

FILED
COURT OF APPEALS
DEPT. III

NO. 84606-5

10 MAY 26 PM 4:38

STATE OF WASHINGTON

**THE SUPREME COURT
STATE OF WASHINGTON**

BY AM
DEPUTY

STATE OF WASHINGTON, PETITIONER,

v.

ERNEST CARTER, RESPONDENT

Court of Appeals Cause No. 37048-4
Appeal from the Superior Court of Pierce County
The Honorable Thomas Feltnagle

No. 97-1-04547-1

PETITION FOR REVIEW

MARK LINDQUIST
Prosecuting Attorney

By
MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

CLERK
2019 JUN -1 AM 8:10
SUPERIOR COURT
PIERCE COUNTY
WSB

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

Table of Contents

A. IDENTITY OF PETITIONER. 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUE PRESENTED FOR REVIEW. 1

 1. Should this Court grant review when the Court of Appeals decision that applies the actual innocence doctrine to an untimely personal restraint petition undermines the finality of judgment, is contrary to case law and to the time bar set by the legislature, and is in conflict with this Court's decision in *In re Bonds*, 165 Wn.2d 135, 196 P.3d 672 (2008)? 1

 2. Should this Court grant review when the Court of Appeals decision grants relief under the actual innocence doctrine despite the fact that this Court has not adopted that theory, the decision conflicts with this Court's decision in *In re Turay*, 153 Wn.2d 44, 54, 101 P.3d 854 (2004), and defendant cannot show that he would be eligible to take advantage of such a doctrine? 2

D. STATEMENT OF THE CASE. 2

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 4

 1. THIS COURT SHOULD GRANT REVIEW AS THE APPLICATION OF THE ACTUAL INNOCENCE DOCTRINE TO AN UNTIMELY PERSONAL RESTRAINT PETITION UNDERMINES THE FINALITY OF JUDGMENT AND WAS APPLIED HERE DESPITE THE ABSENCE OF JUDICIAL OR LEGISLATIVE AUTHORITY AND IN CONFLICT WITH *IN RE BONDS*. 4

2. THIS COURT SHOULD GRANT REVIEW WHERE THE
DECISION BELOW APPLIES A NOVEL LEGAL
DOCTRINE THAT HAS NOT BEEN ACCEPTED IN
THIS STATE, CONFLICTS WITH THIS COURT'S
DECISION IN *IN RE TURAY* AND WHERE
DEFENDANT HAS FAILED TO SHOW THAT HE
WOULD BE ELIGIBLE TO TAKE ADVANTAGE OF
THIS DOCTRINE..... 8

F. CONCLUSION.15

Table of Authorities

State Cases

<i>In re Bonds</i> , 165 Wn.2d 135, 196 P.3d 672 (2008).....	2, 4, 8
<i>In re Lavery</i> , 154 Wn.2d 249, 111 P.3d 837 (2005).....	10, 13
<i>In re Personal Restraint of Carter</i> , COA No. 37048-4-II, 154 Wn. App. 907, --- P.3d ---, 2010 WL 774967 (2009).....	1, 7, 8, 9, 11, 14
<i>In re Turay</i> , 153 Wn.2d 44, 54, 101 P.3d 854 (2004).....	2, 8, 9, 10
<i>State v. Brune</i> , 45 Wn. App. 354, 363, 725 P.2d 454 (1986).....	13
<i>State v. Byrd</i> , 125 Wn.2d 707, 712, 887 P.2d 396 (1995).....	11
<i>State v. Carter</i> , 100 Wn. App. 1028, Not Reported in P.3d, 2000 WL 420660.....	3

Federal and Other Jurisdictions

<i>Bates v. Commonwealth</i> , 751 N.E.2d 843 (Mass. 2001).....	6-7
<i>Beach v. Day</i> , 913 P.2d 622 (Mont. 1996).....	7
California Penal Code 240.....	12
<i>Carriger v. Stewart</i> , 132 F.3d 463, 477 (9th Cir. 1997).....	6
<i>Herrera v. Collins</i> , 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).....	5
<i>McCleskey v. Zant</i> , 499 U.S. 467, 494-95, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).....	10
<i>People v. Colantuono</i> , 26 Cal.Rptr.2d 908, 911-12, 865 P.2d 704 (1994).....	12
<i>Schlup v. Delo</i> , 513 U.S. 298, 314, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).....	5, 6, 7

Constitutional Provisions

Eighth Amendment, United States Constitution.....5

Statutes

RCW 10.73.0904, 7, 10

RCW 10.73.1004, 7

RCW 9.94A.030(32)(a)12

RCW 9.94A.030(28)(b)12

RCW 9A.36.021(1)(c)11

Rules and Regulations

RAP 13.4 (b)(4)1

RAP 13.4(b)(1)1

A. IDENTITY OF PETITIONER.

The State of Washington, respondent below, asks this Court to accept review of the Court of Appeals, Division II decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION.

The State of Washington now seeks review of the published opinion, filed on March 9, 2010, in *In re Personal Restraint of Carter*, COA No. 37048-4-II, 154 Wn. App. 907, --- P.3d ----, 2010 WL 774967 (2009). *See* Appendix A¹. The State respectfully requests that this court review the Court of Appeals' decision vacating defendant's persistent offender sentence by applying the actual innocence doctrine and finding that defendant's California assault conviction is not a strike offense and remanding the case for resentencing. Review is appropriate under RAP 13.4(b)(1) and (4).

C. ISSUE PRESENTED FOR REVIEW.

1. Should this Court grant review when the Court of Appeals decision that applies the actual innocence doctrine to an untimely

¹ The State filed a motion for reconsideration which was denied by the Court of Appeals on April 26, 2010.

personal restraint petition undermines the finality of judgment, is contrary to case law and to the time bar set by the legislature, and is in conflict with this Court's decision in *In re Bonds*, 165 Wn.2d 135, 196 P.3d 672 (2008)?

2. Should this Court grant review when the Court of Appeals decision grants relief under the actual innocence doctrine despite the fact that this Court has not adopted that theory, the decision conflicts with this Court's decision in *In re Turay*, 153 Wn.2d 44, 54, 101 P.3d 854 (2004), and defendant cannot show that he would be eligible to take advantage of such a doctrine?

D. STATEMENT OF THE CASE.

Petitioner, Ernest Carter, hereinafter defendant, 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). The judgment and sentence was entered on September 23, 1998. *Id.* Defendant was sentenced as a persistent offender to life in prison. *Id.*

Defendant filed a direct appeal. In his appeal he raised nine issues including that a prior California conviction was wrongly counted as a strike under the Persistent Offender Accountability Act (POAA) and that

the California conviction should not count in calculating his standard range offender score because the conviction washed out. (PRP Appendix C). The Court of Appeals affirmed his conviction and sentence in an unpublished opinion.² *Id.*

A mandate was issued on October 18, 2000. (Response to PRP-Appendix A.)

On October 2, 2007, almost seven years after the mandate in this case issued, defendant filed this, his first personal restraint petition. On March 10, 2010, the Court of Appeals issued its opinion vacating defendant's persistent offender sentence by finding him actually innocent of being a persistent offender. Appendix A. The State filed a motion to reconsider which was denied on April 26, 2010.

² *State v. Carter*, 100 Wn. App. 1028, Not Reported in P.3d, 2000 WL 420660 (Div. 2, 2000).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THIS COURT SHOULD GRANT REVIEW AS THE APPLICATION OF THE ACTUAL INNOCENCE DOCTRINE TO AN UNTIMELY PERSONAL RESTRAINT PETITION UNDERMINES THE FINALITY OF JUDGMENT AND WAS APPLIED HERE DESPITE THE ABSENCE OF JUDICIAL OR LEGISLATIVE AUTHORITY AND IN CONFLICT WITH *IN RE BONDS*.

RCW 10.73.090 is a mandatory rule that outlines a time bar for appellate consideration of personal restraint petitions and prohibits such consideration after the limitation period has passed. *In re Bonds*, 165 Wn.2d 135, 140, 196 P.3d 672 (2008). The statute promotes the finality of judgments. *Id.* at 141. There are exemptions to the one year time bar and they include: newly discovered evidence, convictions under unconstitutional statutes, convictions barred by double jeopardy, convictions obtained with insufficient evidence, sentences in excess of the court's jurisdiction, or significant changes in the law which will apply retroactively to the petitioner's case. RCW 10.73.100, *Bonds*, 165 Wn.2d at 140.

The actual innocence exception is not a recognized exception to the one year time bar for collateral attacks in Washington State. In federal collateral attacks, petitioners have attempted to utilize claims of actual

innocence in two different ways. The first type of claim petitioners have asserted is what has been termed a “freestanding” claim of innocence to support what the Supreme Court has termed “a novel substantive constitutional claim . . . that the execution of an innocent person would violate the Eighth Amendment.” *Schlup v. Delo*, 513 U.S. 298, 314, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

However, in *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), a majority of the Court rejected such a claim, holding that a claim of actual innocence is not in itself a cognizable constitutional claim. 506 U.S. at 404. The Court then went on to surmise that, assuming such a claim were cognizable in a capital case, the threshold showing would be “extraordinarily high.” 506 U.S. at 417.

This Court should reverse the Court of Appeal and reject defendant’s claim of actual innocence. First, the Supreme Court has never recognized such a claim as valid. Second, defendant is not facing execution. And third, for the reasons outlined below, defendant has fallen far short of meeting the extraordinarily high burden of proving his actual innocence.

The second type of innocence claim asserted in federal habeas cases is one in which the petitioner is allowed to obtain review of his constitutional claims of error despite procedural bars if he falls within the

“narrow class of cases . . . implicating a fundamental miscarriage of justice.” *Schlup v. Delo*, 513 U.S. at 314. In this type of case, the claim of innocence operates as a “gateway” to allow review of the claims of constitutional error at trial.

Even if Washington courts were to adopt wholesale the federal jurisprudence regarding claims of actual innocence in habeas petitions, defendant would not be entitled to relief under the relevant federal standards. His claim of actual innocence cannot be used as a “gateway” to obtain review of other cognizable claims of constitutional error, because, as the Court of Appeals has determined, he has no other cognizable claims of constitutional error. His claim of actual innocence is a “freestanding” claim, and as explained below, even if such a claim were recognized in a non-capital case, defendant has fallen far short of meeting the extraordinarily high burden of proving his innocence. *Carriger v. Stewart*, 132 F.3d 463, 477 (9th Cir. 1997).

Moreover, because the “actual innocence” gateway is based on the Supreme Court’s interpretation of federal habeas statutes, there is no basis for applying it to personal restraint petitions filed in Washington state courts. For this reason, other states have concluded that the standard set forth in *Schlup* has no application to collateral attacks litigated in the state courts. See *Bates v. Commonwealth*, 751 N.E.2d 843 (Mass. 2001)

(stating that *Schlup* “does not permit a petitioner to disregard a State’s established postconviction procedures”); *Beach v. Day*, 913 P.2d 622 (Mont. 1996) (holding that *Schlup* has no application to state petition for postconviction relief). The Court of Appeals did not explain why the Supreme Court’s interpretation of federal habeas statutes requires this Court to disregard the clear procedural bars set forth in RCW 10.73.090 and 10.73.100. In fact, in the decision below, the Court of Appeals indicates that none of the case law they recite, including both State and Federal law, indicate that this doctrine is applicable to an untimely personal restraint petition and that none of the decisions deal with an untimely petition raising a sentencing challenge. (Appendix A, *Carter*, 37048-4-II, page 11). The Court of Appeals then went on to note that defendant could not make showing of bad faith, deception, or false assurances in order to take advantage of equitable tolling. *Id.* However, despite this, the Court of Appeals then went on to decide that the actual innocence doctrine is an exception to the one-year statute of limitations in RCW 10.73.090. *Id.* at 12.

The Court of Appeals decision is contrary to promoting the finality of judgments. The decision below carves out a new exception that is not rooted in case law and is not in line with the legislative aims in setting a strict time bar with enumerated exceptions under RCW 10.73.090.

Further, the decision below conflicts with this Court's decision in *Bonds* as the Court of Appeals found that equitable tolling did not apply and yet applied the actual innocence doctrine anyway. See *Bonds*, 165 Wn.2d at 141. The Court of Appeals has undercut the finality of judgment. See *Id.* at 143. This Court should accept review.

2. THIS COURT SHOULD GRANT REVIEW WHERE THE DECISION BELOW APPLIES A NOVEL LEGAL DOCTRINE THAT HAS NOT BEEN ACCEPTED IN THIS STATE, CONFLICTS WITH THIS COURT'S DECISION IN *IN RE TURAY* AND WHERE DEFENDANT HAS FAILED TO SHOW THAT HE WOULD BE ELIGIBLE TO TAKE ADVANTAGE OF THIS DOCTRINE.

a. This Court has declined to apply the actual innocence doctrine.

In the decision below, the Court of Appeals notes that none of the cases that deal with the actual innocence exception, including *In re Turay*, 153 Wn.2d 44, 101 P.3d 854 (2004), concern personal restraint petitions that are untimely. (Appendix A, *Carter*, 37048-4-II, page 11.) Yet despite the fact that the Washington has declined to apply this federal doctrine, that defendant does not meet the standards for equitable tolling and that this doctrine has not been applied to a sentencing statute, the court still found that defendant could take advantage of the actual innocence exception.

This Court in *Turay* specifically rejected applying the actual innocence exception. *Turay*, 153 Wn.2d at 56. Further, this Court rejected applying the exception because the defendant had not proved that he was actually innocent of being a sexually violent predator. *Id.* Although Turay was not confined pursuant to a criminal conviction, the analysis is applicable here. *Id.* This Court in *Turay* found that there was no issue of innocence to consider because there was no conviction to consider. *Id.* There is no conviction to consider in the instant case in terms of applying the actual innocence doctrine. Defendant is not claiming that he is actually innocent of his criminal conviction but that he is actually innocent of his sentence in that he should not be considered a persistent offender. The actual innocence doctrine has not been applied to a sentencing challenge. (*See*, Appendix A, *Carter*, 37048-4-II, page 11.)

Further, this Court noted in *Turay* that a review of federal law indicated that the burden was on a defendant to establish actual innocence. *Turay*, 153 Wn.2d at 54-55. In the instant case, defendant failed to show how that was actually innocent of being a persistent offender and yet the Court of Appeals still found that defendant could seek relief under such a doctrine. The Court of Appeals' decision conflicts with this Court's decision in *Turay*.

- b. Even if actual innocence doctrine was a valid exception to RCW 10.73.090, defendant did not meet his burden.

Even if the actual innocence doctrine applied in this State, defendant did not meet his burden. As the dissent below notes, defendant has failed to actually show that his California offense is not factually comparable to the Washington offense of assault in the second degree. (Appendix A, *Carter*, 37048-4-II, page 17.) It is the defendant's burden to establish actual innocence. *Turay*, 153 Wn.2d at 55, citing *McCleskey v. Zant*, 499 U.S. 467, 494-95, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991). The State disputes the Court of Appeals determination that based on *In re Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005), defendant has shown that he is actually innocent.

In *Lavery*, the Supreme Court concluded that federal bank robbery is defined more broadly than Washington's robbery in the second degree statute because the federal crime does not require proof of intent to steal. *Lavery*, 154 Wn.2d at 255. Thus, a conviction for federal bank robbery is not automatically comparable to robbery in the second degree. However, a federal bank robbery conviction could be comparable if the defendant admitted to or stipulated to facts that establish intent to steal in the federal prosecution or if intent to steal had been proved beyond a reasonable doubt. *Id.* at 258.

The Court of Appeals found that defendant's assault with a firearm on a peace officer in California is a "general intent crime," and that assault in the second degree in Washington is a "specific intent crime." (Appendix A, *Carter*, 37048-4-II, page 14.) However, a careful analysis of cases from both states reveals that the California statute is not defined more broadly than the Washington statute. The intent required under both statutes is comparable.

Pursuant to RCW 9A.36.021(1)(c), a person is guilty of assault in the second degree if he "assaults another with a deadly weapon." In Washington, assault has a common law, rather than a statutory definition. *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995). There are two common law definitions of assault. *Id.* The first definition is "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." *Id.* The second definition is "putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm." *Id.* at 712-13. In regard to the first definition, the State must prove that the defendant acted with intent to cause bodily harm. *Id.* at 713. In regard to the second definition, the State must prove that the defendant acted with intent to create in the victim's mind a reasonable apprehension of harm. *Id.* Assault in the second degree is a most serious

offense, and thus a strike for purposes of determining whether an offender is a persistent offender. RCW 9.94A.030(28)(b) and (32)(a).

California Penal Code 240 defines assault as “an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another.”

In *People v. Colantuono*, 26 Cal.Rptr.2d 908, 911-12, 865 P.2d 704 (1994), California’s Supreme Court addressed the “recurring” question of the intent necessary to prove the crime of assault with a firearm. Significantly, the Court explained that “a conventional specific intent-general intent inquiry was inadequate to resolve the question directly.” *Id.* The Court concluded that the necessary mental state is “an intent merely to do a violent act.” *Id.* at 916. The State need not prove “a specific intent to inflict a particular harm.” *Id.* at 913.

The California crime is not defined more broadly than the Washington crime. In Washington, the State is required to prove an intent to cause bodily harm or an intent to put another in apprehension of harm. In California, the State is required to prove an intent to do a violent act. As defined by statute in Washington “bodily injury” and “bodily harm” mean “physical pain or injury, illness or an impairment of physical condition.” Thus, an intent to cause bodily harm encompasses any intent to cause pain or injury. There is no appreciable difference between an

intent to cause bodily harm or put another in apprehension of harm and an intent to do a violent act against another person. A violent act would cause bodily harm in the form of either pain or injury, or at least an apprehension of harm. This is particularly true when the violent act is assaulting another with a firearm.

Moreover, even if the California assault statute is not precisely legally comparable to the Washington assault statute, a California assault conviction would still be factually comparable if the defendant's conduct would have violated a comparable Washington statute. *Lavery*, 154 Wn.2d at 255. In conducting this analysis, the court may only rely on facts that were admitted or stipulated to or proved to the finder of fact beyond a reasonable doubt. *Id.* at 258. In a personal restraint petition, petitioner bears the burden of showing prejudicial error. *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986). Bare allegations unsupported by citation to authority, references to the record, or persuasive reasoning cannot sustain this burden of proof. *Brune*, 45 Wn. App. at 363.

In the present case, defendant bears the burden of proving that his California conviction is not legally or factually comparable to assault in the second degree. Defendant has failed to meet this burden. He has presented no facts from which this Court could conclude that his

California conviction was based on conduct that was not factually comparable to the crime of assault in the second degree.

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. (*See* PRP Appendix I). As the dissent points out in the decision below, "What we do know from common sense and experience is that it is quite likely that someone firing a gun at a police car is intending to harm the police officer in the vehicle. ... Carter has not shown that he lacked the requisite intent and that his offense is therefore not factually comparable." (Appendix A, *Carter*, 37048-4-II, page 17.)

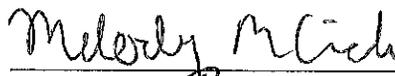
In sum, defendant has made no colorable showing of actual innocence. But even if he had, there is no "actual innocence" exception to the procedural bars provided in Washington law. Defendant's petition is untimely and he has not shown an exception to the time bar. The Court of Appeals has issued a ruling that does not uphold the importance of finality of judgments, is in direct conflict with case law and legislative intent and instead has carved out a new exception and applied it broadly to a defendant who can not show that he qualifies for relief. The State asks this Court to accept review of the decision below.

F. CONCLUSION.

For the foregoing reasons, the State respectfully asks this Court to accept review of the decision below.

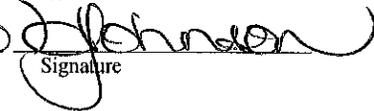
DATED: May 26, 2010

MARK LINDQUIST
Pierce County
Prosecuting Attorney


MELODY M. ERICK
Deputy Prosecuting Attorney
WSB # 35453

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.

05/26/10 
Date Signature

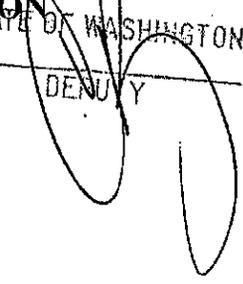
FILED
COURT OF APPEALS
STATE OF WASHINGTON
MAY 26 PM 4:38
BY 
DEPUTY

APPENDIX "A"

Published Opinion

FILED
COURT OF APPEALS
DIVISION II

10 MAR -9 AM 8:12

STATE OF WASHINGTON
BY 
DENY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Personal Restraint Petition of:

No. 37048-4-II

ERNEST CARTER,

Petitioner.

PUBLISHED OPINION

ARMSTRONG, J. — Ernest Carter¹ contends in this personal restraint petition that his rights to due process and a fair trial were violated during his 1998 trial on two counts of first degree robbery when he appeared in shackles visible to at least one juror. He also contends that his persistent offender sentence is unlawful because his California assault conviction is not comparable to a Washington “strike” offense. We agree that Carter’s California assault is not a strike offense, therefore, we vacate Carter’s persistent offender sentence and remand for resentencing. We reject the shackling challenge as untimely.

FACTS

When tried in Pierce County for first degree robbery in 1998, Carter had prior convictions in California and Oregon for assault with a firearm on a peace officer and attempted murder. Consequently, he was eligible for life imprisonment without the possibility of parole under the Persistent Offender Accountability Act (POAA), former RCW 9.94A.120 (1994), if found guilty of one or both robbery counts. On the first day of trial, the State noted for the record that Carter had chosen to wear shackles instead of a stun belt and that the parties had located a garbage can so that the jury

¹ Carter changed his name to Le’Taxione after his conviction. Because his court documents use his former name, this opinion does so as well.

No. 37048-4-II

could not see his restraints. Two days later, defense counsel asked to be heard during a recess. He informed the court that when his client was being taken out of the courtroom, a juror saw him shackled. The defense moved for a mistrial. A police officer explained that it was jail policy to apply leg restraints or a stun belt in three strikes cases. After confirming that the policy was legitimate because of the potential for escape, the trial court questioned the juror implicated.

The juror admitted to seeing Carter under escort but not in restraints, and he added that he had not discussed the matter with any other jurors. The juror volunteered, however, that he had seen Carter's leg restraints on the first day of voir dire. He denied saying anything about the restraints to his fellow jurors but added that the restraints "were plainly visible from where I was sitting in the pew there. I didn't think anything of it because it's rather common to have." Report of Proceedings (RP) at 355.

After the court excused the juror, the defense renewed its motion for a mistrial, contending that if one juror saw the shackles, others might have seen them, and adding that Carter had a constitutional right not to be seen in shackles. The court denied the motion. The jury convicted Carter on both counts. The trial court concluded that Carter's California assault and Oregon attempted murder convictions were comparable to most serious offenses in Washington and sentenced him to life in prison.

Carter appealed, and two of the issues he raised concerned his shackling and the comparability of his California conviction. In an unpublished opinion, this court held that Carter had not shown prejudice as a result of his shackling because a defendant is not prejudiced by his mere appearance in restraints during jury selection. *State v. Carter*, 100 Wn. App. 1028, 2000 WL 420660, at *5. Consequently, the trial court did not abuse its discretion in denying Carter's

No. 37048-4-II

motion for a mistrial. This court also rejected Carter's contention that his California assault conviction was comparable to third degree assault of a police officer in Washington and thus not a most serious offense. *Carter*, at *12-13.

Carter petitioned the Washington Supreme Court for review, arguing that his California assault conviction was not comparable to Washington's assault statute because the California statute did not require the specific intent the Washington statute required. Our Supreme Court denied his petition for review, and we issued our mandate on October 18, 2000. When Carter filed a habeas petition raising the comparability issue, a federal district court dismissed it as procedurally barred on March 29, 2002.

Carter filed this personal restraint petition on October 3, 2007. He again seeks relief on the shackling and comparability issues.

ANALYSIS

I. TIMELINESS

Personal restraint procedure has its origins in the state's habeas corpus remedy. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823, 650 P.2d 1103 (1982). Fundamental to the nature of habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. *Hagler*, 97 Wn.2d at 823. A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal. *Hagler*, 97 Wn.2d at 824. On collateral review, the burden is on the petitioner to establish either constitutional error that caused actual and substantial prejudice to his case or nonconstitutional error resulting in a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810-12, 792 P.2d 506 (1990).

No. 37048-4-II

Personal restraint petitions generally are prohibited if not filed within one year after the judgment and sentence becomes final. RCW 10.73.090(1). The petitioner bears the burden of proving that an exception to the RCW 10.73.090 statute of limitation applies. *State v. Schwab*, 141 Wn. App. 85, 90, 167 P.3d 1225 (2007), *review denied*, 164 Wn.2d 1009, 195 P.3d 86 (2008), *cert. denied*, 129 S. Ct. 1348, 173 L. Ed. 2d 614, 77 USLW 3469 (2009).

Carter filed his petition almost seven years after his judgment and sentence became final. *See* RCW 10.73.090(3)(b) (judgment and sentence becomes final when this court files its mandate disposing of direct appeal). He claims, however, that his petition is exempt from the time limit because he did not receive notice of the one-year statute of limitation from the trial court. *See* RCW 10.73.110 (trial court shall advise defendant of one-year statute of limitation when it pronounces judgment and sentence). When a statute requires notice, the failure to comply creates an exemption to the time bar. *In re Pers. Restraint of Vega*, 118 Wn.2d 449, 451, 823 P.2d 1111 (1992).

After hearing oral argument, we remanded for a reference hearing on the notice issue. The superior court found that the sentencing court did not orally inform Carter of his collateral attack rights at any time during sentencing and that Carter did not receive a copy of the "Advice of Collateral Attack Time Limit" form filed in his case until 2007. Findings of Fact 3, 8, 11. The superior court also found, however, that Carter received a copy of his judgment and sentence at sentencing and from his habeas attorney in 2002. Carter argues that the finding stating that he received a copy of his judgment and sentence at sentencing lacks evidentiary support. He contends further that he did not read the page of his judgment and sentence containing the

collateral attack information when he received it in 2002, and that even if he did, the language was insufficient to provide him proper notice.

We need not review the evidence supporting the challenged finding. Even if the superior court incorrectly found that Carter received a copy of his judgment and sentence at sentencing, Carter acknowledges receiving a copy in 2002. Carter's judgment and sentence states that "[p]ursuant to RCW 10.73.090 and RCW 10.73.100, the defendant's right to file any kind of post sentence challenge to the conviction or the sentence may be limited to one year." Petition, App. A, at 7. Carter claims that he did not read this information until 2007, but receipt of the judgment and sentence is sufficient to constitute notice. *See In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 453 n.16, 853 P.2d 424 (1993) (sentencing documents containing notice of time limit are sufficient to meet State's burden of showing notice); *State v. Robinson*, 104 Wn. App. 657, 661, 669-70, 17 P.3d 653 (2001) (statement in judgment and sentence that any collateral attack on the judgment would be subject to RCW 10.73.090 and RCW 10.73.100 was sufficient to give defendant notice of one-year statute of limitation applicable to collateral attacks). Insofar as Carter challenges the language in the judgment and sentence, we find it sufficient to convey the requisite notice. *Robinson*, 104 Wn. App. at 669-70; *see also Payne v. Mount*, 41 Wn. App. 627, 635, 705 P.2d 297 (1985) (holding that a notice citing the relevant statute for appeal time limit was adequate under due process). Having received notice of the one-year time limit in 2002, Carter's petition is untimely unless he can establish that an exception to that time limit applies.

II. SHACKLING

Carter argues that a recent change in the law justifies this court's reconsideration of the shackling issue. *See* RCW 10.73.100(6) (time limit does not apply to petition if significant change in the law is material to the conviction or sentence and applies retroactively).

A defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999). Generally, when a jury views a shackled defendant, that defendant's constitutional right to a fair and impartial trial is impaired. *State v. Elmore*, 139 Wn.2d 250, 273, 985 P.2d 289 (1999). In rejecting Carter's appeal, however, we stated that when the jury's view of a defendant in shackles is brief or inadvertent, the defendant must make an affirmative showing of prejudice. *Carter*, at *5 (citing *Elmore*, 139 Wn.2d at 273). Because Carter failed to show any prejudice resulting from his appearance in restraints during jury selection, the trial court did not abuse its discretion in denying his motion for a mistrial. *Carter*, at *5.

Carter now argues that the United States Supreme Court changed the legal standard to apply in assessing the potential harm from shackling in *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953, 73 USLW 4370 (2005). *Deck* held that where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the sentencing jury, the defendant need not demonstrate actual prejudice to make out a due process violation. *Deck*, 544 U.S. at 635. Rather, the State must prove beyond a reasonable doubt that the shackling error did not contribute to the verdict. *Deck*, 544 U.S. at 635. According to Carter, the *Deck* decision thus changed the harmless error standard applicable to shackling issues. Instead of placing the burden on the defendant to prove prejudice, the burden is on the State to prove an

No. 37048-4-II

absence of prejudice. Carter contends that this change in the law applies retroactively to his case.

Deck applied clearly established law relevant to the guilt phase of a trial to the capital sentencing context. *Lakin v. Stine*, 431 F.3d 959, 963 (6th Cir. 2005). Prior Supreme Court precedent did not involve the penalty phase of a capital trial but involved only shackling before a determination of guilt. *Marquard v. Sec'y for the Dep't of Corrs.*, 429 F.3d 1278, 1311 (11th Cir. 2005). Insofar as *Deck* changed the law applicable to the penalty phase of a trial, it does not apply retroactively. *Marquard*, 429 F.3d at 1311-12.

Thus, under federal law, *Deck* imposes a new rule applicable to the penalty phase of a trial that is not retroactive. Consequently, it did not significantly change the law material to Carter's conviction. See RCW 10.73.100(6). Furthermore, we noted in 2002 that although a claim of unconstitutional shackling is subject to harmless error analysis, it is unclear whether shackling in the courtroom creates a presumption of prejudice that the State must overcome or whether the defendant must demonstrate that the shackling was prejudicial. *State v. Jennings*, 111 Wn. App. 54, 61, 44 P.3d 1 (2002). To illustrate, *Jennings* cited Washington Supreme Court decisions issued in 2001 and 1984 that placed the burden on the State, and other decisions from the same court issued in 1999 and 1998 that placed the burden on the defendant. *Jennings*, 111 Wn. App. at 61 n.2 & 3. Thus, Carter could have raised in his direct appeal, his petition for review, or a personal restraint petition filed before *Deck*, the same point of law he raises now. Carter does not succeed in showing that a significant change in the law renders the shackling issue exempt from the one-year bar. See *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258-59, 111 P.2d 837 (2005) (one test to determine whether intervening case represents a significant

change in the law is whether the defendant could have argued this issue before publication of the decision). Because he does not argue that any other exception applies to this issue, we do not discuss it further.

III. SENTENCING

A. Time Bar

Under the “mixed petition” rule, a court may not consider a petition filed after the one-year deadline where only some of the issues fall within an exception in RCW 10.73.100. *See In re Pers. Restraint of Hankerson*, 149 Wn.2d 695, 702, 72 P.3d 703 (2003) (court will not decide claims under RCW 10.73.100 that are not time barred if some issues are untimely). Where a remaining issue rests on a different exception, however, it may be reached. *See In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 350-51, 5 P.3d 1240 (2000) (court can decide facial invalidity claims after dismissing untimely claims). We therefore address Carter’s sentencing issue because recent case law demonstrates that he is actually innocent of the life sentence he received.²

B. Actual Innocence Exception

Carter argues that the one-year time limit in RCW 10.73.090 should be tolled under the “actual innocence” exception. The federal courts have applied this exception under limited circumstances to grant habeas relief where review ordinarily would be barred because of a

² Because of the mixed petition rule and our holding that Carter’s shackling issue does not satisfy the exception in RCW 10.73.100(6), we do not address his arguments that the sentencing issue can be considered under RCW 10.73.100(5) and (6). The exception in RCW 10.73.100(5) applies if the sentence imposed exceeded the trial court’s jurisdiction.

No. 37048-4-II

procedural default in state court. *See Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 170 (2nd Cir. 2000). In an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a writ of habeas may be granted even in the absence of a showing of cause for the procedural default. *Murray v. Carrier*, 477 U.S. 478, 495-96, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). The Supreme Court has “transported” the actual innocence concept to the sentencing phase of capital trials, and some lower federal courts have applied it to noncapital sentencing as well. *Spence*, 219 F.3d at 170-71 (citing *Smith v. Murray*, 477 U.S. 527, 537-38, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1996)); *see also United States v. Mikalajunas*, 186 F.3d 490, 495 (4th Cir. 1999) (limiting actual innocence exception in noncapital cases to review of eligibility for career offender or other habitual offender guideline provisions); *United States v. Maybeck*, 23 F.3d 888, 892-94 (4th Cir. 1994) (holding that defendant was actually innocent of being career offender because his predicate offenses did not qualify him for that status). The Supreme Court has not addressed whether the actual innocence exception can be applied to sentencing outside the capital context, and this question has divided the Courts of Appeals. *See Dretke v. Haley*, 541 U.S. 386, 392-93, 124 S. Ct. 1847, 158 L. Ed. 2d 659 (2004) (recognizing divergence of opinion in Courts of Appeals regarding availability of exception in noncapital sentencing context but declining to reach issue); *see also United States v. Richards*, 5 F.3d 1369, 1371 (10th Cir. 1993) (person cannot be actually innocent of a noncapital sentence).

The Eighth Circuit applied the actual innocence exception where a defendant was sentenced under a habitual offender statute that was not in effect when he committed his offenses. *Jones v. Arkansas*, 929 F.2d 375, 380-81 (8th Cir. 1991). This application allowed

him to obtain relief in a habeas corpus proceeding even though he had not raised the same claim of error previously in state court. The *Jones* court cited the United States Supreme Court's statement, in the capital sentencing context, that if one is "actually innocent" of the sentence imposed, a federal habeas court can excuse a procedural default to correct a fundamentally unjust incarceration. *Jones*, 929 F.2d at 381 (citing *Smith*, 477 U.S. at 537). "It would be difficult to think of one who is more 'innocent' of a sentence than a defendant sentenced under a statute that *by its very terms* does not even apply to the defendant." *Jones*, 929 F.2d at 381 (emphasis in original). The court concluded that manifest injustice would occur if it were to adhere rigidly to the procedural default rule. *Jones*, 929 F.2d at 381 n.16; *see also Smith v. Collins*, 977 F.2d 951, 959 (5th Cir. 1992) (assuming without deciding that actual innocence exception applies to noncapital sentencing procedures; such application would require defendant to show that, absent alleged error, he would not have been legally eligible for his sentence).

The Washington Supreme Court has recognized that the actual innocence exception is "extremely rare" and applicable in "extraordinary case[s]." *In re Pers. Restraint of Turay*, 153 Wn.2d 44, 55; 101 P.3d 854 (2004) (quoting *Schlup v. Delo*, 513 U.S. 298, 321; 115 S. Ct 851, 130 L. Ed. 2d 808 (1995)). The court declined to apply it to excuse Turay's failure to raise an issue in a previous petition, finding that there was no issue of innocence to consider because Turay, who was civilly committed as a sexually violent predator, was not confined for a criminal conviction. *Turay*, 153 Wn.2d at 56. Turay's claim that he was confined in violation of due process was insufficient to find an exception under state law comparable to the actual innocence exception under federal law. *Turay*, 153 Wn.2d at 56. "Instead, to avoid dismissal of this petition on abuse of the writ grounds, he must, at the least, show that when the State confined

No. 37048-4-II

him he was not presently dangerous. He has not done so.” *Turay*, 153 Wn.2d at 56. Thus, the *Turay* court did not reject the actual innocence exception completely but declined to apply it where the petitioner failed to prove that he was actually innocent of his sexually violent predator status.

We recognize that neither *Turay* nor the federal decisions cited above address the actual innocence exception in the context presented here; that is, where the petition is otherwise untimely. *But see Souter v. Jones*, 395 F.3d 577, 599 (6th Cir. 2005) (actual innocence exception applies to one-year limitation period for habeas corpus petitions). We also recognize that none of these decisions apply the actual innocence exception to an untimely petition raising a sentencing challenge. All of these decisions deal with procedural bars, however, and the one-year statute of limitation in RCW 10.73.090 is a procedural, rather than jurisdictional, bar that may be overcome in certain instances. *See State v. Littlefair*, 112 Wn. App. 749, 757-59, 51 P.3d 116 (2002) (RCW 10.73.090 is statute of limitation, or procedural bar, to which equitable tolling may apply). Our Supreme Court has allowed equitable tolling of the one-year statute of limitation where the filing of a timely petition was barred by bad faith, deception, or false assurances. *In re Pers. Restraint of Bonds*, 165 Wn.2d 135, 141, 196 P.3d 672 (2008). In so holding, the court reasoned that equitable tolling permits a court to allow an action to proceed when justice requires it, even though a statutory time period has passed. *Bonds*, 165 Wn.2d at 141.

Carter makes no showing of bad faith, deception, or false assurances and thus cannot take advantage of the equitable tolling exception heretofore established under Washington law. We apply the exception here based on our conclusion, explained below, that Carter is “actually

innocent” of his persistent offender status. We emphasize that this exception applies only in extremely rare instances, as where a petitioner is “actually innocent” of his persistent offender status.³ Justice requires, however, that we apply the actual innocence exception in this instance to overcome the one-year statute of limitation in RCW 10.73.090.

C. Comparability Analysis

To determine whether a foreign conviction should count as a strike offense, the court employs a two-part comparability analysis. *State v. Johnson*, 150 Wn. App. 663, 676, 208 P.3d 1265 (2009), *review denied*, -- P.3d --. The court first determines whether the elements of the foreign offense are substantially similar to the Washington offense. *Johnson*, 150 Wn. App. at 676. If the elements of the foreign offense are broader, the court must determine whether the offense is factually comparable; i.e., whether the conduct underlying the foreign offense would have violated the comparable Washington statute. *Johnson*, 150 Wn. App. at 676. If a factual analysis is necessary, the court considers only facts admitted or stipulated by the defendant, or proved beyond a reasonable doubt. *Johnson*, 150 Wn. App. at 676. If a foreign conviction is neither legally nor factually comparable, it does not count as a most serious offense under the POAA. *Johnson*, 150 Wn. App. at 677.

There is no dispute that Carter’s Oregon convictions for attempted murder and attempted first degree assault counted as a strike offense.⁴ When we previously assessed the comparability

³ To the extent that Carter’s argument is successive, the ends of justice clearly warrant reconsideration of this issue. *See In re Pers. Restraint of Jeffries*, 114 Wn.2d 485, 487, 789 P.2d 731 (1990) (argument rejected on merits in direct appeal will not be re-evaluated in personal restraint petition unless ends of justice are served thereby).

⁴ Because the Oregon convictions occurred at the same time, they constituted only one most serious offense. *See former RCW 9.94A.030(25)(b)* (1994).

No. 37048-4-II

of his 1983 California conviction for assault on a peace officer with a firearm, we first looked to the underlying facts. In a type of *Newton* plea⁵ in which Carter agreed to the use of what in Washington would be an affidavit of probable cause, Carter accepted that the facts would show that he shot at a police car as it was driving away after his brother's arrest. We then turned to the 1983 California statute defining the crime of assault with a firearm on a peace officer:

Every person who commits an assault with a firearm upon the person of a peace officer . . . and who knows or reasonably should know that the victim is a peace officer . . . engaged in the performance of his or her duties, when the peace officer . . . 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.

Former CAL. PENAL CODE § 245(c) (Deering 1983). California defines assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

CAL. PENAL CODE § 240 (Deering 1983).

In 1983, Washington law defined the offense of second degree assault with a weapon as follows:

Every person who, under circumstances not amounting to assault in the first degree shall be guilty of assault in the second degree when he . . . [s]hall knowingly assault another with a weapon or other instrument or thing likely to produce bodily harm.

Former RCW 9A.36.020(1)(c) (1983), repealed by LAWS OF 1986, ch. 257, § 9. Washington defines assault as "an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with apparent present ability to give effect to the attempt if not prevented."

Carter, at *12 (quoting *State v. Jimerson*, 27 Wn. App. 415, 418, 618 P.2d 1027 (1980)). We reasoned that the 1983 Washington offense most comparable to Carter's California assault was

⁵ When a defendant enters a *Newton* plea, he does not admit guilt but acknowledges that the State has enough evidence to find him guilty. *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

No. 37048-4-II

second degree assault because both offenses shared the common element of assault with a dangerous weapon. *Carter*, at *13.

Other Washington decisions have held that California assault convictions are comparable to first or second degree assault in Washington and thus count as strike offenses. *See, e.g., State v. Wheeler*, 145 Wn.2d 116, 119, 34 P.3d 799 (2001) (conviction of assault with a firearm in California is equivalent to assault with a deadly weapon in Washington); *State v. Berry*, 141 Wn.2d 121, 132, 5 P.3d 658 (2000) (stayed California convictions for assault with intent to commit murder and assault with a deadly weapon counted as strikes under the POAA). These opinions did not discuss the fact that assault in California is a general intent crime while assault in Washington is a specific intent offense.

Specific intent to either create apprehension of bodily harm or cause bodily harm is an essential element of second degree assault in Washington. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); *State v. Welsh*, 8 Wn. App. 719, 724, 508 P.2d 1041 (1973). Therefore, the defense of intoxication is available to a defendant charged with that offense. *Welsh*, 8 Wn. App. at 723. Assault in California requires only 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. Colantuono*, 7 Cal. 4th 206, 214, 26 Cal. Rptr. 2d 908, 865 P.2d 704 (1994). Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm. *Colantuono*, 7 Cal. 4th at 214. The intent to cause any particular injury, to severely injure another, or to injure in the sense of inflicting bodily injury is not necessary. *Colantuono*, 7 Cal. 4th at 214. Consequently, a jury may not consider evidence of the defendant's intoxication in

No. 37048-4-II

determining whether he committed assault in California. *People v. Williams*, 26 Cal. 4th 779, 788, 111 Cal. Rptr. 114, 29 P.3d 197 (2001).

Carter rests his argument on the different intent elements and points out that our Supreme Court found this distinction dispositive in *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005). At issue was whether Lavery's federal conviction for bank robbery was comparable to the Washington crime of second degree robbery and counted as a strike under the POAA. The court held that the two offenses are not legally comparable because the crime of federal bank robbery is a general intent crime and the crime of second degree robbery in Washington requires specific intent to steal as an essential, nonstatutory element. *Lavery*, 154 Wn.2d at 255-56. The Washington definition thus was narrower than the federal crime's definition. A person could be convicted of federal bank robbery without being guilty of second degree robbery in Washington because of the defenses that would be available only to a specific intent crime, including the defense of intoxication. *Lavery*, 154 Wn.2d at 256.

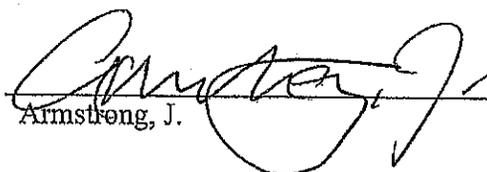
The court then turned to the factual comparability of the federal and state offenses. Where the foreign statute is broader than Washington's, a factual comparison may not be possible because there may have been no incentive for the accused to have attempted to prove that he did not commit the broader offense. *Lavery*, 154 Wn.2d at 258. Lavery would have had no motivation in the earlier conviction to pursue defenses that would have been available to him under Washington's robbery statute but unavailable in the federal prosecution. *Lavery*, 154 Wn.2d at 258. "Furthermore, Lavery neither admitted nor stipulated to facts which established specific intent in the federal prosecution, and specific intent was not proved beyond a reasonable doubt in the 1991 federal robbery conviction." *Lavery*, 154 Wn.2d at 258. Therefore, his federal

No. 37048-4-II

robbery conviction was neither legally nor factually comparable to Washington's second degree robbery and was not a strike under the POAA. *Lavery*, 154 Wn.2d at 258.

Carter's California assault is not legally comparable to second degree assault in Washington because of the different intent elements. In assessing factual comparability, we observe that Carter merely conceded that the facts were sufficient to convict him of assault of a peace officer with a firearm in California. The facts were silent as to Carter's state of mind during the shooting, and Carter had no incentive to introduce any such facts. The facts do not show that Carter acted with the specific intent to injure a police officer or create an apprehension of injury. Consequently, under the reasoning in *Lavery*, Carter's California assault is not comparable to second degree assault in Washington and should not have been counted as a strike. Carter is "actually innocent" of being a persistent offender.⁶

Although we reject Carter's shackling challenge as untimely, we vacate Carter's persistent offender sentence and remand for resentencing.


Armstrong, J.

I concur:


Houghton, J.

⁶ Having granted Carter sentencing relief under the actual innocence exception, we do not address his alternative claim for relief under facial invalidity exception. *In re Pers. Restraint of Banks*, 149 Wn. App. 513, 517, 204 P.3d 260 (2009) (one-year time limit does not apply to judgment and sentence that is invalid on its face).

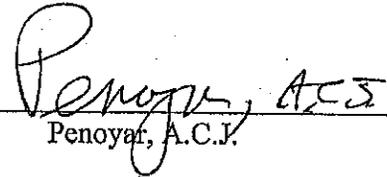
PENoyer, A.C.J. — Relying on the federally-created actual-innocence doctrine, the majority finds this case comparable to “an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent.” Majority at 9. (citing *Murray v. Carrier*, 477 U.S. 478, 495-96, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)). I disagree that this is such a case.

I agree with the majority’s analysis that it is impossible to determine the factual comparability of Carter’s California assault conviction with a Washington second degree assault conviction. But to say this means that Carter is actually or even probably innocent of having had two strikes in 1998 seems to me to be a bridge too far. What we do know from common sense and experience is that it is quite likely that someone firing a gun at a police car is intending to harm the police officer in the vehicle. While a petitioner who can *affirmatively* demonstrate actual innocence could well succeed, Carter has not shown that he lacked the requisite intent and that his offense is therefore not factually comparable.

Carter has not shown, and the burden is his, that the one-year time bar should not apply to him. RCW 10.73.090. To hold otherwise, as the majority does, is to employ an exception for “extremely rare instances” in which the petitioner is “actually innocent” to a case where there is no such showing, rather only an inadequate record to review the claimed error. Majority at 12. Opening the door to cases in which the exception is rooted in the record’s weakness and not on actual innocence not only ignores the exception’s purpose of providing relief to those actually

No. 37048-4-II

innocent without legal recourse but will invite a flurry of cases where defendants pleaded guilty to strike offenses in other states before committing their last strike here. I would deny the petition.


Penoyar, A.C.J.