

*In re Personal Restraint of Carter (Ernest A.)*

No. 84606-5

Stephens, J. (concurring)—I concur in the result reached by the majority because the Court of Appeals erred in applying the actual innocence doctrine before considering other available claims to avoid the time bar. We should heed our own holding and refrain from an unnecessary discussion of the parameters and application of the actual innocence doctrine. That portion of the majority opinion is dictum.

With respect to the majority’s description of the actual innocence doctrine, I also write separately to emphasize that it should not be read to suggest that “factual innocence” in the context of a persistent offender sentencing enhancement requires proof that the defendant did not commit *any* underlying offense. No party makes this argument. Rather, the State argues that proof of factual innocence required Mr. Ernest Carter to prove “that his California conviction was based on conduct that was not factually comparable to the crime of assault in the second degree.” Suppl. Br. of Resp’t at 11. It would erode the very principle of recognizing actual

innocence if the court’s decision were read to suggest that a defendant may be wrongfully sentenced as a persistent offender when, though actually innocent of a strike offense, he was “guilty of something.”

With these observations, I concur.

AUTHOR:

Justice Debra L. Stephens

---

WE CONCUR:

---

---

Justice Tom Chambers

---

---