

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

10 JUN 07 PM 1:12

BY RONALD R. CARPENTER

CLERK

The "Motion for Discretionary Review and Motion for Release of Petitioner" portions of this brief were denied pursuant to the Department Order of November 2, 2010. Portions that are allowed will serve as answer to the State's Motion for Discretionary Review.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

*In re Personal Restraint Petition of:*

No. 84606-5

LE'TAXIONE,  
*aka* ERNEST CARTER,  
Petitioner.

OPPOSITION TO DISCRETIONARY  
REVIEW OR, IN THE ALTERNATIVE,  
CROSS MOTION FOR  
DISCRETIONARY REVIEW AND  
MOTION FOR RELEASE OF  
PETITIONER

I. IDENTITY OF RESPONDING/MOVING PARTY

Petitioner, Le'Taxione (*aka* Ernest Carter), seeks the relief designated in Section II below.

II. STATEMENT OF RELIEF SOUGHT

Deny the State's motion for discretionary review.<sup>1</sup> If this Court accepts discretionary review, then it should accept review of the additional issues raised in this cross-motion.

In any event and prior to any decision on the merits, this Court should enter an order releasing Petitioner on his own recognizance. RAP 16.15 (b). Alternatively,

<sup>1</sup> The State incorrectly designated its pleading as a "Petition for Review." Instead, discretionary review is the only means of reviewing a decision in a PRP. As a result of the State's mistake, it failed to timely file its motion in this court as required by the rules. See RAP 16.14; 13.5A.

1 Petitioner respectfully requests that this Court direct the release of Petitioner with the  
2 conditions of release to be determined by the trial court. *Id.*  
3

### 4 III. FACTS

5 Le'Taxione was convicted in Pierce County in 1998 of two counts of robbery in  
6 the first degree. He was then sentenced to life in prison after the trial court concluded he  
7 that his California assault conviction was a "strike," making him a persistent offender.  
8

9 Le'Taxione filed a PRP challenging both the persistent offender conclusion, as  
10 well as the fairness of his trial given that jurors saw him shackled.  
11

12 The Court of Appeals granted Petitioner's PRP holding:  
13

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

24 The Court of Appeals further explained:  
25

26 Specific intent to either create apprehension of bodily harm or cause bodily harm  
27 is an essential element of second degree assault in Washington. *State v. Byrd*, 125  
28 Wash.2d 707, 713, 887 P.2d 396 (1995); *State v. Welsh*, 8 Wash.App. 719, 724,  
29 508 P.2d 1041 (1973). Therefore, the defense of intoxication is available to a  
30 defendant charged with that offense. *Welsh*, 8 Wash.App. at 723, 508 P.2d 1041.  
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

1 engage in conduct that will likely produce injurious consequences, the prosecution  
2 need not prove a specific intent to inflict a particular harm. *Colantuono*, 7 Cal.4th  
3 at 214, 26 Cal.Rptr.2d 908, 865 P.2d 704. The intent to cause any particular injury,  
4 to severely injure another, or to injure in the sense of inflicting bodily injury is not  
5 necessary. *Colantuono*, 7 Cal.4th at 214, 26 Cal.Rptr.2d 908, 865 P.2d 704.  
6 Consequently, a jury may not consider evidence of the defendant's intoxication in  
7 determining whether he committed assault in California. *People v. Williams*, 26  
8 Cal.4th 779, 788, 111 Cal.Rptr.2d 114, 29 P.3d 197 (2001).

9 As a result, the Court of Appeals vacated "Carter's persistent offender sentence  
10 and remand[ed] for resentencing."

11 Based on the above holding, when he returns for resentencing Le'Taxione's  
12 offender score will be 5 (2 points for the other current offense; 2 points for the 1990  
13 Oregon attempted murder offense; and 1 point for the 1988 drug offense). His standard  
14 range is 57-75 months.

15 Le'Taxione has now served over 12 years—significantly more time than the  
16 maximum sentence authorized under the Guidelines. Nevertheless, he remains  
17 incarcerated.  
18

19 To his credit, Le'Taxione has used the time well. He is a published author of  
20 several books which urge non-violence and stress the importance of community. *See*  
21 [http://www.amazon.com/s/ref=nb\\_sb\\_noss?url=search-alias%3Daps&field-  
23 keywords=le%27taxione&x=16&y=10](http://www.amazon.com/s/ref=nb_sb_noss?url=search-alias%3Daps&field-<br/>22 keywords=le%27taxione&x=16&y=10). His most recent book is for children, and is  
24 entitled "I Am More Than A Gang Member."  
25  
26  
27  
28  
29  
30

1           However, it is now clear that every day Le'Taxione serves in prison is an  
2 additional day beyond the correct maximum punishment authorized under the law. This  
3 is time that can never be returned to him.  
4

5 IV.    ARGUMENT  
6

7           *This Court Should Deny Review*

8           The State argues that the decision below conflicts with caselaw from this Court.  
9 For example, the State argues that the decision below conflicts with *In re Bonds*, 165  
10 Wn.2d 135, 196 P.3d 672 (2008). It does not.  
11

12           The decision below in this case has nothing to do with equitable tolling. Thus,  
13 *Bonds* is inapposite.  
14

15           However, if anything, *Bonds* supports the holding below. The State in *Bonds*  
16 argued that this Court could not read into the statute any exception to the one year time  
17 bar not explicitly found in the statute. This Court disagreed, holding that an equitable  
18 tolling exception should be adopted (even though not legislatively prescribed).  
19 “Equitable tolling is a remedy that permits a court to allow an action to proceed when  
20 justice requires it, even though a statutory time period has elapsed. It acts as an exception  
21 to the statute of limitations that should be used sparingly and does not extend broadly to  
22 allow claims to be raised except under narrow circumstances.” *Bonds*, 165 Wn.2d at 141.  
23  
24  
25

26           The decision below is consistent with the holding and logic of *Bonds*.  
27  
28  
29  
30

1           The State also argues that the decision below conflicts with *In re Turay*, 153  
2 Wn.2d 44, 101 P.3d 854 (2004), which it argues rejected the possibility of an “actual  
3 innocence” exception to the time bar. A careful reading of *Turay* reveals otherwise. The  
4 *Turay* decision does not reject the possibility of an “actual innocence” exception to the  
5 time bar for the simply reason that *Turay* is not a time bar case. Instead, this Court in  
6 *Turay* considered only whether there was an “actual innocence” exception to the abuse of  
7 writ doctrine. Rather than reject the “actual innocence” exception altogether, as the State  
8 misleadingly suggests in its motion, this Court simply found that the facts in *Turay* did  
9 not support application of the exception. “We also find no basis here for any exception  
10 comparable to the actual innocence exception under federal law. *Turay* is not confined  
11 pursuant to a criminal conviction, and there is no issue of innocence to consider.” 153  
12 Wn.2d at 56. Indeed, the *Turay* court held out the possibility that the actual innocence  
13 exception could be applied in the correct case. *Id.* (“Instead, to avoid dismissal of this  
14 petition on abuse of the writ grounds, he must, at the least, show that when the State  
15 confined him he was not presently dangerous.”).

16           The Court of Appeals found that Le’Taxione made that required showing—that he  
17 was being unlawfully detained as a persistent offender when, in fact, he was innocent of  
18 that status.  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

1           Because the decision below does not conflict with any published decision, review  
2 should be denied. RAP 13.4(b). Instead, the decision below is consistent with a large  
3 body of caselaw that the State either overlooks or ignores.  
4

5           This Court has repeatedly referred to its “duty” to correct an erroneous sentence.  
6  
7       *See State v. Loux*, 69 Wn.2d 855, 420 P.2d 693 (1966), *cert. denied*, 386 U.S. 997, 87  
8 S.Ct. 1319, 18 L.Ed.2d 347 (1967); *State ex rel. Sharf v. Municipal Court*, 56 Wn.2d 589,  
9 354 P.2d 692 (1960); *State v. Williams*, 51 Wn.2d 182, 316 P.2d 913 (1957); *McNutt v.*  
10 *Delmore*, 47 Wn.2d 563, 288 P.2d 848 (1955), *cert. denied*, 350 U.S. 1002, 76 S.Ct. 550,  
11 100 L.Ed. 866 (1956). In fact, this Court has gone so far to characterize sentences that  
12 fall outside the actual authority of the trial court as “illegal” or “invalid.” *State v. Luke*,  
13 42 Wn.2d 260, 262, 254 P.2d 718 (1953), *cert. denied*, 345 U.S. 1000, 73 S.Ct. 1146, 97  
14 L.Ed. 1406 (1953). *See also State v. Smissaert*, 103 Wn.2d 636, 694 P.2d 654 (1985)  
15 (amending a judgment more than two years after its original entry by increasing the  
16 original erroneous sentence from a maximum of 20 years to life). The *Smissaert* Court  
17 held that such a correction was proper, noting that “(i)n the past, this court has *required*  
18 resentencing to correct invalid sentences.” 103 Wn.2d at 639 (emphasis added), *citing*  
19 *Brooks v. Rhay*, 92 Wn.2d 876, 602 P.2d 356 (1979); *State v. Pringle*, 83 Wash.2d 188,  
20 517 P.2d 192 (1973); *Dill v. Cranor*, 39 Wash.2d 444, 235 P.2d 1006 (1951).  
21  
22  
23  
24  
25  
26

27           “Because the trial court herein imposed an erroneous sentence, and since the  
28 error has now been discovered, the court has both the power and the duty to correct it.” *In*  
29  
30

1 *re Carle*, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980); *see also In re Personal Restraint of*  
2 *Williams*, 111 Wn.2d 353, 361-62, 759 P.2d 436 (1988) (holding that “where a defendant  
3 was sentenced in violation of a provision of the state sentencing law[,]such an error  
4 may be raised in a personal restraint petition.”).

5  
6  
7 One recent example of this Court correcting an unlawful sentence that was  
8 challenged more than a year after finality is *In re Restraint of Lavery*, 154 Wn.2d 249,  
9 111 P.3d 837 (2005). In that case this Court found that the one-year time bar did not  
10 apply where a life sentence was improperly predicated on a conviction which was not  
11 comparable to a strike. In fact, despite the fact that his conviction had been final for  
12 more than a year *and* he had raised the same claim in his direct appeal *and* in an earlier  
13 PRP, this Court re-examined Leonard Lavery’s foreign robbery conviction and reversed  
14 his “persistent offender” life sentence because it was clear, at the time of the successive  
15 PRP, that Lavery’s conviction was not comparable to a Washington strike.  
16  
17  
18

19 Like Lavery, Le’Taxione makes the same attack on his unlawful sentence.  
20

21 Moreover, this Court’s findings of non-comparability in *Lavery* served as the  
22 template for the Court of Appeals’ decision in this case. Both cases turn on the fact that  
23 the foreign crime was a “general intent” crime while the comparable state crime required  
24 proof of specific intent. This Court in *Lavery* noted that “defenses that have been  
25 recognized by Washington courts in robbery cases which may not be available to a  
26 general intent crime.” 154 Wn.2d at 256. This Court also rejected the State’s argument  
27  
28  
29  
30

1 to remand the case for a factual comparability inquiry (given that Lavery pled guilty to  
2 robbery) because “that examination may not be possible because there may have been no  
3 incentive for the accused to have attempted to prove that he did not commit the narrower  
4 offense.” *Id.* at 257.  
5

6  
7 Le’Taxione’s case differs from Lavery’s only because his foreign conviction is an  
8 assault, not a robbery. Otherwise, the cases are virtually identical. Interestingly, the  
9 State takes the same approach that failed in *Lavery*, arguing that because Le’Taxione  
10 pled guilty in California he waived defenses that he never had and inviting this Court to  
11 examine the facts of the crime and conclude, for the first time, that Le’Taxione  
12 committed the crime after forming the requisite specific intent. Le’Taxione responds by  
13 quoting *Lavery*: “Any attempt to examine the underlying facts of a foreign conviction,  
14 facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a  
15 reasonable doubt in the foreign conviction, proves problematic. Where the statutory  
16 elements of a foreign conviction are broader than those under a similar Washington  
17 statute, the foreign conviction cannot truly be said to be comparable.” “As in *Ortega*,  
18 *Lavery* had no motivation in the earlier conviction to pursue defenses that would have  
19 been available to him under Washington’s robbery statute but were unavailable in the  
20 federal prosecution.” *Id.* at 258. Like *Lavery*, Petitioner had no motivation in California  
21 to pursue an unavailable defense and certainly did not admit to specific intent during his  
22 *Alford* plea.  
23  
24  
25  
26  
27  
28  
29  
30

1 Thus, the decision below is entirely consistent with this Court's caselaw.

2  
3 It is unclear what interest the State has in enforcing an illegal sentence. *See In re*  
4 *LaChapelle*, 153 Wn.2d 1, 6, 100 P.3d 805 (2004), where this Court noted the care that  
5 must be given to the review of scoring errors, noting "(t)he difference of a single point  
6 may add or subtract three years to an offender's sentence. Therefore, the accurate  
7 interpretation and application of the SRA is of great importance to both the State and the  
8 offender." Here, the difference between the correct sentence and the erroneous sentence  
9 actually imposed is much, much greater.  
10  
11

12  
13 Le'Taxione certainly has not benefited from the delay associated with the  
14 discovery of this error. Because the issue involves the application of settled facts to the  
15 law, this is not a case where time has injured the State's ability to prove necessary facts.  
16 Instead, it is only Le'Taxione who has been prejudiced. He should have been a free man  
17 years ago.  
18

19  
20 *Additional Exceptions to the Time Bar*

21 In his PRP, Le'Taxione advanced several additional exceptions to the time bar.  
22 The Court of Appeals considered and rejected only one of those exceptions. If this Court  
23 accepts review of the issue of whether Le'Taxione's assault conviction is comparable to a  
24 Washington strike, it should consider all possible exceptions to the time bar.  
25  
26

27 For example, Le'Taxione argued that his sentence exceeded the jurisdiction of the  
28 court. *In re Restraint of Goodwin*, 146 Wn.2d 861, 865-67, 50 P.3d 618 (2002) (a  
29  
30

1 sentence based on a miscalculated upward offender score is in excess of statutory  
2 authority and generally may be challenged at any time). He also argued that a change in  
3 the law that applied retroactively also made the petition timely. *See* PRP at 18-19. The  
4 Court of Appeals likely did not consider these reasons because it took another route to  
5 timeliness. However, they provide a further support for the timeliness of Le'Taxione's  
6 petition and the correctness of the ruling below.  
7

8  
9 The one time bar exception that the Court of Appeals considered and rejected  
10 related to when and how Le'Taxione was given notice of the statutory limitations on the  
11 right to collateral attack. The Court below determined that because Le'Taxione received  
12 a copy of his judgment in 2002 (which included misleading language about the one year  
13 time bar), that "receipt of the judgment and sentence is sufficient to constitute notice."  
14 *See In re Pers. Restraint of Runyan*, 121 Wash.2d 432, 453 n. 16, 853 P.2d 424 (1993)  
15 (sentencing documents containing notice of time limit are sufficient to meet State's  
16 burden of showing notice); *State v. Robinson*, 104 Wash.App. 657, 661, 669-70, 17 P.3d  
17 653 (2001) (statement in judgment and sentence that any collateral attack on the  
18 judgment would be subject to RCW 10.73.090 and RCW 10.73.100 was sufficient to  
19 give defendant notice of one-year statute of limitation applicable to collateral attacks).  
20  
21  
22  
23

24  
25 However, those cases are easily distinguished. Neither case addresses the issue in  
26 this case—whether, after the effective date of the statutory provision that requires a court  
27 advise a defendant at the time of sentencing of the one-year limit on post-conviction  
28  
29  
30

1 relief, a defendant receives a document that includes an incorrect statement of the time  
2 limitations in some other document (which the defendant does not read), a new one year  
3 time limitation begins. Further, as the above-question suggests the answer must be “no.”  
4 Nothing in the correspondence between Le’Taxione and his habeas attorney put  
5 Le’Taxione on notice that he was being informed about a time bar. Further, there is no  
6 legal support for the idea that the time bar runs anew from the date of notice—no matter  
7 who provides that notice or how. Certainly, Le’Taxione had no reason to believe that a  
8 new one year started in 2002. However, if this Court accepts review it should also  
9 consider this issue.  
10  
11  
12  
13

14 In addition, if this Court disagrees with the Court of Appeals on this issue, then it  
15 must do what the Court of Appeals found unnecessary: review the sufficiency of the  
16 evidence supporting the findings of fact related to whether Le’Taxione received notice of  
17 the time bar when he was sentenced.  
18

19 In sum, there were a number of procedural reasons why Le’Taxione’s petition was  
20 timely. The Court of Appeals accepted one of those reasons. The subsequent opinion  
21 does not conflict with any existing caselaw. There were additional exceptions to the one  
22 year time bar that applied, but which the Court of Appeals did not need to reach given its  
23 holding. If this Court accepts review, it should consider all of the exceptions raised  
24 below. However, Le’Taxione submits that this Court should deny review. This case  
25 does not meet the requisite standards justifying review.  
26  
27  
28  
29  
30

1           *Shackling Claim*

2  
3           If this Court accepts review of the “comparability” claim, it should also accept  
4 review of his shackling claim.

5  
6           Petitioner was shackled at his ankles (joined by a chain) during his trial. There  
7 was no hearing to determine whether a specific justification existed for the shackles.  
8 Instead, Le’Taxione was shackled because he faced a life sentence. RP IX 345-46. As  
9 defense counsel explained, Le’Taxione apparently preferred the shackles to wearing a  
10 stun belt, an equally unjustified, but slightly more prejudicial restraint. RP VII 171-72.  
11  
12 *See also State v. Flieger*, 91 Wash.App. 236, 955 P.2d 872, 874 (1998) (If seen, a stun  
13 belt “may be even more prejudicial than handcuffs or leg irons because it implies that  
14 unique force is necessary to control the defendant.”).

15  
16  
17           While the Court and parties may have presumed the shackles were not visible to  
18 jurors, that presumption was rebutted when, after Le’Taxione informed counsel that one  
19 juror observed him being escorted by jail officers in the hallway, Juror #11 was  
20 juror observed him being escorted by jail officers in the hallway, Juror #11 was  
21 questioned about his observations and noted that the hallway was not the first place he  
22 had observed Petitioner shackled—the shackles were “plainly visible” during *voir dire*.  
23

24  
25           With the knowledge that the shackles were not hidden, but had been “plainly  
26 visible” from the jury pew, defense counsel sought a mistrial. The trial court denied that  
27 motion, and did not inquire of other jurors, reasoning that, regardless of what jurors  
28 observed, Le’Taxione could not have possibly been prejudiced by the shackles, stating, “I  
29  
30

1 can't imagine it makes any difference whatsoever in this trial." *Compare Illinois v.*  
2 *Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970) (Supreme Court  
3 recognized the "inherent disadvantages" to shackling a defendant at trial: physical  
4 restraints may not only cause jury prejudice and impair the presumption of innocence,  
5 they may also detract from the dignity and decorum of the proceeding and impede the  
6 defendant's ability to communicate with his counsel).  
7  
8

9  
10 Although Petitioner contends the trial record plainly demonstrates the visibility of  
11 the shackles, notwithstanding the attempt to obscure them with a garbage can,  
12 Le'Taxione and another witness described in their respective PRP declarations how the  
13 shackles likely remained visible throughout the trial. The State submitted no new  
14 declarations to rebut either the trial record or Petitioner's post-conviction evidence, other  
15 than to argue that Petitioner and his witness are both "incompetent" to comment on what  
16 likely could be seen by jurors. *But see In re Restraint of Davis*, 152 Wn.2d 647, 677-78,  
17 101 P.3d 1 (2004) ("Because the record was unclear as to the extent to which the jury  
18 could detect that the defendant was physically restrained, this court remanded for a  
19 hearing.").

20  
21  
22  
23  
24 Le'Taxione raised and lost this claim on direct appeal was dismissed because he  
25 "has not shown prejudice." In other words, the Court of Appeals applied the harm  
26 standard that applies to non-constitutional errors. At the time, Washington caselaw  
27 supported this conclusion. *See e.g., State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d  
28  
29  
30

1 1061 (1988) (“In order to succeed on his claim, the Defendant must show the shackling  
2 had a substantial or injurious effect or influence on the jury's verdict.”); *State v. Elmore*,  
3 139 Wn.2d 250, 985 P.2d 289 (1999) (same).  
4

5  
6 Petitioner re-raised this claim in his PRP, arguing that the law regarding the  
7 requisite harm standard had changed. The Court of Appeals rejected this claim because it  
8 concluded that *Deck v. Missouri*, 544 U.S. 622, 624 (2005), announced a new rule that  
9 did not apply retroactively. 154 Wn. App. at 185 (“...under federal law, *Deck* imposes a  
10 new rule applicable to the penalty phase of a trial that is not retroactive. Consequently, it  
11 did not significantly change the law material to Carter’s conviction.”).  
12  
13

14 To the contrary, as Petitioner demonstrates below, *Deck* did not create a new rule  
15 with regard to the prejudice standard. However, *Deck* did effectively overrule the  
16 Washington cases which applied a non-constitutional harm standard on review. Because  
17 it is clear that the incorrect standard of review was applied on direct appeal (based on  
18 existing Washington precedent); because that law has now changed; and because  
19 Petitioner’s conviction would have been reversed on direct appeal if the correct standard  
20 of review had been applied, there is a much stronger case that review should be accepted  
21 on this claim than the previous claim.  
22  
23  
24  
25

26 It is indisputable that the Court of Appeals applied an incorrect standard of review  
27 by placing the burden of proof on Le’Taxione to demonstrate prejudice, rather than  
28  
29  
30

1 placing the burden on the State to disprove the possibility of prejudice beyond a  
2 reasonable doubt.  
3

4       The United States Supreme Court unequivocally held in *Deck v. Missouri*, 544  
5 U.S. at 624 (2005), “where a court, without adequate justification, orders the defendant to  
6 wear shackles that will be seen by the jury, the defendant need not demonstrate actual  
7 prejudice to make out a due process violation.” 544 U.S. at 635. In discussing the  
8 “inherent prejudice” resulting from shackling a defendant, the Supreme Court noted, like  
9 the consequences of compelling a defendant to stand trial while medicated, the negative  
10 effects that result from shackling “cannot be shown from a trial transcript.” 544 U.S. at  
11 635 (*citing Riggins v. Nevada*, 504 U.S. 127, 137 (1992)). The Court then found the  
12 State failed to prove harmlessness “beyond a reasonable doubt” and reversed. 544 U.S.  
13 at 635 (*citing Chapman v. California*, 386 U.S. 18, 24 (1967)).  
14  
15  
16  
17

18       Moreover, *Deck* did not make new guilt-phase law. 544 U.S. at 626 (“The answer  
19 is clear: The law has long forbidden routine use of visible shackles during the guilt  
20 phase.”). *See also Marquard v. Secretary for Dept. of Corrections* 429 F.3d 1278,  
21 1311(11<sup>th</sup> Cir. 2005) (While *Deck* was announced subsequent to appellant's conviction,  
22 *Deck's* effect was to extend existing precedent governing shackling to the penalty phase  
23 of a capital trial. *Deck* simply reiterated the previously established rules applicable to the  
24 guilt phase of all criminal trials). Thus, this standard of review was required by the  
25 Constitution at the time of Petitioner’s appeal.  
26  
27  
28  
29  
30

1 At the very outset of the *Deck* opinion the Court announced its holding,  
2 immediately followed by citations to two of the Court's precedents, the most recent of  
3 which was decided in 1986: We hold that the Constitution forbids the use of visible  
4 shackles during the penalty phase, as it forbids their use during the guilt phase, *unless*  
5 that use is "justified by an essential state interest"-such as the interest in courtroom  
6 security-specific to the defendant on trial. *Holbrook v. Flynn*, 475 U.S. 560, 568-569, 106  
7 S.Ct. 1340, 89 L.Ed.2d 525 (1986); *see also Illinois v. Allen*, 397 U.S. 337, 343-344, 90  
8 S.Ct. 1057, 25 L.Ed.2d 353 (1970). *Deck*, 544 U.S. at 624.

9  
10  
11  
12  
13 The Court's legal analysis further illustrates how deeply rooted are the principles  
14 upon which *Deck* is based. The Court began its discussion by observing that "[t]he law  
15 has *long forbidden* routine use of visible shackles during the guilt phase; it permits a  
16 State to shackle a criminal defendant only in the presence of a special need." *Deck*, 544  
17 U.S. at 626 (emphasis supplied). The Court then engaged in a lengthy survey of English  
18 common law and early American jurisprudence reaching as far back as 1769, in which it  
19 referred to the general rule against shackling as "ancient." *Id.* The Court concluded its  
20 summary of early court decisions by observing that those decisions "settled virtually  
21 without exception on a basic rule embodying notions of fundamental fairness: Trial  
22 courts may not shackle defendants routinely, but only if there is a particular reason to do  
23 so." *Id.* at 627. The Court then turned to its (relatively) more recent decisions in *Allen* and  
24 *Holbrook*. *Allen*, a 1970 case, dealt with the permissible remedies available to a trial  
25  
26  
27  
28  
29  
30

1 judge when faced with an abusive and disruptive defendant during a criminal jury trial. In  
2 discussing the option of binding and gagging a defendant during trial, the Court observed:  
3

4 [E]ven to contemplate such a technique, much less see it, arouses a feeling that no  
5 person should be tried while shackled and gagged except as a last resort. Not only  
6 is it possible that the sight of shackles and gags might have a significant effect on  
7 the jury's feelings about the defendant, but the use of this technique is itself  
8 something of an affront to the very dignity and decorum of judicial proceedings  
9 that the judge is seeking to uphold. Moreover, one of the defendant's primary  
10 advantages of being present at the trial, his ability to communicate with his  
11 counsel, is greatly reduced when the defendant is in a condition of total physical  
12 restraint.

11 *Allen*, 397 U.S. at 344.

12 Sixteen years after *Allen*, the Court decided *Holbrook*, in which it confronted the  
13 permissible scope under the due process clause of enhanced security measures in the  
14 courtroom during a criminal trial. The Court framed the issue as follows:  
15

16 We have recognized that certain practices pose such a threat to the "fairness of the  
17 factfinding process" that they must be subjected to "close judicial scrutiny."  
18 *Estelle v. Williams*, 425 U.S. 501, 503-504, 96 S.Ct. 1691, 1692-1693, 48 L.Ed.2d  
19 126 (1976). Thus, in *Estelle v. Williams*, we noted that where a defendant is forced  
20 to wear prison clothes when appearing before the jury, "the constant reminder of  
21 the accused's condition implicit in such distinctive, identifiable attire may affect a  
22 juror's judgment." *Id.*, at 504-505, 96 S.Ct. at 1693. Since no "essential state  
23 policy" is served by compelling a defendant to dress in this manner, *id.*, at 505, 96  
24 S.Ct. at 1693, this Court went no further and concluded that the practice is  
25 unconstitutional. This close scrutiny of inherently prejudicial practices has not  
26 always been fatal, however. In *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25  
27 L.Ed.2d 353 (1970), the Court emphasized that a defendant may be prejudiced if  
28 he appears before the jury bound and gagged. "Not only is it possible that the sight  
29 of shackles and gags might have a significant effect on the jury's feelings about the  
30 defendant, but the use of this technique is itself something of an affront to the very  
dignity and decorum of judicial proceedings that the judge is seeking to uphold."  
*Id.*, at 344, 90 S.Ct., at 1061. Yet the Court nonetheless observed that in certain  
extreme situations, "binding and gagging might possibly be the fairest and most

1 reasonable way to handle” a particularly obstreperous and disruptive defendant.  
2 *Ibid.* The first issue to be considered here is thus whether the conspicuous, or at  
3 least noticeable, deployment of security personnel in a courtroom during trial is  
4 the sort of *inherently prejudicial practice that, like shackling, should be permitted*  
5 *only where justified by an essential state interest specific to each trial.*

6 *Holbrook*, 475 U.S. at 568-69 (emphasis supplied).

7 The *Deck* Court noted that:

8 Lower courts have treated these statements [from *Allen* and *Holbrook*] as setting  
9 forth a constitutional standard that embodies Blackstone's rule [enunciated in  
10 1769]. Courts and commentators share *close to a consensus* that, during the guilt  
11 phase of a trial, a criminal defendant has a right to remain free of physical  
12 restraints that are visible to the jury; that the right has a constitutional dimension;  
13 but that the right may be overcome in a particular instance by essential state  
14 interests such as physical security, escape prevention, or courtroom decorum.

15 *Deck*, 544 U.S. at 628 (emphasis supplied).

16 The Court continued: “In light of this precedent, and of a lower court consensus  
17 disapproving routine shackling dating back to the 19th century, *it is clear that this*  
18 *Court's prior statements gave voice to a principle deeply embedded in the law.*” *Id.* at 629  
19 (emphasis supplied).

20 The Court of Appeals cited to one federal decision holding that *Deck* created a  
21 new penalty phase rule—despite the fact that *Le’Taxione* does not raise a capital penalty  
22 phase claim. On the other hand, the court below ignored several federal appellate courts  
23 have applied the principles enunciated in *Deck* to §2254 appeals in which the petitioners’  
24 convictions had become final long before *Deck* was decided. For example, in *Larson v.*  
25 *Palmateer*, 515 F.3d 1057, 1061-63 (9<sup>th</sup> Cir.), *cert. denied*, 129 S.Ct. 171 (2008), the  
26  
27  
28  
29  
30

1 Ninth Circuit treated *Deck's* holding as “clearly established Federal law” for habeas  
2 purposes—without mentioning *Teague*—even though Larson’s convictions became final  
3 eight years before *Deck* was decided. *See also Lakin v. Stine*, 431 F.3d 959, 963 (6<sup>th</sup> Cir.  
4 2005), *cert. denied*, 547 U.S. 1118 (2006) (“principle that shackling a defendant at trial  
5 without an individualized determination as to its necessity violates the due process clause  
6 was clearly established long before *Deck* was decided”; no reference to *Teague*);  
7 *Mendoza v. Berghuis*, 544 F.3d 650, 653 (6<sup>th</sup> Cir. 2008), *cert. denied*, 129 S.Ct. 1996  
8 (2009) (*Deck's* holding was “clearly established” law for habeas purposes even though  
9 *Deck* was decided “well after all of the relevant state court decisions here”; no reference  
10 to *Teague*).

11  
12  
13  
14  
15 Le'Taxione is willing to accept sentencing relief, even though his trial was marred  
16 by an uncorrected constitutional error. However, if this Court accepts review of the  
17 “comparability” issue, it should also accept review of this claim.  
18

19  
20 *Release Pending Review*

21 RAP 16.15(b) provides that an “appellate court may release a petitioner on bail or  
22 personal recognizance before deciding the petition, if release prevents further unlawful  
23 confinement and it is unjust to delay the petitioner's release until the petition is  
24 determined.”  
25

26  
27 This is the exact situation described by the rule.  
28  
29  
30



## OFFICE RECEPTIONIST, CLERK

---

**From:** Jeff Ellis [jeffreyerwinellis@gmail.com]  
**Sent:** Monday, June 07, 2010 11:26 AM  
**To:** Melody Crick  
**Cc:** OFFICE RECEPTIONIST, CLERK  
**Subject:** Re: PRP of Carter (aka Le'Taxione), No. 84606-5  
**Attachments:** CarterMDR.pdf

Attached please find for filing an answer to the State's motion for discretionary review, a cross-motion for discretionary review; and a motion for release of Petitioner. I have served opposing counsel by sending this email and its attachment to Pierce Co DPA Crick.

Please let me know if you have any questions.

--

Jeff Ellis  
Attorney at Law  
Oregon Capital Resource Counsel  
621 SW Morrison Street, Ste 1025  
Portland, OR 97205  
206/218-7076 (c)

Current Mailing Address:  
705 Second Ave., Ste 401  
Seattle, WA 98104  
206/262-0300 (o)  
206/262-0335 (f)