

No. 84606-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF:

LE'TAXIONE,

PETITIONER.

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SUPPLEMENTAL BRIEF

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A. INTRODUCTION

Le'Taxione is not a persistent offender. His California "assault with a deadly weapon" conviction is not comparable to a Washington second-degree assault "strike." California's assault is a general intent crime. The Washington crime requires specific intent. The resulting available defenses differ. Nevertheless, the State asks this Court to leave this legal error uncorrected simply because more than a year has passed. In other words, Le'Taxione must serve the remainder of his life in prison and tax payers must foot the bill for a sentence that is unlawful. The law is not so harsh or unforgiving.

There are several reasons this petition is timely. Le'Taxione is "actually innocent" of being a persistent offender. Le'Taxione was not informed of the one-year time bar. Comparability law changed and the change applies retroactively. This is not a case where Le'Taxione benefitted or where the State suffered prejudice from the delay in bringing this petition. Comparability analysis does not permit, much less require, new testimony about an old conviction. Instead, it relies entirely on historically settled facts. Those facts have not disappeared over time. The necessary documents from Le'Taxione's California conviction are in the record and attached to his PRP.

Only Le'Taxione has suffered prejudice from the delay. He has served a sentence far exceeding the one rightfully provided by the law.

B. ARGUMENT

1. PETITIONER'S CALIFORNIA ASSAULT CONVICTION IS NOT COMPARABLE TO A STRIKE BECAUSE IT IS A GENERAL INTENT CRIME AND VARIOUS DEFENSES, AVAILABLE IN WASHINGTON, DO NOT APPLY.

Le'Taxione (then known as Ernest Carter) was convicted in 1983 in Fresno County, California of assault of a police officer. The Information alleged that Petitioner "committed an assault with a firearm, to wit: a gun," upon a police officer "engaged in the performance of his duties." *See* Appendix I to PRP. Petitioner pled guilty on May 20, 1983, not contesting the evidence that he shot a gun and hit a police car. Appendix J to PRP, p. 7-8. He was sentenced on June 20, 1983, after the Court informed Petitioner that he had been misadvised of the maximum possible sentence for the crime. Appendix K to PRP, p. 2. The court ordered Petitioner to serve 365 days in custody and suspended the remainder of the sentence. *Id.* at p. 6. Because he was sentenced to jail, the conviction became a misdemeanor under California law. *See* Cal. Penal Code § 17 (b)(1). The sentencing court further found "this is not a crime of violence." *Id.* at 8.

After he was convicted of a robbery in Pierce County, Le'Taxione was sentenced on September 23, 1998, to life in prison as a persistent offender. The California conviction constituted one of two prior "strikes" found by the sentencing court.

In 2007, Le'Taxione filed a PRP claiming that he was not a persistent offender because his California conviction did not constitute a strike. The Court of Appeals agreed and granted Petitioner's PRP holding:

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

The Court of Appeals further explained:

Specific intent to either create apprehension of bodily harm or cause bodily harm is an essential element of second degree assault in Washington. Therefore, the defense of intoxication is available to a defendant charged with that offense. Assault in California requires only the general intent to willfully commit an act, the direct, natural and probable consequences of which, if successfully completed, would be the injury to another. Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm. The intent to cause any particular injury, to severely injure another, or to injure in the sense of inflicting bodily injury is not necessary. Consequently, a jury may not consider evidence of the defendant's intoxication in determining whether he committed assault in California.

(internal citations removed).

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

This was the correct result.

Comparability analysis is explained in *In re PRP of Lavery*, a case with several parallels to the instant case. 154 Wn.2d 249, 111 P.3d 837 (2005). In *Lavery*, this Court found that a federal bank robbery was not comparable to a Washington robbery because the former crime was a general intent offense, while the Washington crime required specific intent. The difference in the *mens rea* resulted in differences in the available defenses. Among the defenses recognized by Washington courts in robbery cases which may not be available to a general intent crime are (1) intoxication; (2) diminished capacity; (3) duress; (4) insanity; and (5) claim of right. This Court did not authorize the examination of the historical facts by the current sentencing court to determine whether the facts negate an otherwise unavailable defense because where “the foreign statute is broader than Washington's, that examination may not be possible because there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense.” 154 Wn.2d at 257.

Like federal bank robbery, California law makes assault with a deadly weapon a general intent crime. *People v. Rocha*, 3 Cal.3d 893, 479 P.2d 372, 92 Cal.Rptr. 172 (1971); *People v. Colantuono*, 7 Cal.4th 206, 214, 26 Cal.Rptr.2d 908, 865 P.2d 704 (1994).

Despite these apparent differences, the State argues the precise intent required under California and Washington law is identical. The State is wrong. Under California law, an offender commits an assault if he does any act that a reasonable person would naturally and probably know was likely to result in a battery. Under California law, an offender does not need to intend harm or apprehension of harm. Put another way, “a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery.” *People v. Williams*, 26 Cal.4th 779, 788 n.3, 111 Cal.Rptr.2d 114, 29 P.3d 197 (2001).

California law does not permit defenses like intoxication to assault. *Id.* And, like in *Lavery*, Le’Taxione neither disclaimed, nor asserted legally unavailable defenses when he pled guilty.¹

Application of the test set forth in *Lavery*, easily and obviously establishes the lack of comparability of this conviction.

The question then is whether this Court can correct the error. The answer is “yes,” for a number of reasons discussed below.

¹ Petitioner urges this Court not to adopt the proposed post-conviction test set forth in the State’s *Petition for Review*—a test which would require Petitioner to affirmatively show that he possessed only the “lesser” intent required under the foreign law or that he a defense unavailable under the foreign law, but applicable in Washington applied. If this Court adopted such a test, it would necessarily require PRP courts to hear and weigh new evidence about the foreign conviction at the current sentencing hearing.

2. COMPARABILITY LAW CHANGED. THE CHANGE APPLIES RETROACTIVELY.

On direct appeal, the Court of Appeals held that Le'Taxione's California assault was comparable to a second-degree assault. Since that time, the law has changed such that it is now clear that the two crimes are not comparable. Where a recent construction of a statute reveals an obvious error in the previous application of that statute, that change justifies bringing a petition more than one year after finality.

Lavery involved a successive and otherwise-time barred PRP. Lavery argued that *Freeburg* represented a change in the law. *State v. Freeburg*, 120 Wn.App. 192, 84 P.3d 292(2004). In *Freeburg*, the Court of Appeals held that recent cases made it clear that federal bank robbery was not legally comparable to the crime of robbery in Washington. *State v. Bunting*, 115 Wn.App. 135, 61 P.3d 375 (2003) (Illinois robbery is not comparable) and *Carter v. United States*, 530 U.S. 255 (2000) (defining federal bank robbery as general intent crime). This Court concluded that Lavery had demonstrated a change in the law because it was obvious at the time of the appeal that the direct appeal decision was erroneous.

Indeed, this Court in *Lavery* began its analysis by noting that the law had changed as far as Mr. Lavery's position was concerned. 154 Wn.2d at 253 ("Lavery's position at sentencing, on direct appeal, and in his first PRP was vindicated when, on February 19, 2004, the Court of Appeals issued its

opinion in *State v. Freeburg*, 120 Wn.App. 192, 84 P.3d 292, review denied 152 Wn.2d 1022, 101 P.3d 108 (2004).” “Because *Freeburg* effectively corrected the error of the *Mutch* analysis, it represents a material change in the law.” *Id.* at 260.

The same is true in this case. On direct appeal, the reviewing court held the two crimes were legally comparable because both “offenses share the common element of assault with a deadly weapon.” However, it is not enough that the two statutes use similar language. *Lavery* makes clear the insufficiency of such a superficial comparison. A general and a specific intent crime are not comparable, especially where the corresponding ranges of available defenses differ.²

As a result, the law has changed because *Lavery* makes it clear that the decision in Le’Taxione’s direct appeal was incorrect.

The State may argue that a change in the law occurs only when a prior appellate decision is explicitly overruled. For example, the State may claim that *Freeburg* overruled *State v. Mutch*, 87 Wn. App. 433, 942 P.2d 1018 (1997), justifying *Lavery*’s petition. It did not. *Freeburg* held that federal bank robbery was *not* legally comparable to a strike. 120 Wn.App.

² In addition, since Le’Taxione’s sentence became final *People v. Williams*, 26 Ca.4th 779, 29 P.3d 197 (2001), further clarified California law regarding the intent required to commit an assault. *Williams*, which interpreted the original meaning of California’s assault statute, made it clear that California law permits a jury to convict a defendant of assault based on facts he should have, but did not know. *Williams, supra*, 26 Cal.4th at p. 790. This further demonstrates the direct appeal decision incorrectly equated both definitions of “assault.”

at 199. So did *Mutch*. 87 Wn.App. at 438 (“We agree that the elements of the federal bank robbery statute are broader than Washington’s robbery statute, and some acts that would violate the federal bank robbery statute would not constitute robbery in Washington.”). The difference is that the Mutch court concluded that his robbery was *factually* comparable to a Washington robbery. *Id.* (“But under the second prong of the foreign convictions test, this is not relevant because Mutch’s actual conduct satisfied the elements of Washington’s robbery statute.”).

Since the direct appeal, it is now clear that Le’Taxione’s California assault conviction is not comparable to a strike. Because the *Lavery* opinion construes the comparability statute, it explains what the statute has always meant. Thus, it is a change that applies retroactively. *In re PRP of Hinton*, 152 Wn.2d 853, 860, 100 P.3d 801 (2004). This petition is timely.

3. LE’TAXIONE WAS NOT PROVIDED NOTICE OF THE TIME LIMIT

Summary of Facts

Le’Taxione was not orally informed of his collateral attack rights when he was sentenced—an undisputed fact.

Two documents were prepared that day: a notice of collateral attack rights and a judgment and sentence. Neither document bears his signature.

At an evidentiary hearing, the testimony was entirely consistent. Le’Taxione testified that he did not receive either document. No one testified otherwise. Nevertheless, the reference hearing court inconsistently

found that Le'Taxione did not receive the "notice," but did receive the judgment. This Court should review the latter finding because it was not supported by *any* evidence, much less *substantial* evidence. It was a guess.

Notice is Required to Start the One Year PRP Clock

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

Under RCW 10.73.110, the trial court *must* advise a defendant of the one-year statute of limitations *when* it pronounces judgment and sentence ("the court shall advise the defendant of the time limit specified in RCW 10.73.090 and 10.73.100"). *See In re Pers. Restraint of Vega*, 118 Wn.2d 449, 823 P.2d 1111 (1992) (we held that where the State made no attempt to give petitioner notice of the amended one-year limitation on filing a personal restraint petition, as required by statute, petitioner was not bound by the one-year limitation). This advice *must* be given in every case. *See In re Restraint of Runyan*, 121 Wn.2d 432, 452-53, 853 P.2d 424 (1993) (finding that Dept. of Corrections did not need to prove actual notice to every prisoner, but noting that notice would not be a problem for prisoners sentenced after effective date of statute because courts are required to provide notice in every case).

This Court has required strict compliance with the statute because “the very purpose of RCW 10.73.090 ... is to encourage prisoners to bring their collateral attacks promptly.” *In re Restraint of Runyan*, 121 Wn.2d at 450. When notice is not properly given, this omission creates an exemption to the time bar. *Schwab, supra*. See also *Vega*, 118 Wn.2d at 450-51 (applying rule to RCW 10.73.120); *State v. Golden*, 112 Wn.App. 68, 78, 47 P.3d 587 (2002) (applying *Vega* rule to RCW 10.73.110).

The Undisputed Facts

Le’Taxione’s sentencing judge did not *orally* advise him of his collateral attack rights on or off the record. The question then becomes whether Le’Taxione was given written notice.

The reference hearing court found that “(a)t the time that Carter was sentenced, a multi-copy form entitled *Advice of Collateral Attack Time Limit* was commonly used to inform defendants of the rights and limitations found in RCW 10.73.090-110.” *FOF, No. 5*. Although such a document appears in the court file, “that document does not bear Mr. Carter’s signature or the date on the line entitled: *Receipt Acknowledged*. In addition, no reference was made to the form during the sentencing hearing.”

As a result, the reference hearing court found:

The Court finds that the greater weight of the evidence supports the conclusion that Mr. Carter was not given the *Collateral Attack* form when he was sentenced on September 23, 1998. The Court further finds there is no evidence contradicting Mr. Carter’s testimony that he did not receive a copy of the document until 2007.

FOF, No. 8.

The Single Disputed Sentence

The reference hearing court found that Le'Taxione received a copy of his judgment and sentence when he was sentenced. However, there was no evidence or testimony giving rise to even an inference that Le'Taxione received his judgment when he was sentenced.

The *Judgment*, like the *Notice*, did not bear Le'Taxione's signature.

Le'Taxione testified that he did not receive the document when he was sentenced. The reference hearing judge did not find his testimony incredible or unbelievable. Consistent with Petitioner's testimony, the reference hearing court found:

Mr. Carter testified that he did not receive a copy of the *Judgment* when he was sentenced. He testified he left the court with only the legal writing pad he brought with him to court that day.

FOF, No. 10. Further, when asked by the State to make express credibility determinations about the testimony, the reference hearing court noted:

I'm not making any other findings about credibility other than the findings of fact....

RP (3/26/2009) 5. When a fact-finder measures witness credibility, this Court does not review that determination on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The reference hearing court found that the usual practice of Deputy Prosecuting Attorney Cooper, was to separate the multiple copies of the

completed judgment and put those copies in two “piles” and “hand them to defense counsel.” *FOF, No. 10*. Although Deputy Prosecuting Attorney Cooper had some memory of Le’Taxione speaking to his attorney during the sentencing, he had no memory of what documents, if any, Mr. Alipuria gave to Le’Taxione that day. RP 41-42.

Mr. Alipuria testified that did not know what documents, if any, he gave his client on the day of sentencing. RP 5-8. Defense counsel, a new lawyer at the time, “did not have a standard practice.” The Court found:

Mr. Alipuria does not remember whether he gave a copy of the *Judgment* to Mr. Carter on the day of the sentencing. He likewise cannot say if, at the time, it was his usual practice to do so.

FOF, No. 10.

Nevertheless, in contrast to the finding regarding the *Notice* and without pointing to any evidence distinguishing the *Judgment*, the court concluded in *Finding No. 10*: “The Court finds that the Defendant did receive a copy of the Judgment and Sentence at the time of sentencing.”

Not only is this finding not supported by “substantial evidence,” it is not supported by *any* evidence. Just as importantly, it is contradicted by the other findings. It is surmise because there is no evidence from which even an inference supporting this finding can be drawn.

The Evidence Must Support the Findings

As a result, this Court should review the challenged sentence in *Finding No. 10* to determine whether it is supported by substantial evidence.³

A reviewing court determines whether challenged findings are supported by substantial evidence. *Rogers Potato Serv., L.L.C. v. Countrywide Potato, L.L.C.*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *State v. Solomon*, 114 Wn.App. 781, 789, 60 P.3d 1215 (2002). Following this Court's formulation, lower courts have defined substantial evidence to mean "more than a mere scintilla;" it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Li Zu Guan v. INS*, 453 F.3d 129, 135 (2d Cir.2006) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). See also *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980). In the case of *N.L.R.B. v. A.S. Abell Co.*, 97 F.2d 951, 958, (4th Cir. 1938), a federal court said that the substantial evidence rule is not satisfied by evidence which merely *creates a suspicion* or which *gives equal support to inconsistent inferences*. Surmise, conjecture and speculation do not

³ Le'Taxione admittedly received a copy of his judgment years later when his case was in habeas. However, there is no support for the conclusion that the one year time clock began running at that time, especially where the plain language of the judgment suggested that his time to file a PRP had run out years earlier.

constitute substantial evidence. *White v. Valley Land Company*, 64 N.M. 9, 322 P.2d 707, 709 (1958). *See also Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 817-18, 733 P.2d 969 (1987).

At most, the evidence supports the inference that DPA Cooper provided two copies of the judgment to defense counsel. However, no possible inference can be drawn regarding what defense counsel did with those two “piles.” Mr. Alipuria’s testimony was that he did not remember what he did in this instance and could not say what he did generally.

The evidence supports the conclusion that Le’Taxione did not receive the judgment. The evidence could also support the conclusion that no one knows if Le;Taxione was provided a copy of his judgment when he was sentenced. Only conjecture, and not the evidence, supports the conclusion that Le’Taxione received a copy that day. Of course, that is exactly what the reference hearing judge did, stating: “I *think* he got a copy of the judgment.” RP (3/26/2009) 1 (emphasis added).

Because Le’Taxione did not receive notice of the one-year time bar, his petition is timely.

4. THE ACTUAL INNOCENCE EXCEPTION

If this Court decides that the two exceptions to the time bar discussed previously do not apply⁴, then Le'Taxione urges this Court to affirm the Court of Appeals and adopt a narrow "actual innocence" exception to the state post-conviction time bar for individuals wrongly sentenced to life in prison as persistent offenders.

The Court of Appeals held:

We apply the exception here based on our conclusion, explained below, that Carter is "actually innocent" of his persistent offender status. We emphasize that this exception applies only in extremely rare instances, as where a petitioner is "actually innocent" of his persistent offender status. Justice requires, however, that we apply the actual innocence exception in this instance to overcome the one-year statute of limitation in RCW 10.73.090.

154 Wn.App. at 920. This Court should affirm the Court of Appeals. The "actual innocence" exception is a narrow, but critical safeguard which this court can either read into either the "insufficient evidence" evidence exception to the time bar or which this Court can hold is required in order for the time bar statute to meet constitutional requirements. *State v. Reyes*, 104 Wn.2d 35, 700 P.2d 1155 (1985)(discussing "constitutional avoidance" rule of construction).

Numerous federal courts have recognized the application and importance of an actual innocence exception. In *Murray v. Carrier*, 477

⁴ See *Dretke v. Haley*, 540 U.S. 945 (2003) (courts should look to actual innocence exception only if other exceptions do not apply).

U.S. 488 (1986), the Supreme Court set forth an actual innocence exception for habeas claims. The *Murray* Court held that a federal habeas court may hear an otherwise unavailable claim when accompanied by showing of actual innocence. The Court explained: “we think that in an extraordinary case, where a constitutional violation has resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.” *Murray*, 433 U.S. at 495. The actual innocence exception is a safeguard against manifest injustices. *Id.* at 495.

A criminal defendant can be innocent of a recidivist penalty in the same way that he can be innocent of a crime. In *Sawyer v. Whitley*, 505 U.S. 333 (1992), the Court approved the extension of the actual innocence exception to the sentencing phase of a capital case. *Id.* at 347. In so doing, the Court focused the actual innocence test on the elements that must be proved in order for a defendant to be eligible for the increased penalty, as opposed to those facts which may mitigate the available penalty.

From these precedents, a number of federal circuit decisions provide additional persuasive support for the applicability of the actual innocence exception to the sentencing phase of non-capital cases, especially recidivist penalties like the persistent offender law.

When it granted Le’Taxione’s PRP, the Court of Appeals primarily relied on *Jones v. Arkansas*, where a defendant was sentenced under a

habitual offender statute that was not in effect when he committed his offenses. 929 F.2d 375, 380-81 (8th Cir.1991). The *Jones* court concluded that manifest injustice would occur if it were to adhere rigidly to the procedural default rule. *Jones*, 929 F.2d at 381 n. 16. Other cases are helpful.

In *Spence v. Superintendent Great Meadow Corr. Facility*, 219 F.3d 162 (2d Cir. 2000), the Second Circuit extended the actual innocence exception to the sentencing phase of a non-capital case. Donovan Spence, who was arrested on a robbery charge, was offered a deal by the judge: if he was not arrested again the judge would punish him only as a youthful offender, but if he was arrested he would be given a sentence of eight-and-one-third years to twenty-five years. *Id.* at 165. Soon after his release, Spence was rearrested, again on robbery charges. Following through on his promise, the judge imposed a stiff sentence relating to the first robbery. Later, however, it was determined that Spence did not commit the second robbery and therefore did not deserve the judge's harsher sentence. *Id.* The Second Circuit allowed the sentence to be reduced, thereby extending the actual innocence exception to the sentencing phase of a non-capital case. The court explained that “[b]y challenging the determination of his responsibility for the act predicated his enhanced sentence, Spence raises precisely the question that the actual innocence exception contemplates.” *Id.* at 171. The court reasoned that the Supreme Court has “made clear that

the availability of actual innocence exception depends not on the ‘nature of the penalty’ the state imposes, but on whether the constitutional error ‘undermined the accuracy of the guilt or sentencing determination.’ *Id.* at 170-71.

Some federal circuits have more narrowly drawn the actual innocence exception to include only recidivist penalties, like Washington’s three strikes law. For example, in *United States v. Mikalajunas*, 186 F.3d 490, 495 (4th Cir. 1999), the Fourth Circuit refused to apply the actual innocence exception to an exceptional guidelines sentence reasoning that an extension to include offenders not sentenced under habitual offender statutes would “conflict squarely with Supreme Court authority indicating that generally more than prejudice must exist to excuse a procedural default.” *Mikalajunas*, 186 F.3d at 495. This logic echoes other courts’ fears that a more broad extension of actual innocence might take the “rare” actual innocence exception and make it the new rule of law. *See Mattingly, M., Actually Less Guilty: The Extension of the Actual Innocence Exception to the Sentencing Phase of Non-Capitol Cases*, 93 Kent. L. J. 531 (2004).

Undoubtedly, the State will argue that the societal interests in finality should prevent this Court from adopting an actual innocence exception, no matter how narrowly drawn or how clear the manifest injustice.

There is no denying the existence of valid policy arguments against extending an actual innocence exception to RCW 10.73.100. However, requiring a post-conviction petitioner to persuasively prove the non-comparability of the challenged conviction eliminates most of these concerns. *See e.g., Custis v. United States*, 511 U.S. 485 (1994)(Unavailability of court records due to passage of time is policy reason supporting refusal to permit constitutional challenge to prior conviction in current sentencing proceeding). Unlike a trial or any other matter which requires the testimony of live witnesses, a comparability determination is based on settled, historical facts. Further, by placing the burden of production on a defendant, he cannot benefit from *and* the State is not prejudiced by the delay. If the documents required for comparability analysis no longer exist, a petitioner will not be able to prove his claim.

It is equally important not to lose sight of what is at stake here—the wrongful deprivation of someone's liberty for his entire life. Justice Black once said, “it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution.” *Brown v. Allen*, 344 U.S. 443, 554 (1953) (dissenting opinion).

Adopting this extension would by no means serve to open up the floodgates. What will change is the fate of those wrongfully sentenced, who otherwise have no recourse. The impact of the actual innocence

exception on the American legal system is, in the grand scheme of things, quite small. Most Americans have likely never heard of it. The same can probably be said for many, if not most, of those engaged in the practice and study of law. To the individual petitioner whose liberty is spared by it, however, actual innocence is incredibly important.

The actual innocence exception is also consistent with the holding in *Runyan*, which found our current post-conviction system constitutional because it guarantees “unlimited access to review in cases where there truly exists a question as to the validity of the prisoner's continuing detention.” *In re Petition of Runyan*, 121 Wn.2d 432, 440, 444-45, 853 P.2d 424 (1993).

This Court applied similar reasoning when it read in an equitable tolling provision to the statute. *In re Petition of Bonds*, 165 Wn.2d 135, 196 P.3d 672 (2008).

The State in *Bonds* argued that the one year time limit could not be tolled because no exception was written into the statute. This Court disagreed. “Equitable tolling is a remedy that permits a court to allow an action to proceed when justice requires it, even though a statutory time period has elapsed. It acts as an exception to the statute of limitations that should be used sparingly and does not extend broadly to allow claims to be raised except under narrow circumstances.” *Bonds*, 165 Wn.2d at 141. That same should apply with equal force here.

The State also argues that this Court has already rejected any “actual innocence” exception, citing *In re Turay*, 153 Wn.2d 44, 101 P.3d 854 (2004). A careful reading of *Turay* reveals otherwise. This Court in *Turay* considered whether there was an “actual innocence” exception to the abuse of writ doctrine. Rather than reject the “actual innocence” exception altogether, this Court found that the exception did not fit into civil law. Even if it did, *Turay* was not factually innocent. “We also find no basis here for any exception comparable to the actual innocence exception under federal law. *Turay* is not confined pursuant to a criminal conviction, and there is no issue of innocence to consider.” 153 Wn.2d at 56.

Contrary to the State’s argument, *dicta* in *Turay* supports the existence of an actual innocence exception. *Id.* (“Instead, to avoid dismissal of this petition on abuse of the writ grounds, he must, at the least, show that when the State confined him he was not presently dangerous.”).

Adopting an actual innocence exception for recidivist sentencing errors preserves this State’s long-standing rule that sentencing errors are correctable. This Court has repeatedly referred to its “duty” to correct an erroneous sentence. *See State v. Loux*, 69 Wn.2d 855, 420 P.2d 693 (1966); *State ex rel. Sharf v. Municipal Court*, 56 Wn.2d 589, 354 P.2d 692 (1960); *State v. Williams*, 51 Wn.2d 182, 316 P.2d 913 (1957); *McNutt v. Delmore*, 47 Wn.2d 563, 288 P.2d 848 (1955).

In fact, this Court has gone so far to characterize sentences that fall outside the authority of the trial court as “illegal” or “invalid.” *State v. Luke*, 42 Wn.2d 260, 262, 254 P.2d 718 (1953), *cert. denied*, 345 U.S. 1000, 73 S.Ct. 1146, 97 L.Ed. 1406 (1953). The *Smissaert* Court held that such a correction was proper, noting that “(i)n the past, this court has *required* resentencing to correct invalid sentences.” *State v. Smissaert*, 103 Wn.2d 636, 694 P.2d 654 (1985).

In *Smissaert*, a jury found the defendant guilty of murder, and the court sentenced him to a maximum term of 20 years in prison. The Board of Prison Terms and Paroles later notified the court that the relevant statute required a maximum sentence of life imprisonment. Approximately two years after the initial sentencing, the trial court corrected the sentence to reflect the statutorily required maximum term. *Smissaert*, 103 Wn.2d at 638. In affirming the entry of a corrected sentence, this Court relied on the trial court's authority to correct an invalid sentence, even if the correction involved a more onerous judgment. *Smissaert*, 103 Wn.2d at 639. *See also In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980) (“Because the trial court herein imposed an erroneous sentence, and since the error has now been discovered, the court has both the power and the duty to correct it.”).

It is unclear what interest the State has in enforcing an illegal sentence. *See In re LaChapelle*, 153 Wn.2d 1, 6, 100 P.3d 805 (2004)

(“The difference of a single point may add or subtract three years to an offender's sentence. Therefore, the accurate interpretation and application of the SRA is of great importance to both the State and the offender.”). Here, the difference between the correct sentence and the erroneous sentence actually imposed is much, much greater.

This Court should adopt an actual innocence exception which justifies an otherwise untimely PRP for an individual who can prove that he was wrongfully sentenced as a persistent offender. Because Le'Taxione has made that threshold showing, the exception applies.

C. CONCLUSION

Le'Taxione is not a persistent offender. He is serving an unlawful life sentence. There are several reasons why this petition is timely—a change in the law that applies retroactively; the failure to properly notify Le'Taxione of the time bar; and the actual innocence exception. This Court should consider the actual innocence exception only if it finds that no other exception applies.

However, the actual innocence exception provides a powerful reminder of the duty to correct legally erroneous persistent offender sentences. The actual innocence exception is a rare exception which serves to cut through the law's red tape in order to prevent a grave injustice.

Justice Stevens put this in perspective in his *Sawyer* concurrence:

Although we have frequently recognized the State's interest in

finality we have never suggested that that interest is sufficient to outweigh the individual's claim to innocence. To the contrary, the 'actual innocence' exception itself manifests our recognition that the criminal justice system occasionally errs and that, when it does, finality must yield to justice.

Sawyer, 505 U.S. at 364.

Based on the above, this Court should vacate Le'Taxione's persistent offender sentence and remand this case for resentencing.

DATED this 20th day of December, 2010.

Respectfully Submitted:

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