(4) One Only	(4) One Only
(5) 12022.6(b) - Over $100,000	2 years	(5)	(5)	(5)	(5)	(5)	(5)
e. TOTAL TERM (Items 2c (2) through 2d (1) - (5). Base term plus enhancements. Check offense with greatest principal term or as directed by the judge.)		Principal Term	Principal Term	Principal Term	Principal Term	Principal Term	Principal Term

3. CRIME WITH GREATEST PRINCIPAL TERM AS DETERMINED IN ITEM 2e. COUNT (SPECIFY):

a. Base term of that count (From item 2c (2)) ☐ Lower ☐ Middle ☐ Upper		4
b. Total enhancements imposed on that count (From item 2d (1) - (5))		5A
(1) ☐ PC 12022 (1 yr.) ☐ PC 12022.5 (2 yrs.) ☐ PC 12022.7 (3 yrs.)		5B
(2) ☐ PC 12022.6 (a) (1 yr.) ☐ PC 12022.6 (b) (2 yrs.)		

4. ☐ PRIOR PRISON TERM (PC 667.5)

	Number Charged & Found	Number Stricken			
a. ☐ PC 667.5(c) felony with new PC 667.5(c) felony			X3		5C
b. ☐ PC 667.5(c) felony without new PC 667.5(c) felony			X1		5D
c. ☐ Other felony with new felony					

5. ☐ CONSECUTIVE SENTENCES-OFFENSES NOT LISTED IN PC 667.5(c). (NO ENHANCEMENTS PERMITTED.) ☐ CONTINUED IN ATTACHMENT 5.

	Count	1/3	Count	1/3	Count	1/3	Count	1/3			
a. ☐ Current case									Total		5E(1)
b. ☐ Prior uncompleted									Total		5E(2)
c. ☐ Total stayed over excess of 5 years on total of items 5a and 5b.										( )	

6. CONSECUTIVE SENTENCES-OFFENSES LISTED IN PC 667.5(c). (ENHANCEMENTS PERMITTED.) ☐ CONTINUED IN ATTACHMENT 6.

	Count	1/3	Count	1/3	Count	1/3	Count	1/3			
a. ☐ Current case									Total		5E(3)
b. ☐ Prior uncompleted									Total		5E(4)

7. TOTAL FIXED TERM

a. Base term plus additional terms (Add items 3a; 3b(1); 3b(2); 4a; 4c; 5a; 5b; 5c; 6a and 6b)		8
b. Limited total fixed term (If in the current case: (i) the defendant was convicted of a PC 667.5(c) felony or (ii) an enhancement was imposed under PC 12022, 12022.5, 12022.6 or 12022.7 enter the same number as item 7a. Otherwise, double the base term, from item 3a)		
c. ☐ Total years stayed over excess of limited total fixed term (Subtract 7b from 7a)	( )	

8. ☐ TOTAL YEARS STAYED PURSUANT TO CRC 447 and PC 1170.1(a) and 1170.1(f)

(Add items 5c and 7c) ( ) 7

(Continued on reverse side)

[redacted]

...mpleted sentence
...nty: b. Case number: [redacted] Count (P-): d. Code section: e. Crim[redacted] degree: f. Date of conviction:

☐ Concurrent sentence
a. ☐ Present case — Count:
b. ☐ Prior uncompleted
(1) County: (2) Case number: (3) Count:

11. The court, having read and considered the probation report and no legal cause having been shown why judgment should not be pronounced,
a. ☐ found the defendant in violation of probation and probation was revoked on (Date):
b. ☐ denies probation and sentences defendant to State Prison.
c. ☐ sentences defendant to County Jail for the period of (Number of days):
d. ☒ suspends imposition of sentence and defendant is placed on probation for the period of: 5 yrs.
(1) ☐ upon conditions set forth in ☐ item 16. ☒ attachment 11d.
e. ☐ commits defendant to California Youth Authority.
f. ☐ suspends proceedings and defendant is committed
(1) ☐ to California Rehabilitation Center.
(2) ☐ as a Mentally Disordered Sex Offender.
(3) ☐ as presently insane.
(4) ☐ Other (Specify):
g. ☐ Other (Specify):

12. ☐ Execution of sentence is
a. ☐ stayed, pending appeal, as follows
(1) stayed as to count:
(2) to become permanent when sentence is completed as to count:
b. ☐ suspended and defendant is placed on probation for the period of:
(1) ☐ upon conditions set forth in ☐ item 16. ☐ attachment 12b.
c. ☐ Other (Specify):

3. Court pronounced sentence on (Date): 6/20/83
a. Defendant was held in custody, through and including the date of pronouncement of sentence as follows (Total number of days: 163
(1) Count: (2) Time other than Dept. of Corrections: (3) Dept. of Corrections time:
109 actual + 54 good time/work time

4. ☒ Defendant is remanded to the custody of the Sheriff
a. [redacted] to be delivered ☐ forthwith ☐ after 48 hours, excluding Saturday, Sundays and holidays into the custody of the Director of Corrections at the Reception-Guidance Center located at
(1) ☐ California Institution for men — Chino
(2) ☐ California Institution for women — Frontera
(3) ☐ California Medical Facility — Vacaville
(4) ☐ Other (Specify):
b. ☐ until advised by the California Youth Authority as to the date and place of delivery.
c. ☒ for the period of (Number of days): 365
(1) ☒ Defendant remanded forthwith.
(2) ☐ Defendant to report to County Jail on (Date):

Tentative release date 11/2/83

5. The court
a. ☒ advised the defendant of all appeal rights as required in CRC 250 and defendant acknowledged understanding them.
b. ☒ informed the defendant, as required by PC 1170(c), that as part of the sentence after expiration of the term the defendant may be on parole for period as provided in PC 3000.

6. ☐ Terms of probation ☐ set forth in attachment 11d or 12b ☐ as follows:

7. Total number of pages attached: one

CLERK'S CERTIFICATE

I hereby certify that the foregoing is a correct copy of the original on file in my office.

Dated: Fresno, California: ..... Clerk, By _____, Deputy
(Seal)