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SUPREME COURT  
STATE OF WASHINGTON  
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BY SUSAN L. CARLSON  
CLERK

No. 97137-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE PERSONAL RESTRAINT PETITION OF:

**LONNIE TENNANT,**

PETITIONER.

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**PERSONAL RESTRAINT PETITION**

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**ORIGINAL**

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**PORTAL**

## **A. STATUS OF PETITIONER**

Lonnie E. Tennant, Petitioner, challenges his life without parole sentence imposed in Cowlitz Co. Superior Court (Case No. 01-1-01175-5) after he was found to be a persistent offender. Mr. Tennant (DOC #936287) is imprisoned at the Stafford Creek Correctional Center in Aberdeen, Washington. He has filed one previous PRP.

## **B. FACTS**

Mr. Tennant challenges the persistent offender finding and subsequent life without parole sentence.

In the current case, Mr. Tennant was conviction of second-degree child rape and molestation. The sentencing court found that Tennant's prior "strike" offenses were: (1) second degree assault in 1982 in Jefferson County, Missouri; and (2) first degree burglary in 1990 in Chelan County, Washington. This PRP focuses on the Missouri assault conviction.

On direct appeal, Tennant argued the Missouri conviction was not a comparable to a strike offense. That argument was rejected. *State v. Tennant*, 119 Wash. App. 1038 (2003).

Tennant asserts that the law has since changed and that change is both material and retroactive.

## C. ARGUMENT

### *Introduction*

Mr. Tennant is not a persistent offender. While his 1982 Missouri assault conviction may have been comparable to Washington's 1982 definition of second degree assault, it is not comparable to Washington's definition in effect at the time of Tennant current crime. Because Washington law now requires that comparison, this PRP is timely, not successor barred, and is meritorious. Most importantly, Tennant's life without parole sentence should be vacated and Tennant resentenced.

### *Persistent Offender Law Has Changed*

Under RCW 9.94A.570, a persistent offender shall be sentenced to life in prison without the possibility of release. A persistent offender is one who has been convicted of a most serious offense and has two prior felonies that are also most serious offenses. RCW 9.94A.030(37)(a).

Second degree assault is a most serious offense. RCW 9.94A.030(32)(b). Felonies committed before December 2, 1993, are classified as most serious offenses if they are comparable to a most serious offense. RCW 9.94A.030(32)(u).

On direct appeal, the court concluded that Tennant's 1982 second degree assault from Missouri was comparable to a most serious offense. The court reasoned:

Tennant's Missouri conviction for second degree assault occurred in 1982. We first compare the elements of the two states' second degree assault crimes as they were defined in 1982. See *Russell*, 104 Wn.App. at 441. In 1982, Missouri's second degree assault statute provided:

A person commits the crime of assault in the second degree if:

- (1) He knowingly causes or attempts to cause physical injury to another person by means of a deadly weapon or dangerous instrument.

MO. REV. STAT 565.060. Missouri defined a "dangerous instrument" as any instrument ... which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury. MO. REV. STAT 556.061(7). Tennant's second degree assault was a class D felony in Missouri. Mo. Rev. Stat 556.060.

Washington's counterpart for second degree assault in 1982 provided in part:

- (1) Every person who, under circumstances not amounting to assault in the first degree shall be guilty of assault in the second degree when he:

....

- (c) Shall knowingly assault another with a "weapon or other instrument or thing likely to produce bodily harm."

RCW 9A.36.020 (repealed 1988). The statute did not define weapon or other instrument or thing likely to produce bodily harm.

Comparison of the two statutes shows that Missouri's second degree assault was more difficult to prove than Washington's. Washington defines "assault" as either (1) "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," or (2) an attempt to cause fear and apprehension of imminent bodily harm. *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995); *Howell v. Winters*, 58 Wash. 436, 438, 108 P. 1077 (1910). The Missouri statute is narrower in that it requires physical harm or an attempt to cause physical harm; it does not include the creation of mere fear of bodily harm, as Washington's definition encompasses.

The elements of the Washington statute are met if the defendant knowingly caused the victim to believe that harm was imminent, without necessarily attempting to cause physical injury. No showing that the defendant either caused harm or intended to cause harm is necessary. Thus, commission of second degree assault in Washington occurred any time a person attempted to "cause physical injury" under Missouri's second degree assault statute. Clearly, these elements are satisfied by Tennant's Missouri guilty plea to the elements of the crime as stated in the Information: "[T]he defendant attempted to cause physical injury to one Paul E. Smith and defendant did so by means of a deadly and dangerous instrument." See *State v. Bunting*, 115 Wn.App. 135, 143, 61 P.3d 375 (2003).

The second step in the court's analysis is to determine whether the Washington counterpart crime was a Class A, B, or C felony, or a gross or simple misdemeanor. Russell, 104 Wn.App. at 443. The Washington counterpart to Missouri's second degree assault was a class B felony in 1982. RCW 9A.36.020 (1982).

*State v. Tennant*, 119 Wash. App. 1038 (2003). In short, the court concluded that Tennant's 1982 Missouri conviction was comparable to a 1982 second-degree assault in Washington.

*The Law Now Requires a Comparison to the Definition of Assault in Effect at the Time of Tennant's Current Crime*

Since Tennant's direct appeal, the law now recognizes that an assault committed in Washington prior to 1982 is not comparable to a most serious offense or strike. "The 1982 assault statute is broader than the current second degree assault statute." *State v. Webb*, 183 Wash. App. 242, 247–49, 333 P.3d 470, 473–74 (2014) ("The 1982 conviction is not legally or factually comparable to a most serious offense. Therefore, the trial court erred when it sentenced Webb as a persistent offender."). See also *State v. Failey*, 165 Wash. 2d 673, 677, 201 P.3d 328, 330 (2009) (requiring comparison to current definition of most serious offense).

In that case, the trial court found that Webb's 1982 assault conviction was comparable a most serious offense. However, under the statutory definition of second degree assault at the time of Webb's current crime the elements are that a person is guilty of second degree assault if he "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a) (emphasis added). In contrast in 1982, a person was guilty of second degree assault if he "knowingly

inflict[ed] grievous bodily harm” on another. Former RCW 9A.36.020(1)(b) (1979). Webb argued that the elements differ as to both the mental state required and the type of harm that ensued. The Court of Appeals agreed.

*Tennant’s Missouri Conviction is Not Comparable to a Second Degree Assault*

At a minimum *Webb* overrules the prior decision in this case which concluded that since Tennant’s Missouri conviction was comparable to a Washington assault circa 1982 that it constituted a most serious offense. *Webb* makes it clear that one additional step is required—one not performed in Tennant’s case previously.

When the Court of Appeals compared Tennant’s 1982 Missouri assault conviction to Washington’s 1982 version of second degree assault, the court concluded that Missouri’s second degree assault was more difficult to prove than Washington’s version of the crime. In 1982 in Washington, a person could commit a second degree assault by *knowingly* assaulting another with a deadly weapon. However, at the time of Tennant’s current conviction, Washington law required an intentional assault with a deadly weapon.

As compared to Washington's crime of second degree assault at the time of Tennant's current conviction, it is clear that the foreign conviction is not legally or factually comparable.

Tennant was convicted of knowingly causing physical injury by the use of a deadly weapon—i.e., that he knowingly caused or attempted to cause physical injury to another person by means of a deadly weapon or dangerous instrument. As *Webb* explained, in 1982, a person was guilty of second degree assault in Washington if he “knowingly inflict[ed] grievous bodily harm” on another. Former RCW 9A.36.020(1)(b) (1979). However, under the current statute and the statute in effect at the time of Tennant's current crime, a person is guilty in Washington of second degree assault if he “[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm,” or if he “assaults another with a deadly weapon.” RCW 9A.36.021(1)(a), (c). Both subsections now require an intentional assault in contrast to the lesser “knowing” requirement specified previously. In *City of Spokane v. White*, 102 Wn.App. 955, 10 P.3d 1095 (2000), *review denied* 143 Wn.2d 1011, 21 P.3d 291 (2001), the court explicitly held that the mental state of performing an act “willfully equates with knowingly... [and] knowingly is a less

serious form of mental culpability than intent.” *White*, 102 Wn.App. at 961. See also RCW 9A.08.010(2) (when acting knowingly suffices to establish an element of a statute, such element also is established if a person acts intentionally, but not vice versa).

The applicable Missouri law did not require proof that a defendant infallibly know that a certain result will follow in order to show the defendant acted ‘knowingly. *State v. Harris*, 825 S.W.2d 644, 647 (Mo.App.1992). A person “acts knowingly” “[w]ith respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.” Section 562.016.3(2). “A defendant's mental state may be reasonably inferred from the act itself.” *State v. Theus*, 967 S.W.2d 234, 239 (Mo.App.1998). Moreover, under Missouri law “it will be presumed that a person intends the natural and probable consequences of his acts.” *State v. O'Brien*, 857 S.W.2d 212, 218 (Mo. 1993).

In contrast, under Washington law specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree. *State v. Abuan* 161 Wash.App. 135, 257 P.3d 1 (2011).

Under the applicable Washington law, an intentional assault is required. Under Missouri law, only a knowing assault is required.

Because there is no factual finding in the Missouri conviction that Tennant committed an intentional assault, the crimes are not legally or factual comparable. At most, Tennant admitted to the elements as stated in the Missouri Information: “[T]he defendant attempted to cause physical injury to one Paul E. Smith and defendant did so by means of a deadly and dangerous instrument.”

Likewise, if this Court compares Tennant’s Missouri conviction to Washington’s assault subsection requiring an intentional assault and reckless infliction of “substantial bodily harm,” the Missouri law falls short because it only requires an attempt to cause physical injury.

*This Petition is Timely*

If the State chooses to assert the time bar, this petition is timely for three reasons. First, as discussed above, the law has changed. At the time of Tennant’s conviction and direct appeal, comparability required a court only to look at the elements of the crime at the time of the prior crime. Now, the law requires a

comparison to the law in existence at the time of the current crime. That change is retroactive.

Other exceptions to the time bar apply. The State's proof that Tennant was a persistent offender was insufficient to support the finding. RCW 10.73.100 (4). Under subsection (5), the sentence imposed was in excess of the court's jurisdiction.

However, what is clear is that Tennant is not a persistent offender and his life without parole sentence is unlawful.

**D. CONCLUSION AND PRAYER FOR RELIEF**

Based on the above, this Court should grant this petition and remand with directions to resentence Mr. Tennant.

DATED this 7<sup>th</sup> day of April 2019

Respectfully Submitted:

/s/Jeffrey Erwin Ellis  
Jeffrey Erwin Ellis #17139  
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VERIFICATION OF PETITION BY ATTORNEY

I declare under penalty of perjury under the laws of the State of Washington that I am the attorney for the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

April 7, 2019//Portland, OR

s/Jeffrey Ellis

**ALSEPT & ELLIS**

**April 07, 2019 - 10:41 AM**

**Filing Personal Restraint Petition**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** Case Initiation  
**Trial Court Case Title:** State Vs Lonnie Ecklas Tennant  
**Trial Court Case Number:** 01-1-01175-5  
**Trial Court County:** Cowlitz Superior Court  
**Signing Judge:**  
**Judgment Date:**

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- PRP\_Personal\_Restraint\_Petition\_20190407104126SC068194\_1626.pdf  
This File Contains:  
Personal Restraint Petition  
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**Comments:**

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**Note: The Filing Id is 20190407104126SC068194**

VERIFICATION OF PETITION

I, Lonnie Tennant, verify that I have received a copy of the Personal Restraint Petition filed on my behalf and I verify its contents and that it was filed on my behalf.

4-11-19 S.C.C.C.  
Date and Place

  
Lonnie Tennant

**CERTIFICATE**

I, Lon E. Tennant, certify as follows:

1. That I have previously been found indigent by this court.

2. That the highest level of education I have completed is:

Grade School     High School     College or greater

3. That I have held the following jobs: Commercial Fisherman

4. That I:     have not received job training  
               have received the following job training: \_\_\_\_\_

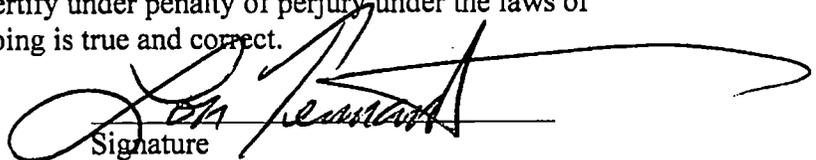
5. That I:     do not have a mental or physical disability that would affect my ability to work  
               have the following mental or physical disability that would affect my ability to work: \_\_\_\_\_

6. That I:     do not have children or family members that normally depend on me for financial support  
               have the following children or family member that normally depend on me for support \_\_\_\_\_

7. That I:     do not anticipate my financial condition improving in the foreseeable future through inheritance, sale of land, or similar.  
               anticipate my financial condition improving in the foreseeable future as follows: \_\_\_\_\_

I, Lon E. Tennant, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

4-11-19  
Date

  
Signature

Stafford Creek Cor. Center  
Place