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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 II**

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

NO. 37048-4-II

24606-5

PETITIONER'S SUPPLEMENTAL
MEMORANDUM RE: REFERENCE
HEARING FINDINGS

I. INTRODUCTION

This Court directed the Pierce County Superior Court to conduct a hearing and make factual findings on the issue of whether and when Le'Taxione¹ was provided with notice of the statutory limitations on collateral attack. After the reference hearing was concluded and findings entered, on April 15, 2009, this Court granted Petitioner's motion for leave to supplement the reference hearing record with a transcript of the hearing followed by an opportunity for the parties to file supplemental briefs limited to the reference hearing findings of fact (FOF).

Le'Taxione does not contest that virtually all of the *FOF*'s are supported by substantial evidence. Thus, he does not challenge those findings. Instead, his challenge

1 is limited to one sentence in the reference hearing court's tenth finding. That finding is:
2 "Defendant did receive a copy of the Judgment and Sentence at the time of sentencing."
3

4 That sentence is not supported by any evidence, much less "substantial evidence."

5 Instead, it is the product of conjecture. Thus, this Court should reject that finding.
6

7 To be clear, if this Court accepts the challenged finding, Le'Taxione repeats his
8 earlier argument that the warning on the judgment is misleading because it *can* be read as
9 stating that the one-year time bar is permissive ("...the defendant's right to file any kind
10 of post sentence challenge may be limited to one year."). Although other constructions
11 are possible, the "warning language" fails to comply with the statutory mandate.
12

13 Obviously, this Court does not need to reach that issue if it concludes that the last
14 sentence in *FOF, No. 10* is not supported by substantial evidence—the focus of this
15 pleading.
16

17 II. FACTS

18 Because Le'Taxione challenges only one sentence in one finding, his discussion
19 of the facts focuses exclusively on the testimony related to the challenged sentence.
20

21 Three witnesses testified at the reference hearing.² Those witnesses were:
22 Le'Taxione, his former attorney (Hari Alipuria), and the former prosecutor (Patrick
23 Cooper). Only Le'Taxione testified that he had a memory of what documents he
24 received on the date of his sentencing. RP 14-15. Mr. Alipuria testified that he had no
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29 ¹ Petitioner's legal name is Le'Taxione. However, he was charged and convicted in Pierce County Superior Court
30 under his former name: Ernest Carter. Thus, this supplemental brief uses his current and former names
interchangeably.

² "RP" refers to the verbatim report of proceedings from the March 20, 2009, hearing. "RP (3/26/2009)" refers to
the verbatim report of proceedings from the entry of the *FOF*'s.

1 independent memory of what documents, if any, he gave to his client on the day of
2 sentencing. RP 5-8. Although Deputy Prosecuting Attorney Cooper had some memory
3 of Le'Taxione speaking to his attorney during the sentencing, he had no current memory
4 of what documents, if any, Mr. Alipuria gave to Le'Taxione that day. RP 41-42.
5

6
7 More specifically, Le'Taxione was shown a copy of his judgment and asked:

8 Q Does that appear to be the judgment and sentence?

9 A Yes, sir.

10 Q All right. When you came to court the day that you were sentenced, did
11 you bring anything with you to court that day?

12 A Yes, sir.

13 Q What did you bring?

14 A I brought a notepad.

15 Q Sort of similar to the one on your desk today?

16 A Almost exactly.

17 Q Okay. When you left the sentencing hearing, did you have any additional
18 paperwork with you?

19 A No, sir.

20 Q Did you have this document with you when you left?

21 A No, sir.

22 RP 14-15. Le'Taxione was later asked:
23

24 Q At any point during your sentencing hearing, did anyone, whether it was the
25 judge, your attorney, or the prosecutor, tell you about a one-year limit on
26 your right to collateral attack?

27 A No, sir.

28 RP 16. Thus, Le'Taxione consistently testified that he did not receive either the
29 judgment or the collateral attack" notice at the time of sentencing. *See also FOF, No. 10.*
30

1 DPA Cooper testified that his usual practice, following completion of the form,
2 was to hand two copies of the judgment to defense counsel: "It's a multi-copy paper. I
3 can't remember the exact number, but it has five or six copies, had five or six copies,
4 similar to what we have now. And copies are given to different individuals at the time
5 after it's entered." He continued:
6
7

8 Q; Your usual practice then and now with regard to these multi-forms was to
9 take the copy for the defense attorney and the copy for the defendant and
10 give to it the defense attorney, right?

11 A Typically what would happen is there would be five or six piles and the
12 piles would be separated out, and, yes, I mean, I guess I don't recall and I
13 don't recall in this case. Typically, the file would either be taken by the
14 defense attorney and he would either distribute it and/or his client if they
15 were still in the courtroom.

16 Q All right. You don't recall whether Mr. Carter left the courtroom that day
17 with a copy of his judgment and sentence?

18 A No, I can't say I recall that.

19 Q And, as you have previously indicated, Respondent's Exhibit No. 3, the
20 advice of rights on collateral attack, does not bear his signature, correct?

21 A Correct.

22 Q And you did not point that out to the court, correct?

23 A I would assume I did not. If I had seen that it hadn't been signed, I would
24 have.

25 Q Nor did you ask the court to advise Mr. Carter of his rights on collateral
26 attack?

27 A Well, based on the transcript, I don't see anything in the sentencing
28 transcript where anything was said about that.

29 RP 42-43.
30

1 Mr. Alipuria candidly admitted:

2 A My memory of this particular hearing? It's not that good.

3 Q Do you recall today whether you gave my client, Le'Taxione....a copy of
4 the judgment and sentence at the time of sentencing? In other words, I
5 want to be precise, do you have an independent memory today of what you
6 did back then?

7 A I do not.

8 Q All right. Did you have a practice at the time? Did you have a common
9 practice regarding providing the criminal defendant with a copy of the
10 judgment and sentence?

11 A At the time I had been practicing law less than a year. I started practicing
12 around February, and this case, the sentencing is in September, so to
13 characterize something as common practice, at that point I don't know that I
14 developed a common practice.

15 Q And do you have a practice of going over a judgment and sentence with
16 your client prior to the judge signing and entering it?

17 A I do now. At that point, I had not been practicing law a year. To
18 characterize anything as a common practice at that point, I don't even know
19 that I had a common practice.

20 Q Again, given that this is a three-strikes case, would you have gone over the
21 judgment and sentence with the defendant?

22 A Would I have gone over....I don't remember. I don't remember.

23 RP 8-9. When asked if his client necessarily would have seen the judgment as it was
24 being prepared:
25

26 A Well, I believe he was standing right there at the time I initialed this.

27 Q Okay. So he would have seen the judgment and sentence?

28 A I'm not sure. I mean, the fact I was standing there and I initialed it and the
29 prosecuting attorney initialed it doesn't necessarily mean he saw it. We
30

1 could have initialed it and then handed it back. I don't remember him
2 taking a look at it, no.

3 RP 10.

4
5 III. ARGUMENT

6 *Introduction*

7 The factual issue this Court remanded for an evidentiary hearing was whether
8
9 Petitioner was provided notice of his collateral attack rights—either on the specific form
10 commonly used for that purpose or by receiving a copy of the *Judgment*, which contained
11 a somewhat truncated (and arguably misleading) reference to collateral attack rights.
12

13 *The Unchallenged Findings*

14 The reference hearing court noted that “Judge Felnagle did not orally inform Mr.
15 Carter of his collateral attack rights at any time during sentencing.” The reference
16 hearing court further found that “(t)here is no evidence that Judge Felnagle orally
17 informed Mr. Carter of those rights off the record.” *FOF, No. 3*. The court also found
18 that “(a)t the time that Carter was sentenced, a multi-copy form entitled *Advice of*
19 *Collateral Attack Time Limit* was commonly used to inform defendants of the rights and
20 limitations found in RCW 10.73.090-110.” *FOF, No. 5*. Although such a document
21 appears in the court file, “that document does not bear Mr. Carter’s signature or the date
22 on the line entitled: *Receipt Acknowledged*. In addition, no reference was made to the
23 form during the sentencing hearing.” As a result, the reference hearing court found:
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29 The Court finds that the greater weight of the evidence supports the conclusion
30 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.

1
2 *FOF, No. 8.*

3 These findings are supported by substantial evidence and are not challenged by
4
5 Petitioner.

6 There are additional, unchallenged findings.

7 *Finding No. 9* notes that the *Judgment*, just like the collateral attack notice, does
8
9 not bear Mr. Carter's signature indicating receipt of a copy of that document. The
10 *Judgment* contains a fingerprint form. However, the fact that Petitioner was fingerprinted
11
12 for sentencing is not probative on the issue of whether he contemporaneously received a
13 copy of his judgment.³

14 The reference hearing court also found, consistent with the testimony, that the
15
16 usual practice of Deputy Prosecuting Attorney Cooper, who did not have an independent
17
18 memory of the sentencing hearing, was to separate the multiple copies of the completed
19
20 judgment and put those copies in two "piles" and "hand them to defense counsel." *FOF,*
21
22 *No. 10.* The reference hearing court further found, consistent with the testimony of
23
24 former defense counsel, Hari Alipuria, that defense counsel "did not have a standard
25
26 practice" at the time regarding providing one of those two piles to the defendant. Thus,
27
28 the Court found:

29
30 ³ There was a factual dispute at the hearing regarding whether Le'Taxione was fingerprinted in court or prior to the sentencing hearing. The reference hearing court did not resolve that dispute. Instead, the court found: (a) Petitioner did not sign the fingerprint form; (b) he was fingerprinted earlier in the proceedings; and (c) the courtroom clerk signed the form. Thus, although the court struck the next line in the *FOF's* stating that the form was "not probative" on whether Petitioner was given a copy of the judgment at sentencing, it did not find the opposite. That unresolved factual dispute remains irrelevant to the issue of whether Petitioner contemporaneously received a copy of the judgment. One fact is simply not probative of the other. Further, as noted elsewhere in this pleading, the reference hearing court adopted several findings consistent with Petitioner's testimony and did not find him incredible or unbelievable.

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

4 *FOF, No. 10.*

5 *The Single Challenged Sentence*

6
7 Petitioner does, however, dispute one sentence found in *Finding No. 10*: “The
8 Court finds that the Defendant did receive a copy of the Judgment and Sentence at the
9 time of sentencing.” Not only is this finding not supported by “substantial evidence,” it
10 is not supported by *any* evidence; is contradicted by evidence that the reference hearing
11 court did not reject or find incredible (namely, Petitioner’s testimony); is contradicted in
12 large part by other findings; and can only be characterized as surmise.
13

14
15 Consistent with Petitioner’s testimony, the reference hearing court found:

16
17 Mr. Carter testified that he did not receive a copy of the *Judgment* when he was
18 sentenced. He testified he left the court with only the legal writing pad he
19 brought with him to court that day.

20 *FOF, No. 10.*

21 Further, when asked by the State to make express credibility determinations about
22 the testimony, the reference hearing court noted:

23
24 I’m not making any other findings about credibility other than the findings of
25 fact....

26 RP (3/26/2009) 5. When a fact-finder measures witness credibility, this Court does not
27 review that determination on appeal. *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d
28 850 (1990).
29
30

1 The Court then (somewhat contradictorily) found that Mr. Carter received a copy
2 of the judgment on the day he was sentenced despite the complete absence of any
3 testimony to that effect or any other evidence from which he could draw that inference.
4 Indeed, that portion of the *Finding* does not specifically reference any testimony from the
5 hearing. Nor does the finding note any evidence from which an inference supporting this
6 finding can be drawn.
7

8
9 Thus, Petitioner challenges the last sentence of *Finding No. 10* as not supported by
10 substantial evidence.
11

12 A reviewing court determines on appeal whether challenged findings of fact are
13 supported by substantial evidence. *Rogers Potato Serv., L.L.C. v. Countrywide Potato,*
14 *L.L.C.*, 152 Wash.2d 387, 391, 97 P.3d 745 (2004). Substantial evidence is evidence
15 sufficient to persuade a fair-minded, rational person of the finding's truth. *State v.*
16 *Solomon*, 114 Wash.App. 781, 789, 60 P.3d 1215 (2002), *review denied*, 149 Wash.2d
17 25, 72 P.3d 763 (2003). Following the Supreme Court's earlier formulation, lower courts
18 have defined substantial evidence to mean "more than a mere scintilla;" it is "such
19 relevant evidence as a reasonable mind might accept as adequate to support a
20 conclusion." *Li Zu Guan v. INS*, 453 F.3d 129, 135 (2d Cir.2006) (quoting *Consolidated*
21 *Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)). *See also*
22 *Hojem v. Kelly*, 93 Wash.2d 143, 145, 606 P.2d 275 (1980). In the case of *N.L.R.B. v.*
23 *A.S. Abell Co.*, 97 F.2d 951, 958, (4th Cir. 1938), a federal court said that the substantial
24 evidence rule is not satisfied by evidence which merely *creates a suspicion* or which
25 *gives equal support to inconsistent inferences*. Surmise, conjecture or speculation do not
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1 constitute substantial evidence. *White v. Valley Land Company*, 64 N.M. 9, 322 P.2d 707,
2 709 (1958). At the core, neither a verdict nor a finding can be founded on mere theory or
3 speculation. *See generally Campbell v. ITE Imperial Corp.*, 107 Wash.2d 807, 817-18,
4 733 P.2d 969 (1987).
5

6
7 Thus, the *FOF's* are contradictory. The reference hearing court specifically
8 attributed portions of Petitioner's testimony and refused an invitation to find even
9 portions of his testimony incredible. However, if one removes Petitioner's testimony
10 from the equation, there remains no affirmative evidence to support the finding that he
11 received a copy of his judgment at the time of sentencing. At best, the evidence supports
12 the inference that DPA Cooper provided two copies of the judgment to defense counsel.
13 However, no possible inference can be drawn regarding what defense counsel did with
14 those two "piles." Mr. Alipuria's testimony simply put was that he did not remember
15 what he did in this instance and could not say what he did generally.
16
17

18
19 All of the other evidence only supports the inference that Le'Taxione was present
20 in court during the duration of his sentencing hearing. The fact that he was fingerprinted
21 says nothing about whether Le'Taxione was given a copy of the judgment at the
22 conclusion of the hearing.
23
24

25 Indeed, the weight of the evidence supports the conclusion that the hearing did not
26 follow "normal practice." Le'Taxione was not given and did not sign the collateral attack
27 notice. Although he was orally informed of his right to appeal, the sentencing court did
28 not orally inform him of his collateral attack rights—the next logical step.
29
30

1 While it is possible to posit a guess about whether Le'Taxione was given a copy of
2 his judgment on the day he was sentenced to life in prison—once again, putting aside his
3 testimony—such a conclusion remains only a guess.
4

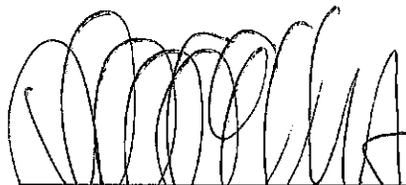
5 Which is exactly what the reference hearing judge did, stating: “I *think* he got a
6 copy of the judgment.” RP (3/26/2009) 1 (emphasis added). In contrast, the judge was
7 able to cite specific reasons (even aside from Petitioner’s testimony), supporting the
8 finding that Petitioner did not get a copy of the “collateral attack” notice. However, with
9 respect to the judgment, the judge guessed.
10
11

12 IV. CONCLUSION

13 This Court should review the *Findings*, conclude that the last sentence of *Finding*
14 *No. 10* is not supported by substantial evidence, and then grant Petitioner’s PRP.
15

16 DATED this 10th day of July, 2009.

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a/k/a Ernest Carter

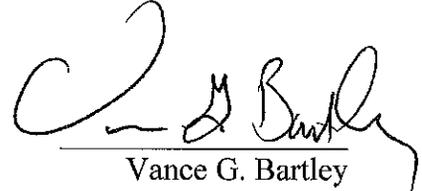
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CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on July 10, 2009 I served the parties listed below with a copy of *Petitioner's Supplemental Memorandum Regarding Reference Hearing Findings* as listed below:

Michelle Luna Green
Deputy Prosecuting Attorney
930 Tacoma Ave. S Rm. 946
Tacoma, WA 98402-2171

7-10-09 Sea, WA
Date and Place


Vance G. Bartley

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