

NO. 84606-5

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ERNEST CARTER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 97-1-04547-1

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the Court of Appeals err when it applied the actual innocence doctrine to an untimely personal restraint petition, undermining the finality of judgment and in the absence of judicial or legislative authority?

2. Did the Court of Appeals err when it granted defendant relief under the actual innocence exception where the doctrine is not a valid exception to the time bar in RCW 10.73.090, the doctrine has not been applied to sentencing and defendant cannot meet the burden of proving he is actually innocent?

B. 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 The Court of Appeals affirmed his conviction and sentence in an unpublished opinion. *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. *In re Carter*, 154 Wn. App. 907, 230 P.3d 181 (2010). The State filed a motion to reconsider which was denied on April 26, 2010.

The State petitioned this Court for review. Review was granted.

C. ARGUMENT.

1. THE COURT OF APPEALS APPLICATION OF THE ACTUAL INNOCENCE DOCTRINE TO AN UNTIMELY PERSONAL RESTRAINT PETITION UNDERMINES THE FINALITY OF JUDGMENT AND WAS APPLIED DESPITE THE ABSENCE OF JUDICIAL OR LEGISLATIVE AUTHORITY.

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. *Carter*, 154 Wn. App. at 919-20. This includes this Court’s decision in *In re Turay*, 153 Wn.2d 44, 101 P.3d 854 (2004). 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 applied this doctrine 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.

This Court in *Turay* specifically rejected applying the actual innocence exception. *Turay*, 153 Wn.2d at 56. 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. *Carter*, 154 Wn. App. at 919-20.

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*.

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 decisions in *Bonds* as the Court of Appeals found that equitable tolling did not apply and *Turay* as the defendant was not claiming he was innocent of a conviction and yet the Court of Appeals 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 reverse the Court of Appeals decision below.

2. EVEN IF THE ACTUAL INNOCENCE DOCTRINE WAS A VALID EXCEPTION TO RCW 10.73.090, AND COULD BE APPLIED TO A SENTENCING ISSUE, DEFENDANT DID NOT MEET HIS BURDEN.

Even if the actual innocence doctrine applied in this State, and even if it could be extended to a sentencing issue, 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. *Carter*, 154 Wn.

App. at 925. 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." *Carter*, 154 Wn. App. at 924. 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." *Carter*, 154 Wn. App. at 925.

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

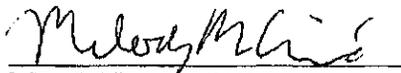
Appeals has issued a ruling that does not uphold the importance of finality of judgments, is in direct conflict with case law and legislative intent and instead has carved out a new exception and applied it broadly to a defendant who can not show that he qualifies for relief. The State asks this Court to reverse the Court of Appeals and to affirm defendant's sentence.

D. CONCLUSION.

For the foregoing reasons, the State respectfully asks this Court to reverse the decision of the Court of Appeals and to affirm defendant's sentence.

DATED: December 20, 2010

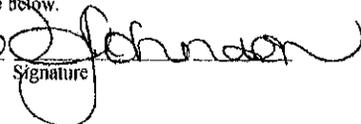
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Attached is the State's Supplemental Response Brief