

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

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IN RE THE PERSONAL RESTRAINT PETITION OF:

ERNEST A. CARTER  
(aka LE'TAXIONE)

PETITIONER.

FILED  
COURT OF APPEALS  
DIVISION II  
08 APR 14 AM 9:07  
STATE OF WASHINGTON  
BY DEPUTY

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**REPLY IN SUPPORT OF  
PERSONAL RESTRAINT PETITION**

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## A. INTRODUCTION

Ernest Carter raises a challenge to his conviction (that he was improperly shackled) and a challenge to his sentence (that he is not a persistent offender). However, before this Court can address the merits of his claims, Carter must show why the time bar does not apply.

Although Carter advances several arguments, the simplest reason the time bar does not apply is because Carter was not given timely and accurate notice of the time bar. Thus, his PRP is timely.

Moving to the merits, Carter was unjustifiably and visibly shackled before his jury. When this Court reviewed this issue on direct appeal, it followed Washington Supreme Court precedent and applied a non-constitutional harm standard. Instead, current caselaw defining the historical prohibition against visible shackles makes it clear that the error is both inherently prejudicial and constitution in dimension. Application of the proper harm standard results in reversal. This Court should revisit this issue and reverse. To the extent there is a contest about whether any jurors saw Carter's shackles, this Court should remand for an evidentiary hearing.

Current caselaw makes it clear that Carter is not now and never was a persistent offender. In response, the State argues that this Court should not correct this error—that, once reviewed, sentencing mistakes should

remain uncorrected. In reply, Carter contends that a sentence not authorized by the SRA is a fundamental defect which justifies collateral relief, especially where the erroneous sentence is “life in prison.”

**B. ARGUMENT**

1. NOTICE EXCEPTION TO THE TIME BAR

Any discussion regarding the expiration of the time bar presumes that the one year, post-conviction clock started in the first place. In order to start the one-year limit, a defendant must be given proper notice. *State v. Schwab*, 141 Wn. App. 85, 167 P.3d 1225 (2007).

If this exception applies, then both of Carter’s claims are timely. If this exception applies, Carter does not need to show a change in the law (in order to consider his shackling claim and sentencing claims) or a facial invalidity (as an alternate basis for this Court’s consideration of his sentencing claim).

In his PRP, Carter made a *prima facie* case that he was not provided with the one-page *Advice* of the one year time limit on collateral attacks that was filed in his case. That document was not signed by Carter. The State has not rebutted that claim with any new evidence. Thus, the record is apparently uncontested that Carter was not served with the separate *Advice* form. *See In re Rice*, 118 Wn.2d 876, 886-87, 828 P.2d 1086 (1992) (“In order to define disputed questions of fact, the State must meet

the petitioner's evidence with its own competent evidence. If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.”).

Instead, the State points to the *Judgment and Sentence*, which is also not signed by Carter, as support for its claim that he was properly notified. However, at no point during the sentencing hearing did the court orally explain the limitations on post-conviction relief, direct that Mr. Carter review any portion of the *Judgment*, or insure that he be given a copy of it. In contrast, the Court did explain to Mr. Carter at some length that he had a right to appeal. RP 520-21. In addition, Mr. Carter stated in his declaration that “(a)t sentencing, I was not informed (orally or in writing) of the one year limit on collateral attacks.” Thus, the fact that the State can now point to a document in the court file that mentions collateral attack limitations does not at all contest Mr. Carter’s declaration, which is reinforced by the absence of any contrary information in the record.

However, the bigger problem with the State’s argument is that the *Judgment* provides inaccurate information about the time bar. The *Judgment* says the right to file a collateral attack “may” be limited to one year. In other words, it suggests that the time bar is permissive—that a court “may” choose to apply it.

There is nothing permissive about the time bar or the accompanying notice requirement. Under RCW 10.73.110, the trial court *must* advise a defendant of the one-year statute of limitations *when* it pronounces judgment and sentence (“the court shall advise the defendant of the time limit specified in RCW 10.73.090 and 10.73.100”). *See In re Pers. Restraint of Vega*, 118 Wn.2d 449, 823 P.2d 1111 (1992) (we held that where the State made no attempt to give petitioner notice of the amended one-year limitation on filing a personal restraint petition, as required by statute, petitioner was not bound by the one-year limitation). The statute provides that a Court must advise the defendant of both the time limit as it is defined in RCW 10.73.090 and the applicable exceptions set forth in RCW 10.73.100. In other words, the statute requires the Court to advise a defendant of the definition of a collateral attack (RCW 10.73.090), the existence of the one-year limitation (*id.*), when the one-year period begins (*id.*), as well as the six instances where the one-year limit does not apply (RCW 10.73.100). This advice *must* be given in every case. *See In re Restraint of Runyan*, 121 Wn.2d 432, 452-53, 853 P.2d 424 (1993) (finding that Dept. of Corrections did not need to prove actual notice to every prisoner, but noting that notice would not be a problem for prisoners sentenced after effective date of statute because Courts are required to provide notice in every case).

Washington courts have required strict compliance with the statute, including the notice requirements, because “the very purpose of RCW 10.73.090 ... is to encourage prisoners to bring their collateral attacks promptly.” *In re Restraint of Runyan*, 121 Wn.2d at 450. It logically follows that strict compliance applies with equal force to the requirement of notice. *Schwab, supra*. When notice is not properly given, this omission creates an exemption to the time bar and a court, therefore, must treat the defendant's petition for collateral review as timely. *Schwab, supra*. See also *In re Restraint of Vega*, 118 Wn.2d at 450-51 (applying rule to RCW 10.73.120); *State v. Golden*, 112 Wn.App. 68, 78, 47 P.3d 587 (2002) (applying *Vega* rule to RCW 10.73.110), *review denied*, 148 Wn.2d 1005, 60 P.3d 1212 (2003).

Here, Carter's *Judgment* states that a defendant's right to file a post-sentence challenge “may be limited to one year.” In contrast, as the Court stated in *Schwab*, “(b)y statute, the trial court is required to notify a defendant at sentencing that he *must* file any collateral attack within a year.” The failure to properly inform him meant Schwab's petition was timely. Even assuming that Carter was timely informed by the *Judgment*, the fact that he was told his collateral attack rights “may” be limited constitutes misadvice. This Court should conclude that Carter's petition is timely.

2. SHACKLING CLAIM

Introduction

Petitioner was shackled at his ankles (joined by a chain) during his trial. There was no hearing to determine whether a specific justification existed for the shackles. Instead, Carter was shackled because he faced a life sentence. RP IX 345-46. As defense counsel explained, Carter apparently preferred the shackles to wearing a stun belt, an equally unjustified, but slightly more prejudicial restraint. RP VII 171-72. *See also State v. Fliieger*, 91 Wash.App. 236, 955 P.2d 872, 874 (1998) (If seen, a stun belt “may be even more prejudicial than handcuffs or leg irons because it implies that unique force is necessary to control the defendant.”).

While the Court and parties may have presumed the shackles were not visible to jurors, that presumption was rebutted when, after Carter informed counsel that one juror observed him being escorted by jail officers in the hallway, Juror #11 was questioned about his observations and noted that the hallway was not the first place he had observed Carter shackled—the shackles were “plainly visible” during *voir dire*.

With the knowledge that the shackles were not hidden, but had been “plainly visible” from the jury pew, defense counsel sought a mistrial. The trial court denied that motion, and did not inquire of other jurors, reasoning that, regardless of what jurors observed, Carter could not have possibly

been prejudiced by the shackles, stating, “I can’t imagine it makes any difference whatsoever in this trial.” *Compare Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970) (Supreme Court recognized the “inherent disadvantages” to shackling a defendant at trial: physical restraints may not only cause jury prejudice and impair the presumption of innocence, they may also detract from the dignity and decorum of the proceeding and impede the defendant’s ability to communicate with his counsel).

Although Carter contends the trial record plainly demonstrates the visibility of the shackles, notwithstanding the post-motion attempt to obscure them with a garbage can, Carter and another witness described in their respective declarations how the shackles likely remained visible throughout the trial. The State submitted no new evidence to rebut either the trial record or Carter’s post-conviction evidence, other than to argue that Carter and his witness are both “incompetent” to comment on what likely could be seen by jurors. *But see In re Restraint of Davis*, 152 Wn.2d 647, 677-78, 101 P.3d 1 (2004) (“Because the record was unclear as to the extent to which the jury could detect that the defendant was physically restrained, this court remanded for a hearing.”).

*Did the Direct Appeal Court Erroneously Apply a Non-Constitutional Harm Standard Which Justifies Revisiting this Issue?*

The State's first defense to the merits of this claim is to argue that it is the same claim raised on direct appeal governed by the same law. In other words, nothing has changed.

Despite framing its argument in this manner, the State initially admits that the law is now settled, at least for cases on direct appeal, that the State bears the burden of proving that an unjustified decision to visibly shackle a defendant is harmless beyond a reasonable doubt. This is an appropriate concession given the United States Supreme Court's unequivocal statement in *Deck v. Missouri*, 544 U.S. 622, 624 (2005), "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." 544 U.S. at 635. In discussing the "inherent prejudice" resulting from shackling a defendant, the Supreme Court noted, like the consequences of compelling a defendant to stand trial while medicated, the negative effects that result from shackling "cannot be shown from a trial transcript." 544 U.S. at 635 (*citing Riggins v. Nevada*, 504 U.S. 127, 137 (1992)). The Court then found the State failed to prove harmlessness "beyond a reasonable doubt" and reversed. 544 U.S. at 635 (*citing Chapman v. California*, 386 U.S. 18, 24 (1967)).

Moreover, *Deck* did not make new guilt-phase law. 544 U.S. at 626 (“The answer is clear: The law has long forbidden routine use of visible shackles during the guilt phase.”). *See also Marquard v. Secretary for Dept. of Corrections* 429 F.3d 1278, 1311(11<sup>th</sup> Cir. 2005) (While *Deck* was announced subsequent to appellant's conviction, *Deck's* effect was to extend existing precedent governing shackling to the penalty phase of a capital trial. *Deck* simply reiterated the previously established rules applicable to the guilt phase of all criminal trials). Thus, this standard of review was required by the Constitution at the time of Carter’s appeal.

In contrast to the requirements of the constitution, Carter’s appeal was dismissed because “Carter has not shown prejudice.” Thus, it is indisputable that this Court applied an incorrect standard of review by placing the burden of proof on Carter to demonstrate prejudice, rather than placing the burden on the State to disprove the possibility of prejudice beyond a reasonable doubt.

Nevertheless, the State argues in shackling cases Washington appellate courts have always placed the burden of proof beyond a reasonable doubt on the State. *Response*, p. 7. Not only is this not true in general (*see e.g., State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1988) (“In order to succeed on his claim, the Defendant must show the shackling had a substantial or injurious effect or influence on the jury's verdict.”); *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999) (same);

*State v. Jennings*, 111 Wn. App. 54, 61, 44 P.3d 1(2002) (“Case law is not clear, however, regarding 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”), it was obviously not the standard applied to this case.

The State then argues that it was somehow Carter’s fault that this Court applied an incorrect standard of review. *Response*, p. 8. To the contrary, this Court applied an erroneous standard of review by following controlling Washington Supreme Court precedent. That precedent was plainly wrong, but neither this Court nor Carter can be held to blame for the utilization of an incorrect standard of review that worked to Carter’s clear detriment. Instead, the simple reality is that, at the time of Carter’s appeal, the Washington law was contrary to what was constitutionally required.

*Application of the Correct Standard of Review Should Result in Reversal*

After conceding that, legally speaking, a claim of shackling error is governed by the *Chapman* standard, the State then does an about-face and argues that Carter bears the burden of showing actual prejudice in order to merit relief. *Response*, p. 8-9 (“defendant...cannot show prejudice,” because shackling does not “rise to the level of a due process violation absent a showing of actual prejudice.”).

First, the State argues that this a PRP and so, even if Carter was erroneously deprived of the benefit of the correct standard of review on direct appeal, nothing can be done to correct that error—he must, instead, bear the post-conviction burden of showing harm. The State is wrong for two reasons.

First, it is obvious, if this Court had applied the correct standard of review on direct appeal, that Carter’s conviction would have been reversed. Thus, Carter has overwhelmingly demonstrated a fundamental miscarriage of justice. It is true that the United States Supreme Court recently held in 28 USC § 2254 (habeas) proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the "substantial and injurious effect" standard set forth in *Brecht*, whether or not the state appellate court recognized the error and reviewed it for harmlessness under the “harmless beyond a reasonable doubt” standard set forth in *Chapman*. *Fry v. Pliler*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 2321 (2007). *Fry* does not apply to state court review, however, and certainly does not relieve this Court of its obligation to apply and enforce federal constitutional principles in state court proceedings.

In any event, *Deck* supports the conclusion that, even in a post-conviction setting, the State must demonstrate harmlessness. *See Deck*, 544 U.S. at 635 (“where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need

not demonstrate actual prejudice to make out a due process violation.”) *See also Lakin v. Stine*, 431 F.3d 959, 966 (6<sup>th</sup> Cir. 2005) (Habeas case challenging guilt phase shackling. “*Deck* makes clear, however, that it is the State's burden [to prove harmlessness], and not the defendant's.”). This conclusion is further supported by an examination of the cases cited by the *Deck* court in support of the conclusion that shackling error was “inherently prejudicial.” For example, *Deck* noted that shackles can interfere with the accused’s “ability to communicate” with his lawyer. 544 U.S. at 631 (*citing Allen*, 397 U.S. at 344; and *People v. Harrington*, 42 Cal. 165, 168 (1871) (shackles “impos [e] physical burdens, pains, and restraints ..., ... ten[d] to confuse and embarrass” defendants’ “mental faculties,” and thereby tend “materially to abridge and prejudicially affect his constitutional rights”)). Unjustified interference with the right to counsel constitutes a structural error. *See generally United States v. Gonzalez-Lopez*, 548 U.S. 140, \_\_\_, 126 S.Ct. 2557, 2564 (2006) (“We have little trouble concluding that the erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.”) (internal punctuation removed). In addition, in discussing the assessment of the level of prejudice from shackles, the Court cited to a case involving the unjustified medication of a defendant at trial. *Deck*, 544 U.S. at 635 (“the practice will often have negative effects, but-like ‘the consequences of

compelling a defendant to wear prison clothing’ or of forcing him to stand trial while medicated-those effects ‘cannot be shown from a trial transcript.’”). In the case cited by *Deck, Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), the Supreme Court held that the analogous error creates an unacceptable risk of trial error and entitles the defendant to “automatic vacatur” of his conviction. 504 U.S. at 135-138.

Of course, this Court does not need to delve into this question if it decides to simply correct the obvious direct appeal error.

#### *Visible Shackles*

The State then argues that Carter waived the issue by not objecting until it became clear that the shackles were visible to jurors. What the State misses is that a shackling error becomes “inherently prejudicial” only when the shackles are visible to jurors. *Deck, supra* (“the Constitution forbids the use of *visible* shackles...”). Thus, while shackling a defendant at trial without an individualized determination as to its necessity violates the due process clause, a principle clearly established long before *Deck* was decided, only when those shackles are visible is the due process violation inherently prejudicial.

For that reason, trial counsel timely objected and moved for a mistrial when it became apparent, after the inquiry with a juror, that efforts to conceal the shackles were ineffective. Defendant’s objection was timely.

It was the trial court's response that was deficient—justifying denial of Carter's mistrial motion based on reasoning completely at odds with the Constitution.

Further, the State's attempt to argue that a lesser harm standard applies where jurors only briefly observe the shackles (*Response*, p. 10) finds no support in the facts of this case. The questioned juror stated that the shackles were plainly visible. Carter's declarations lead to the same conclusion.

*Prejudice from Unjustified, Visible Shackles*

As the State's *Response* correctly notes (p. 11-12), several witnesses in Carter's trial testified that they thought he was armed, not as a result of seeing a gun, but instead largely because of his appearance. In addition, Carter's jury saw him shackled, a condition supporting the conclusion that he is guilty. *Deck*, 544 U.S. at 630 ("Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process. It suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.'"). It also "almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community." *Id.* See also *Dyas v. Poole*, 317 F.3d 934, 937 (9<sup>th</sup> Cir. 2003) (Dyas was charged with a violent crime, increasing the risk that 'the shackles essentially branded [her] as having a violent nature.'").

Moreover, the Supreme Court has recognized that “little stock need be placed in jurors' claims” that they will not be prejudiced. *Holbrook v. Flynn*, 475 U.S. 560, 570, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). Where, as with visible shackling, a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings.... [T]herefore, 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. *Id.* (quotation marks omitted).

This Court’s analysis thus must focus on whether the risk was there, not whether the jurors could recognize the risk. In this case, an overwhelming risk was present.

*This Court Should Correct the Direct Appeal Error*

Finally, the State argues that judicial economy should trump the Constitution—that this Court should refuse to consider this issue because it was raised on direct appeal. *Response*, p. 6. To the contrary, the interests of justice allow relitigation of an issue raised on direct appeal if there has been an intervening change in the law or some other justification for not raising a crucial point or argument on direct appeal. *In re Davis*, 152

Wn.2d 647, 750, 101 P.3d 1 (2004). Both exceptions apply, here. First, this Court unquestionably applied the non-constitutional harm standard to a constitutional error. Next, to the extent that the record was not clear on direct appeal, Carter has added additional facts in this PRP which, at a minimum, merit a hearing. Carter discusses this issue at greater length in his next claim of error.

In sum, Carter asks this Court to apply the law, which is now properly understood. In response, the State asks this Court to refuse to correct an error—that finality is more important than justice. Carter humbly contends that the former view is the correct one.

3. SENTENCING CLAIM

Despite the fact that his conviction had been final for more than a year and he had raised the same claim in his direct appeal *and* in an earlier PRP, the Washington Supreme Court re-examined Leonard Lavery’s foreign robbery conviction and reversed his “persistent offender” life sentence because it was clear, at the time of the successive PRP, that Lavery’s conviction was not comparable to a Washington strike. *In re Restraint of Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005). One prime reason for the non-comparability finding was that there were “defenses that have been recognized by Washington courts in robbery cases which may not be available to a general intent crime.” 154 Wn.2d at 256. The

Supreme Court rejected the State's argument to remand the case for a factual comparability inquiry (given that Lavery pled guilty to robbery) because "that examination 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 narrower offense." *Id.* at 257.

Carter's case differs from Lavery's only because his foreign conviction is an assault, not a robbery. Otherwise, the cases are virtually identical: Carter re-raises his comparability claim by demonstrating a change in the law clarifying that the California crime is a general intent crime, in contrast to the specific intent Washington crime, and noting that certain defenses apply here, but not in the foreign jurisdiction.

Interestingly, the State takes the same approach that failed in *Lavery*, arguing that because Carter pled guilty in California he waived defenses that he never had and inviting this Court to examine the facts of the crime and conclude, for the first time, that Carter committed the crime after forming the requisite specific intent.

Carter responds by quoting *Lavery*: "Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington

statute, the foreign conviction cannot truly be said to be comparable.” “As in *Ortega*, Lavery had no motivation in the earlier conviction to pursue defenses that would have been available to him under Washington's robbery statute but were unavailable in the federal prosecution.” *Id.* at 258.

Like Lavery, Carter had no motivation in California to pursue an unavailable defense and certainly did admit to specific intent during his *Alford* plea.

The State also fails when it argues that the Washington crime of second-degree assault with a deadly weapon “does not require specific intent.” *Response*, p. 16. The State is incorrect. An essential element of second degree assault is specific intent either to cause bodily harm or to create apprehension of bodily harm. *State v. Eakins*, 127 Wn.2d 490, 902 P.2d 1236 (1995); *State v. Byrd*, 125 Wash.2d 707, 713, 887 P.2d 396 (1995). As a result, intoxication and diminished capacity are affirmative defenses against second degree assault where the evidence shows the mental condition impaired the defendant's ability to form the required specific intent. *Eakins*, 127 Wn.2d at 496.

This was also the law in Washington in 1983 (when Carter was convicted in California). *State v. Welsh*, 8 Wn. App. 719, 724, 508 P.2d 1041 (1973) (“A charge of second-degree assault involves the element of specific intent.”); *State v. Ferrick*, 81 Wn.2d 942, 944-45, 506 P.2d 860,

862 (1973) (“Thus, competent evidence of such a condition [inability to form the intent] is admissible wherever it tends logically and by reasonable inference to prove or disprove that a defendant was capable of forming a required specific intent.”). As the Court of Appeals explained in *State v. Edmon*, 28 Wn. App. 98, 104, 621 P.2d 1310 (1981):

The concept of specific intent involves an intent in addition to the intent to do the physical act. Thus, an intent to produce a certain result from the act would be specific intent. The fine distinction between the intent to produce a result (specific intent) and the awareness of a result of one's conduct (knowledge) should not determine the admissibility of expert medical evidence of a mental disability caused by a mental disorder. We have previously recognized the relevance of voluntary intoxication to the existence of “knowledge.” It would be incongruous to allow a defense to “knowledge” where the defendant was responsible for his mental state (voluntary intoxication) and to reject it where the defendant was not responsible for his mental state (mental disorder).

(internal citations removed).

Because the State does not contest that “intoxication” is not a defense to California’s general intent crime of assault with a firearm (*see People v. Williams*, 26 Cal.4<sup>th</sup> 779, 29 P.3d 197 (2001)), Carter does not belabor that point. Whatever superficial similarities exist between the California and Washington crimes, it is clear—utilizing the test laid down in *Lavery*—the crimes are not comparable.

Since this Court decided Carter’s direct appeal in 2000, the California courts have clarified that their assault statute requires only general intent and does not permit intoxication as a defense (in 2001) and

the Washington Supreme Court has further explained the comparability process (in 2005). As a result, it is now clear that Carter is not a persistent offender and should not be serving a life sentence.

In reviewing this case, it is important to keep in mind that, historically speaking, Washington courts have always corrected obvious and non-discretionary sentencing errors, even in the face of a procedural bar. In fact, the rules of appellate procedure expressly entitle a petitioner to collateral relief when his “sentence ... was imposed or entered in violation of the ... laws of the State of Washington[.]” RAP 16.4(c)(2). As a result, the Washington Supreme Court has summarized its responsibility to correct an erroneous sentence as follows: “Because the trial court herein imposed an erroneous sentence, and since the error has now been discovered, the court has both the power and the duty to correct it.” *In re Carle*, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980); *see also In re Personal Restraint of Williams*, 111 Wn.2d 353, 361-62, 759 P.2d 436 (1988) (holding that “where a defendant was sentenced in violation of a provision of the state sentencing law[,] such an error may be raised in a personal restraint petition.”).

In *In re LaChapelle*, 153 Wn.2d 1, 6, 100 P.3d 805 (2004), the Court noted the care that must be given to the review of scoring errors, noting “(t)he difference of a single point may add or subtract three years to an offender's sentence. Therefore, the accurate interpretation and

application of the SRA is of great importance to both the State and the offender.” Here, the difference between the correct sentence and the erroneous sentence actually imposed is much, much greater.

In addition, multiple courts have repeatedly referred to the “duty” to correct an erroneous sentence. *See State v. Loux*, 69 Wn.2d 855, 420 P.2d 693 (1966), *cert. denied*, 386 U.S. 997, 87 S.Ct. 1319, 18 L.Ed.2d 347 (1967); *State ex rel. Sharf v. Municipal Court*, 56 Wn.2d 589, 354 P.2d 692 (1960); *State v. Williams*, 51 Wn.2d 182, 316 P.2d 913 (1957); *McNutt v. Delmore*, 47 Wn.2d 563, 288 P.2d 848 (1955), *cert. denied*, 350 U.S. 1002, 76 S.Ct. 550, 100 L.Ed. 866 (1956). In fact, the Supreme Court has gone so far to characterize sentences that fall outside the actual authority of the trial court as “illegal” or “invalid.” *State v. Luke*, 42 Wn.2d 260, 262, 254 P.2d 718 (1953), *cert. denied*, 345 U.S. 1000, 73 S.Ct. 1146, 97 L.Ed. 1406 (1953).

The decision in *State v. Smissaert*, 103 Wn.2d 636, 694 P.2d 654 (1985), provides an interesting corollary. In *Smissaert*, the trial court amended a judgment more than two years after its original entry by increasing the original erroneous sentence from a maximum of 20 years to a maximum of life. The *Smissaert* Court held that such a correction was proper, noting that “(i)n the past, this court has *required* resentencing to correct invalid sentences.” 103 Wn.2d at 639 (emphasis added), *citing Brooks v. Rhay*, 92 Wn.2d 876, 602 P.2d 356 (1979); *State v. Pringle*, 83

Wash.2d 188, 517 P.2d 192 (1973); *Dill v. Cranor*, 39 Wash.2d 444, 235 P.2d 1006 (1951).

It would be impossible for undersigned counsel to logically explain to Carter why Smissaert's sentence was corrected to his detriment more than one year after his conviction was final, but that Carter's equally invalid sentence cannot be corrected despite the fact that it is equally unlawful and obviously a much more onerous and significant error.

If, as the Court held in *In re Restraint of Goodwin*, 146 Wn.2d 861, 865-67, 50 P.3d 618 (2002), a sentence based on a miscalculated upward offender score is in excess of statutory authority and generally may be challenged at any time, then Carter's challenge to his erroneous life sentence is both timely and proper.

### **C. CONCLUSION**

When the Supreme Court upheld the constitutionality of the one-year time bar, it noted that "the writ of habeas corpus is not to be granted for the correction of minor procedural defects or irregularities, but rather is reserved for cases where the processes of justice are actually subverted." *In re Runyan*, 121 Wn.2d 432, 453, 853 P.2d 424 (1993) (internal quotation marks removed). Surely, this must be one of those cases.

Petitioner was visibly and unjustifiably shackled. When this Court reviewed his case it followed state precedent, but, in doing so, applied a

clearly erroneous standard of standard of review. The prejudice to Carter from the application of an incorrect harm standard is plain: he is entitled to a new trial when the State is made to properly bear the burden of proving harmlessness beyond a reasonable doubt.

Likewise, utilizing a correct understanding of California law as applied to the proper test for comparability, it is equally clear that Carter is not a persistent offender.

Contrary to the State's claim that Carter "sat back at trial" and then waited "ten years" to bring a PRP as a means of obtaining a tactical advantage, Carter's incarceration for the last decade was anything but tactical. This Court should grant his PRP or, at a minimum, remand his shackling claim to the trial court for an evidentiary hearing.

DATED this 11<sup>th</sup> day of April, 2008.

Respectfully Submitted:



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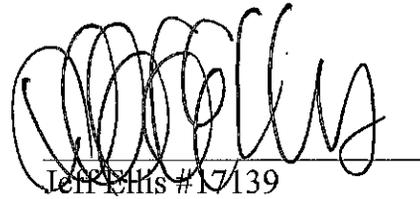
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**CERTIFICATE OF SERVICE**

I, Jeff Ellis, certify that on April 11, 2008, I mailed a copy of the attached *Reply Brief* to counsel for Respondent by placing it in the mail addressed to:

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4/11/08 Seattle, WA  
Date and Place



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