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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY LOM  
DEPUTY

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

In re Personal Restraint Petition of  
LE'TAXIONE,  
*aka* ERNEST CARTER,  
Petitioner.

NO. 37048-4-II

821606-5

PETITIONER'S REPLY  
MEMORANDUM RE: REFERENCE  
HEARING FINDINGS

I. INTRODUCTION

In his opening memorandum addressing the trial court's *Findings of Fact* (FOF), Petitioner argued that one sentence from one of the findings (No. 10) was not supported by substantial evidence—that it was the product of speculation. In response, the State begins by misconstruing the burden of proving compliance with RCW 10.73's notice provisions (which is on the State) with the burden of showing grounds justifying relief (on Petitioner).

The State then distorts the evidence, arguing that because the trial prosecutor had a practice of always giving two copies of the judgment to defense counsel, Petitioner must have received a copy. However, the issue is not whether *defense counsel* received a copy. The issue is whether *Petitioner* received a copy. On that issue, the State failed to

1 produce any evidence that either directly or inferentially shows that defense counsel  
2 provided Petitioner a copy of the judgment.  
3

4 The State further argues that Petitioner should not have been believed. However,  
5 the State made that same request of the trial court. The trial judge expressly refused to  
6 make any adverse credibility determinations regarding the testimony of Le'Taxione.  
7

## 8 II. ARGUMENT

9  
10 *The Fact that the Prosecutor "Always" Gave Two Copies of the Judgment to*  
11 *Defense Counsel Only Proves that Defense Counsel Received Two Copies*

12 The State's first argument depends on a bit of clever subterfuge.

13 The State suggests that the record shows that DPA Cooper gave a copy of the  
14 judgment to Petitioner. *Response*, p. 2. DPA Cooper's testimony does not go so far.  
15 Instead, his testimony was merely that one of the multi-form copies of the judgment was  
16 intended for the defendant. DPA Cooper testified that his usual practice was to provide  
17 defense counsel with the copy intended for the defendant. RP 42. DPA Cooper did not  
18 recall whether defense counsel gave a copy of the judgment to his client. RP 43.  
19  
20

21 The fact that the trial prosecutor gave two copies of a document to defense counsel  
22 does not prove that defense counsel gave one to Le'Taxione, even if defense counsel and  
23 the defendant discussed matters during the course of the sentencing.  
24

25 The crucial fact missing from the State's argument is, of course, defense counsel's  
26 act of providing one of those two copies to Petitioner. On that point, the reference  
27 hearing court found that defense counsel "did not have a standard practice" at the time  
28  
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1 regarding providing one of those two copies to the defendant. *FOF*, No. 10. Thus, the  
2 Court found:

3  
4 Mr. Alipuria does not remember whether he gave a copy of the *Judgment* to Mr.  
5 Carter on the day of the sentencing. He likewise cannot say if, at the time, it was  
6 his usual practice to do so.

7 *FOF*, No. 10.

8 The State studiously ignores this *Finding*—one that it does not challenge.

9  
10 The State then argues that the following evidence supports the reference hearing  
11 court's unexplained *Finding* that Petitioner received a copy of the judgment at his  
12 sentencing hearing. *Response*, p. 5.

13  
14 (a) Petitioner was present at his own sentencing hearing;

15  
16 (b) Petitioner was actively involved in the hearing where he was given a life  
17 sentence;

18  
19 (c) Petitioner was represented by counsel.

20  
21 However, none of those facts give rise to any inference that Petitioner received a  
22 copy of the judgment. These facts only prove the obvious—that Le'Taxione was present  
23 in court and represented by counsel during his sentencing. Instead, the critical inquiry is  
24 whether Mr. Alipuria gave a copy of the judgment to Le'Taxione when they were in  
25 court. On that point, the only evidence is: (a) Petitioner's testimony that he did not  
26 receive a copy (RP 14-15); and (b) the testimony of the attorneys that neither could  
27 remember whether Petitioner received a copy. Given that defense counsel testified that  
28 he had no idea what he did with the document (RP 6-8)—testimony that the reference  
29 hearing court adopted as part of the *FOF* No. 10—coupled with the fact that the reference  
30

1 hearing court did not reject Petitioner’s testimony, not only is the one challenged  
2 sentence not supported by substantial evidence, the weight of the evidence accepted by  
3 the reference hearing court supports the opposite conclusion.  
4

5 In any event, it is clear that the contested portion of *FOF* No. 10 is not supported  
6 by any, much less “substantial” evidence. *See e.g., State v. Hutton*, 7 Wn. App. 726, 728,  
7 502 P.2d 1037 (1972) (Substantial evidence is evidence that would convince an  
8 unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. The  
9 fact-finder cannot find there is substantial evidence of a fact if it must rely on guess,  
10 speculation, or conjecture.)  
11  
12

13 The State, in its *Response*, also points to a conflict in the testimony about the  
14 fingerprint form which accompanies the filed judgment. However, the trial court did not  
15 resolve that apparent conflict, as *FOF* No. 9 shows. And, although the trial court struck  
16 the last sentence in *FOF* No. 9, it did not replace that sentence with another finding. In  
17 any event, the presence of Le’Taxione’s fingerprints on a form attached to the judgment  
18 does not give rise to an inference that defense counsel gave a copy of the judgment to  
19 Petitioner. The two sets of facts are simply not related.  
20  
21  
22

23 The State’s *Response* further demonstrates that surmise, and only surmise,  
24 supports the challenged sentence in *FOF*, No. 10.  
25

26 *The State Bears the Burden of Showing Notice*  
27

28 The State is incorrect about which party bears the burden of proving notice. The  
29 State must show that Petitioner received notice. Petitioner does not need to prove a  
30 negative—that he did not receive notice. Timely notice is not the default position.

1 RCW 10.73.100 provides “(a)t the time judgment and sentence is pronounced in a  
2 criminal case, the court shall advise the defendant of the time limit” associated with a  
3 collateral attack. The time bar in RCW 10.73.090(1) is conditioned on compliance with  
4 RCW 10.73.110. *State v. Golden*, 112 Wash. App. 68, 78, 47 P.3d 587 (2002) (citing *In*  
5 *re Pers. Restraint of Vega*, 118 Wash.2d 449, 451, 823 P.2d 1111 (1992)). For example,  
6 in *State v. Schwab*, 141 Wn. App. 85, 167 P.3d 1225 (2007), this Court held that because  
7 there was “no evidence in our record showing that the trial court or DOC notified Schwab  
8 that he only had one year to collaterally attack the judgment,” this Court reated his  
9 petition as timely.  
10

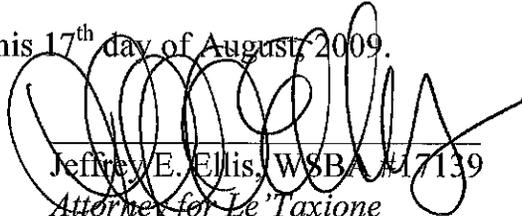
11 This is consistent with the general rule that the party required to provide notice  
12 must prove that notice was given—where that issue is contested. *See* 16 B Am. Jur.2d  
13 *Constitutional Law, Due Process, Notice*, § 931-944. *See also In re Dependency of E.S.*,  
14 92 Wn. App. 762, 771, 964 P.2d 404 (1998) (State bears burden of proving notice in  
15 compliance with statutory requirements); *State v. Lauman*, 5 Wn. App. 670, 490 P.2d 450  
16 (1971) (where statute requires a party to provide notice that same party bears burden of  
17 proving notice where contested); *Gen. Matters, Inc. v. Paramount Canning Co.*, 382  
18 So.2d 1262, 1264 (Fla.Dist.Ct.App.1980) (“[T]he burden is on the plaintiff to show that  
19 he gave the required notice within a reasonable time.”); *Hepper v. Triple U Enters., Inc.*,  
20 388 N.W.2d 525, 527 (S.D.1986) (“Notice is an element that must be specifically proven;  
21 it is not an affirmative defense.”).

22 Failure to provide notice is not an “exception” to the time bar. It is a prerequisite  
23 to its application. As a result, the State has not carried its burden.  
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1 III. CONCLUSION

2 This Court should review the *Findings*, conclude that the last sentence of *Finding*  
3  
4 *No. 10* is not supported by substantial evidence, and then grant Petitioner's PRP.

5 DATED this 17<sup>th</sup> day of August, 2009.

6   
7  
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**CERTIFICATE OF SERVICE**

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on August 19, 2009 I served the parties listed below with a copy of *Petitioner's Reply Memorandum Re: Reference Hearing Findings* as follows:

Michelle Luna-Green  
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Deputy Prosecuting Attorney  
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8/19/09 Sea, WA  
Date and Place

BY Vance G. Bartley DEPUTY  
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09 AUG 20 11:55  
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