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Court of Appeals  
Division II  
No. 52418-7  
State of Washington  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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IN RE PERSONAL RESTRAINT PETITION OF:

**LONNIE TENNANT,**

PETITIONER.

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**PERSONAL RESTRAINT PETITION**

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## A. INTRODCUTION

Lonnie Tennant is not a persistent offender. His prior 1982 Missouri assault conviction was not comparable to a “serious violent offense” in effect at the time of Tennant’s current conviction. The State does not disagree. The State also does not dispute that Washington’s 1982 assault statute is broader than the current second-degree assault statute as the Court of Appeals held in *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.”).

Instead, the State argues that Tennant’s conviction was comparable to Washington’s second-degree assault definition *in effect on the date of the Missouri crime*, 1982. The State contends that the test for comparability of a “most serious offense” is the same as for any prior felony conviction. That is the test applied on Tennant’s direct appeal. *State v. Tennant*, 119 Wash. App. 1038 (2003) (“We first compare the elements of the two states’ second-degree assault crimes as they were defined in 1982.”).

The State is wrong. Subsequent caselaw has corrected the erroneous analysis used on Tennant’s appeal.

A “most serious offense” is statutorily defined as including 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. RCW 9.94A.030 (33). In other words, for both in- and out-of-state offenses the crime must be comparable to a most serious offense at the time of the current, not prior crime. Because Tennant’s prior assault conviction was not comparable to a second-degree assault as defined at the time of his current crime (November 2001), he is not a persistent offender.

This Court can and must correct this error. Tennant is unlawfully serving a life without parole sentence. Resentencing is required to correct invalid sentences. *State v. Smissaert*, 103 Wash. 2d 636, 639, 694 P.2d 654 (1985). Mr. Tennant’s PRP is properly before this Court both because there has been a change in the law, correcting the comparability analysis for most serious offenses. In addition, the evidence proffered by the State is insufficient as a matter of law to establish that Tennant is a persistent offender.

## B. ARGUMENT

This Court reviews de novo whether an offense may be classified as a most serious offense. *State v. Thieffault*, 160 Wash.2d 409, 414, 158 P.3d 580 (2007). There is a different test for determining the comparability of a most serious offense than the test for ordinary felonies. The State, like Tennant’s direct appeal court, applied the wrong test.

The State is correct that for criminal history other than most serious offenses when comparing statutes, “we apply the law existing at the time of the conviction.” *Matter of Canha*, 189 Wash. 2d 359, 372, 402 P.3d 266, 273 (2017). However, that test does not apply to most serious offenses used to prove that a defendant is a persistent offender.

To decide if the conviction is a “most serious offense,” the court compares the foreign offense to Washington offenses that would have constituted “most serious offenses” at the time that the defendant committed the offense for which he is being sentenced. *Webb, supra*. “Felonies committed before December 2, 1993, are classified as most serious offenses if they are comparable to a most serious offense.” *Webb*, 183 Wash. App. at 247. Because there were no “most serious offenses” before the

effective date of the POAA, for crimes committed before December 2, 1993, the comparison cannot be made to the elements of a crime as it existed prior to that date—here, 1982. In 1982, there were no “most serious offenses.” In *Webb*, the court found defendant’s prior assault conviction was comparable to a second-degree assault as defined in 1982 (the date of the prior crime), but not as defined on the POAA’s effective date or the date of the current crime. “*Webb* could have been convicted of assault in 1982 based on an injury involving only pain, but he could not be convicted of assault under the current statute for an injury involving only pain. The 1982 assault statute is broader than the current second-degree assault statute.” *Webb*, 183 Wash. App. at 249.

The same is true, here. Because the State contest the comparability of Tennant’s prior assault conviction based only on the definition of second-degree assault as it existed in 1982, and not after December 2, 1993, Tennant will not repeat that argument, here other than to emphasize that Tennant’s conviction from Missouri required only a “knowing” assault. Washington requires an intentional assault—a higher means rea.

The State's response argues that even if Tennant is not a persistent offender, no exception to the one-year time bar applies. The State's response is both unconscionable and legally incorrect.

First, Tennant easily establishes a material and substantive change in the law. As the response establishes, the law regarding comparability of most serious offenses, in both Tennant's appeal and in other published caselaw has previously held that the analysis looks to the Washington crime in effect on the date of the prior conviction, even where that prior conviction occurred prior to the creation of the persistent offender statute. After focusing on the statutory definition of a most serious offense, *Webb* holds otherwise. The change is material because Tennant's prior conviction is comparable to Washington's assault definition in effect in 1982 (Former RCW 9A.36.020(1)(b) (1979)), but not after December 2, 1993, and not as of the date of Tennant's current crime.

In addition, this PRP is timely because the evidence introduced by the State in order to prove that Tennant is a persistent offender was insufficient as a matter of law. RCW 10.73.100 (4). The SRA requires the trial court to conduct a sentencing hearing. RCW 9.94A.500(1). The trial court must

decide by a preponderance of the evidence whether a defendant has a criminal history and specify the convictions it has found to exist. *State v. Thorne*, 129 Wash.2d 736, 781, 921 P.2d 514 (1996). The State bears the burden of proving that the predicate convictions exist for the purpose of a POAA sentence. *Lopez*, 147 Wash.2d at 519; see RCW 9.94A.500(1). This burden is on the State “because it is ‘inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.’” *State v. Ford*, 137 Wash.2d 472, 480, 973 P.2d 452 (1999) (quoting *In re Pers. Restraint of Williams*, 111 Wash.2d 353, 357, 759 P.2d 436 (1988)). When the State fails to prove comparability to a most serious offense, the State “has not met its burden” of proof. *State v. Knippling*, 166 Wash. 2d 93, 104, 206 P.3d 332 (2009). When a statute establishes a mandatory minimum sentence, the facts required to support that finding constitute an element of the crime. *Alleyne v. United States*, 570 U.S. 99, 103 (2013); *State v. Allen*, 192 Wash. 2d 526, 534, 431 P.3d 117 (2018).

Because the State failed to meet its burden in this case, the evidence was insufficient to support the finding.

**C. CONCLUSION**

This Court should grant this petition, vacate Mr. Tennant's judgment and persistent offender finding and remand with directions to resentence Mr. Tennant to a standard range sentence.

DATED this 2<sup>nd</sup> day of September 2019

Respectfully Submitted:

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**Transmittal Information**

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