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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO**

In re Personal Restraint Petition of)

No. **37048-4**

LE'TAXIONE)

**PERSONAL RESTRAINT
PETITION**

aka ERNEST A. CARTER,)
Petitioner.)

A. STATUS OF PETITIONER

Le'Taxione (formerly known as Ernest Carter), Petitioner, seeks relief from confinement. Le'Taxione (DOC #746316) is currently incarcerated at the Washington State Reformatory in Monroe, Washington serving a life without parole sentence.

Le'Taxione was convicted by a jury in 1998 of two counts of first-degree robbery in Pierce County Superior Case No. 97-1-04547-1. After trial, the court found that his criminal history included two prior "most serious" offenses which counted as "criminal history." Consequently, Le'Taxione was sentenced as a "persistent offender" to life without parole. A copy of the *Judgment* is attached as Appendix A.

Le'Taxione seeks to proceed *in forma pauperis*. A *Motion to Proceed In Forma Pauperis* and a signed *Statement of Finances* has been filed along with this petition.

1 B. GROUNDS FOR RELIEF

2 1. Le'Taxione's right to due process and a fair trial was violated when he was
3 forced to appear in shackles visible to his jurors. He was prejudiced because the shackles
4 suggested to his jury—a jury presented with the factual issue of whether he armed during
5 the charged robberies—that he was dangerous. Because the law regarding the harm
6 arising from shackling errors has changed and because that change should be applied to
7 this case, Le'Taxione should be permitted to raise this claim more than one year after his
8 conviction became final. Turning then to the merits, Le'Taxione was harmed by this
9 error and is entitled to a new trial.
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11 2. Le'Taxione is not a persistent offender. His California assault conviction is
12 not comparable to a Washington strike. In addition, that conviction washes out of his
13 offender score. Because the law construing the California crime of assault has changed,
14 he can raise the comparability issue in this petition. Because the improper inclusion of a
15 conviction that washes out and the failure to include any offender score calculation
16 constitute facial invalidities, he can raise these issues more than one year after his
17 conviction was final. As a result, his *Judgment* should be vacated.
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24 C. STATEMENT OF FACTS

25 *Procedural History*

26 On November 6, 1997, Le'Taxione was charged in Pierce County Superior Court
27 of two first-degree robbery counts (No. 97-1-04547-1). He was convicted, as charged, by
28 a jury on August 18, 1998. On September 23, 1998, he was sentenced to life in prison,
29 after the trial court found he was a “persistent offender.”
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1 Le'Taxione appealed (Case No. 23940-0-II). This Court affirmed in an
2 unpublished decision issued on April 14, 2000, which is attached as Appendix B. In that
3 appeal, he raised the issue of whether the trial court abused its discretion in denying a
4 mistrial motion after a member of the venire saw him in shackles and whether
5 Petitioner's California assault conviction was "comparable."
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8 Le'Taxione next sought discretionary review in the Washington Supreme Court in
9 case number 69695-1. In that petition, he raised only comparability issues. Review was
10 denied on October 11, 2000. *See* Appendix C. The mandate from the direct appeal
11 issued on October 18, 2000.
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14 Less than a year later, on October 10, 2001, Le'Taxione filed a petition for habeas
15 corpus in the United States District Court, Western District of Washington (No. 01-
16 5581). That petition raised only the comparability issue raised in the petition for review.
17 The habeas petition was dismissed on June 5, 2002 because the comparability issue had
18 not been "exhausted," *i.e.*, presented to the state's highest court as a federal constitutional
19 violation. *See* Appendix D, p. 4 ("The[re] is no mention of any federally protected right
20 or interest in the petition."). Habeas counsel did not raise the shackling issue, despite
21 Petitioner's specific request, because he failed to appreciate that a claim of unfair
22 shackling is grounded on federal constitutional principles. *See* Appendix E (letter from
23 habeas counsel).
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28 That was not habeas counsel's only error. Because habeas counsel failed to timely
29 inform Le'Taxione that the United States District Court had dismissed his petition and
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1 did not explain the right to appeal (nor, did he file a notice of appeal), no appeal was
2 filed. *See* Appendix F (Admonition by Washington State Bar).

3
4 Le'Taxione has not filed a previous Personal Restraint Petition attacking this
5 *Judgment.*

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7 *Facts of the Offense*

8 On direct appeal, this Court described the facts as follows:

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10 On November 4, 1997, Sabrina Raulins and Carter were together in Carter's
11 apartment, smoking crack cocaine. Raulins drove Carter, in her 1979 light blue
12 Lincoln Continental, to a Subway restaurant in the 6400 block of Yakima Avenue
13 in Tacoma. Carter entered, without any money. He was wearing a flannel shirt,
14 baseball cap, and baggy nylon athletic pants; he was acting antsy and nervous
15 and had his hand under his shirt. After placing an order, Carter told Subway
16 employee Dennis Duperry, 'Give me all your money' and 'I'm going to blow you
17 away if you don't give me all the money.' Duperry gave Carter \$80 to \$130,
18 Carter left, and Duperry called 911. Raulins drove Carter back toward his
19 apartment. On the way, she dropped him off, and he went 'somewhere,'
20 eventually returning to his apartment with \$80 to \$100 worth of crack cocaine,
21 which he and Raulins smoked.

22
23 In the late hours of the night, Raulins drove Carter to a 7-Eleven store in the
24 9600 block of Pacific Avenue in Tacoma. From across the street at a commercial
25 car lot, Jack Schnoor observed Carter exit Raulins' car and stuff what appeared to
26 be an L-frame revolver into his pants and walk into the store. Raymond Leroy, the
27 car lot security officer, was with Schnoor; he also observed 'a black male get out
28 of the vehicle and stuff something underneath his shirt before entering the 7-
29 Eleven. Inside the 7-Eleven, Carter asked the store clerk about some lighter fluid
30 then he left without incident. Carter got back in Raulins' car, they circled the
parking lot a few times, and proceeded north on Pacific Avenue. Carter asked
Raulins to stop at the AM/PM Mini-Mart located in the 8400 block of Pacific
Avenue. He went inside with his hand underneath his flannel shirt; it remained
there while he was in the store. Carter asked about prices for gum, asked for a bag,
which employee Shane Arnold gave him, and then, in a forceful tone of voice,
demanded, 'Open the register drawer.' Arnold complied, setting the drawer on the
counter. Carter took roughly \$75 in cash and told Arnold to turn around. Arnold
put his hands up and turned around, and while doing so, saw Raulins' car outside
the store. Arnold took another look at the car while locking the store's door after

1 Carter had left. Arnold called 911, providing a description of Carter and Raulins'
2 vehicle.

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4 At trial, Raulins testified that Carter: had gone into the AM/PM Mini-Mart without
5 any money; had been wearing the flannel shirt while they were together; and had
6 taken the shirt off in her car before the police stopped them. Duperry testified that
7 he was a hundred percent sure that Carter was the person who had robbed him.
8 Schnoor testified he was one hundred percent sure Carter was the person he
9 saw. But Leroy was unable to identify Carter. Arnold testified he was sure that
10 Carter was the person who robbed him, and he thought Carter possibly had a
11 weapon underneath his shirt, but he didn't know what was there.

12 *See Appendix B (internal citations removed).*

13 A few additional facts are necessary. The primary defense at trial (and the lead
14 issue in the appeal) was to attack the claim that the robber displayed what appeared to be
15 a deadly weapon. Both store clerks testified that they did not know whether the robber
16 was armed.

17 During trial, a potential juror stated that he observed Petitioner wearing shackles
18 on his legs. That juror indicated that the shackles were easily observed from the jury box.
19 After that juror was excused, a small garbage can was placed in front of the defense table.
20 However, as the attached declarations from Le'Taxione and an attendee at trial state, it
21 was still relatively easy for jurors to see the shackles on his legs, which he was forced to
22 wear for the entire trial. *See Declaration of Le'Taxione attached as Appendix G;*
23 *Declaration of Katherine Clay attached as Appendix H.*
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1 *The Prior Assault Conviction from California*

2 LeTaxione was sentenced to life in prison after the court found that he “struck
3 out.” Specifically, the trial court found that Petitioner had two prior most serious
4 offenses which both counted as “criminal history.”
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6 Petitioner was convicted in 1983 in Fresno County, California of assault of a
7 police officer pursuant to Cal. Penal Code § 245 (c). The Information alleged that
8 Petitioner “committed as assault with a firearm, to wit: a gun,” upon a police officer
9 “engaged in the performance of his duties.” See Information attached as Appendix I.
10 Petitioner pled guilty on May 20, 1983. See Appendix J. He was sentenced on June 20,
11 1983, after the Court informed Petitioner that he had been misadvised of the maximum
12 possible sentence for the crime. See Appendix K, *Transcript of Sentencing* at p. 2. The
13 Court ordered Petitioner to serve 365 days in custody (with credit for time served),
14 suspended the remainder of the sentence, put Petitioner on probation, and set several
15 probationary conditions. Because he was sentenced to jail, after judgment the conviction
16 became a misdemeanor under California law. See Cal. Penal Code § 17 (b)(1). In
17 addition, the sentencing court found “this is not a crime of violence.” *Id.* at 8.
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24 Le’Taxione was later convicted and sentenced on December 19, 1988 of unlawful
25 possession of a controlled substance and of Attempted Murder (in Oregon) in 1990.
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1 D. ARGUMENT

2 **First Claim for Relief: Le'Taxione was Unconstitutionally Shackled. Since his**
3 **Direct Appeal, The Law Has Changed and That Change Should be Applied to**
4 **Him.**

5 *Introduction*

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7 Le'Taxione was shackled at his trial. His shackles were visible to his jury. *See*
8 *Declarations* attached as Appendix G and H. *See also* Appendix B (quoting excused
9 juror that “they were plainly visible from where {he} was sitting in the pew.”). If there is
10 any question about this fact, this Court should remand for an evidentiary hearing. The
11 only reason given by the trial court supporting the decision to force Petitioner to appear
12 before his jury wearing shackles was “jail policy.”

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15 In the direct appeal opinion, the Court of Appeals held that in order “to succeed on
16 his claim,” Le'Taxione must “show the shackling had a substantial and injurious effect on
17 the jury’s verdict.” *Appendix B*, p. 5. In case there was any doubt that the burden of
18 proving harm fell on Petitioner, this Court later stated: “even if a deliberating juror had
19 observed Carter in shackles during voir dire, as had Juror No. 11, *Carter has not shown*
20 *prejudice.*” *Id.*

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24 That statement of law is no longer valid. Since the direct appeal decision, the law
25 has changed. The law now requires the State to prove the harmlessness of shackling
26 beyond a reasonable doubt. “Thus, where a court, without adequate justification, orders
27 the defendant to wear shackles that will be seen by the jury, the defendant need not
28 demonstrate actual prejudice to make out a due process violation.” *Deck v. Missouri*,
29 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). Instead, the State must prove
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1 “beyond a reasonable doubt that the [shackling] error complained of did not contribute to
2 the verdict obtained.” *Deck, supra* (quoting *Chapman v. California*, 386 U.S. 18, 24, 87
3 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

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5 This change in the law justifies bringing this issue, now.

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7 *Shackling and the Applicable Standard of Review*

8 This Court’s direct appeal decision required Petitioner to “show the shackling had
9 a substantial or injurious effect or influence on the jury’s verdict.” Appendix B, p. 5.

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11 The opinion relies on earlier state cases in accord, specifically *State v. Hutchinson*, 135
12 Wn.2d 863, 888, 959 P.2d 1061 (1998)(“In order to succeed on his claim, the Defendant
13 must show the shackling had a substantial or injurious effect or influence on the jury's
14 verdict.”) and *State v. Elmore*, 139 Wn.2d 250, 274, 985 P.2d 289 (1999) (“In order to
15 succeed on such claim, a defendant must show prejudice, that is, ‘a substantial or
16 injurious effect or influence on the jury's verdict.’”) for support. Thus, at the time of his
17 direct appeal, it was clear that state law assigned the burden of demonstrating harm to the
18 defendant.

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22 Since that time, as demonstrated above, the United States Supreme Court has
23 made it clear that the proper direct review standard requires the State, not the defendant,
24 to demonstrate the harmlessness of the error beyond a reasonable doubt. *Deck, supra*.

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26 This distinction and change in the law is significant.

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28 Assigning the State the burden of proving beyond a reasonable doubt that an error
29 did not contribute to the verdict is much different than requiring a defendant to
30 demonstrate that shackling had a substantial and injurious effect on the verdict. Thus,

1 there can be little question but that the law has changed and that the change is material.
2 RCW 10.73.100 (6). *See also Lakin v. Stine*, 431 F.3d 959 (6th Cir. 2005) (Criticizing the
3 application of a harm standard pre-Deck and noting “*Deck* makes clear, however, that it
4 is the State's burden, and not the defendant's.”)
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7 The question then is whether “sufficient reasons exist to require retroactive
8 application of the changed legal standard.” *Id.* Because constitutional error has required
9 application of the *Chapman* standard for many years and because state courts evaluating
10 this issue have consistently applied an improper standard of review, it follows that
11 sufficient reasons exist to apply the changed standard. In essence, Le’Taxione is asking
12 this Court to apply the standard that should have been applied (and was constitutionally
13 mandated) on direct review.
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17 Le’Taxione begins by tracing the origins of the application of an erroneous legal
18 standard to shackling error. As mentioned above, this Court cited to *Hutchinson, supra*,
19 as authority for applying the substantial and injurious standard of review. *Hutchinson* in
20 turn drew its harm standard from *Rhoden v. Rowland*, 10 F.3d 1457, 1460 (9th Cir. 1993).
21 However, *Rhoden* was a habeas case that quoted the harm standard established in *Brecht*
22 *v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). In announcing
23 this harm standard, *Brecht* explained that because habeas and direct review fulfill
24 different functions, the limited nature of habeas review dictates a more onerous harm
25 standard. *Id.*, 507 U.S. at 633-38. As one court has explained, “Because state courts
26 [must apply *Chapman*] on direct review, it makes little sense to require federal habeas
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1 courts to engage in an identical analysis...” *Starr v. Lockhart*, 23 F.3d 1280, 1292 (8th
2 Cir. 1994).

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4 On the other hand, *Chapman* has applied to constitutional errors since its inception
5 in 1967. The characterization of improper shackling as constitutional error is not new.
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7 *Deck*, 544 U.S. at 628 (“While these earlier courts disagreed about the degree of
8 discretion to be afforded trial judges, they settled virtually without exception on a basic
9 rule embodying notions of fundamental fairness: Trial courts may not shackle defendants
10 routinely, but only if there is a particular reason to do so....More recently, this Court has
11 suggested that a version of this rule forms part of the Fifth and Fourteenth Amendments'
12 due process guarantee....Courts and commentators share close to a consensus that, during
13 the guilt phase of a trial, a criminal defendant has a right to remain free of physical
14 restraints that are visible to the jury; *that the right has a constitutional dimension*; but that
15 the right may be overcome in a particular instance by essential state interests such as
16 physical security, escape prevention, or courtroom decorum.”) (internal citations removed
17 and emphasis added). Thus, application of the *Chapman* standard to this case simply
18 applies the correct standard of review, albeit one that is different from the standard
19 mandated by Washington Supreme Court cases.
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25 *Harm*

26 The harm to Petitioner arises from the fact that the primary disputed element at
27 trial was whether Petitioner was armed. As long ago as 1897, the Washington Supreme
28 Court observed that keeping a defendant in restraints during trial might be a violation of
29 the defendant's constitutional rights because “ ‘the jury must necessarily conceive a
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1 prejudice against the accused, as being in the opinion of the judge a dangerous man, and
2 one not to be trusted, even under the surveillance of officers.’ ” *State v. Williams*, 18
3 Wash. 47, 51, 50 P. 580 (1897) (quoting *State v. Kring*, 64 Mo. 591 (1877)). Thus, the
4 shackles in this case provided proof of a disputed element.
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6
7 At a minimum, Le’Taxione is entitled to an evidentiary hearing on whether jurors
8 were able to observe his shackles. See *In re Restraint of Davis*, 152 Wn.2d 647, 101 P.3d
9 1 (2004) (Reversing death sentence after remanding case for evidentiary hearing on
10 whether jurors were able to see leg shackles). If they were, or if the State does not
11 present evidence disputing this claim (*In re Rice*, 118 Wn.2d 876, 885, 828 P.2d 1086,
12 *cert. denied*, 506 U.S. 958 (1992), then he is entitled to a new trial.
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15 **Second Claim for Relief: Petitioner’s California Assault Conviction Should Not**
16 **Have Been Included in His Offender Score Because Is Not Comparable to a**
17 **Washington “Most Serious Offense” and Washes Out of His Offender Score.**

18 Petitioner’s 1983 California conviction for assault with a firearm is not
19 comparable to a Washington “most serious offense.” If it is comparable to a Washington
20 crime, it washes out. Therefore, Le’Taxione is not a persistent offender and should not
21 have been sentenced to life in prison. In essence, Le’Taxione is innocent of the persistent
22 offender finding that increased his sentence to “life.”
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1 1. A Material and Retroactive Change in the California Definition of Assault
2 Demonstrates that Le'Taxione's Conviction Does Not Constitute a
3 "Strike."

4 *Introduction*

5 In 1983, Le'Taxione was charged and convicted in California of assault on a
6 police officer with a firearm. The sentencing court found this conviction equivalent to
7 second-degree assault in Washington. In 2000, this Court affirmed that conclusion on
8 appeal. *See Appendix B*

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11 In 2001, the California Supreme Court construed the original meaning of its
12 assault statute (a statute in existence since 1872) and held that assault is a general intent
13 crime and, as such, defenses such as intoxication do not apply. *People v. Williams*, 26
14 Ca.4th 779, 29 P.3d 197 (2001). Thus, it is now clear that the California offense of
15 assault with a firearm is not comparable to Washington's second-degree assault crime—
16 a specific intent crime that allows intoxication as a defense. Le'Taxione is not a
17 persistent offender and he should not be sentenced to life in prison.

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21 *Comparability Analysis*

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23 This Court previously concluded (on direct appeal) that Le'Taxione's assault
24 conviction was comparable to a second-degree assault. This Court began its analysis by
25 noting that "(t)o determine if a foreign crime is comparable to a Washington offense, ...
26 the elements of the out-of-state crime must be compared to the elements of Washington
27 criminal statutes in effect when the foreign crime was committed." *State v. Morley*, 134
28 Wn.2d 588, 603, 952 P.2d 167 (1998). On this point, the law remains the same.

1 However, the law construing California's statutory definition of assault has
2 changed. The California crime of assault with a firearm upon a peace officer was
3 defined in 1983 as: Every person who commits an assault with a firearm upon the person
4 of a peace officer ... and who knows or reasonably should know that the victim is a peace
5 officer ... engaged in the performance of his or her duties, when the peace officer ... is
6 engaged in the performance of his or her duties shall be punished by imprisonment in the
7 state prison for four, six or eight years. Former Cal.Penal Code sec. 245(c) (Deering
8 1983).

9 As this Court further explained in the direct appeal opinion, in 1983 second degree
10 assault in Washington was defined as: Every person who, under circumstances not
11 amounting to assault in the first degree shall be guilty of assault in the second degree
12 when he ... {s}hall knowingly assault another with a weapon or other instrument or thing
13 likely to produce bodily harm. Former RCW 9A.36.020(1)(c) (1983), repealed by Laws
14 of 1986, ch. 257, sec. 9.

15 This Court then correctly focused on the comparative definitions of "assault."

16 Starting with this state, because "assault" is not defined in the Washington
17 criminal code, courts rely upon the common law definition of assault, stating that an
18 assault "is an attempt, with unlawful force, to inflict bodily injury upon another,
19 accompanied with apparent present ability to give effect to the attempt if not prevented."
20 *State v. Jimerson*, 27 Wn.App. 415, 418, 618 P.2d 1027 (1980); see also *State v. Wilson*,
21 125 Wn.2d 212, 218, 883 P.2d 320 (1994) ("Three definitions of assault are recognized
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1 in Washington: (1) an attempt, with unlawful force, to inflict bodily injury upon another
2 {attempted battery}; (2) an unlawful touching with criminal intent {actual battery}; and
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4 (3) putting another in apprehension of harm whether or not the actor intends to inflict or
5 is capable of inflicting that harm {common law assault}.” (Quotation omitted)). Under
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7 RCW 9A.36.021, the specific intent either to create apprehension of bodily harm or to
8 cause bodily harm is an essential element of assault in the second degree. *See State v.*
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10 *Byrd*, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995); *State v. Austin*, 59 Wash.App. 186,
11 192-93, 796 P.2d 746 (1990); *State v. Krup*, 36 Wash.App. 454, 457, 676 P.2d 507,
12 *review denied*, 101 Wn.2d 1008 (1984).

13
14 Thus, an “assault” in Washington is a specific intent crime.

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16 Switching then to California law, this Court’s direct appeal opinion correctly notes
17 that under California law, “assault” was (and still is and has been since 1872) defined as
18 “an unlawful attempt, coupled with a present ability, to commit a violent injury on the
19 person of another .” Cal.Penal Code sec. 240 (Deering 1983). However, after this
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21 Court’s decision on direct appeal, the California Supreme Court construed the original
22 meaning of the statutory definition of assault in *People v. Williams*, 26 Cal.4th 779, 29
23 P.3d 197 (2001).

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25 In *Williams*, the California Supreme Court held that the crime of “assault is a
26 general intent crime.” *Id.* at 784. The California court further explained that to commit
27 an assault the defendant must intentionally engage in conduct that will likely produce
28 injurious consequences, the prosecution need not prove a specific intent to inflict a
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1 particular harm. “The crime of assault has always focused on the nature of the act and
2 *not on the perpetrator's specific intent.*” *Id.* at 786 (emphasis supplied). Unlike
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4 Washington law which requires, at a minimum, the intent to cause apprehension of a
5 battery, under California law an assault requires only “the general intent to willfully
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7 commit an act the direct, natural and probable consequences of which if successfully
8 completed would be the injury to another.” *Id.* at 784. The California law requires only
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10 that a “defendant intended to commit an act likely to result in such physical force, not
11 whether he or she intended a specific harm.” *Id.* The requirement of “likely to result in
12 physical force” is measured from the point of an objective observer, rather than focusing
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14 on the subjective intent of the actor. *Id.* at 788. For example, a defendant who honestly
15 believes that his act was not likely to result in a battery is still guilty of assault if a
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17 reasonable person, viewing the facts known to defendant, would find that the act would
18 directly, naturally and probably result in a battery. *Id.* at 788, n. 3.

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20 The differences between the requisite mental states are significant. Under
21 California law a trier-of-fact cannot “consider evidence of defendant's intoxication in
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23 determining whether he committed assault.” *Williams*, at 788. In contrast, under
24 Washington law, because second-degree assault is a specific intent crime it can be
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26 negated by intoxication. *See State v. Welsh*, 8 Wash.App. 719, 724, 508 P.2d 1041
27 (1973); *State v. Mitchell*, 65 Wn.2d 373, 397 P.2d 417 (1964). See also *State v.*
28 *Sandomingo*, 39 Wash.App. 709, 695 P.2d 592 (1985) (An instruction on voluntary
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30 intoxication is warranted where the crime involves a particular mental state and there is

1 substantial evidence that the defendant was in fact intoxicated at the time the crime was
2 committed and that the intoxication affected his ability to acquire the requisite mental
3 state).
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5 These differences lead to the clear conclusion that an assault with a deadly
6 weapon conviction in California is not comparable to an assault with a deadly weapon in
7 this state.
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10 In fact, the differences between the assault definitions are remarkably similar to
11 the differences which resulted in the conclusion that federal bank robbery is not
12 comparable to a Washington robbery. *See In re Restraint of Lavery*, 154 Wn.2d 249,
13 111 P.3d 837 (2005); *State v. Freeburg*, 120 Wash.App. 192, 84 P.3d 292 (2004).
14 *Lavery*, and *Freeburg* before it, held that federal bank robbery was not comparable to a
15 state robbery because while “federal bank robbery is a general intent crime,” the “crime
16 of second degree robbery in Washington, however, requires specific intent to steal as an
17 essential, nonstatutory element.” 154 Wn.2d at 255. “Its definition is therefore narrower
18 than the federal crime's definition. Thus, a person could be convicted of federal bank
19 robbery without having been guilty of second degree robbery in Washington.” *Id.*
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24 In addition to the differences in the elements of the crime, the narrower federal
25 *mens rea* meant that defenses available in Washington were unavailable in federal court.
26 For example, intoxication is a permissible defense to robbery in Washington, but it is not
27 available to the general intent required for a federal robbery. *Id.* The result of these
28 differences is that any attempt to examine the underlying facts of a foreign conviction,
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1 facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a
2 reasonable doubt in the foreign conviction, proves problematic. “Where the statutory
3 elements of a foreign conviction are broader than those under a similar Washington
4 statute, the foreign conviction cannot truly be said to be comparable.” *Id.* at 258.
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7 The same result follows here. Just as in *Freeburg* and *Lavery*, because the crime
8 of assault in California is a general intent crime, its definition is narrower than this state’s
9 assault counter-part. Thus, a person could be convicted of second-degree assault in
10 California without having been guilty of second-degree assault Washington. In short, the
11 crimes are not “legally comparable.” Further, the differences in the available defenses
12 make any comparison of the facts impossible. Thus, the crimes are also not “factually
13 comparable.”
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17 It is true that comparability looks at the elements of the crime at the time the crime
18 was committed. However, the Court in *Williams* construed the statute to determine what
19 it has always meant. *Williams*, 26 Cal.4th at 785 (“As always, we begin with the statute
20 and seek to ascertain the Legislature's intent at the date of enactment.”). *See also In re*
21 *Restraint of Hinton*, 152 Wn.2d 853, 860, 100 P.3d 801 (2004) (When a court construes a
22 statute, setting out what the statute has meant since its enactment, there is no question of
23 retroactivity; the statute must be applied as construed to conduct occurring since its
24 enactment). *See also Bousley v. United States*, 523 U.S. 614, 620-21, 118 S.Ct. 1604,
25 140 L.Ed.2d 828 (1998) (same). Thus, *Williams* defines the law at the time of
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1 It is helpful to note that the Washington Supreme Court's decision in *Lavery*, like
2 this case, involved a change in the law (defining robbery) that was applied retroactively,
3 as an exception to the time bar. *Lavery*, 154 Wn.2d at 258-59 ("Because *Freeburg*
4 effectively corrected the error of the [prior legal] analysis, it represents a material change
5 in the law."). In *Freeburg*, the Court of Appeals "corrected the error" by applying a case
6 from 2000 (*Carter v. United States*, 530 U.S. 255, 120 S.Ct. 2159, 147 L.Ed.2d 203
7 (2000)) holding that federal robbery was a general intent crime, to *Freeburg's* pre-1994
8 conviction (the opinion does not indicate the date of the robbery conviction, but it
9 necessarily must pre-date *Freeburg's* current 1994 crime), and concluded that "(t)he trial
10 court erred in concluding that *Freeburg's* federal conviction was comparable to a second
11 degree robbery conviction in Washington." 120 Wn.App. at 199.

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17 *A Material Change in the Law that Applies Retroactively*

18 Generally, collateral attacks on judgments are prohibited if not brought within one
19 year of becoming final. *In re Restraint of LaChapelle*, 153 Wn.2d 1, 6, 100 P.3d 805
20 (2004). However, the statutorily enumerated exceptions include a material change in the
21 law where the Court "determines that sufficient reasons exist to require retroactive
22 application of the changed legal standard." RCW 10.73.100 (6). That standard applies to
23 this case.
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26 In determining whether there had been a material change in the law which creates
27 an exception to the time bar, the *Lavery* court asked whether the comparability argument
28 had been "unavailable" earlier because it was foreclosed by an appellate decision. 154
29 Wn.2d at 260 ("The *Freeburg* court disposed of the defendant's claim in precisely the
30

1 same fashion advocated by Lavery in his direct appeal. Before *Freeburg*, however, that
2 argument was unavailable to Lavery as it had been foreclosed by *Mutch*. Thus, *Freeburg*
3 represents a significant change in the law.”).

4
5 The same result follows here. Prior to *Williams*, Le’Taxione was precluded from
6 arguing that his assault conviction did not constitute a strike because this Court held that
7 it was a strike. Thus, *Williams* represents a material change in the law that applies to this
8 case.
9

10
11 It is now overwhelmingly clear that Petitioner is not a persistent offender. His
12 *Judgment* should be vacated and he should be resentenced to a “standard range” sentence.
13

14 *Sentence in Excess of Jurisdiction*

15 In addition to the “change in the law” exception, Le’Taxione can further rely on
16 the exception set out in RCW 10.73.100(5) because the sentence imposed was in excess
17 of the court’s jurisdiction. *In re Restraint of Goodwin*, 146 Wn.2d 861, 865-866, 50 P.3d
18 618 (2002); *In re Perkins*, 143 Wn.2d 261, 263, 19 P.3d 1027 (2001).
19

20 *Equitable Tolling and Miscarriages of Justice*

21
22 If this Court concludes that neither exception specified above applies, then this
23 Court should find that the one year time limit has been equitably tolled. There are two
24 reasons to apply the equitable tolling doctrine to this case. First, if this Court finds that
25 *Williams* does not constitute a change in the law because California’s assault was never
26 comparable to a Washington second-degree assault, then the Court should find that
27 Petitioner was justified in relying on this Court’s decision (holding otherwise) in failing
28 to timely bring this petition. Second, Le’Taxione is “actually innocent” of the persistent
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1 offender finding. The miscarriage of justice that accompanies sentencing him to life
2 when he is not a “persistent offender” should also toll the statute.
3

4 To begin, the one-year time bar is subject to equitable tolling. *See State v.*
5 *Littlefair*, 112 Wn. App. 749, 760, 51 P.3d 116 (2002), *review denied* 149 Wn.2d 1020
6 (2003) (noting that at least three Court of Appeals criminal cases have applied equitable
7 tolling); *State v. Robinson*, 104 Wn. App. 657, 667, 17 P.3d 653, *review denied*, 145
8 Wash.2d 1002, 35 P.3d 380 (2001) (recognizing that RCW 10.73.090 can be equitably
9 tolled, but declining to toll it in the particular case); *In re Personal Restraint Petition of*
10 *Hoisington*, 99 Wn. App. 423, 993 P.2d 296 (2000) (holding that “[t]he doctrine of
11 equitable tolling applies to statutes of limitation but not to time limitations that are
12 jurisdictional;” that RCW 10.73.090 “functions as a statute of limitation and not as a
13 jurisdictional bar[;]” and thus that RCW 10.73.090 “is subject to the doctrine of equitable
14 tolling.”). Equitable tolling is a remedy that “permits a court to allow an action to proceed
15 when justice requires it, even though a statutory time period has nominally elapsed.”
16 *State v. Duvall*, 86 Wn.App. 871, 874, 940 P.2d 671 (1997). Appropriate circumstances
17 for equitable tolling include bad faith, deception, or false assurances, and the exercise of
18 diligence by the post-conviction petitioner. *Id.* at 875, 940 P.2d 671 (quoting *Finkelstein*
19 *v. Security Properties, Inc.*, 76 Wn. App. 733, 739-40, 888 P.2d 161, *review denied*, 127
20 Wn.2d 1002, 898 P.2d 307 (1995)).
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28 If this Court finds that the law has not changed because his California conviction
29 was never comparable to a strike, then this Court should not fault Petitioner for failing to
30 bring a timely petition. Instead, this Court should find that principles of equity toll the

1 statutory time limit. See *State v. Duvall*, 86 Wash.App. 871, 940 P.2d 671 (1997); *In re*
2 *Hoisington*, 99 Wash.App. 423, 993 P.2d 296 (2000) (After unsuccessfully pursuing two
3 direct appeals and a prior personal restraint petition (PRP), Hoisington filed a new PRP in
4 which he again claimed ineffective assistance of counsel. When the State responded that
5 the new PRP was time-barred under RCW 10.73.090, Hoisington replied that he had
6 raised the issue of specific enforcement of the plea agreement in his two appeals and in a
7 prior personal restraint petition; that the court had failed to address it; and that RCW
8 10.73.090 should be equitably tolled. Division Three agreed and granted the petition.).
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12 The same result follows in this case. If Le'Taxione is correct that his California
13 assault conviction is not comparable to a Washington "strike" offense (a point that seems
14 indisputable), then, if the statutory time bar does not admit an exception, it surely admits
15 equity.
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18 *Actual Innocence of the Persistent Offender Finding*

19 In addition, Petitioner's actual innocence of the "persistent offender" finding
20 provides another basis for equitable tolling. See *Souter v. Jones*, 395 F.3d 577, 599-602
21 (6th Cir. 2005). In *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397
22 (1986), the Supreme Court recognized a narrow exception to the doctrine of procedural
23 default where a constitutional violation has "probably resulted" in the conviction of one
24 who is "actually innocent" of the substantive offense. *Id.*, at 496. Accord, *Schlup v. Delo*,
25 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). This exception was extended to
26 claims of capital sentencing error in *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514,
27 120 L.Ed.2d 269 (1992). Acknowledging that the concept of "actual innocence" did not
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1 translate neatly into the capital sentencing context, the Supreme Court limited the
2 exception to cases in which the applicant could show "by clear and convincing evidence
3 that, but for a constitutional error, no reasonable juror would have found the petitioner
4 eligible for the death penalty under the applicable state law." *Id.*, at 336.
5

6
7 The exception has been further extended to error resulting in the imposition of an
8 unauthorized sentence (*Wainwright v. Sykes*, 433 U.S. 72, 91, 97 S.Ct. 2497, 53 L.Ed.2d
9 594 (1977)), especially where that sentence is increased as a result of an improper
10 recidivist finding. *See Spence v. Superintendent*, 219 F.3d 162, 170-71 (2d Cir. 2000)
11 (actual innocence exception applies in non-capital context. Exception depends not on the
12 nature of the penalty, but on whether the error undermined the accuracy of the guilt or
13 sentencing determination); *United States v. Mikalajunas*, 186 F.3d 490 (4th Cir. 1999)
14 (Actual innocence exception applies to noncapital, habitual offender sentencings).
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18 While state courts have not fully discussed the "actual innocence" exception, it has
19 long recognized that the incorrect calculations involving prior convictions involve a
20 miscarriage of justice. "Moreover, a sentence that is based upon an incorrect offender
21 score is a fundamental defect that inherently results in a miscarriage of justice." *In re*
22 *Restraint of Johnson*, 131 Wn.2d 558, 569, 933 P.2d 1019 (1997).
23
24

25 The analysis in *Johnson* accords with early cases in this state, which drew a
26 distinction between errors in a judgment resulting from some error or irregularity
27 occurring at or before trial, and sentences imposed without jurisdiction or in excess of
28 that authorized by law. While a judgment and sentence could not be successfully
29 challenged on habeas corpus if it were merely erroneous, sentences in excess of lawful
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1 authority could be successfully challenged. *See e.g., In re Casey*, 27 Wash. 686, 690, 68
2 P. 185 (1902). The rule was stated: " '[W]hen the court has jurisdiction of the person and
3 the subject matter, and *the punishment is of the character prescribed by law*, habeas
4 corpus will not lie for the release of a prisoner because of mere errors, irregularities, and
5 defects in the sentence which do not render it void.' " *Gossett v. Smith*, 34 Wash.2d 220,
6 223-24, 208 P.2d 870 (1949) (emphasis added) (quoting A.B. Shepherd, Annotation,
7 *Illegal or Erroneous Sentence as Ground for Habeas Corpus*, 76 A.L.R. 460, 469
8 (1932)). If, however, the court lacked the " 'authority to render the particular judgment,' "
9 the judgment was " 'fatally defective and open to collateral attack.' " *Id.* at 224, 208 P.2d
10 870 (quoting 75 Utah 245, 284 P. 323, 76 A.L.R. at 469). *See also In re Goodwin*, 146
11 Wn.2d 861, 868-69, 50 P.3d 618 (2002).

12 Here, Le'Taxione is innocent of being a "persistent offender" because his assault
13 conviction is not comparable (and, as he argues in the next section, it washes out). Thus,
14 his sentence, in excess of what is authorized by law, constitutes a miscarriage of justice.
15 Le'Taxione's PRP should not be dismissed as untimely.

16 2. Wash Out

17 If this somehow Court concludes that it cannot reach the comparability issue, this
18 Court should nevertheless still conclude that Le'Taxione is not a persistent offender
19 because his California assault conviction washes out.

20 *The Wash Out Provisions Apply to Strikes*

21 Preliminarily, it is important to start with the fundamental premise that underpins
22 this claim: prior most serious offenses wash out and do not count as "strikes." RCW

1 9.94A.030(33) defines a "persistent offender" as someone who has "been convicted as an
2 offender on at least two separate occasions, whether in this state or elsewhere, of felonies
3 that under the laws of this state would be considered most serious offenses and *would be*
4 *included in the offender score under*" the wash out provisions now found in RCW
5 9.94A.535. (emphasis added). "Applying the washout provisions to the POAA is
6 consistent with that act's purpose of deterring repeat offenses. Because the 'washout'
7 provisions provide an incentive to not reoffend, they advance the goals of the POAA."
8 *State v. Keller*, 98 Wn. App. 381, 387, 990 P.2d 423 (1999). "Thus, a defendant's entire
9 criminal history would not be used to determine whether he or she is a persistent
10 offender. Rather, only those convictions that have not washed out and are therefore
11 "included in the offender score" under former RCW 9.94A.360 are considered for
12 purposes of the POAA." *Id.*

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18 Out-of-state convictions are classified according to the comparable offense
19 definitions and sentences provided by Washington law. When classifying an out-of-state
20 conviction, the first step is to identify the "comparable" Washington "offense definition,"
21 if there is one. Identification is accomplished by comparing the elements of the out-of-
22 state crime with the elements of potentially comparable Washington crimes. *State v.*
23 *Franklin*, 46 Wash.App. 84, 87-89, 729 P.2d 70 (1986). Once the "comparable"
24 Washington "offense definition" has been identified, the next step is to ascertain how
25 Washington law classifies that definition--is it a felony, and if so, an A, B, or C felony? If
26 Washington law classifies the definition as an A, B, or C felony, the final step is to assign
27 the same classification to the out-of-state conviction.
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1 Thus, if Le'Taxione's assault conviction washes out, then the trial court's
2 persistent offender finding is erroneous and he should not be sentenced of life in prison.
3

4 It does because it is comparable to aiming a firearm in violation of RCW 9.41.230.
5 That crime is a gross misdemeanor, meaning that it serves to interrupt other wash out
6 periods, but does not constitute criminal history.
7

8 *Improper Calculation of the Washout Period Constitutes a Facial Invalidity*

9 A *Judgment* which improperly includes washed out prior convictions is invalid on
10 its face. *In re Restraint of Goodwin*, 146 Wn.2d 861, 866-67, 50 P.3d 618 (2002)
11 (“Initially, the State appropriately concedes that Goodwin may challenge his sentence
12 despite the one-year bar of RCW 10.73.090 because the judgment and sentence appears
13 invalid on its face.”). *See also In re Restraint of LaChapelle*, 153 Wn.2d 1, 6, 100 P.3d
14 805 (2004).
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18 In addition, Petitioner's *Judgment* is invalid on its face because it fails to include
19 any offender score. This deficiency, which is apparent from the face of the *Judgment*,
20 reveals the trial court's failure to properly calculate both the offender score by applying
21 washout.
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23 Finally, in addition to these exceptions, the exceptions discussed in the section
24 above apply with equal force to the erroneous washout calculation.
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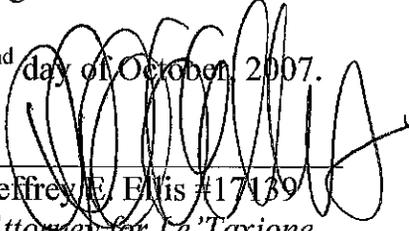
1 E. CONCLUSION

2
3 Le'Taxione was improperly shackled at his trial. On direct review, this Court
4 applied the standard of review specified by the state Supreme Court. However, that
5 standard was improper, as the law now makes clear. Petitioner was harmed because
6
7 jurors who observed his shackles could conclude that court officials viewed him as
8 dangerous, which interfered with the presumption of innocence and likely aided the proof
9 of the contested element of whether he was armed during the robberies. He is entitled to
10 an evidentiary hearing or a new trial.
11

12
13 Because his California assault conviction is not comparable to a strike, but is
14 instead only comparable to a gross misdemeanor, Le'Taxione is not a "persistent
15 offender." As a result, he was erroneously sentenced to "life without the possibility of
16 early release."
17

18
19 This Court should grant Le'Taxione's *Personal Restraint Petition* and remand this
20 case for either a new trial or for resentencing.

21 DATED this 2nd day of October, 2007.

22
23 
24 Jeffrey E. Ellis #17139
25 Attorney for Le'Taxione

26 Law Offices of Ellis,
27 Holmes & Witchley, PLLC
28 705 Second Ave., Ste 401
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30 (206) 262-0300
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APPENDIX A ~
JUDGMENT AND SENTENCE

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

ERNEST ALVIN CARTER, JR.,

Defendant.

CAUSE NO. 97-1-04547-1

JUDGMENT AND SENTENCE
(FELONY - PERSISTENT OFFENDER)

DOB: 12/15/64
SID NO.: WA17476262
LOCAL ID:

I. HEARING

1.1 A sentencing hearing in this case was held on 1.23.98

1.2 The defendant, the defendant's lawyer, HARI ALIPURIA, and the deputy prosecuting attorney, PATRICK COOPER, were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court
FINDS:

2.1 CURRENT OFFENSES(S): The defendant was found guilty on 8/18/98 by
 plea jury-verdict bench trial of:

Count No.: I *FIRST PRC*
Crime: ROBBERY IN THE SECOND DEGREE, Charge Code: (AAA2)
RCW: 9A.56.190, 9A.56.200(1)(a)-(b) and 9A.08.020
Date of Crime: 11/5/97 *190*
Incident No.: 973090128 *Alia*

Count No.: II *FIRST PRC*
Crime: ROBBERY IN THE SECOND DEGREE, Charge Code: (AAA2)
RCW: 9A.56.190, 9A.56.200(1)(a)-(b) and 9A.08.020
Date of Crime: 11/4/97 *190*
Incident No.: 973081190 *Alia*

Additional current offenses are attached in Appendix 2.1.

JUDGMENT AND SENTENCE
(FELONY - PERSISTENT OFFENDER) - 1

- A special verdict/finding for use of deadly weapon was returned on Count(s).
- A special verdict/finding of sexual motivation was returned on Count(s).
- A special verdict/finding of a RCW 69.50.401(a) violation in a school bus, public transit vehicle, public park, public transit shelter or within 1000 feet of a school bus route stop or the perimeter of a school grounds (RCW 69.50.435).
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400(1)):

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Date of Crime	Crime Type
ASLT PD w/ Firearm	8/20/83	A	3/4/83	V
UPCS	12/19/88	A	6/29/88	NV
ATT MURD/FA				
ATT ASLT 1	10/1/90	A	4/30/90	V

- Additional criminal history is attached in Appendix 2.2.
- Prior convictions served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(5)(a)):

2.3 SENTENCING DATA:

	Offender Score	Seriousness Level	Range Months	Maximum Years
Count No. I:				LIFE w/o Parole
Count No. II:				LIFE w/o Parole

- The current offense is a most serious offense as defined in RCW 9.94A.030, and the defendant is a persistent offender, resulting in a sentence range of life without parole.

JUDGMENT AND SENTENCE
(FELONY - PERSISTENT OFFENDER) - 2

Additional current offense sentencing data is attached in Appendix 2.3.

2.4 EXCEPTIONAL SENTENCE:

For violent offenses, serious violent offenses, most serious offenses, or any felony with a deadly weapon special verdict under RCW 9A.02.030; any felony with any deadly weapon enhancements under RCW 9A.02.030(3) or (4) or both; and/or felony crimes of possession of a machine gun, possessing a stolen firearm, reckless endangerment in the first degree, theft of a firearm, unlawful possession of a firearm in the first or second degree, and/or use of a machine gun, the recommended sentencing agreements or plea agreements are attached as follows:

Life w/o possibility of Parole

2.5 RESTITUTION:

Restitution will not be ordered because the felony did not result in injury to any person or damage to or loss of property.
 Restitution should be ordered. A hearing is set for _____
 Extraordinary circumstances exist that make restitution inappropriate. The extraordinary circumstances are set forth in Appendix 2.5.

2.6 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS: The court has considered the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability to pay:

no legal financial obligations.
 the following legal financial obligations:

- crime victim's compensation fees.
- court costs (filing fee, jury demand fee, witness costs, sheriff services fees, etc.)
- county or interlocal drug funds.
- court appointed attorney's fees and cost of defense.
- fines.
- other financial obligations assessed as a result of the felony conviction.

JUDGMENT AND SENTENCE
(FELONY - PERSISTENT OFFENDER) - 3

A notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the offender, if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed.

THE FINANCIAL OBLIGATIONS IMPOSED IN THIS JUDGMENT SHALL BEAR INTEREST FROM THE DATE OF THE JUDGMENT UNTIL PAYMENT IN FULL, AT THE RATE APPLICABLE TO CIVIL JUDGMENTS. RCW 10.82.090. AN AWARD OF COSTS ON APPEAL AGAINST THE DEFENDANT MAY BE ADDED TO THE TOTAL LEGAL FINANCIAL OBLIGATIONS. RCW 10.73.

2.7 SPECIAL FINDINGS PURSUANT TO RCW 9.94A.120 (PERSISTENT OFFENDER):

[X] The defendant is a persistent offender who has on two separate occasions been convicted of most serious offenses before the commission of the current offense, which is also a most serious offense, and shall be sentenced to life without the possibility of parole.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 LEGAL FINANCIAL OBLIGATIONS. Defendant shall pay to the Clerk of this Court:

\$ _____ Restitution to: NO restitution sought

\$ _____ Court costs (filing fee, jury demand fee, witness costs, sheriff service fees, etc.);

\$ 500.- Victim assessment;

JUDGMENT AND SENTENCE (FELONY - PERSISTENT OFFENDER) - 4

1
2
3
4 \$ _____, Fine; [] VLCSA additional fine waived due to
indigency (RCW 69.50.430);
5 \$ _____, Fees for court appointed attorney;
6 \$ _____, Washington State Patrol Crime Lab costs;
7 \$ _____, Drug enforcement fund of _____;
8 \$ _____, Other costs for: _____;

9 \$ 500⁰⁰, TOTAL legal financial obligations [] including
10 restitution [] not including restitution.

11 Payments shall not be ~~less than \$ _____ per month.~~ set by corrections Payments shall
commence ~~on _____~~ per corrections

12 [] Restitution ordered above shall be paid jointly and severally with:

Name	Cause Number
_____	_____
_____	_____

15 The defendant shall remain under the court's jurisdiction and the
16 supervision of the Department of Corrections for a period up to ten
years from the date of sentence or release from confinement to assure
17 payment of the above monetary obligations.

18 Any period of supervision shall be tolled during any period of time the
offender is in confinement for any reason.

19 [X] Bond is hereby exonerated.

28 JUDGMENT AND SENTENCE
(FELONY - PERSISTENT OFFENDER) - 5

4.2 PERSISTENT OFFENDER CONFINEMENT: Pursuant to RCW 9.94A.120, the court imposes the following sentence:

(a) CONFINEMENT: Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections commencing _____

[X] The defendant having been found to be a Persistent Offender pursuant to RCW 9.94A.120, and is sentenced to life without the possibility of parole on Count(a)

_____ months on Count No. _____ [] concurrent [] consecutive
_____ months on Count No. _____ [] concurrent [] consecutive
_____ months on Count No. _____ [] concurrent [] consecutive

[] This sentence shall be [] concurrent [] consecutive with the sentence in _____

[X] Credit is given for 311 days served;

[X] OTHER SPECIAL CONDITIONS AND CRIME RELATED PROHIBITIONS:
NO CONTACT W/ SEANE ARNOLD, DENNIS DUPEYRY,
SARWA ROLLINS, LESTER BIXBY, RAYMOND LEROY,
JACK SCHNOOR OR ROBERT SECTA FOR LIFE

(c) [] HIV TESTING. The Department of Corrections shall test the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. (RCW 70.24.340)

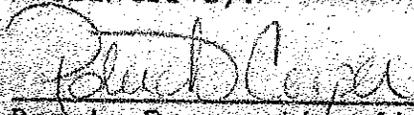
(d) [X] DNA TESTING. The defendant shall have a blood sample drawn for purpose of DNA identification analysis. The Department of Corrections shall be responsible for obtaining the sample prior to the defendant's release from confinement. (RCW 43.43.754)

JUDGMENT AND SENTENCE
(FELONY - PERSISTENT OFFENDER) - 6

PURSUANT TO RCW 10.73.090 AND 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.

Date: 9-23-98


JUDGE

Presented by:

Deputy Prosecuting Attorney
WSB # 15770

Approved as to form:

Lawyer for Defendant
WSB # 5899

sda

JUDGMENT AND SENTENCE
(FELONY - PERSISTENT OFFENDER) - 7

APPENDIX B ~
DIRECT APPEAL OPINION

Westlaw

Not Reported in P.3d
 Not Reported in P.3d, 100 Wash.App. 1028, 2000 WL 420660 (Wash.App. Div. 2)
 (Cite as: Not Reported in P.3d)

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Page 1

State v. Carter
 Wash.App. Div. 2,2000.

NOTE: UNPUBLISHED OPINION, SEE RCWA
 2.06.040

Court of Appeals of Washington, Division 2.
 STATE of Washington, Respondent,

v.

Ernest A. CARTER, Jr., Appellant.
No. 23940-0-II.

April 14, 2000.

Appeal from Superior Court of Pierce County,
 Docket No. 97-1-04547-1, judgment or order under
 review, date filed 09/23/1998, Thomas J. Feltnagle,
 Judge.

Linda J. King, Attorney At Law, Steilacoom, WA,
 for appellant(s).

Kathleen Proctor, Pierce County Deputy Pros Atty,
 Tacoma, WA, for respondent(s).

UNPUBLISHED OPINION

HUNT.

*1 Ernest Alvin Carter, Jr., appeals his convictions for two counts of first degree robbery and his persistent offender sentence of life without the possibility of parole. He argues that: (1) the evidence was insufficient to prove that he displayed a deadly weapon during one of the robberies; (2) the trial court improperly commented on the evidence; (3) the trial court erred in denying his motion for a mistrial when a juror saw him wearing shackles; (4) the trial court erred in admitting evidence that he had been seen at a nearby 7-Eleven store before one of the robberies; (5) prosecutorial misconduct prejudiced his defense; (6) he received ineffective assistance of counsel; (7) the cumulative effect of trial errors requires reversal; (8) a prior California conviction was wrongly counted as a strike under the Persistent Offender Accountability Act (POAA); and (9) the California conviction should not count in calculating his standard range offender score because the conviction 'washed out.' Holding that the

trial court committed no reversible error, we affirm.

FACTS

On November 4, 1997, Sabrina Raulins and Carter were together in Carter's apartment, smoking crack cocaine. Raulins drove Carter, in her 1979 light blue Lincoln Continental, to a Subway restaurant in the 6400 block of Yakima Avenue in Tacoma. Carter entered, without any money. He was wearing a flannel shirt, baseball cap, and baggy nylon athletic pants; he was acting 'antsy' and 'nervous' and had his hand under his shirt. After placing an order, Carter told Subway employee Dennis Duperry, 'Give me all your money' and 'I'm going to blow you away if you don't give me all the money.' Duperry gave Carter \$80 to \$130, Carter left, and Duperry called 911. Raulins drove Carter back toward his apartment. On the way, she dropped him off, and he went 'somewhere,' eventually returning to his apartment with \$80 to \$100 worth of crack cocaine, which he and Raulins smoked.

In the 'late hours of the night,' Raulins drove Carter to a 7-Eleven store in the 9600 block of Pacific Avenue in Tacoma. From across the street at a commercial car lot, Jack Schnoor observed Carter exit Raulins' car and 'stuff{(((} what appeared to be an L-frame revolver into his pants and walk{ } into the store.' Raymond Leroy, the car lot security officer, was with Schnoor; he also observed 'a black male ^{FN1}... g{e}t out of the vehicle and stuff{(((} something underneath his shirt' before entering the 7Eleven. Inside the 7-Eleven, Carter asked the store clerk about some lighter fluid then he left without incident. Carter got back in Raulins' car, they circled the parking lot a few times, and proceeded north on Pacific Avenue. Carter asked Raulins to stop at the AM/PM Mini-Mart located in the 8400 block of Pacific Avenue. He went inside with his hand underneath his flannel shirt; it remained there while he was in the store. Carter asked about prices for gum, asked for a bag, which employee Shane Arnold gave him, and then, in a

Not Reported in P.3d

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Page 2

Not Reported in P.3d, 100 Wash.App. 1028, 2000 WL 420660 (Wash.App. Div. 2)

(Cite as: Not Reported in P.3d)

'forceful' tone of voice, demanded, 'Open the {register} drawer.' Arnold complied, setting the drawer on the counter. Carter took roughly \$75 in cash and told Arnold to turn around. Arnold put his hands up and turned around, and while doing so, saw Raulins' car outside the store. Arnold took another look at the car while locking the store's door after Carter had left. Arnold called 911, providing a description of Carter and Raulins' vehicle.

FN1. Carter is African American.

*2 Police officers Robert Maule and Edward Wade responded to the robbery report at 4:20 a.m. and began an 'area check' for Raulins' vehicle. Approximately 24 blocks from the AM/PM Mini-Mart, they recognized the vehicle as it passed them from the opposite direction and noted 'there was a black male hunched down in the front passenger seat.' The officers pulled the vehicle over.

Wade contacted the driver, Raulins; learned her license had been suspended; and placed her in a patrol car. Maule contacted the passenger, Carter, and saw a flannel shirt next to Carter on the seat. After receiving another suspect description from an officer at the AM/PM Mini-Mart, Maule removed Carter from the car; patted him down for weapons; saw money (\$68) sticking out of his shorts pocket; and placed him in the back of another patrol car. Arnold and Schnoor arrived at the scene for a 'suspect elimination or a showup' and identified Carter and the vehicle, after which the officers placed Carter under arrest.

At some point, the officers asked Carter 'about the shirt' next to him on the seat of Raulins' vehicle, to which Carter replied 'it was his.' ^{FN2}In addition to the flannel shirt, the police also recovered an 'AM/PM plastic bag' and a baseball cap from the front seat in Raulins' vehicle.

FN2. It is not clear when and from where Officers Wade and Maule 'pulled { (Carter) out,' after asking him about the flannel shirt. Nor is it clear when the officers placed Carter in the police car. Officer Maule testified:

We wanted to make sure that it was his shirt and that it wasn't just sitting on the seat. We asked him about the shirt. He said it was his, and then we pulled-in the breast pockets, there were items, I think a house key and a lighter or something, and we pulled him out, and he said that, 'Yeah, that's my house key, and that's my lighter.' (Emphasis added). Officer Wade testified: '{The shirt} was located in the car, and Mr. Carter said it was his, and several personal items that were inside the pockets were given to him later that he claimed were his in the pockets.'

At trial, Raulins testified that Carter had gone into the AM/PM Mini-Mart without any money; had been wearing the flannel shirt while they were together; and had taken the shirt off in her car before the police stopped them. Duperry testified that he was a 'hundred percent' sure that Carter was the person who had robbed him. Schnoor testified he was '{o}ne hundred percent sure' Carter was the person he saw. But Leroy was unable to identify Carter. Arnold testified he was sure that Carter was the person who robbed him, and he thought Carter possibly had a weapon underneath his shirt, but he 'didn't know what was there.'

By second amended information, the State charged Carter with two counts of first degree robbery. A jury found Carter guilty on both counts. The sentencing court found Carter to be a persistent offender under the POAA, and sentenced him to life without the possibility of parole. He challenges the use of a prior California conviction as a basis for his persistent offender status.

ANALYSIS

I. Sufficiency of the Evidence

Carter argues that there was insufficient evidence on which to convict him of first degree robbery of Shane Arnold (the AM/PM Mini-Mart clerk) because there was no evidence that he displayed a deadly weapon.^{FN3}This argument fails.

Not Reported in P.3d

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Page 3

Not Reported in P.3d, 100 Wash.App. 1028, 2000 WL 420660 (Wash.App. Div. 2)

(Cite as: Not Reported in P.3d)

FN3. Carter argues that Arnold testified: he never saw a weapon; 'didn't know' whether Carter had a gun; and 'didn't know what was {under Carter's flannel shirt}.'

In reviewing a claim of insufficient evidence, the court must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' *State v. Ortiz*, 119 Wn.2d 294, 311-12, 831 P.2d 1060 (1992) (quotations omitted). '{A}ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.' *State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). A person is guilty of robbery in the first degree if in the commission of a robbery or of immediate flight therefrom, he:

- *3 (a) Is armed with a deadly weapon; or
- (b) Displays what appears to be a firearm or other deadly weapon; or
- (c) Inflicts bodily injury.

RCW 9A.56.200(1) (emphasis added).

The jury was instructed:

A person 'displays' a deadly weapon by making it actually visible to the victim. A person also 'displays' what appears to be a firearm or deadly weapon, if, by his conduct or speech, he leads the victim to believe that he is actually armed with a firearm or deadly weapon, even though no weapon is seen.

See *State v. Henderson*, 34 Wn.App. 865, 868-69, 664 P.2d 1291 (1983) ('{W} here the accused indicates (verbally or otherwise) the presence of a weapon (real or toy), the effect on the victim is the same whether it is actually seen by the victim or whether it is directed at the victim from inside a pocket. In either situation the apprehension and fear is created which leads the victim to believe the robber is truly armed with a deadly weapon.')

Although he did not actually see Carter display a weapon, Arnold testified that: Carter was acting suspiciously inside the AM/PM store; Carter's hand 'never moved from under the shirt'; Carter

'demanded' that he open the cash drawer; Arnold thought Carter possibly had a weapon; and Arnold held up his hands when Carter ordered him to turn around.

Further, Duperry testified that Carter had his hand under his shirt at the Subway restaurant when he said, 'I'm going to blow you away if you don't give me all the money.' Duperry was robbed roughly five hours before Arnold; Carter wore the same flannel shirt during both robberies, holding his hand and possibly something else under the shirt both times.

Schnoor testified he saw Carter 'stuff{ } what appeared to be an L-frame revolver into his pants' before entering the 7 Eleven store, only five minutes before Carter entered the AM/PM Mini-Mart. Finally, Leroy testified he was with Schnoor and saw a black male exit Raulins' car outside the 7-Eleven and 'stuff{(((} something underneath his shirt.'

Given this evidence, a rational trier of fact could have determined that, when Carter robbed Arnold, Carter was either armed with a deadly weapon or displayed what appeared to be a deadly weapon.

II. Trial Court's Comment on the Evidence

During the State's direct examination of Detective Gary Davis, concerning the preparation of crime scene photographs, the trial court stated: 'You are going to have to reference them {the photographs} by exhibit or the Court of Appeals will never understand what is happening.' Carter argues that the court's comment 'directly inferred to the jury the judge's personal opinion that Carter was guilty, that he would be convicted on these robbery counts, that the matter would be appealed,' the comment was prejudicial, and his convictions should be reversed. Trial court judges are forbidden from commenting upon the evidence presented at trial. Washington Const. art. IV, sec. 16. 'An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question.' *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 111

Not Reported in P.3d

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Page 4

Not Reported in P.3d, 100 Wash.App. 1028, 2000 WL 420660 (Wash.App. Div. 2)

(Cite as: Not Reported in P.3d)

S.Ct. 752, 112 L.Ed.2d 772 (1991)}. *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). 'The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury.' *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). 'Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial.' *Lane*, 125 Wn.2d at 838. In such a case, the State must "show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment." *Lane*, 125 Wn.2d at 838-39 (quoting *State v. Stephens*, 7 Wn.App. 569, 573, 500 P.2d 1262 (1972), *aff'd* in part, *rev'd* in part, 83 Wn.2d 485, 519 P.2d 249 (1974)). The State advances two persuasive responses to Carter's call for reversal. First, 'it is highly unlikely ... that the jurors would be aware that most criminal appeals are taken by the defense or that they would deduce, from that fact, that the trial court's reference to an appeal was somehow a comment upon {Carter's} guilt.' *United States v. Hood*, 593 F.2d 293, 298 (8th Cir.1979); see also *Jackson v. State*, 723 So.2d 319, 319-20 (Fla.Ct.App.1998). Further, at the start of the trial and before jury deliberations, the trial court instructed the jury to disregard any comment they perceived as indicating the court's opinion of the evidence.

*4 Second, even if the trial court's directive were an impermissible comment on the evidence, Carter was not prejudiced: The State proffered overwhelming evidence of Carter's guilt. Duperry testified he was one 'hundred percent' sure that Carter was the person who robbed him the evening of November 4, 1997; and Carter told him, while Carter's hand was under his flannel shirt, 'I'm going to blow you away if you don't give me all the money.' Arnold testified that: he gave the robber an AM/PM MiniMart grocery bag; he was sure Carter was the person who robbed him the morning of November 5, 1997; Carter's hand 'never moved from under the {flannel} shirt'; and he thought it possible that Carter had a weapon. Carter's companion, Raulins, testified that she drove Carter to

the Subway, 7-Eleven, and AM/PM Mini-Mart on the evening of November 4, 1997, and the morning of November 5, 1997. Each time, Carter went in without money, but he was able to buy '\$80 to \$100' worth of drugs after leaving the Subway, and he had a 'whole bunch of' bills in his pocket after leaving the AM/PM Mini-Mart. And Carter had been wearing the flannel shirt seen by Duperry and Arnold.

Schnoor testified that he was 'one hundred percent sure' that Carter was the person he saw outside the 7 Eleven, 'stuff[ing] what appeared to be an L-frame revolver into his pants.' Leroy testified he was with Schnoor and saw a black male exit Raulins' car outside the 7 Eleven and 'stuff{ } something underneath his shirt.' Finally, the police found the flannel shirt and an AM/PM Mini-Mart grocery bag in Raulins' car, as well as \$68 in Carter's pocket.

Carter has not shown that the trial court's comment influenced the jury. Were we to construe it as an impermissible comment on the evidence, we would nevertheless affirm, because Carter fails to demonstrate prejudice.

III. Carter's Appearance in Shackles

On the third day of trial, during a recess in the State's case-in-chief, Juror 11 exited the courtroom and saw Carter being escorted by two deputies. Carter 'was shackled by his ankles,' consistent with jail policy for potential three-strikes inmates. Carter informed his attorney, who moved for a mistrial. When questioned in the absence of other jurors, Juror 11 denied having seen the shackles when Carter was being escorted. He did state, however, that, during jury voir dire, he had 'notice{d} {Carter} had on leg restraints ... {and} they were plainly visible from where {he} was sitting in the pew.' Juror 11 denied mentioning it to fellow jurors, and said he 'didn't think anything of it because it's rather common to have.' The trial judge excused Juror 11, replacing him with an alternate juror. Defense counsel then renewed the motion for a mistrial, arguing because Juror 11 had seen the shackles,

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 Not Reported in P.3d, 100 Wash.App. 1028, 2000 WL 420660 (Wash.App. Div. 2)
 (Cite as: Not Reported in P.3d)

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Page 5

'that means other people might have seen them, and Mr. Carter does have a constitutional right not to be viewed in shackles.'(Emphasis added). The trial court denied the motion, stating: I think I've gone way beyond what I needed to to protect the integrity of this trial, and the supposition that Mr. Carter was seen by others in shackles may or may not be correct, but even if it is, I can't imagine it makes any difference whatsoever to this trial, especially so given what {Juror 11} just said. And the look on his face was one of absolute bewilderment that I would be excusing him for this reason when it's obvious to everybody in this courtroom that he's in custody.

*5 We review a trial court's ruling on a motion for a mistrial for abuse of discretion. *State v. Early*, 70 Wn.App. 452, 462, 853 P.2d 964 (1993).

It is well settled that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances.

This is to ensure that the defendant receives a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 3 and article I, section 22 (amendment 10) of the Washington State Constitution.

State v. Finch, 137 Wn.2d 792, 842, 975 P.2d 967 (citations omitted), cert. denied, ___ U.S. ___, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999).^{FN4}

FN4. Carter does not appear to be challenging on appeal the initial decision to shackle him. Nor does he appear to have challenged that decision at trial.

Generally, when a jury views a shackled defendant, that person's constitutional right to a fair and impartial trial is impaired. *State v. Elmore*, 139 Wn.2d 250, 273, 985 P.2d 289 (1999). But when the "jury's view of a defendant or witness in shackles is brief ... or inadvertent, the defendant must make an affirmative showing of prejudice." *Elmore*, 139 Wn.2d at 273 (quoting *Wilson v. McCarthy*, 770 F.2d 1482, 1485-86 (9th Cir.1985)). Thus, '{i}n or-

der to succeed on his claim, {Carter} must show the shackling had a substantial or injurious effect or influence on the jury's verdict.' *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed.2d 69 (1999). First, Carter has not established that any verdict-deliberating juror saw him wearing leg restraints or was aware that he was so restrained. Although Juror 11 indicated that Carter's restraints were 'plainly visible' to him during jury selection, the State had, on the first day of trial, informed the trial judge that it had positioned a garbage can between Carter and the jury so the jury could not see the restraints.

Second, even if a deliberating juror had observed Carter in shackles during voir dire, as had Juror No. 11, Carter has not shown prejudice. A defendant is not prejudiced by his mere appearance in restraints during jury selection. *Elmore*, 139 Wn.2d at 274 (citing *Early*, 70 Wn.App. at 462, and *State v. Gosser*, 33 Wn.App. 428, 435, 656 P.2d 514 (1982)). We hold that the trial court did not abuse its discretion in denying Carter's motion for a mistrial.

IV. Evidence of Carter's Presence at the 7-Eleven

Carter argues the trial court abused its discretion in admitting videotape evidence of his presence at the 7-Eleven before the AM/PM Mini Mart robbery. The trial court ruled the evidence admissible, stating: '{T}he issues of identity, res gestae, and corroboration of {Raulins'} testimony ... make this evidence probative and not unfairly prejudicial.'

A trial court's decision to admit evidence 'will not be disturbed on appeal absent an abuse of discretion.' *State v. Brown*, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997). 'A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.' *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). We may affirm a trial court's evidentiary ruling on any basis, even one not stated by the trial court. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995); see also RAP 2.5(a).

*6 Evidence is relevant if it has 'any tendency to

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Page 6

Not Reported in P.3d, 100 Wash.App. 1028, 2000 WL 420660 (Wash.App. Div. 2)

(Cite as: Not Reported in P.3d)

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'ER 401.'Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or ... needless presentation of cumulative evidence.'ER 403.'Evidence which is not relevant is not admissible.'ER 402.

Evidence that Carter was videotaped at the 7-Eleven only five minutes before the robbery at the AM/PM Mini-Mart, 12 blocks away, was highly relevant to the issue of the robber's identity. This evidence, viewed together with Arnold's testimony that Carter robbed him, and Raulins' testimony that she dropped Carter off at the 7-Eleven before taking Carter to the AM/PM Mini-Mart, is relevant to show that Carter was the robber. Further, the videotape showing Carter at the 7-Eleven is relevant to the degree of robbery: Schnoor testified he saw Carter enter the 7-Eleven, 'stuff{ing} what appeared to be an L-frame revolver into his pants.'

Carter maintains that, even if the evidence is relevant, it 'should not have been admitted because it was cumulative and confusing.'But he does not indicate how the evidence was cumulative or how it was confusing. Carter contends that the videotape was prejudicial because it 'opened the door to additional {irrelevant} testimony about his appearance at the 7Eleven,' but he did not object to that testimony at trial.

Generally, claims of error not raised in the trial court are not reviewable on appeal. RAP 2.5(a). Further, the additional evidence Carter cites ^{FN5} is not irrelevant. The trial court did not abuse its discretion in admitting the videotape evidence.

FN5. The 7-Eleven clerk's description of Carter's behavior in the store; Schnoor's testimony that Carter appeared suspicious and stuffed the revolver into his pants; and Raymond Leroy's testimony that he saw Carter 'stuff{ } something underneath his shirt.'

V. Prosecutorial Misconduct

'To prevail on a prosecutorial misconduct argument, 'the defendant must establish both improper conduct by the prosecutor and prejudicial effect.'"In re Personal Restraint of Pirtle, 136 Wn.2d 467, 481, 965 P.2d 593 (1998) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).'Prejudice is established only if there is a substantial likelihood the instances of misconduct affected the jury's verdict.'"Personal Restraint of Pirtle, 136 Wn.2d at 481-82 (quoting *State v. Pirtle*, 127 Wn.2d at 672). Carter identifies three instances of allegedly prejudicial misconduct.

A. Carter's Admitted Ownership of the Flannel Shirt

Carter's first claim is that the prosecutor, without notice to defense counsel ^{FN6} and without setting a CrR 3.5 hearing,^{FN7} offered Carter's uninformed,^{FN8} custodial statement to police that it was his flannel shirt found next to him in Raulins' car. One month before trial, in response to the trial court's inquiry about whether a CrR 3.5 hearing had been set, the prosecutor informed the court:

FN6. During discovery, 'the prosecuting attorney shall disclose to the defendant ... no later than the omnibus hearing ... the substance of any oral statements made by the defendant.'CrR 4.7(a)(1)(ii).

FN7.'When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible.'CrR 3.5(a).

FN8. See *Miranda v. State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

The only statements that would be involved would be any statements that we allege he made to the clerks at the time of the robbery. There's no state-

Not Reported in P.3d

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Page 7

Not Reported in P.3d, 100 Wash.App. 1028, 2000 WL 420660 (Wash.App. Div. 2)

(Cite as: Not Reported in P.3d)

ments made after-at the time of his arrest, but I will check that. If there is, I will set a 3.5 motion.

*7 A CrR 3.5 motion was never filed; no hearing was conducted; and defense counsel did not object to the police officers' testimony that Carter admitted ownership of the flannel shirt.

The State does not explain why a CrR 3.5 hearing was not held. Instead the State argues, without citation to the record, that the record equally supports a conclusion that the prosecutor notified defense counsel of the content of the statements and counsel waived the holding of a 3.5 hearing, because 'ownership' of the shirt was not critical to his defense. The lack of an objection certainly indicates a lack of surprise.

We cannot discern from the record why a CrR 3.5 hearing was not held. Nonetheless, assuming without deciding that the prosecutor engaged in misconduct by eliciting Carter's statement from the two police witnesses without first having conducted a CrR 3.5 hearing, the misconduct was not prejudicial. There is no substantial likelihood it affected the jury's verdict, given Raulins' testimony that Carter owned the shirt and had taken it off in her car and the other overwhelming evidence of Carter's guilt. See supra Part II.

B. The Product Rule

Use of the product rule invites the jury to multiply the frequencies of independent events 'together to obtain an estimate about the rarity of the events occurring together.' *State v. Copeland*, 130 Wn.2d 244, 292, 922 P.2d 1304 (1996). 'The product rule suggests an infallibility which is inappropriate where eye witness testimony is concerned and independence of events is not established.' *Copeland*, 130 Wn.2d at 293. '{C}losing argument involving multiplication of hypothetical probabilities {is} likely to mislead the jury in the absence of careful explanation of the probability of a coincidental misidentification and the distinct probability the defendant left the incriminating traces.' *Copeland*, 130 Wn.2d at 293 (citing 1 McCormick on Evidence sec. 210, at 953-54 n. 13 (John W. Strong ed., 4th

ed.1992)).

Carter claims that the prosecutor made '{i}mproper use of the product rule in closing argument,' but he does not cite to any part of the record to support his argument. See RAP 10.3(a)(5) (requiring that argument be supported by references to relevant parts of the record). Rather, Carter argues:

The prosecutor's comments during closing argument impermissibly invited the jury to consider the unlikelihood of the circumstances of the Subway, the 7Eleven and the AM/PM {sic} occurring together, and then multiplying the rarity of those events together, to reach a conclusion that cumulatively the odds of these events occurring without the suspect being Mr. Carter were extremely rare, and therefore the eyewitnesses couldn't be wrong in their identifications.

In response, the State identifies three pages of transcript of the prosecutor's closing argument pertaining to Carter's claim: Finally, the fact that there was one robbery, it makes sense to believe that this person was involved in another robbery this night, especially when you consider that, if they're getting this money to buy crack cocaine, to use it up, if they only got \$90 to \$120 the first time from the Subway, they're getting five rocks of cocaine, there's two people using crack cocaine, if they're continuing all night and using more of the drugs, it makes sense that they're going to need more money ... and that's why they're back at the AM/PM trying to get some more money.

*8

___ {T}o believe that {Carter} was not involved in the AM/PM, you would have to say that, five minutes prior, somehow he would have changed all his clothes down to his underwear at the time that the person went into the AM/PM store and then somehow put all those clothes back on, the similar clothes when he was arrested 20 minutes later by the police officers.

... {I}'s just too incredible to imagine that that did happen, and it doesn't-it defies common sense and reasonableness to believe that something like that

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Page 8

Not Reported in P.3d, 100 Wash.App. 1028, 2000 WL 420660 (Wash.App. Div. 2)

(Cite as: Not Reported in P.3d)

could happen or did happen.

....

And again, what {Arnold and Duperry} said is very telling. From Shane Arnold, the clerk at the AM/PM, looking at him, saying, 'I'm afraid it's him.' And then, again, Mr. Duperry, 'I saw that face.' To believe otherwise, you have to believe that there's somehow an evil twin out there that matches everything with Mr. Carter. And not only that, you have to believe it's someone he doesn't know, someone who has his same looks, was out in this area at 4 o'clock in the morning at the same time, same clothes, and in a same similar {sic} type car at this time to believe that he wasn't the person involved in the AM/PM robbery.

The defense did not object to these comments and requested no curative instruction.

Thus, even assuming the prosecutor improperly invoked the product rule, Carter's {f}ailure to object to an improper comment constitutes waiver of error unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. 'Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.'

Brown, 132 Wn.2d at 561 (footnote omitted) (quoting *State v. Russel*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)); see also *Copeland*, 130 Wn.2d at 293-94. A curative instruction could have neutralized any prejudice to Carter.

C. The 'Missing Witness' Inference

Carter's last claim of prosecutorial misconduct appears to be twofold. First, he argues that during closing argument, the prosecutor inferred that Carter had a duty to present evidence of his innocence: {The Constitution} outlines rights to protect innocent people, and it's a sword for the citizens of the community to make sure that guilty people are found guilty based upon proper evidence.

This is the best process, as you know, to determine whether someone's guilty or not guilty. There's no evidence in this case that anyone came into this courtroom or would come into this courtroom and knowingly say that this is—that they are accusing an innocent man. There is no evidence of this, because this is not happening.

A criminal defendant has no duty to present any evidence of his innocence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). But here, the prosecutor's comments cannot reasonably be interpreted as implying that Carter had a duty to call witnesses to prove his innocence.

*9 Carter also challenges the prosecutor's closing argument about the failure of expected defense witnesses to testify:

Finally, as to the defense case, in the defense opening, they stated that they were going to present two witnesses, Jackie Ball and Janice Gipson, to confirm what the defendant had done this night. The defense, once they decide to put on a case, you can consider the evidence they did or did not present.... Neither one of those witnesses were presented. You have to wonder, why weren't these witnesses presented?

It is fair to infer that, clearly, those people would not have helped them. Otherwise, they would ... have presented their testimony to you in this case.

Under the 'missing witness' doctrine, 'where a party fails to produce otherwise proper evidence which is within his or her control, the jury may draw an inference unfavorable to that party.' *Russell*, 125 Wn.2d at 90. But '{t}he inference may be drawn only where there is an unexplained failure to call a witness whom it would be natural for a party to call if that party knew that the testimony would be favorable.' *Russell*, 125 Wn.2d at 90. The inference may not be drawn if: (1) the witness is unimportant; (2) the testimony would be cumulative; (3) the witness's absence can be satisfactorily explained; (4) the witness is not competent to testify;

Not Reported in P.3d

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Page 9

Not Reported in P.3d, 100 Wash.App. 1028, 2000 WL 420660 (Wash.App. Div. 2)

(Cite as: Not Reported in P.3d)

(5) some privilege protects the witness's testimony; (6) the witness's testimony would be self-incriminatory if favorable to the party who could have called the witness; (7) the witness is equally available to both parties; or (8) the inference in-fringes on the defendant's constitutional rights, such as the right to remain silent. *State v. Blair*, 117 Wn.2d 479, 489-91, 816 P.2d 718 (1991).

Here, the prosecutor's reference to missing defense witnesses Jackie Ball and Janice Gipson was not improper. Carter failed to provide their testimony even though Ball and Gipson purportedly knew he was not involved in the robberies.^{FN9} Carter's failure to provide that testimony, in light of his counsel's opening remark that Ball and Gipson would testify, was the subject of proper prosecutorial comment. Additionally, defense counsel failed to object to any of these closing argument comments; thus, even if the comments were improper, reversal is not required because the error could have been obviated by a curative instruction, which the defense did not request. See *Brown*, 132 Wn.2d at 561.

FN9. Opening statements were not included in the appellate record. Thus, it is not possible to tell precisely how Ball and Gipson were supposed to have testified.

VI. Assistance of Counsel

Carter argues his counsel was ineffective for: (1) 'inquiring of the court on the day of trial whether a 3.5 hearing had been scheduled'; (2) failing to comply with the requirement that motions to suppress be in writing; (3) failing to object when Carter's un-Mirandized custodial statement about owning the flannel shirt was offered into evidence; (4) failing to object to the joinder of the two robbery counts, and failing to move for severance of the two robbery counts; (5) continuing to cross-examine Arnold, 'suggesting {that Arnold} feared Mr. Carter had a gun under his shirt, which was contrary to {Arnold's} direct testimony'; (6) failing to move for dismissal of the AM/PM Mini Mart robbery count or to argue during closing argument the lack of proof on the element of 'displaying a deadly

weapon'; and (7) 'waiv{ing} any issues in this appeal' by 'fail{ing} to object, assert a proper basis for objections, request any curative instruction, or move for mistrial or dismissal.'

*10 There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions by exercising reasonable professional judgment. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). To establish ineffective assistance of counsel, a criminal defendant must show that counsel's performance was deficient and that the deficiency resulted in prejudice, such that there is a reasonable probability that, absent counsel's errors, the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McFarland*, 127 Wn.2d at 334-35. If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot constitute ineffective assistance. *Lord*, 117 Wn.2d at 883.

First, Carter's trial counsel inquired about a CrR 3.5 hearing on July 15, 1998, almost one month before the first day of trial, which was August 11, 1998. Moreover, even if Carter's trial counsel was arguably deficient in failing to request a CrR 3.5 hearing or failing to object to, or seek suppression of, Carter's statement that he owned the flannel shirt, the outcome would likely have been the same. There was other clear evidence that the shirt was Carter's: Even Carter's companion and driver on the day of the robberies, Raulins, explained that the flannel shirt on the seat of her car belonged to Carter and that he had been wearing it. Similarly, counsel's failure to object to the prosecutor's near invocation of the product rule during closing argument might also arguably be characterized as ineffective assistance of counsel. But again, in light of the presumption of effective assistance of counsel and likely lack of prejudice, Carter has failed to show that his counsel's assistance fell below acceptable standards.

Carter's remaining allegations of deficient performance also fail. As to joinder of the two robbery

counts, '{t}wo or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses' are of the 'same or similar character' or are 'based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.' CrR 4.3(a). Both offenses charged here were robberies that shared similar characteristics and were part of a single scheme to obtain money for drugs. Thus, counsel's failure to object to joinder was of no consequence.

Regarding the cross-examination of Arnold, defense counsel was successful in eliciting Arnold's concession that he 'didn't know what was under Carter's shirt, and that 'it could have been {Carter's} finger for all I know.' Contrary to appellate counsel's assertion, the record does not reflect that Carter's trial counsel also elicited from Arnold that he feared Carter had a gun under his shirt.

Lastly, trial counsel's failure to move for dismissal of the AM/PM MiniMart robbery count was not deficient; given the abundant evidence supporting that count, such a motion would likely have failed. Trial counsel's silence during closing argument with respect to whether Carter displayed a weapon is understandable, given Carter's defense that he did not commit the robberies. Trial counsel did stress, however, that no weapon was ever found on or near Carter at the time of his arrest. Significantly, the question of counsel's effectiveness may be resolved 'upon a finding of lack of prejudice without determining if counsel's performance was deficient.' *Lord*, 117 Wn.2d at 884. The abundant evidence of Carter's guilt of both robberies, see supra Part II, cures any prejudice resulting from trial counsel's alleged deficiencies in performance. Overall, Carter received effective assistance of counsel.

VII. Cumulative Error

*11 Where it is reasonably probable that the cumulative effect of nonreversible errors materially affected the trial's outcome, reversal is mandated. *State v. Johnson*, 90 Wn.App. 54, 74, 950 P.2d 981

(1998). That standard has not been met here; Carter has identified few, if any, errors committed by the trial court.

VIII. The Persistent Offender Accountability Act (POAA) ^{FN10}

FN10. '{A}lso known as the 'three strikes and you're out' law.' *State v. Morley*, 134 Wn.2d 588, 602, 952 P.2d 167 (1998).

A persistent offender is an offender who '{h}as been convicted in this state of any felony considered a most serious offense'^{FN11} and, before the commission of the current offense, has 'been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.360.' RCW 9.94A.030(27)(a).

FN11. RCW 9.94A.030(23) lists as '{m}ost serious offense{s}' 22 categories of felonies, or attempts to commit one of those felonies, including any class A felony (such as first degree robbery), second degree assault, and 'any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection.'

Application of the persistent offender definition can be broken down into several steps. After a defendant has been convicted in this state of a most serious offense, RCW 9.94A.030(27)(a)(i), four more elements must be present for a defendant to be declared a persistent offender: (1) The defendant must have been previously convicted on at least two separate occasions, (2) in this state or elsewhere, (3) of felonies that, under the laws of this state, would be considered most serious offenses (defined in RCW 9.94A.030(23)), and (4) would be included in the offender score under RCW 9.94A.360. RCW 9.94A.030(27)(a)(ii).

State v. Morley, 134 Wn.2d 588, 603, 952 P.2d 167

Not Reported in P.3d

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Page 11

Not Reported in P.3d, 100 Wash.App. 1028, 2000 WL 420660 (Wash.App. Div. 2)

(Cite as: Not Reported in P.3d)

(1998). The trial court found that Carter's criminal history included a 1983 California conviction for assault on a peace officer with a firearm, and 1990 Oregon convictions for attempted murder with a firearm and first degree attempted assault. The trial court further found that the current offenses of first degree robbery constituted a 'most serious offense' under RCW 9.94A.030.

In determining that the Oregon and California convictions constituted two most serious offenses, FN12 the trial court noted: (1) there was no dispute that the Oregon convictions were the equivalent of a most serious offense; and (2) the California conviction was equivalent to second degree assault in Washington. The trial court found a factual basis for the California conviction, explaining:

FN12. Because the Oregon convictions occurred at the same time, they constitute only one most serious offense. See RCW 9.94A.030(27)(a)(ii).

we have the transcript from the sentencing and from the taking of the plea, and apparently, at the time of the plea, the factual basis was presented as what we call a Newton or Alfred plea {sic}. FN13 Mr. Carter didn't specifically say, I did this, this, and that. He agreed to the use of what we would term an Affidavit of Probable Cause....

FN13. When a defendant enters an Alford plea, he does not admit guilt but, rather, acknowledges that the State has enough evidence to find him guilty. *North Carolina v. Alford*, 400 U.S. 25, 37-38, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The Washington counterpart to Alford is *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

Apparently, in going through it, then, they describe how the police were arresting Mr. Carter's brother, and as the police cars were driving away, it appears that shots rang out and hit the police car, and Mr. Carter was identified as the person who did the shooting. FN14

FN14. At sentencing, the California trial court imposed a five-year suspended sentence, placing Carter on probation, a term of which was 365 days of jail time. Also, the trial court found, 'in compliance with Government Code section 13960 and 13967 this is not a crime of violence.' Those statutes deal with indemnification of crime victims from a common fund.

On appeal, Carter argues that the trial court erred in considering the California assault on a peace officer comparable to Washington's second degree assault, a class B felony, a most serious offense. RCW 9.94A.030(23). FN15 Instead, he contends, the California assault is most comparable to Washington's 1983 third degree assault of a police officer, a class C felony, which is not a most serious offense.

FN15. Carter also argues that the case should be remanded to determine whether he and Ernest Garnett Carter, the defendant in the California and Oregon cases, are the same people. But the State established at the sentencing hearing, through the testimony of a fingerprint expert, that Ernest Garnett Carter and Ernest Alvin Carter, Jr., are the same person.

*12 To determine if a foreign crime is comparable to a Washington offense, ... the elements of the out-of-state crime must be compared to the elements of Washington criminal statutes in effect when the foreign crime was committed.... While it may be necessary to look into the record of a foreign conviction to determine its comparability to a Washington offense, the elements of the charged crime must remain the cornerstone of the comparison.

Morley, 134 Wn.2d at 605-06 (emphasis added) (citations omitted).

The California crime of assault with a firearm upon a peace officer was defined in 1983 as: 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

Not Reported in P.3d

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Page 12

Not Reported in P.3d, 100 Wash.App. 1028, 2000 WL 420660 (Wash.App. Div. 2)

(Cite as: Not Reported in P.3d)

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 sec. 245(c) (Deering 1983). 'Assault' was (and still is) defined as 'an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.' Cal.Penal Code sec. 240 (Deering 1983). In 1983, Washington's second degree assault with a weapon crime was defined as: 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, sec. 9. Third degree assault was defined as: Every person who, under circumstances not amounting to assault in either the first or second degree, shall be guilty of assault in the third degree when he ... {w}ith intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or another person shall assault another.

Former RCW 9A.36.030(1)(a) (1983), repealed by Laws of 1986, ch. 257, sec. 9.

Because 'assault' is not defined in the Washington criminal code, the courts rely upon the common law definition of assault, one of which 'is 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.' *State v. Jimerson*, 27 Wn.App. 415, 418, 618 P.2d 1027 (1980); see also *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994) ('Three definitions of assault are recognized in Washington: (1) an attempt, with unlawful force, to inflict bodily injury upon another {attempted battery}; (2) an unlawful touching with criminal intent {actual battery}; and (3) putting another in apprehension of harm whether or

not the actor intends to inflict or is capable of inflicting that harm {common law assault}.' (Quotation omitted)).

*13 The 1983 Washington offense that is most comparable to Carter's California assault conviction (with a firearm upon a peace officer) is second degree assault, former RCW 9A.36.020(1)(c) (1983). Both offenses share the common element of assault with a dangerous weapon: The California statute requires a firearm; the Washington statute requires 'a weapon or other instrument or thing likely to produce bodily harm.'

Former

RCW 9A.36.020(1)(c) (1983).

It is less significant that both the California statute and Washington's 1983 assault three statute share the common element of a peace officer victim, engaged in the performance of his or her duties. Both California and Washington, in 1983 and at the time Carter was sentenced for the instant robberies, differentiated among degrees of assault based on the seriousness of the threat or harm; the use or display of a dangerous weapon, such as a firearm; and whether the victim of the assault is an officer acting in the course of duty. In 1983, the California statutory scheme increased the penalty if the 'second degree assault' was on a police officer.^{FN16}

FN16. Compare Former Cal.Penal Code sec. 245(c) (Deering 1983) (providing for a four, six, or eight-year term of imprisonment for assault with a firearm on a peace officer), with Former Cal.Penal Code sec. 245(a)(2) (Deering 1983) (providing for, among other things, a two, three, or four-year term of imprisonment for assaulting any person with a firearm).

In 1983, a gross misdemeanor simple assault in Washington included any assault that did not amount to first or second degree assault, former RCW 9A.36.010 (1983) & former 9A.36.020 (1983), and which did not cause physical injury 'by means of a weapon or other instrument or thing

Not Reported in P.3d

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Page 13

Not Reported in P.3d, 100 Wash.App. 1028, 2000 WL 420660 (Wash.App. Div. 2)

(Cite as: Not Reported in P.3d)

likely to produce bodily harm,' former RCW 9A.36.030(1)(b) (1983). Former RCW 9A.36.040, repealed by Laws of 1986, ch. 257, sec. 9. But if the simple assault was intended to interfere with a police officer making a lawful arrest, the crime was elevated to third degree assault, a class C felony, former RCW 9A.36.030(1)(a) (1983). Neither of these lesser degrees of assault, however, were established unless the assault was 'under circumstances not amounting to assault in either the first or second degree.' Former RCW 9A.36.030(1) (1983); see also former 9A.30.040(1) (1983). Thus, under Washington's 1983 statutory scheme, the issue of whether the victim was a police officer was not relevant if, as here, the assault involved a deadly weapon or firearm giving rise to a second, or first, degree assault charge.

The offenses also must be comparable at the time of sentencing. See RCW 9.94A.030(23)(u). By the time Carter was sentenced in 1998, a noninjurious assault on a police officer still constituted only a class C felony (third degree assault) if the underlying acts did not constitute first or second degree assault. RCW 9A.36.031(1)(g).^{FN17}

FN17. The current version of second degree assault is a class B felony. RCW 9A.36.021(2). It applies if a person '{a}ssaults {a police officer} with a deadly weapon,' but without the intent to inflict great bodily harm. RCW 9A.36.021(1)(c); see also 9A.36.011(1). Under the current statutory scheme, only in the absence of a deadly weapon, is an assault on a police officer classified as third degree assault. Simple assault has been reclassified as assault in the fourth degree, a gross misdemeanor. RCW 9A.36.041.

Thus, Carter's 1983 California conviction is comparable to a class B felony in Washington, both in 1983, when he committed the prior offense, and in 1998, when he was sentenced for the current offenses. We hold that the trial court did not err in finding Carter to be a persistent offender and in sentencing him accordingly.

IX. Carter's Offender Score

Carter argues that his 'California conviction in 1983, comparable to or scored as a class C felony in Washington, should not be included in his offender score for the purpose of calculating a standard range sentence under the Sentencing Reform Act, for it 'washed out' prior to his {1990} convictions in the State of Oregon.' See RCW 9.94A.360(2) ('Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.'). But at sentencing, the trial court did not enter an offender score for Carter. Thus, Carter's argument is not relevant to this appeal. Affirmed.

*14 A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

SEINFELD, P.J., and HOUGHTON, J., concur.
Wash.App. Div. 2, 2000.

State v. Carter

Not Reported in P.3d, 100 Wash.App. 1028, 2000 WL 420660 (Wash.App. Div. 2)

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APPENDIX C ~
PETITION FOR REVIEW DENIED

Westlaw

11 P.3d 824 (Table)
141 Wash.2d 1026, 11 P.3d 824 (Table)
(Cite as: 141 Wash.2d 1026, 11 P.3d 824 (Table))

Page 1

State v. Carter
Wash. 2000.
(The Court's decision is referenced in a Pacific
Reporter table captioned "Supreme Court of
Washington Table of Petitions for Review.")

Supreme Court of Washington
State

v.

Ernest Alvin Carter, Jr.
NO. 69695-1

October 11, 2000

Appeal From: 23940-0-II

Petition For Review: Denied.

Wash. 2000.
State v. Carter
141 Wash.2d 1026, 11 P.3d 824 (Table)

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APPENDIX D ~
DISMISSAL OF HABEAS PETITION

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CV 01-05581 100000015

ENTR'D
ON DOCKET

MAR 2 2002

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CLERK U.S. DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA	
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10 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

11
12 ERNST ALVIN CARTER Jr.,

13 Petitioner,

14 v

15 JOSEPH LEHMAN,

16 Respondent

Case No C01-5581FDB

REPORT AND
RECOMMENDATION

17
18 This habeas corpus petition has been referred to the undersigned Magistrate Judge pursuant
19 to 28 U S C § 636 (b) and local Rules MJR 3 and 4 Having reviewed the 28 U S C § 2254
20 petition, the answer, and the remaining file, the undersigned recommends that the Court find this
21 petition unexhausted and procedurally barred Accordingly, the petition should be **DISMISSED**
22 **WITH PREJUDICE**

23 FACTS

24 Petitioner is a state prisoner currently incarcerated at the Washington State Penitentiary He
25 filed this petition to challenge his 1998 Pierce County conviction for two counts of Robbery in the
26 First Degree On September 23rd, 1998 the trial court imposed a life sentence without possibility of
27 parole based on a finding that petitioner was a persistent offender pursuant to RCW 9 94A.120

1 Petitioner appealed and raised the following issues

2 1 Issues Pertaining to Assignment of Error No 1

3 Where the robber's hand remained without moving under his shirt during the
4 robbery of the AM/PM store and the clerk testified he did not know or
consider that the robber had a weapon, was there sufficient evidence
of the element "display" what appears to be a firearm?

5 2 Issues Pertaining to Assignment of Error No 2

6 Did the Judge improperly comment on the evidence by conveying his
belief in appellant's guilt and likelihood of conviction when he
7 exclaimed *sua sponte* in the jury's presence, "You are going to have to
reference then by exhibit or the Court of Appeals will never
8 understand what is happening "

9 3 Issues Pertaining to Assignment of Error No 3

10 Did the trial court abuse its discretion in denying a motion for a
mistrial after appellant alleged a juror had seen him in shackles during
11 transport, where the trial court relied solely on jail policy of shackling
all potential three strike defendants and found there was no prejudice
because the shackles were obscured by a wastebasket in the
12 courtroom, but a juror disclosed the shackles were plainly visible in
the courtroom during voir dire?

13 4 Issues Pertaining to Assignment of Error No 4

14 The State admitted a videotape and elicited testimony from witnesses
relating to appellant's "suspicious" appearance at a 7-Eleven store just
15 prior to the AM/PM robbery, including testimony that he stuffed a
gun into his pants. Where no criminal conduct occurred at the 7-
16 Eleven, there was no evidence a gun was used in the AM/PM robbery,
and no gun was found on appellant when he was arrested, did the
17 court abuse its discretion in allowing admission of that evidence
under ER 403, relying on *res gestae*, identity and corroboration of a
18 codefendant's testimony?

19 5 Issues Pertaining to Assignment of Error No 5

20 Did the prosecutor commit misconduct requiring a new trial where he,
1) offered non-*Mirandized* statements attributed to appellant after his
21 arrest, without notice to defense counsel or holding a CrR 3 5 hearing,
2) during closing argument relied on the improper product rule, 3)
22 referred to missing witness law not included in the jury instructions,
and 4) inferred appellant was required to prove his innocence?

23 6 Issues Pertaining to Assignment of Error No 6

24 Was appellant denied effective assistance of counsel where defense
counsel 1) failed to move for a CrR 3 5 suppression hearing or object
25 to the State's offer of non-*Mirandized* inculpatory statements
attributed to appellant, 2) failed to object to joinder of two counts of
first degree robbery, or move for their [sic] severance, 3) cross
26 examined the AM/PM clerk by suggesting he feared appellant had a
gun under his shirt, contrary to the clerk's testimony, 4) failed to
27 move for dismissal or argue to the jury that the State had not met its
burden of proof on that element of the crime, and 5) failed to object or
28 provide the proper basis for objections?

1
2 7 Issues Pertaining to Assignment of Error No. 7

3 Where the State's evidence was weak as to each count of robbery, did
4 the cumulative effect of multiple errors throughout trial materially
5 affect the verdicts?

6 (Dkt # 14 exhibit 3 pages 1 to 4)

7 The Court of Appeals affirmed the conviction and petitioner filed for discretionary review
8 with the Washington State Supreme Court. In that petition he raised the following issues

9 1 Whether Mr. Carter's 1983 California conviction for assault on a
10 police officer under Cal. Penal Code Sec. 245(c) is most comparable
11 to third degree assault under Washington law, not a "most serious
12 offense," in that both crimes share the element of assault of a police
13 officer while engaged in the performance of his official duties rather
14 than second degree assault, a "most serious offense," which requires a
15 higher degree of mental culpability and lacks the element of assault
16 against a peace officer.

17 2 Where Cal. Penal Code Sec. 245(c) is not identical to, and is
18 broader than, the Washington assault statutes in that it lacks an
19 element of specific intent, which element is required for all degrees of
20 assault under Washington law, whether the facts underlying Mr.
21 Carter's 1983 California conviction would support conviction on the
22 crime of third degree assault, rather than second degree assault, where
23 the evidence was that as police officers were arresting Mr. Carter's
24 brother, they heard shots, which may have been fired into the air
25 rather than at the police officers.

26 3 Whether Mr. Carter's 1983 California assault conviction under
27 Cal. Penal Code Sec. 245(c) is not comparable to any Washington
28 statute and therefore should be classified as a class C felony, not a
"most serious offense," in that the California statute lacks an element
of specific intent, which element is required for all Washington
crimes of assault.

(Dkt # 14 exhibit 8 pages 1 and 2)

The petition for review was denied on October 11th, 2000 and the mandate from the State
Court of Appeals issued on October 18th, 2000. On October 10th, 2001 this petition was filed and
petitioner raises two issues:

1 During pre-trial proceedings, the Defendant appeared before at
least one juror while shackled. This juror indicated that Mr. Carter's
shackles were plainly visible from where the juror was sitting. The
record does not contain any facts to support Mr. Carter's being
shackled during court proceedings other than a local jail policy
requiring that defendants who are potentially subject to the so-called
Three Strikes Law, which can result in imposition of a sentence of life
without possibility of parole, should be shackled during all

1 proceedings There was nothing in Mr Carter's criminal history nor
2 his behavior that indicated he was a risk to either inappropriately act
out during court proceedings or attempt to escape

3 2. The State failed to properly show that Mr Carter's conviction for
4 assault of a police officer in the state of California was the equivalent
of a conviction of a most serious offense under the Washington law

5 (Dkt # 1 page 5A)

6 DISCUSSION

7 1 Exhaustion of state remedies

8 As a threshold issue the Court must determine whether or not petitioner has properly
9 presented his federal claims to the state courts In order to satisfy the exhaustion requirement,
10 petitioners claims must have been fairly presented to the state's highest court Picard v Connor,
11 404 U S 270, 276 (1971), Middleton v Cupp, 768 F 2d 1083, 1086 (9th Cir 1985) A federal
12 habeas petitioner must provide the state courts with a fair opportunity to correct alleged violations
13 of prisoners' federal rights Duncan v Henry, ---U S ---115 S Ct 887, 888 (1995) It is not enough
14 that all the facts necessary to support the federal claim were before the state courts or that a
15 somewhat similar state law claim was made Id, citing Picard v Connor, 404 U S 270 (1971) and
Anderson v Harless, 459 U S 4 (1982)

16 Respondents argue that neither claim is exhausted because the first claim was not raised at
17 the State Supreme Court level and the second claim was only raised as a violation of state law and
18 not as a violation of a right secured under the Constitution of the United States Respondents also
19 argue that the claims are now procedurally barred as a result of the state's one year statute of
20 limitations on collateral attacks to convictions, RCW 10.73.090

21 the first claim The issue of petitioner appearing in
22 shackles was raised on direct appeal to the Washington State Court of Appeals (Dkt # 14 exhibit 3
23 issue 3) The issue was not raised in the motion for discretionary review (Dkt # 14 exhibit 8)
24 Accordingly, this issue was never presented to the State's highest court and is unexhausted

25 The second issue was raised in the petition for discretionary review (Dkt # 14 exhibit 8)
26 The is no mention of any federally protected right or interest in the petition The issues raised in the
27 brief are issues of Washington State's interpretation of California Law to determine what
28

1 Washington law is comparable to petitioner's California conviction The petition for review in the
2 Washington State Supreme Court exhausted no federal claim

3 2 Procedural Barr

4 Normally, a Federal Court faced with an unexhausted petition dismisses the petition without
5 prejudice, so that the petitioner has an opportunity to exhaust the claims in state court Here,
6 however, petitioner is barred from filing in state court as any further filing would be time barred
7 pursuant to RCW 10 73 090 RCW 10.73 090 states

8 (1) No petition or motion for collateral attack on a judgment and
9 sentence in a criminal case may be filed more than one year after the
10 judgment becomes final if the judgment and sentence is valid on its
11 face and was rendered by a court of competent jurisdiction

12 (2) For the purposes of this section, "collateral attack" means any
13 form of post conviction relief other than direct appeal "Collateral
14 attack" includes, but is not limited to, a personal restraint petition, a
15 habeas corpus petition, a motion to vacate judgment, a motion to
16 withdraw guilty plea, a motion for a new trial, and a motion to arrest
17 judgment

18 (3) For the purpose of this section, a judgment becomes final on the
19 last of the following dates:

20 (a) The date it is filed with the clerk of the trial court,

21 (b) The date that an appellate court issues its mandate
22 disposing of a timely direct appeal from the
23 conviction, or

24 (c) The date that the United States Supreme Court
25 denies a timely petition for certiorari to review a
26 decision affirming the conviction on direct appeal
27 The filing of a motion to reconsider denial of certiorari
28 does not prevent a judgment from becoming final

RCW 10 73 090 (emphasis added)

21 The Court of Appeals for the State of Washington entered the mandate On October 18th,
22 2000 No action which would toll the running of the one year has been filed and the petitioner
23 would now be barred from returning to State Court.

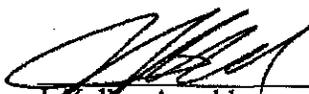
24 Federal Courts generally honor state procedural bars unless it would result in a "fundamental
25 miscarriage of justice." or petitioner demonstrates cause and prejudice Coleman v Thompson,
26 501 U S 722, 750 (1991) Petitioner has made no showing of a fundamental miscarriage of justice
27 and cannot demonstrate cause and prejudice

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CONCLUSION

This petition for writ of habeas corpus is unexhausted and procedurally barred
Accordingly, the petition should be **DISMISSED WITH PREJUDICE** A proposed order
accompanies this Report and Recommendation

DATED this 28 day of March, 2002



J. Kelley Arnold
United States Magistrate Judge

APPENDIX E ~
LETTER FROM HABEAS COUNSEL

Law Office of
LESLIE STOMSVIK
133 So. 51st St.
Tacoma, WA 98408
(253) 565-9561 • Fax (253) 565-1011

January 22, 2002

Mr. Ernest Carter
DOC #746316
Unit 8 Tier E Cell 9
Washington State Penitentiary
1313 North 13th Ave.
Walla Walla WA 99362

Dear Mr. Carter:

I have received a letter from you with some questions about your federal court action. First of all, I have just received a Notice of Appearance from Assistant Attorney General Gregory Rosen. He will apparently represent the State in your case.

You also asked me about the additional issue of your having been seen in shackles by some potential jurors in your case. In addition, you have asked about the use of a surveillance tape.

To address the surveillance tape question first, the question of whether or not the tape was properly admitted is a matter for the discretion of the trial judge. Basically, a judge is allowed to admit evidence which is relevant and not unduly prejudicial. The term relevant means that the evidence tends to prove or disprove some matter which is at issue in the case. In your situation, the surveillance tape, even though it was from a store which was not robbed, shows that you were in the neighborhood of the store which was robbed and also shows what clothing you were wearing at the time. This tape is not particularly persuasive evidence on the question of your guilt or innocence, but it is also not particularly harmful to you in that you are shown on a tape from a store which you did not rob. Since, you did not commit a crime in that store, showing you having been there did not especially hurt your position.

Since this matter was litigated before the state court and resolved in accordance with Washington State evidence law, it is very unlikely that the Federal Court will look at the question. Federal relief extends only to violations of federal rights in the course of state criminal prosecutions. There is not federal right which is particularly impacted by use of the tape other than the basic right to due process. Trying to add this issue to your federal case is probably not going to help you at all.

The same analysis is true regarding the shackling issue. Not every possible mistake that a state court makes rises to the level of a federal constitutional issue. Given the record which I have reviewed, it is not clear that there was any error made by the trial judge. There is not an absolute rule stating that criminal defendants cannot appear in restraints. Indeed, there are a number of cases where it has been found proper, for security reasons, to have a defendant restrained in court.

It is not clear that the member of the jury pool who saw you in shackles, in fact, ever talked to the other jurors about that fact. It is also clear that the matter was argued to the Washington State courts and that they rejected the argument. It is not at all clear that the Federal Court would view this matter any differently than the state court does.

I strongly recommend to you as a matter of strategy, that you not pursue issues that are not clearly debatable. Adding issues to a Federal Court claim which do not have obvious merit often distracts the Court from the issues that you present which are meritorious. In this case, in my view, the issue that presents a reasonable chance of succeeding is the issue involving what it takes to prove an out of state conviction for purposes of the three strikes and your out law. It is this issue that the Court has asked for a response about and it seems to me that it is this issue which will get you relief if that is going to happen. Setting another issue simply so that the Court can reject it does not seem to me to be a strategy which is in your best interest. Please let me know your feelings on this subject.

Very truly yours,



Leslie Stomsvik

ls/mm

APPENDIX F ~
ADMONITION OF HABEAS COUNSEL BY WASHINGTON STATE BAR

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MAY 09 2005

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

LESLIE O. STOMSVIK,
Lawyer (WSBA No.3071).

Proceeding No.

ADMONITION.

Pursuant to Rule ELC 13.5(b), a Review Committee of the Disciplinary Board issues the following admonition:

ADMISSION TO PRACTICE

1. At all times material to this complaint, you practiced in the state of Washington.

FACTS

2. In 2001, you agreed to represent a client in a federal habeas corpus petition.
3. You filed the petition and sent a copy to the client.
4. In March 2002, the Magistrate dismissed the client's petition. You filed an objection and the Judge dismissed the client's petition.
5. You did not send a copy of the order to your client or tell him that the petition had been dismissed.
6. You did not explain your client's right to appeal the decision.

2 client.

3 MISCONDUCT

4 8. By failing to notify your client that his petition had been dismissed, you violated
5 Rule RPC 1.4(a) of the Rules of Professional Conduct (RPC).

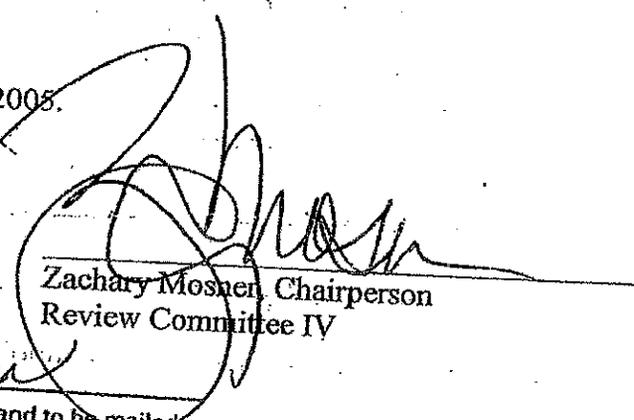
6 9. By failing to explain to your client that he could appeal the dismissal of his
7 petition, you violated RPC 1.4(b) of the Rule of Professional Conduct.

8 ADMONITION

9 YOU ARE HEREBY ADMONISHED FOR THIS MISCONDUCT. This admonition
10 is not a disciplinary sanction, but is a disciplinary action, and shall be admissible in
11 evidence in subsequent discipline or disability proceedings involving you.

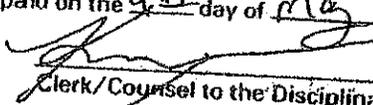
12 You may protest the issuance of this Admonition, pursuant to ELC 13.5 by filing a
13 written notice of protest with the Association-Attention: Clerk to the Disciplinary
14 Board, within 30 days of the service of this Admonition upon you. Upon receipt of a
15 timely protest, this Admonition shall be rescinded, and the grievance by shall be
16 deemed ordered to hearing.

17 Dated this 9th day of May, 2005.

18 
19 Zachary Mosher, Chairperson
20 Review Committee IV

21 CERTIFICATE OF SERVICE

22 I certify that I caused a copy of the Admonition
23 to be delivered to the Office of Disciplinary Counsel and to be mailed
24 to Abel D. Stomvik Respondent/Respondent's Counsel
at 133 S 51st St Tacoma by Certified/first class mail
postage prepaid on the 9th day of May, 2005


Clerk/Counsel to the Disciplinary Board

APPENDIX G ~
DECLARATION OF LE'TAXIONE

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5 **IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**
6 **DIVISION TWO**

7 *In re Personal Restraint Petition of*) No. _____
8)
9 LE'TAXIONE,) DECLARATION OF
10) LE'TAXIONE
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I, Le'Taxione declare:

1. I am the Petitioner in this case. I was formerly known by the name of Ernest Carter.
2. I was forced to wear shackles during my entire trial. The shackles were cuffed around my ankles and included a silver colored chain that connected both cuffs.
3. During jury selection, it was easy for all of the jurors to see my shackles—at least the chains.
4. After one juror told the judge that the juror could see the shackles, a small garbage can was moved in front of me.
5. While the garbage can may have blocked the view of one or two jurors, any jurors that sat at an angle to me could still see the chain. Further, the garbage can was not always directly in front of me, so it is very likely that all of my jurors saw my shackles during the course of the trial.

1 I declare under the penalty of perjury of the laws of the State of Washington that
2 the foregoing is true and correct.
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5 9-20-07 WSR
6 Date and Place

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Le'Taxione

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APPENDIX H~
DECLARATION OF KATHERINE CLAY

1
2 **IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**
3 **DIVISION TWO**

4 *In re Personal Restraint Petition of*) No. _____
5)
6 LE'TAXIONE,)
7 *aka* ERNEST CARTER,) **DECLARATION OF**
8) **KATHERINE CLAY**
9)
10)
11)
12)

11 I, Katherine Clay, declare:

- 12
- 13 1. I am over 18 years old and competent to make the following declaration.
 - 14 2. I was married to Ernest Carter at the time of his trial in Pierce County.
 - 15 3. I attended most every day, if not every day, of his trial.
 - 16 4. During trial, Mr. Carter was shackled at the ankles. There was a chain that
17 connected the shackles. When Mr. Carter was seated at counsel table, I could still see the
18 shackles. When Mr. Carter was seated at counsel table, I could still see the
19 shackles.
20
 - 21 5. It seemed obvious to me that some, if not all, of the jurors who decided his case
22 could also see the shackles. Although there was a small garbage can placed in front of
23 the table, it did not totally block the view of the shackles.
24

25
26 I declare under the penalty of perjury of the laws of the State of Washington that
27 the foregoing is true and correct.
28

29
30 9/28/07
Date and Place

Katherine Carter
Katherine Clay

APPENDIX I ~
INFORMATION FROM CALIFORNIA ASSAULT CONVICTION

FILED

APR 5 1983

FRESNO COUNTY CLERK
DARLENE FORD

DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

1 THE PEOPLE OF THE STATE OF)
2 CALIFORNIA)
3)
4)
5)
6)
7 Vs.)
8 ERNEST GARNETT CARTER,)
9)
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Defendant(s).

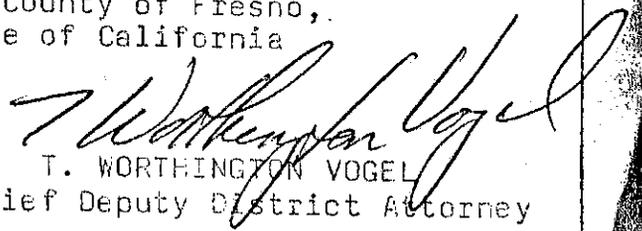
CASE NUMBERS:
Superior Court 293727-4
Arraignment Date 4-12-83
Municipal Court F70341
District Attorney 83F0755

INFORMATION

The District Attorney of the County of Fresno hereby accuses ERNEST GARNETT CARTER of committing the following crime at and in the County of Fresno, State of California:

VIOLATION OF SECTION 245(c) OF THE PENAL CODE, a felony.
The said defendant, on or about March 4, 1983, did willfully and unlawfully commit an assault with a firearm, to wit: a gun, upon the person(s) of G. T. KELLEY, (a) peace officer(s) then and there engaged in the performance of his duties, the said defendant(s) then and there knowing and reasonably should have known that the said peace officer(s) was then and there engaged in the performance of his duties.

EDWARD W. HUNT
District Attorney for
the County of Fresno,
State of California

by 
T. WORTHINGTON VOGEL
Chief Deputy District Attorney

APPENDIX J~
GUILTY PLEA FROM CALIFORNIA ASSAULT CONVICTION

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE COUNTY OF FRESNO

3 Before the Honorable Stephen R. Henry, Judge
4 Department Thirteen

FILED
JUL 05 1983

5 -o0o-

6 THE PEOPLE OF THE STATE OF)
7 CALIFORNIA,)
8 Plaintiff,)
9 vs.)
10 ERNEST G. CARTER,)
11 Defendant.)

Case No. 293727-4

CHANGE OF PLEA

12 Fresno, California

May 20, 1983

13 -o0o-

14 REPORTER'S TRANSCRIPT

FILED

15 -o0o-

16 A P P E A R A N C E S:

17 FOR THE PLAINTIFF:

EDWARD HUNT, District Attorney
of the County of Fresno
BY: ALAN NUNEZ
Deputy District Attorney

MAY 31 1983
J. D. McElroy
DEPUTY

19 FOR THE DEFENDANT:

EDWARD SARKISIAN, JR., Public
Defender of the County of Fresno
BY: LUCILE WHEATON
Deputy Public Defender

25 Reported by:

26 DOREEN L. PERKINS, C.S.R.
CERTIFICATE NO. 5150

5163
ORIGINAL

MORNING SESSION - MAY 20, 1983

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(Thereupon the following proceedings were held in open court in the presence of the court, counsel and the defendant.)

THE COURT: Action Number 293727-4, People versus Ernest G. Carter.

MS. WHEATON: Your Honor, do you have the preliminary hearing transcript handy?

THE COURT: All right. Who is appearing for the People in this case?

MR. NUNEZ: Alan Nunez, Your Honor, on behalf of Mr. Turner of the District Attorney's Office.

THE COURT: And --

MS. WHEATON: Lucile Wheaton appearing with Mr. Carter who is before the court.

THE COURT: All right. This is the time set for final confirmation in this matter.

Counsel, apparently you have a disposition of the case that you want to urge on the court?

MS. WHEATON: Yes, we do, Your Honor. Mr. Carter is going to ask permission to withdraw his previously entered plea of not guilty. He will be entering a plea of guilty to the charge on the condition that there be no initial state prison.

THE COURT: Is that the offer?

1 MR. NUNEZ: Yes, Your Honor, it is.

2 THE COURT: And for what reason do you urge this agree-
3 ment on the court?

4 MR. NUNEZ: Your Honor, there are evidentiary problems
5 in the proof of this case. And the offer was made based on
6 those problems.

7 THE COURT: Well, there are evidentiary problems in
8 every case. Counsel, are those substantial problems, if so,
9 what is the nature of them?

10 MR. NUNEZ: Yes, Your Honor. There is a single eye
11 witness in this case. I happen to have done the preliminary
12 hearing in this case, and felt at that time had the defendant
13 been willing to accept the same offer, it would have been
14 tendered. The witness in the case although she did provide
15 credible evidence, I believe, would be the defense might be
16 able to show some discrepancies and suffer personal bias on
17 the part of the witness that may affect the jury.

18 THE COURT: What is the defendant's criminal history?

19 MS. WHEATON: I think, Your Honor, that as a juvenile he
20 had a battery. Is that right?

21 THE DEFENDANT: (Nods head.)

22 THE COURT: How old is Mr. Carter?

23 MS. WHEATON: Mr. Carter is 19.

24 THE DEFENDANT: Eighteen.

25 MS. WHEATON: Eighteen.

26 THE COURT: What is the maximum term of imprisonment in

1 this case?

2 MR. NUNEZ: Four years, Your Honor.

3 THE COURT: Is that the only criminal history you're
4 aware of?

5 MR. NUNEZ: That is what I'm checking now, Your Honor.
6 We appear to have no -- either convictions as an adult on
7 this defendant, Your Honor. We do show a number of charges,
8 however, no disposition is shown. I would imagine that some
9 of those were never prosecuted.

10 THE COURT: California Youth Authority is not an alterna-
11 tive for sentencing in this matter?

12 MS. WHEATON: I think it's no longer available to him.

13 THE COURT: All right. Mr. Carter, your attorney states
14 that you want to withdraw your previously entered plea of not
15 guilty and plead guilty to the felony offense of assault with
16 a firearm on a peace officer. Is that what you want to do?

17 THE DEFENDANT: Yes.

18 THE COURT: And you realize that this is a felony
19 offense, and if then under the terms of the plea bargain the
20 court accepts that, you would not be sentenced to state prison
21 initially, but could do up to one year in custody on a proba-
22 tionary grant; is that your understanding?

23 THE DEFENDANT: Yes.

24 THE COURT: You further realize that if the terms of the
25 plea bargain are carried out and you later violate a term or
26 condition of your probationary grant, that you could be

1 sentenced to state prison less credit for any time that you've
2 done for a period up to four years?

3 THE DEFENDANT: Yes.

4 THE COURT: I want you to further understand that the
5 court is not necessarily approving this plea bargain. I want
6 to see what the results of the Probation Office are so that I
7 can make a better informed decision on that case on what
8 sentence I believe to be appropriate. If, however, I do not
9 believe the condition to be appropriate in your case and I
10 withdraw my approval, I would then allow you to withdraw your
11 plea and we can start fresh with regard to your case; do you
12 understand this?

13 THE DEFENDANT: Yes.

14 THE COURT: If that happens, whatever you tell me here
15 today including your plea of guilty will not be usable against
16 you in any proceeding; do you understand that?

17 THE DEFENDANT: Yes.

18 THE COURT: All right. It is necessary for me to know,
19 Mr. Carter, what it is that you did that makes you believe
20 that you're guilty of this crime so that I can make sure that
21 an innocent person is not being convicted. Are you prepared
22 to give me such a statement today?

23 THE DEFENDANT: Yes.

24 MS. WHEATON: Your Honor?

25 THE COURT: Yes?

26 MS. WHEATON: Your Honor, I've had several discussions

1 with my client. We would be entering the plea under People
2 versus West. I have certain pages that I discussed with the
3 District Attorney that are not lengthy. I would ask the court
4 to review as the factual basis for the plea.

5 THE COURT: Mr. Carter, the court is generally reluctant
6 to take such a plea agreement. Is it your wish to submit
7 this on certain portions of the preliminary hearing examina-
8 tion where testimony was there taken?

9 THE DEFENDANT: Yes.

10 THE COURT: Rather than give the court a factual
11 statement?

12 THE DEFENDANT: Yes.

13 THE COURT: The reason that I have those reservations,
14 Mr. Carter, is I would hate to think that a person who's not
15 truly guilty is -- is serving a punishment for the crime.

16 What is it that prompts you to urge the court to utilize
17 this procedure?

18 THE DEFENDANT: Because I'm guilty.

19 THE COURT: All right. Is part of your motivation the
20 fear that you might be convicted and sentenced to state
21 prison?

22 THE DEFENDANT: Yes.

23 THE COURT: Rather than taking advantage of the offer
24 that has been extended?

25 THE DEFENDANT: Yes.

26 THE COURT: In addition, you're just reluctant to give a

7
1 factual basis, I take it?

2 THE DEFENDANT: Yes.

3 THE COURT: All right. What portions of the transcript
4 do you rely on, counsel, in support of this plea?

5 MS. WHEATON: Page 3.

6 THE COURT: Who is testifying there?

7 MS. WHEATON: It simply identifies Rene Bell as giving
8 the testimony.

9 THE COURT: I see.

10 MS. WHEATON: The basis of her testimony is Page 6, 7
11 and 8.

12 THE COURT: And would you summarize that for me, please?

13 MS. WHEATON: All right. Ms. Bell testified that she
14 was present in a group of people when Ernest Carter pulled
15 out a gun and shot it about four times. That's on Page 6.
16 On Page 7 -- uhm -- the police cars were parked down the
17 street from her house. On Page 8 he was shooting in the
18 direction of the cars.-- of the police cars.

19 THE COURT: And were the cars occupied?

20 MS. WHEATON: Page 28, Your Honor, I think we can pick it
21 up. And that would be identifying Officer Kelly as being the
22 testifying witness. This is testimony on Page 32, 33 and 34.
23 As they had arrested Mr. Carter's brother and put him in one
24 of the two patrol cars, and as the two patrol cars were leav-
25 ing, one patrol car was in the area and it sounded -- he heard
26 sounds that sounded like gunshots. And then it sounded like

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1 something struck the back of the patrol car. The patrol car
2 was examined later and they found a place that could have been
3 made by a round bullet. They did not notice that prior to
4 going on duty that day.

5 THE COURT: And they had made an inspection of the car
6 apparently before going on duty?

7 MS. WHEATON: Yes.

8 THE COURT: People satisfied with that?

9 MR. NUNEZ: Yes, Your Honor.

10 THE COURT: Those portions as a factual basis? All
11 right. Mr. Carter, I ask you, are you satisfied that the
12 court may rely on the transcript in this case as stated by
13 your attorney?

14 THE DEFENDANT: Yes.

15 THE COURT: Very well, Mr. Carter, you have an absolute
16 right to a jury trial, public and speedy trial by jury, and
17 if you give up that right, you have the same right to be tried
18 before a judge sitting without a jury in what is called a
19 court trial.

20 You have the right to the assistance of a lawyer at all
21 stages of the proceedings.

22 You have a right to confront your accusers, that means,
23 to see, to hear and cross-examine those witnesses that are
24 called to testify against you.

25 Further, you have a right to have the witnesses at your
26 trial that you want to attend. This is the subpoena power

1 you have through the process of the court to require that
2 those people be at your trial.

3 You have the right to present evidence in your own
4 behalf and in your own defense at your trial.

5 At your trial you have the privilege against self-
6 incrimination. That is the right you have to remain silent.
7 You cannot be compelled to testify at your trial if you choose
8 not to do that. It is not your burden to show that you are
9 innocent whether charges are to be untrue, rather, the burden
10 is on the prosecution to prove their case against you beyond
11 a reasonable doubt if they can do that.

12 Further, if you choose not to testify, your silence
13 cannot be used against your interest in any way at your trial.
14 Of course, you do have the right to testify, but by pleading
15 guilty you're giving up this right also.

16 Do you know what a jury trial is, Mr. Carter?

17 THE DEFENDANT: Yes.

18 THE COURT: Have you ever seen one?

19 THE DEFENDANT: Yes.

20 THE COURT: Tell me what you believe a jury trial to be?

21 THE DEFENDANT: Twelve people to tell us whether you're
22 guilty or not guilty.

23 THE COURT: Do you know how those people are called in
24 to make that decision?

25 THE DEFENDANT: No.

26 THE COURT: They are called at random from throughout

1 the community?

2 THE DEFENDANT: Yes.

3 THE COURT: They are people from every walk of life and
4 the idea is that they are people who are fair and impartial?

5 THE DEFENDANT: Yes.

6 THE COURT: That's their principal qualification. In
7 making the selection of those 12 people they are called from
8 a larger number that are brought to court and you and your
9 attorney along with the prosecutor and the court participate
10 in selecting which 12 are going to sit on your case; do you
11 understand this?

12 THE DEFENDANT: Yes.

13 THE COURT: Further, after they have heard all of the
14 evidence and have heard the instructions of law as given to
15 them by the court and the arguments of your counsel, they go
16 to deliberate and make up their minds. Unless all 12 of
17 these people are convinced beyond a reasonable doubt of your
18 guilt and they all agree that you are guilty, you cannot be
19 convicted; do you understand that?

20 THE DEFENDANT: Yes.

21 THE COURT: You realize that by pleading guilty you're
22 giving up your right to a jury trial?

23 THE DEFENDANT: Yes.

24 THE COURT: Do you give up that right?

25 THE DEFENDANT: Yes.

26 THE COURT: Do you realize that by pleading guilty you're

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giving up your right also to a court trial before a judge without a jury?

THE DEFENDANT: Yes.

THE COURT: Do you give up that right?

THE DEFENDANT: Yes.

THE COURT: Do you realize further that by pleading guilty you won't see the witnesses that are called to testify against you, this is your right of confrontation, and you'll not be able to hear what they have to say or you'll not have your attorney cross-examine those witnesses; do you realize this?

THE DEFENDANT: Yes.

THE COURT: Do you then give up your right to confront, cross-examine and see and hear those witnesses?

THE DEFENDANT: Yes.

THE COURT: Do you further realize that by pleading guilty you're giving up your right to subpoena witnesses, to require that those witnesses come to court to testify in your own behalf?

THE DEFENDANT: Yes.

THE COURT: Do you then give up your right to subpoena those witnesses?

THE DEFENDANT: Yes.

THE COURT: Do you realize that by pleading guilty you're giving up your right to present evidence in your own defense and in your own behalf at your trial?

1 THE DEFENDANT: Yes.

2 THE COURT: Do you then give up your right to present
3 such evidence?

4 THE DEFENDANT: Yes.

5 THE COURT: Do you further realize that by pleading
6 guilty you -- well, do you know that you have the right to
7 remain silent and to require the prosecution to prove their
8 case against you beyond a reasonable doubt?

9 THE DEFENDANT: Yes.

10 THE COURT: Do you know that by pleading guilty you're
11 giving up this right because you're admitting that you com-
12 mitted this crime by your plea of guilty and in doing so you're
13 incriminating yourself?

14 THE DEFENDANT: Yes.

15 THE COURT: Do you then give up your right to remain
16 silent, that is, your privilege against self-incrimination?

17 THE DEFENDANT: Yes.

18 THE COURT: Do you have any question about any of the
19 rights that I've explained to you, Mr. Carter?

20 THE DEFENDANT: No.

21 THE COURT: Do you feel as though you understand these
22 rights?

23 THE DEFENDANT: Yes.

24 THE COURT: Are you giving these rights up voluntarily?

25 THE DEFENDANT: Yes.

26 THE COURT: Has anybody threatened you or anyone near and

1 dear to you to get you to plead guilty and give up these
2 rights?

3 THE DEFENDANT: No.

4 THE COURT: A further consequence of your plea of guilty
5 is this, Mr. Carter, if you are not a citizen of the United
6 States you could be deported or excluded from admission to
7 the United States or be denied naturalization pursuant to the
8 laws of the United States.

9 Still another consequence is this, if you are ultimately
10 sent to state prison, after you're released from custody
11 there you would be placed on parole for a period of three
12 years. And if you violate any terms or conditions on your
13 parole, you could be returned to custody for a period up to
14 one year on each parole violation; do you understand that?

15 THE DEFENDANT: Yes.

16 THE COURT: As a term and condition of your probation,
17 you could be fined in this case, Mr. Carter, up to \$5000. I
18 bet you didn't know that before you walked into court?

19 THE DEFENDANT: No.

20 THE COURT: Does that change your mind about wanting to
21 plead guilty here today?

22 THE DEFENDANT: No.

23 THE COURT: All right. Are there any other -- are you
24 presently on parole or probation in any other case?

25 THE DEFENDANT: No.

26 THE COURT: Are there any other consequences, counsel,

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that we ought to discuss with Mr. Carter? Reparation?

Mr. Carter, one of the things that you may be required to do as a term and condition of your probation is to make reparation on behalf of the victims. This means to reimburse the victims for any losses that have been occasioned by your acts. I take it there is a dent in a patrol car that you may be responsible for. I don't know if there may be something else or not, but that is a possible term.

Are any other consequences appropriate here, counsel?

MR. NUNEZ: I can think of none, Your Honor.

MS. WHEATON: I know of none.

THE COURT: Mr. Carter, have you talked about this case with your attorney and gone over the facts and circumstances so that she can properly assist you and defend you?

THE DEFENDANT: Yes.

THE COURT: Have any promises been made to you such as leniency or reward or any other kind of promises other than those for the conditional plea here that we have talked about?

THE DEFENDANT: No.

THE COURT: Ms. Wheaton, do you think you've had enough time to go over this case with your attorney, with your client, and discuss the facts of the case, his possible defenses, the consequences of this plea and his rights with him?

MS. WHEATON: Yes, I have, Your Honor.

THE COURT: Do you consent to the change of plea?

MS. WHEATON: Your Honor, he's entering this plea with

1 my consent, but it is without my advice.

2 THE COURT: In other words, you consent to the plea but
3 have advised him to the contrary?

4 MS. WHEATON: Yes, I think he thoroughly understood the
5 choices before him, and I felt he was entitled to make his
6 own decision on it.

7 THE COURT: All right. Permission is then granted to
8 withdraw the previously entered plea of not guilty in this
9 case, Mr. Carter, and the plea is hereby withdrawn.

10 I now ask you to the charge of felony -- the felony
11 violation of Penal Code Section 245(c), which is assault with
12 a deadly weapon on a peace officer, who is engaged in the per-
13 formance of his duties, how do you now plead?

14 THE DEFENDANT: Guilty.

15 THE COURT: All right. The guilty plea is accepted and
16 ordered entered into the minutes of the court. The court
17 finds that Mr. Carter understands his constitutional rights,
18 he understands the nature of the crime to which he's entered
19 his plea of guilty and the consequences of that guilty plea.
20 I find that he understandingly and voluntarily has entered
21 that plea with the waiver of his constitutional rights and has
22 expressed a factual basis for the entry of the plea through the
23 preliminary hearing transcript by the People versus West.

24 The trial date is then ordered vacated.

25 This matter is referred to the Probation Office for a
26 presentence investigation and report.

1 Counsel, Friday as you can see is not a convenient date
2 for the court to take up these matters. I would suggest that
3 it either be advanced to June the 15th, which is the 26th day,
4 or extend it over until June the 20th, which would require a
5 waiver.

6 MS. WHEATON: What day of the week would it be? I would
7 rather have it not be Tuesday or Wednesday.

8 THE COURT: Monday would be June the 20th.

9 MS. WHEATON: June 20th. All right, is the early date?

10 THE COURT: That is a later date.

11 MS. WHEATON: A later. Is that all right with you?

12 THE DEFENDANT: Yes.

13 MS. WHEATON: That's fine.

14 THE COURT: Mr. Carter, you're entitled to be sentenced
15 within 28 days of today. Do you give up your right to be
16 sentenced at that time and agree that this may be extended
17 over for a few days until June the 20th?

18 THE DEFENDANT: Yes.

19 THE COURT: Very well, judgment and sentencing and con-
20 sideration of the report of the Probation Office is set for
21 Monday, June the 20th, 1983 at 9:30 in the morning, this
22 department.

23 You are remanded to custody pending further proceedings
24 in this matter.

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STATE OF CALIFORNIA)
) SS.
COUNTY OF FRESNO)

I, DOREEN L. PERKINS, Official Certified Shorthand Reporter, do hereby certify and declare that I was the duly appointed and acting Official Stenographic Reporter for the Superior Court of the State of California, County of Fresno, on the hearing of the foregoing matter; that the foregoing is a complete, true and correct transcription of the stenographic notes as taken by me in said matter.

Dated this 30th day of May, 1983.

Doreen L. Perkins
DOREEN L. PERKINS, C.S.R.
CERTIFICATE NO. 5150

APPENDIX K~
SENTENCING TRANSCRIPT FROM CALIFORNIA ASSAULT CONVICTION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

Before the Honorable Stephen R. Henry, Judge

Department Thirteen

FILED
AUG 19 1983

-oOo-

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff,

vs.

ERNEST GARNETT CARTER,

Defendant.

[Handwritten signature]

No. 293727-4

R.P.O. & JUDGMENT

-oOo-

Fresno, California

June 20, 1983

-oOo-

A P P E A R A N C E S:

FOR THE PEOPLE: EDWARD W. HUNT, District Attorney
of the County of Fresno
BY: WILLIAM CROSSLAND
Deputy District Attorney

FOR THE DEFENDANT: EDWARD SARKISIAN, JR., Public Defender
of the County of Fresno
BY: ROBERT RAINWATER
Deputy Public Defender

FOR THE PROBATION DEPARTMENT: DON HOGNER, Chief Probation Officer
of the County of Fresno
BY: SAMUEL OBWALD
Deputy Probation Officer

-oOo-

REPORTED BY:

BRENDA J. TRACY, C.S.R.
CERTIFICATE NO. 2319

1 MORNING SESSION - JUNE 20, 1983

2 THE COURT: On page four, People vs. Ernest Garnett
3 Carter, action number 293727-4.

4 MR. RAINWATER: Yes, Your Honor, Mr. Carter is present
5 in court with Counsel, Robert Rainwater.

6 MR. OBWALD: Sam Obwald for the Probation Office.

7 MR. CROSSLAND: William Crossland for the People.

8 THE COURT: All right. Mr. Carter, this is the time
9 set for judgment and sentencing in your case.

10 Counsel, there appears to be about two legal causes why
11 sentence should not now be pronounced. One of those legal
12 causes is the Court's advisement of Mr. Carter's -- as to
13 the possible consequences of the change of plea of guilty
14 in this case, inasmuch as this Court erroneously told
15 Mr. Carter that he could be sentenced to State Prison for
16 four years maximum; and the term is eight years maximum.
17 That would be, alone, a basis to withdraw his entry of
18 plea, even though the Court would be complying with the
19 agreement in the case.

20 However, the Court is not persuaded that a grant of pro-
21 bation is appropriate in this case. How would you like to proceed?

22 MR. RAINWATER: Well, first of all, I would like to
23 ask the Court to consider standing by the plea bargain.

24 But, is the Court precluding me from arguing that point?

25 THE COURT: Not at all. In other words, as I see it,
26 if the District Attorney is strongly urging of supporting

1 the agreement for a grant of probation in this case, I
2 would have to have a further agreement from your client
3 that he understands and is willing to abide by his plea,
4 with the full knowledge that a probation violation could
5 land him in prison for up to eight years.

6 MR. RAINWATER: I think he's aware of that.

7 THE COURT: All right. Let's hear from the District
8 Attorney's office.

9 MR. CROSSLAND: Your Honor, our position is the same
10 as it was when the plea was entered, I believe in this
11 Court. We're still supporting the plea agreement.

12 THE COURT: All right. As I understand it, you
13 expressed to the Court -- first of all, I was misadvised
14 as to the criminal history of Mr. Carter at that plea
15 agreement. In accordance with my notes, I see that I was
16 aware of one of the battery cases only. I was told at
17 that time by the District Attorney's office that there was
18 evidentiary problems that had led them to make this offer
19 and extend this to Mr. Carter; and is that the reason
20 you're asking to maintain the plea agreement?

21 MR. CROSSLAND: Yes, Your Honor.

22 THE COURT: All right. Under those circumstances,
23 Counsel, I would intend to follow it, if your client is
24 willing to relieve the Court from the misadvisement
25 earlier.

26 MR. RAINWATER: I -- can I just have a minute to talk

1 to him?

2 THE COURT: Surely.

3 MR. RAINWATER: But, I believe he will.

4 (Thereupon Mr. Rainwater conferred with
5 his client.)

6 MR. RAINWATER: Yes, Your Honor, he's prepared to go
7 ahead, understanding that.

8 THE COURT: In other words, Mr. Carter, when you
9 entered your plea of guilty in this court, it was
10 conditional that you would be allowed to have a grant of
11 probation of up to one year in the Fresno County Jail. I
12 told you that a consequence of your plea of guilty would
13 be that if you violated any terms or conditions of
14 probation, you could go to State Prison for up to four
15 years. That was an error. You could go to State Prison
16 for up to eight years.

17 Do you understand that?

18 THE DEFENDANT: Yes.

19 THE COURT: Is it your wish to maintain your plea of
20 guilty on the condition that you receive initially grant
21 of probation, with the understanding that you could be
22 spending time in State Prison up to eight years if you
23 violate your probation?

24 THE DEFENDANT: Yes.

25 THE COURT: People satisfied with -- with that waiver?

26 MR. CROSSLAND: Yes, Your Honor.

1 THE COURT: Very well. Mr. Carter, imposition of
2 sentence is -- excuse me. Further discussion, Counsel?

3 MR. RAINWATER: If -- if the Court intends to abide by
4 the plea bargain, I have no further discussion as to the
5 terms of probaion.

6 THE COURT: Mr. Crossland?

7 MR. CROSSLAND: Uh, well, Your Honor, in light of the
8 plea agreement, and this probation report, we feel the
9 maximum commitment to local time is appropriate. I think
10 the Defendant's record speaks for itself and that's
11 sufficient basis alone.

12 THE COURT: Mr. Obwald?

13 MR. OBWALD: Your Honor, in light of the plea
14 agreement, we have nothing further to add.

15 THE COURT: All right. I'll be calling upon you
16 shortly to assist the Court with a suggestion for
17 probationary terms.

18 Is the matter then submitted, Counsel?

19 MR. RAINWATER: Yes, Your Honor.

20 THE COURT: Very well. Mr. Carter, imposition of
21 sentence is suspended in your case and your application for
22 grant of probation is ordered approved.

23 It is incumbent upon the Court to find unusual
24 circumstances to exist in the situation such as yours,
25 because that is required by Penal Code section 1203(e),
26 subdivision (2).

1 As I understand the new sentencing rules, it is not
2 necessary for me to do that if I make this finding as a
3 result of a plea agreement, which, of course, was the case
4 here. For that reason, I rely on the plea agreement rather
5 than the finding of any unusual circumstances, specifically
6 in your case to allow you this grant of probation.

7 Terms of your probation are as follows: First of all,
8 it is for a five-year formal probationary grant. That
9 means regular reporting to the Probation Office and
10 compliance with their lawful directives to you.

11 Next term is that you spend 365 days in the custody of
12 the Sheriff of Fresno County.

13 Are the 109 days, 54 and 163, correct?

14 MR. OBWALD: Yes, Your Honor.

15 THE COURT: Any dispute with that, Counsel?

16 MR. RAINWATER: No, Your Honor.

17 THE COURT: From this term in custody you're credited
18 163 days; that is, 109 actual days served, plus 54
19 good-time/work-time days.

20 Next term, you obey all lawful laws and all lawful
21 orders of the Probation Office.

22 Next term, that you seek and maintain gainful
23 employment during your period of probation.

24 Next term is that you not possess any dangerous or
25 deadly weapons, nor have such weapon under your control.

26 Next term is that you submit your person, your

1 property, your place of abode and your vehicle to search
2 and seizure, at any time of the day or night, with or
3 without a search warrant, upon the request of any peace
4 officer or probation officer.

5 Is there alcohol involved in this case? I can't find
6 it.

7 MR. RAINWATER: I don't believe so, Your Honor.

8 MR. OBWALD: I don't believe so, Your Honor.

9 THE COURT: Next term is that you pay a fine, payable
10 through the Probation Office in the amount of \$152, such
11 fine is to include Penalty Assessment Costs and
12 Construction Fund Costs.

13 Any other terms being recommended, Counsel, or Mr.
14 Obwald?

15 MR. OBWALD: Two, Your Honor. I believe there's an
16 issue as to whether or not there was any damage to the
17 vehicle and we would ask an order for restitution.

18 THE COURT: Thank you.

19 MR. OBWALD: And, also, an order that the Defendant
20 not use force or violence, or threat of force or violence
21 against any person except in self-defense.

22 THE COURT: Next term is that you make reparation on
23 behalf of the loss suffered by the victim in this case,
24 specifically in regard to injury to the vehicle, at such
25 times and amounts as directed by the Probation Office.

26 Next term is that you refrain from the use of force or

1 violence on any person except in self-defense. Of course,
2 that could constitute a violation of the law, in any event,
3 which could land you back in before this Court on a
4 violation.

5 Any other terms being recommended?

6 MR. OBWALD: No, Your Honor.

7 THE COURT: Do you understand these terms of
8 probation, Mr. Carter?

9 THE DEFENDANT: Yes.

10 THE COURT: Do you agree to accept them and abide by
11 them?

12 THE DEFENDANT: Yes.

13 MR. OBWALD: Tentative release date would be
14 November 2nd.

15 THE COURT: Very well. I find in compliance with
16 Government Code section 13960 and 13967 this is not a
17 crime of violence.

18 -oOo-

19 STATE OF CALIFORNIA)
20 COUNTY OF FRESNO) ss.

21 I, BRENDA J. TRACY, Certified Shorthand Reporter, do
22 hereby certify that the foregoing pages comprise a full,
23 true and correct statement of the proceedings as reflected
24 therein.

24 DATED: Fresno, California,
25 June 27, 1983.

26 Brenda J. Tracy
BRENDA J. TRACY, C.S.R.
Official Shorthand Reporter
Certificate No. 2319

I'm going to print this letter so that I can walk you through my legal issue and my motion for accelerated discretionary review. Also enclosed is the Admonition of that lawyer that I paid for who violated the rules of professional conduct.

1st
PARAGRAPH

First of all the judge stated "in accordance with Government Code 13960 & 13967 this is not a crime of violence" (see Code 13960 attached). 13960 is merely a description of what must transpire in order for my crime to be a class A or class B Felony and because my crime didn't meet this criterion I was able to plead to a class C Felony. 13967 merely deals with probation for my crime in California. Since there were no sustained injuries Government Code 13960 & 13967 was used as a validation to take the violence out of the crime.

2nd
PARAGRAPH

Secondly in order for a crime in Washington to be a strikeable offense it must be considered a "most serious offense". These offenses are described by Washington law as: (see most serious offenses attached). For out of state crimes they use the comparability method which means that an out of state crime must be comparable to a "most serious offense" in Washington (see 23 (u) highlighted in blue attached). But a most serious offense must be a class A or class B Felony or 1st & 2nd degree crime.

3rd
PARAGRAPH

I plead guilty to a PC 245 C which is a class C Felony or 3rd degree Felony (see 245 C highlighted in blue). If you look at RCW 9A.36.031 Assault in the third degree (highlighted in blue) you'll see

4th
PARAGRAPH

THAT MY CRIME IS MOST COMPARABLE TO AN ASSAULT IN THE 3RD DEGREE OR CLASS C FELONY WHICH IS NOT A STRIKABLE OFFENSE. AS A MATTER OF FACT BECAUSE THERE WAS NO BODILY HARM A CLASS C FELONY IS ALL MY CALIFORNIA CRIME CAN BE COMPARED TO.

ALSO ENCLOSED IS WASHINGTON STATE BAR ASSOCIATION (WSBA) ADMONITION OF MY CROOKED ASS LAWYER. HE DIDNT EVEN PROTEST THE ADMONITION INCLUDING ENTIRE PROCEDURE THAT I WENT THROUGH TO SECURE SAID ADMONITION AGAINST THE LAWYER.

COVER LETTER: (DEAR SIRMANT

MY NAME IS ERNEST CARTER. I WAS SENTENCED ELEONEOUSLY TO 3 STRIKES. I RETAINED A LAWYER WITH \$2,000 DOLLARS. SAID LAWYER LIED TO ME ABOUT MY APPEAL, MISREPRESENTED ME, BASICALLY COMMITTING FRAUD BECAUSE HE RECEIVED FUNDS BUT DID NOT DO THE WORK.

SAID LAWYER WAS ADMONISHED BY THE WASHINGTON STATE BAR ASSOCIATION FOR HIS MISREPRESENTATION OF ME AND NEGLIGENCE. I AM SEEKING A FULL RETURN OF MONIES RENDERED ALONG WITH DAMAGES OF A MONETARY NATURE. ENCLOSED IS A COPY OF THE WSBA ADMONITION WHICH ALSO MAKES EVIDENT SAID LAWYERS PREVIOUS UNPROFESSIONAL, SCANDALOUS BEHAVIOR. IF YOU CAN HELP ME RECEIVE MONIES RENDERED IN THIS ISSUE PLEASE CONTACT ME AT:

CE FAXONE X ANA. ERNEST CARTER #746310
MUNICIPAL CORRECTIONAL COMPLEX

Marital violence. Elizabeth Truninger
(1971) 23 Hast.L.J. 259.

Library References

C.J.S. Criminal Law §§ 1759, 1761 to 1772,
1774 to 1786.

Notes of Decisions

proceedings in which the state recovers money through a lien under § 13966 when the crime victim/claimant is the active litigant responsible for the recovery. 64 Ops.Atty.Gen. 540, 7-3-81.

Attorney fees and costs 1

1. Attorney fees and costs
The state is not responsible for a proportionate share of attorney fees and costs for legal

§ 13960. Definitions; operative date

As used in this article:

(a) "Victim" means any of the following residents of the State of California, or military personnel and their families stationed in California:

- (1) A person who sustains injury or death as a direct result of a crime.
- (2) Anyone legally dependent for support upon a person who sustains injury or death as a direct result of a crime.
- (3) Any member of the family of a victim specified by paragraph (1) or any person in close relationship to such a victim, if that member or person was present during the actual commission of the crime, or any member or person herein described whose treatment or presence during treatment of the victim is medically required for the successful treatment of the victim.
- (4) Any member of the family of a person who sustains injury or death as a direct result of a crime when the family member has incurred emotional injury as a result of the crime. Pecuniary loss to these victims shall be limited to only medical expenses, mental health counseling expenses, or both, of which the maximum award shall not exceed ten thousand dollars (\$10,000).
- (5) In the event of a death caused by a crime, any individual who legally assumes the obligation, or who voluntarily pays the medical or burial expenses incurred as a direct result thereof.

(b) "Injury" includes physical or emotional injury, or both. However, this article does not apply to emotional injury unless such an injury is incurred by a person who also sustains physical injury or threat of physical injury or by a

2011/10/10 10:49:00 AM

(23) "Most serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies, as now existing or hereafter amended:

(a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;

(b) Assault in the second degree;

(c) Assault of a child in the second degree;

(d) Child molestation in the second degree;

(e) Controlled substance homicide;

(f) Extortion in the first degree;

(g) Incest when committed against a child under age fourteen;

(h) Indecent liberties;

(i) Kidnapping in the second degree;

(j) Leading organized crime;

(k) Manslaughter in the first degree;

(l) Manslaughter in the second degree;

(m) Promoting prostitution in the first degree;

(n) Rape in the third degree;

(o) Robbery in the second degree;

(p) Sexual exploitation;

(q) Vehicular assault;

(r) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating

liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

(s) Any other class B felony offense with a finding of sexual motivation, as "sexual motivation" is defined under this section;

(t) Any other felony with a deadly weapon verdict under RCW 9.94A.125;

(u) Any felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection;

(v)(i) A prior conviction for indecent liberties under RCW 9A.88.100(1) (a), (b), and (c), chapter 260, Laws of 1975 1st ex. sess. as it existed until July 1, 1979, RCW 9A.44.100(1) (a), (b), and (c) as it existed from July 1, 1979, until June 11, 1986, and RCW 9A.44.100(1) (a), (b), and (d) as it existed from June 11, 1986, until July 1, 1988;

(ii) A prior conviction for indecent liberties under RCW 9A.44.100(1)(c) as it existed from June 11, 1986, until July 1, 1988, if: (A) The crime was committed against a child under the age of fourteen; or (B) the relationship between the victim and perpetrator is included in the definition of indecent liberties under RCW 9A.44.100(1)(c) as it existed from July 1, 1988, through July 27, 1997, or RCW 9A.44.100(1) (d) or (e) as it existed from July 25, 1993, through July 27, 1997.

might for assault upon a peace officer or firefighter with a stun gun or taser, as described in subd. (c), from imprisonment in the state pris-

exceeding one year, or by fine not exceeding one thousand dollars (\$1,000), or by both the fine and imprisonment."

Cross References

Penalty for bringing in courtroom, courthouse or court building, see § 171b.

Library References

Assault and Battery § 53.
C.J.S. Assault and Battery § 69.

Handwritten notes: 77.05, 104, 1000

§ 245. Assault with deadly weapon or force likely to produce great bodily injury; punishment:

(a)(1) Every person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury is punishable by imprisonment in the state prison for two, three or four years, or in a county jail not exceeding one year, or by fine not exceeding ten thousand dollars (\$10,000), or by both such fine and imprisonment.

(2) Every person who commits an assault upon the person of another with a firearm is punishable by imprisonment in the state prison for two, three, or four years, or in a county jail for a term of not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment.

(b) Every person who commits an assault with a deadly weapon or instrument, other than a firearm, or by any means likely to produce great bodily injury upon the person of a peace officer or fireman, and who knows or reasonably should know that the victim is a peace officer or fireman engaged in the performance of his or her duties, when such peace officer or fireman is engaged in the performance of his or her duties shall be punished by imprisonment in the state prison for three, four, or five years.

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

(d) When a person is convicted of a violation of this section, in a case involving use of a deadly weapon or instrument or firearm, and the weapon or instrument or firearm is owned by that person, the court shall order

C. 12/1, p. 314
308, § 4, eff.
1510, § 1; Sta
c. 1126, p. 50
§ 152.5, oper
30, 1980; Stat
25, 1982; Stat
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WSBA
OFFICE OF DISCIPLINARY COUNSEL

Randy Beitel
Senior Disciplinary Counsel

direct line: 206-727-8257
fax: 206-727-8325
e-mail: randyb@wsba.org

July 7, 2004

Leslie Stomsvik
Attorney at Law
133 South 51st Street
Tacoma, WA 98408

RE: Grievance of Ernest Carter
WSBA File No. 04-00420

Dear Mr. Stomsvik:

I enclose a copy of Mr. Carter's June 21, 2004 comments, together with the various exhibits. Attached is the June 5, 2002 Mailing Certificate of Clerk which reflects that copies of the Judge's order dismissing Mr. Carter's habeas corpus petition were mailed to various individuals, including you as Mr. Carter's counsel, but not directly to Mr. Carter as you have alleged. This differs from the recollection you indicated in your June 3, 2004 letter. At this point, we will analyze this matter on the basis that Mr. Carter was not sent a copy of the June 5, 2002 order directly by the Clerk. I note that this comports with the language in the last sentence of the Judges order reflecting the mailing directions to the Clerk.

Prior to concluding our investigation, we want to review your entire file on the representation of Mr. Carter. Please submit that for our review pursuant to ELC 5.3(e).

Thank you for your cooperation.

Sincerely,


Randy Beitel
Senior Disciplinary Counsel

enc.

cc: Ernest Carter

VERIFICATION OF PETITION

I, LeTaxione (a/k/a Ernest Carter), verify under penalty of perjury that the foregoing is true and correct and has been filed on my behalf.

Executed on this 20th day of September, 2007.



LeTaxione