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STATE OF WASHINGTON

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

In re Personal Restraint Petition of

LE'TAXIONE,  
*aka* ERNEST CARTER,

Petitioner.

NO. 3 7048-4-II

PETITIONER'S SUPPLEMENT TO  
*PERSONAL RESTRAINT PETITION*

I. INTRODUCTION

Le'Taxione, *aka* Ernest Carter, Petitioner, recently filed a Personal Restraint Petition in this Court. In this supplemental pleading, Petitioner provides another basis for this Court to conclude that his petition is timely.

II. FACTS

When Le'Taxione was sentenced he was not advised of the collateral attack time limits.

Petitioner was sentenced on January 23, 1998. As the attached sentencing transcript reveals, at no point was he informed on the record about the one-year time limit for collateral attacks. *See Sentencing Transcript* attached as Appendix A. Le'Taxione's declaration is in accord. *See Appendix B.*

PETITIONER MAY FILE THE  
PETITION WITHOUT PAYMENT OF  
A FILING FEE

COURT CLERK

1 A document entitled *Advice of Collateral Attack Time Limit* appears in the court  
2 file. However, on the line below "receipt acknowledged" there is no date and no  
3 signature of defendant. As mentioned previously, there is no reference anywhere in the  
4 record that supports the conclusion that this notice was given to Petitioner.  
5

6  
7 III. ARGUMENT

8 Generally, no collateral attack on a judgment and sentence may be filed more than  
9 a year after the judgment is final if the judgment and sentence is valid on its face and was  
10 rendered by a court of competent jurisdiction. RCW 10.73.090(1). The defendant bears  
11 the burden to prove that an exception to the RCW 10.73.090 statute of limitations applies.  
12  
13 *Shumway v. Payne*, 136 Wn.2d 383, 400, 964 P.2d 349 (1998).  
14

15 There is a notice exception to the RCW 10.73.090(1) time bar. *State v. Schwab*,  
16 \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (October 2, 2007). When a statute requires that a court or  
17 DOC notify a defendant of a time bar and the notice is not given, this omission creates an  
18 exemption to the time bar and a court, therefore, must treat the defendant's petition for  
19 collateral review as timely. *Id. See also In re Pers. Restraint of Vega*, 118 Wn.2d 449,  
20 450-51, 823 P.2d 1111 (1992) (applying rule to RCW 10.73.120); *State v. Golden*, 112  
21 Wn.App. 68, 78, 47 P.3d 587 (2002) (apply *Vega* rule to RCW 10.73.110), *review*  
22 *denied*, 148 Wn.2d 1005, 60 P.3d 1212 (2003).  
23  
24

25 Under RCW 10.73.110, the trial court must advise a defendant of the one-year  
26 statute of limitations when it pronounces judgment and sentence. That clearly did not  
27 happen in this case. There is no evidence that Petitioner received the *Advice of Collateral*  
28 *Attack Time Limit*. In fact, all of the evidence is to the contrary. The trial court did not  
29  
30

1 direct that Petitioner receive a copy. The prosecutor did not do so, either. The lack of  
2 defendant's signature on the document suggests that he was not given a copy.  
3

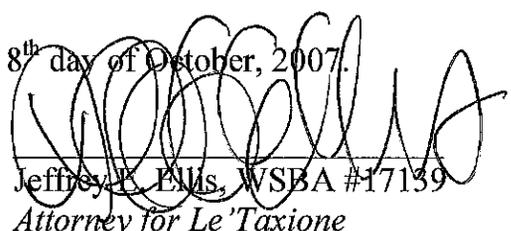
4 The *Judgment*, which the record does not reflect was served on Petitioner and was  
5 also not signed by him, contains a sentence referencing post-conviction challenges. That  
6 notice is both incomplete and incorrect because it states that a defendant's right to file a  
7 post-sentence challenge "may be limited to one year." While the statute admits  
8 exceptions to the one-year time bar, the statute provides that, unless an exception applies,  
9 a defendant's right to collateral challenge a judgment must be filed within one year.  
10 Thus, even if Petitioner actually received his *Judgment* at a later date receipt of that  
11 document does not suffice. See *Schwab, supra* ("Without deciding the issue of whether  
12 actual notice exempts compliance with RCW 10.73.090(1), we hold that the record  
13 before us does not contain facts sufficient to hold that Schwab received actual notice  
14 sufficient to satisfy the statutory notice provisions.").

15 As this Court stated in *Schwab*, "(b)y statute, the trial court is required to notify a  
16 defendant *at sentencing* that he must file any collateral attack within a year." The failure  
17 to do so meant that Schwab's petition was timely. The same failure results in the same  
18 conclusion, here.

### 25 III. CONCLUSION

26 This Court should conclude that Le'Taxione's PRP is timely because he was not  
27 informed on the record of the one-year collateral attack time limit.  
28  
29  
30

DATED this 8<sup>th</sup> day of October, 2007.



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APPENDIX A  
TRANSCRIPT OF SENTENCING HEARING

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
2 IN AND FOR THE COUNTY OF PIERCE  
3 DEPARTMENT 15  
4

5 STATE OF WASHINGTON, )  
6 Plaintiff, )  
7 vs. ) COA No. 23940-0-II  
8 ERNEST A. CARTER, JR., ) No. 97-1-04547-1  
9 Defendant. ) Volume XIII  
10 ) IN COUNTY CLERK'S OFFICE

11 VERBATIM REPORT OF PROCEEDINGS A.M. JAN 20 1999 P.M.  
12 SENTENCING PIERCE COUNTY, WASHINGTON  
13 BY ED RUTT, COUNTY CLERK  
14 DEPUTY

15 September 23, 1998  
16 Pierce County Courthouse  
17 Tacoma, Washington

18 Before the  
19 HONORABLE THOMAS J. FELNAGLE

20 A P P E A R A N C E S

21 For the Plaintiff: MR. PATRICK COOPER  
22 Attorney at Law  
23 Tacoma, Washington

24 For the Defendant: MR. HARI ALIPURIA  
25 Attorney at Law  
Tacoma, Washington

REPORTED BY: SHERI L. SCHELBERT, CSR

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I N D E X

SENTENCING

WITNESSES

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EXHIBITS

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2 - Copy of print card	503
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1 SEPTEMBER 23, 1998

2 MORNING SESSION

3 \* \* \* \* \*

4 THE COURT: This is State of Washington versus  
5 Ernest Alvin Carter; 97-1-04547-1. This is the time  
6 set for sentencing, and I want to be sure that both  
7 sides are prepared for sentencing.

8 MR. COOPER: Yes, Your Honor, the State is  
9 prepared.

10 MR. ALIPURIA: We are prepared, Your Honor.

11 THE COURT: All right.

12 MR. COOPER: Your Honor, the State had received a  
13 copy of the presentence report. I have Toni Wentland  
14 here from Tacoma Police Department Forensics, and I was  
15 going to have her just identify through fingerprints  
16 the comparisons of the prior convictions of Mr. Carter  
17 from his Oregon and California convictions, and we  
18 would like to do that.

19 THE COURT: Ms. Wentland, would you like to come  
20 forward? Would you raise your right hand, please?

21 TONI WENTLAND, called as a witness on behalf  
22 of the State, being duly sworn  
23 according to law, was examined  
24 and testified as follows:

25 ///

DIRECT EXAMINATION

1  
2 BY MR. COOPER:

3 Q. You can stand here if you want. Could you just state  
4 your name for the record and spell your last name for  
5 the court reporter?

6 A. Toni, T-O-N-I, Wentland, W-E-N-T-L-A-N-D.

7 Q. You work for the Tacoma Forensic Department?

8 A. That's correct, Tacoma Police Department.

9 Q. Do part of your duties include comparing fingerprints  
10 and whether they compare to each other or come from the  
11 same individual?

12 A. Yes, that's a part of my duties.

13 Q. And in this particular case involving an Ernest Carter,  
14 did you access fingerprints from a booking sheet on an  
15 Ernest Carter and compare them to some other documents?

16 A. Yes, I did.

17 Q. And you have access to the booking prints that are kept  
18 in a computerized record in the regular course of  
19 business?

20 A. They're actually a hard record, the actual print card  
21 itself.

22 Q. That's what you work from, the actual print card  
23 itself?

24 A. Yes.

25 Q. I am going to hand to you what is marked as Plaintiff's

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Exhibit Number 2. Does that appear to be a copy of the actual print card that you have?

A. Yes, it is.

Q. Did you -- I am going to hand to you what is marked as Plaintiff's Exhibit Number 3. Did you receive some documents, documents which you compared fingerprints from involving an Ernest Carter?

A. Yes, I did.

Q. And I am going to show to you what is marked Plaintiff's Exhibit Number 3. On the third page is some listed fingerprints. Did you use that as a fingerprint comparison for the Oregon conviction of Mr. Carter?

A. Yes, I did.

Q. And also on Plaintiff's Exhibit Number 4, did you use this fingerprint card for the California convictions to compare to?

A. Yes, I did.

Q. And did you make any conclusions as to whether the individual who was booked in the Pierce County Jail as Ernest Carter was the same person who was convicted in California and Oregon on these other charges?

A. Yes, the prints from the booking card from our system was a match to those two prints that you provided me, two sets of prints, the one from Fresno, California,

1 and the one from Oregon City, Oregon.

2 MR. COOPER: Your Honor, the State would offer  
3 Plaintiff's Exhibits 1, 2, 3, and 4.

4 THE COURT: What was Number 1?

5 MR. COOPER: Number 1 is the report by Ms.  
6 Wentland.

7 THE COURT: Okay. Mr. Alipuria.

8 MR. ALIPURIA: No objection.

9 THE COURT: One through four are admitted.

10 (Plaintiff's Exhibit Nos. 1-4 admitted  
11 into evidence.)

12 MR. COOPER: That's all the questions I have for  
13 Ms. Wentland, Your Honor.

14 THE COURT: Hang on, Ms. Wentland, just a second.  
15 Mr. Alipuria, do you have any questions?

16 MR. ALIPURIA: No, I don't.

17 THE COURT: All right, thank you.

18 MR. COOPER: Also, Your Honor, I have certified  
19 copies -- Exhibit Number 5 is a copy of the Information  
20 from the State of California, and Number 6 is also a  
21 certification of guilty plea from the State of  
22 California, and Number 7 is a copy of the presentence  
23 report regarding Mr. Carter with a conviction in the  
24 State of California.

25 THE COURT: I'm sorry, would you identify those

1 again? I didn't get them written down.

2 MR. COOPER: Number 5 is the copy of the original  
3 Information from the State of California regarding  
4 Mr. Carter, and Number 6 is a certification of the --  
5 well, Number 5 is the Information that he pled to.  
6 Number 6 is the initial Information of the charges in  
7 the State of California, and Number 7 is the  
8 presentence report from the State of California. And I  
9 would offer five, six, and seven.

10 THE COURT: Mr. Alipuria, any objection?

11 MR. ALIPURIA: No objection, Your Honor.

12 THE COURT: Then five, six, and seven are also  
13 admitted.

14 (Plaintiff's Exhibit Nos. 5-7 admitted  
15 into evidence.)

16 MR. COOPER: Your Honor, that's what the State  
17 would offer as to documentation that Mr. Carter is the  
18 same person that was convicted in the States of  
19 California and Oregon. I don't know if you want me to  
20 address further our belief. The charges that we have  
21 from the State of Oregon are Attempted Murder and  
22 Attempted Assault in the First Degree.

23 The documents show that there was an assault on a  
24 peace officer with a deadly weapon from the State of  
25 California in 1983, and the Information notes that it

1 is with a handgun. The State believes that's similar  
2 to an Assault in the Second Degree in the State of  
3 Washington. So, based on those two convictions,  
4 Mr. Carter would be appropriate to be sentenced under  
5 the three strikes law as a persistent offender.

6 THE COURT: Let me just take a moment to review  
7 the various submittals.

8 Now, the only question I have is with regard to  
9 the prior Attempted Murder with a firearm and Attempted  
10 Assault in the First Degree, which are the Oregon  
11 convictions. Their Judgment and Sentence that you have  
12 provided doesn't set out the elements specifically.  
13 It's hard to imagine that an Attempted Murder with a  
14 firearm and/or an Attempted Assault in the First Degree  
15 wouldn't be an equivalent to a most persistent offense  
16 in the State of Washington, but does the State have any  
17 concern in that regard?

18 MR. COOPER: No, Your Honor. I will look in -- I  
19 guess the State's position or belief was, since it was  
20 an Attempted Murder and an Attempted Assault 1, plus it  
21 was a crime with a firearm, that that would fit under  
22 the three strikes law.

23 THE COURT: Certainly, nothing on its face would  
24 suggest otherwise.

25 Mr. Alipuria, do you have either any evidence you

1 want to submit or any argument you want to make with  
2 regard to Mr. Carter's prior criminal history?

3 MR. ALIPURIA: I have short argument, Your Honor.  
4 I am going to talk about the California conviction, and  
5 I will talk about the convictions. Under the  
6 California conviction, the Court says specifically that  
7 this is not a violent offense when the Court sentenced  
8 him.

9 THE COURT: Help me out. What are you looking  
10 at?

11 MR. ALIPURIA: I gave the paper to the judicial  
12 assistant. It's right here. Okay, yes, last page,  
13 line 14, 15, and 16.

14 THE COURT: Now, what is the document that you  
15 have had marked?

16 MR. ALIPURIA: This is superior court, People of  
17 the State of California versus Ernest Carter. This is  
18 his sentencing.

19 THE COURT: Okay. And are you offering that  
20 then?

21 MR. ALIPURIA: Yes, I am.

22 THE COURT: That's been marked Exhibit, what, 8?

23 THE CLERK: Defendant's Exhibit 8.

24 THE COURT: Mr. Cooper, do you have any  
25 objection?

1 MR. COOPER: No, Your Honor. That's a document  
2 that the State had provided to the defense.

3 THE COURT: Eight is admitted.

4 (Defendant's Exhibit No. 8 admitted into  
5 evidence.)

6 THE COURT: So you were looking on what page now  
7 again?

8 MR. ALIPURIA: It's the last page, lines 14, 15,  
9 and 16, Your Honor.

10 THE COURT: This is a dialogue, I guess, between  
11 the Court and -- so this is a report of proceedings.  
12 So this is the transcript of the dialogue that took  
13 place at the time of the sentencing; is that what we've  
14 got?

15 MR. ALIPURIA: Yes, it is, Your Honor.

16 THE COURT: Now, you are looking at the last page.

17 MR. ALIPURIA: Last page, lines 14, 15, and 16,  
18 Your Honor.

19 THE COURT: This is the Court speaking: "Very  
20 well. I find in compliance with Government Code  
21 section 13960 and 13967 this is not a crime of  
22 violence." Okay.

23 MR. ALIPURIA: Okay, the Court says specifically,  
24 it's not a crime of violence, it's not a most serious  
25 offense under the laws of the State of Washington.

1           Also, in that case, there were significant  
2           evidentiary problems. My client pled guilty to that  
3           offense only because he didn't want to go to jail.  
4           There was no evidence that he ever fired at the  
5           officer. There was only one dent in the car which was  
6           not proven to be caused by a bullet. His brother was  
7           in the car, which would lead one to believe he did not  
8           fire on the car. So there is significant evidence to  
9           suggest that this was not a violent crime, and it  
10          should not be a most serious offense under the laws of  
11          the State of Washington.

12           THE COURT: Mr. Cooper, do you have anything you  
13          can shed to enlighten the Court on what the California  
14          situation is?

15           MR. COOPER: I do, Your Honor. Now, which  
16          document did he have marked as Number 8?

17           THE COURT: It's the report of proceedings. It's  
18          called "R.P.O. and Judgment," and it's dated June 20th,  
19          1983, and it's an eight-page transcript that apparently  
20          happened at the time of sentencing.

21           MR. COOPER: I'd just ask to mark that. That's  
22          the previous change of plea, and that's a transcript,  
23          certified copy of that.

24           And I guess, just before we go into that, I  
25          noticed, Your Honor, I do have a copy of the indictment

1 from Oregon of the Information. I wanted to check to  
2 see if that was included in the packet I gave you,  
3 because I would mark that also if you don't have that.

4 THE COURT: I will hand down the exhibits. Two  
5 and three are the ones you would be most concerned  
6 with.

7 MR. ALIPURIA: I am not finished, Your Honor, if  
8 you want to just take the California charge and then  
9 the rest of my argument. I mean, it's short.

10 MR. COOPER: Without interrupting Mr. Alipuria any  
11 further, I would mark Number 9, that additional  
12 transcript from the change of plea dated May 20th,  
13 1983, and another document of the Judgment and  
14 Sentence, which includes the indictment, which is  
15 marked as Plaintiff's Exhibit Number 10, just so that's  
16 in the record. I would offer both of those.

17 THE COURT: What's the difference between nine and  
18 eight?

19 MR. COOPER: Eight is the sentencing, when they  
20 did the sentencing.

21 THE COURT: And nine is the change of plea.

22 MR. COOPER: Actually, I think at the sentencing  
23 they talk about -- they go over the -- they actually  
24 take another plea at the sentencing date, because there  
25 was some concern about something not -- I can't

1 remember exactly what it was, but they essentially  
2 reaffirmed the plea.

3 THE COURT: I see.

4 Mr. Alipuria, do you have any objection to Exhibit  
5 9?

6 MR. ALIPURIA: No, I don't, Your Honor.

7 THE COURT: All right. Mr. Alipuria, you wanted  
8 to continue with your argument?

9 MR. ALIPURIA: Yes, Your Honor. I think we also  
10 need to look at the legislative intent of the most  
11 serious offense statute. Here we have a person -- the  
12 California charge, it's not violent. I mean, he fired  
13 a gun. He didn't fire it at the police car. There's  
14 no evidence he fired it at the police car.

15 And in this case, the intent of that statute is to  
16 put dangerous criminals, people that -- armed robbers  
17 and rapists and murderers, the most dangerous  
18 criminals, into prison for the rest of their lives, and  
19 here we have somebody -- there is no evidence that  
20 there was a weapon in this case, Your Honor.

21 I mean, here's arguably -- he went into these two  
22 convenience stores because he was on drugs, put his  
23 finger under a shirt, and robbed them. I mean, that is  
24 not the intent of the most serious offense statutes.

25 He is not within the gamut of the statute. He is

1 not a most dangerous criminal.

2 THE COURT: With regard to the California  
3 conviction, looking at Exhibit 5, which is apparently  
4 what Mr. Carter pled to, it suggests that the elements  
5 are that the defendant did willfully and unlawfully  
6 commit an assault with a firearm. Now, wouldn't that  
7 be the equivalent of a Washington Second Degree  
8 Assault, a most serious offense?

9 MR. ALIPURIA: Well, yes, it would, Your Honor,  
10 but we have to look at the totality of the  
11 circumstances. I mean, here we have -- he was a kid at  
12 the time. His brother was in the car. He really  
13 didn't fire at the car. There's no evidence that he  
14 fired at the car. He pled guilty simply so he wouldn't  
15 have to go to prison.

16 THE COURT: Is there any case law that you can  
17 point me to that suggests the Court goes that far  
18 behind the conviction in the other state to look at  
19 what the fact pattern was or whether or not there  
20 should be some -- or the Court even has any authority  
21 to consider mitigating factors? Isn't this just kind  
22 of --

23 MR. ALIPURIA: Well, it's within the discretion of  
24 the Court, Your Honor.

25 THE COURT: There is discretion?

1 MR. ALIPURIA: I said it's within the discretion  
2 of the Court.

3 THE COURT: What discretion do I have if I find  
4 that he has been convicted of an equivalent most  
5 serious offense? Isn't that the whole purpose behind  
6 the persistent offender law is to take from the Court a  
7 large degree of discretion and say, "We don't care what  
8 you judges may think. If, in fact, you find that he  
9 has committed these offenses or out-of-state  
10 equivalents, then here is the sentence that's going to  
11 be meted out," and that's a decision the Legislature  
12 has made?

13 MR. ALIPURIA: I understand that you look at an  
14 out-of-state court and compare the elements of the  
15 out-of-state crime with the elements of the in-state  
16 crime and then determine whether or not it's a most  
17 serious offense. I am just asking, in this case, since  
18 this is a case where a person's life is at stake, that  
19 we do look behind, we do look at the totality of the  
20 circumstances, we do look at what was going on within  
21 the mind of Ernest Carter when he pled guilty to this.

22 THE COURT: Do you have any further argument with  
23 regard to the criminal history --

24 MR. ALIPURIA: No, I don't, Your Honor.

25 THE COURT: -- or any of the convictions?

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MR. ALIPURIA: No, I don't.

THE COURT: Anything the State wants to say with regard to the criminal convictions?

MR. COOPER: I guess the only thing I would note for the record -- and I think it talks about facts in the P.S.I. It talks about facts in the change of pleas, by each individual, and I think it clearly fits Assault in the Second.

My research on the California law, as best I could figure, the reason why the Court said that this is not a crime of violence, at that time in the State of California, they were required, if someone was convicted of a crime with a handgun, that they had to find some type of extenuating circumstances to grant probation. Otherwise, it was a required -- sort of like the firearm enhancement in our state. They've got to go do the five years in prison or three years in prison mandatory, but there was a part in the statute that was written that, if there were exceptions either found by the Court or it was the result of a plea bargain, which it was, they also talk about in the change of plea that probation could be agreed to even though they were pleading to a crime that had a mandatory minimum.

That's what happened to Mr. Carter in this case,

1 but the elements of the crime are those of an Assault  
2 in the Second Degree in our state, and a firearm was  
3 used. And I think that's reflected in the P.S.I. and  
4 in the change of plea when they talk about the facts  
5 and what's available to the Court, or at least what  
6 they considered and what he pled to in the  
7 Information.

8 THE COURT: So, when the Court makes this finding  
9 of mitigation, then it's no longer in the State of  
10 California defined as a crime of violence, and that,  
11 therefore, allows some mechanism to grant probation or  
12 a portion of probation?

13 MR. COOPER: Right. What I found was under  
14 Section 1203 of the California laws, and they use crime  
15 of violence, and that term is not used in this section  
16 in the California penal code, but it does note that,  
17 except in unusual cases where the interest of justice  
18 would best be served if the person is granted  
19 probation, probation shall not be granted to any of the  
20 following persons, and that included a person with a --  
21 who had used or attempted to use a deadly weapon upon  
22 another human being.

23 So they had to make -- I am not sure that term  
24 that the Court used, crime of violence, fits in the  
25 penal code, but it does fit that they have to somehow

1 make a record that there are exceptions. In the  
2 previous plea, it talks about that an exception is  
3 found just where the parties agree to it, and that's  
4 under a plea bargain situation, which that exception  
5 can also be found.

6 MR. ALIPURIA: Well, I think we need to look at  
7 the fact too that the Court did give him probation in  
8 that case. I mean, that shows that, if he really did  
9 fire a weapon at a police officer, the Court didn't  
10 view it that way or they wouldn't have given him  
11 probation. I think one thing we need to remember is  
12 that people don't get probation for most serious  
13 offenses.

14 THE COURT: Anything else?

15 MR. ALIPURIA: No, Your Honor.

16 THE COURT: Anything else the State wants to say?

17 MR. COOPER: I think the analysis is whether the  
18 elements of the crime meet the elements of the crime in  
19 the State of Washington, and that's what the Court is  
20 to do. I think it's clear that assault of a peace  
21 officer with a firearm does meet Assault in the Second  
22 Degree in the State of Washington, and with the other  
23 conviction in Oregon, he would be a persistent  
24 offender.

25 THE COURT: Now, with regard to the conviction in

1 Oregon, there was Exhibit 10. That was offered. Would  
2 you hand me that exhibit, Judy, please? That's the  
3 Oregon Judgment.

4 MR. COOPER: And attached in the back is the  
5 indictment, I believe, on that one.

6 THE COURT: And the Judgment is the same as  
7 Exhibit --

8 MR. COOPER: Right, the Judgment.

9 THE COURT: -- 3; is that right?

10 MR. COOPER: Except it didn't have -- Number 10  
11 has the indictment attached.

12 THE COURT: Mr. Alipuria, any objection to Exhibit  
13 10?

14 MR. ALIPURIA: No, Your Honor.

15 (Plaintiff's Exhibit No. 10 admitted into  
16 evidence.)

17 THE COURT: With regard to the Oregon conviction,  
18 it's really not argued that this is not the equivalent  
19 of a most serious offense, and under our sentencing  
20 structure, to be a persistent offender, one needs to be  
21 convicted of, in essence, three most serious offenses.

22 And our statute then goes on to delineate what a  
23 most serious offense is. It doesn't necessarily say  
24 it's a crime of violence or anything of that sort. It  
25 lists specifically what the crimes are, and one of the

1 ones listed is Assault in the Second Degree. Assault  
2 in the Second Degree is committed in the State of  
3 Washington if someone assaults someone with a firearm.

4 So the question, then, with regard to the  
5 California conviction is, is there a valid conviction  
6 in California that appears to be facially  
7 constitutional for an equivalent Washington most  
8 serious offense, in this case, Assault in the Second  
9 Degree? And what's been provided to me is an  
10 Information which delineates the elements for the crime  
11 of unlawful assault with a firearm as willfully and  
12 unlawfully committing assault with a firearm, to wit, a  
13 gun, upon the person of, in this case, a police  
14 officer.

15 Those elements, on their face, would certainly  
16 support the fact that they're the equivalent of a  
17 Washington State Assault in the Second Degree.

18 Then, going beyond that, if we were to take the  
19 next step and try and see, as the defense has  
20 suggested, whether or not there's really a factual  
21 basis behind this conviction, we have the transcript  
22 from the sentencing and from the taking of the plea,  
23 and apparently, at the time of the plea, the factual  
24 basis was presented as what we call a Newton or Alfred  
25 plea. Mr. Carter didn't specifically say, I did this,

1 this, and that. He agreed to the use of what we would  
2 term an Affidavit of Probable Cause, but what they term  
3 a preliminary hearing examination where testimony is  
4 taken.

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

11 So there certainly appears to be a factual basis  
12 even behind the facially constitutional conviction. So  
13 I find that both of these prior offenses, the  
14 California and the Oregon, are the equivalent of most  
15 serious offenses in the State of Washington.

16 Now, with regard to the sentence to be handed out,  
17 does the State have any comment with regard to  
18 sentencing or is there any victim representative that  
19 wants to address the Court?

20 MR. COOPER: There's no victim representatives,  
21 Your Honor. I was going to just have in the Judgment  
22 and Sentence no contact with any of the witnesses or  
23 victims for life, and the State was going to put in  
24 restitution, but because we don't have that, I don't  
25 know -- I don't think I am going to put in any

1 L.F.O.s. I am not sure how the Court usually handles  
2 that. I know the P.S.I. asks for \$500, \$110, I think.  
3 It seems like that might be sort of a worthless  
4 gesture.

5 THE COURT: Mr. Alipuria, anything you want to say  
6 with regard to the sentencing?

7 MR. ALIPURIA: No, Your Honor.

8 THE COURT: Mr. Carter, is there anything you want  
9 to say?

10 THE DEFENDANT: No.

11 THE COURT: The Court has no discretion. The  
12 Legislature, as I've already indicated, has made that  
13 decision and determined that judges ought not to be  
14 making these decisions. The Legislature will make them  
15 for us. That being the case, I have no discretion. I  
16 have to sentence Mr. Carter to life in prison without  
17 chance of parole as a persistent offender.

18 I think the crime victim penalty assessment is  
19 mandatory, so I have to assess that. I will order no  
20 contact. Above and beyond that, are there any  
21 conditions that need to be, by law, imposed?

22 Mr. Cooper, are you aware of any others?

23 MR. COOPER: No, Your Honor. I know the P.S.I.  
24 writer spoke about community placement, but even if  
25 this wasn't a persistent offender case, community

1 placement wouldn't be appropriate, is my  
2 understanding.

3 Your Honor, since it was a jury trial, I think we  
4 do need to read the appeal rights also. I had  
5 forgotten about that.

6 THE COURT: Do you have the admonition with you?

7 MR. COOPER: I didn't bring a written form.

8 THE COURT: Mr. Carter, it's my duty to advise you  
9 that you have a right to appeal your determination of  
10 guilt at trial. And I might add that you'd also have a  
11 right to appeal, with relation to the sentencing, the  
12 determinations made that you are, in fact, a persistent  
13 offender.

14 Unless a Notice of Appeal is filed with the clerk  
15 of the court within 30 days from the entry of the  
16 Judgment or the order appealed from, you will have  
17 irrevocably waived your right to appeal. If you have  
18 no lawyer to file a notice of appeal for you, the clerk  
19 of the court will, if requested by you, file a Notice  
20 of Appeal on your behalf.

21 If you cannot afford the cost of an appeal, you  
22 have the right to have a lawyer appointed to represent  
23 you on appeal and to have such parts of the trial  
24 record as are necessary for review of errors assigned  
25 transcribed for you, both at public expense.

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THE DEFENDANT: Your Honor --

THE COURT: Yes.

THE DEFENDANT: -- can I have the Court file the Notice of Appeal for me, because the lawyer will not -- he won't be representing me on appeal.

MR. ALIPURIA: I won't be representing Mr. Carter on appeal, Your Honor.

THE COURT: Well, you are still in the case, and Mr. Carter needs to be sure that he gets his appeal filed in time. If you are going to be seeking to withdraw, you should contact the Department of Assigned Counsel so that we're sure that somebody comes in in your place, but we definitely don't want Mr. Carter's appeal rights to pass by before a Notice of Appeal is done.

You have given oral notice here today, Mr. Carter, of your intent to appeal.

THE DEFENDANT: Okay.

MR. COOPER: Your Honor, the only thing I guess I didn't write on the J & S was credit for time served. That might be -- based on my calculation, I figured 312 days.

THE DEFENDANT: Ten months and 18 days.

MR. COOPER: That's from November 5th.

THE DEFENDANT: Yes.

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MR. COOPER: I think there's a spot on the J & S,  
Your Honor, for credit for time served, so 311 days.

THE COURT: All right. Anything else we need to  
take up at this time?

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

THE COURT: We'll be at recess.

(Proceedings concluded.)

APPENDIX B  
DECLARATION OF PETITIONER

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

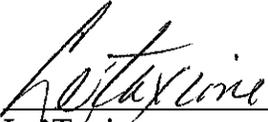
*In re Personal Restraint Petition of* ) No. \_\_\_\_\_  
)  
LE'TAXIONE, ) DECLARATION OF  
) LE'TAXIONE  
Petitioner. )  
)  
)  
)

I, Le'Taxione declare:

1. I am the Petitioner in this case. I was formerly known by the name of Ernest Carter.
2. At sentencing, I was not informed (orally or in writing) of the one year limit on collateral attacks.
3. My current attorney recently provided me with a copy of a document entitled *Advice of Collateral Attack Time Limit*, which has my name and case number on it, but does not bear my signature. To the best of my memory, I was not provided a copy of this document previously. The first time I remember seeing this document was when my current attorney showed it to me.

1 I declare under the penalty of perjury of the laws of the State of Washington that  
2 the foregoing is true and correct.  
3

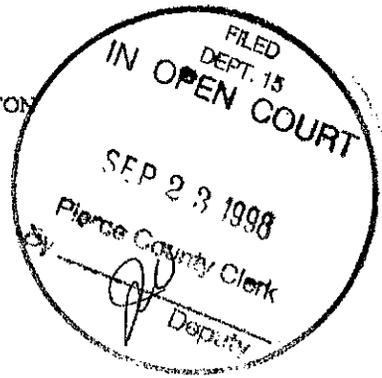
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APPENDIX C  
ADVICE OF COLLATERAL ATTACK TIME LIMIT

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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  
ADVICE OF COLLATERAL  
ATTACK TIME LIMIT

Pursuant to RCW 10.73.110, you are hereby advised of the following time limit regarding collateral attack:

RCW 10.73.090:

- (1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.
- (2) For the purposes of this section, "collateral attack" means any form of post conviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.
- (3) For the purposes of this section, a judgment becomes final on the last of the following dates:
  - (a) The date it is filed with the clerk of the trial court;
  - (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
  - (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

RCW 10.73.100

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
- (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
- (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, Section 9 of the State Constitution;
- (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
- (5) The sentence imposed was in excess of the court's jurisdiction; or
- (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

I have been advised of the above time limit regarding collateral attack pursuant to statutes.

RECEIPT ACKNOWLEDGED:

DATE: \_\_\_\_\_

DEFENDANT: \_\_\_\_\_

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

9 In re Personal Restraint Petition of  
10 LE'TAXIONE,  
11 *aka* ERNEST CARTER,  
12  
13 Petitioner.

NO. \_\_\_\_\_  
PETITIONER'S MOTION TO  
PROCEED IN FORMA PAUPERIS

14  
15  
16 I. IDENTITY OF MOVING PARTY

17 Le'Taxione, *aka* Ernest Carter, Petitioner, seeks the relief designated in Part II.

18  
19 II. STATEMENT OF RELIEF SOUGHT

20 Waive the filing fee associated with Petitioner's *Personal Restraint Petition*. A  
21  
22 copy of Petitioner's *Statement of Finances* is attached.

23 III. FACTS

24  
25 Petitioner is an indigent defendant who seeks to file the attached PRP. Due to his  
26 indigence, Petitioner seeks to have the filing fee waived.

27 III. ARGUMENT

28  
29 Pursuant to RAP 16.8, Petitioner respectfully requests that this Court waive the  
30 filing fee associated with his *Personal Restraint Petition*.

1 IV. CONCLUSION

2 This Court should waive the filing fee in this case.

3  
4 DATED this 2<sup>nd</sup> day of October, 2007.

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9   
10 Jeffrey E. Ellis, WSBA #17139  
11 *Attorney for Le Taxione*

12 Law Offices of Ellis, Holmes  
13 & Witchley, PLLC  
14 705 Second Avenue, Suite 401  
15 Seattle, WA 98104  
16 (206) 262-0300  
17 (206) 262-0335 (fax)  
18 ellis\_jeff@hotmail.com  
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**CERTIFICATE SUPPORTING MOTION TO PROCEED IN FORMA PAUPERIS**

I, LeTaxione, certify as follows:

1. That I am the petitioner and I wish to file a PRP in the above-entitled cause.
2. That I own:  
 a. No real property  
 b. Real property valued at \$\_\_\_\_\_.
3. That I own:  
 a. No personal property other than my personal effects  
 b. Personal property (automobile, money, inmate account, motors, tools, etc.) valued at \$\_\_\_\_\_.
4. That I have the following income:  
 a. No income from any source.  
 b. Income from employment, disability payments, SSI, insurance, annuities, stocks, bonds, interests, etc., in the amount of \$\_\_\_\_\_ on an average monthly basis. I received \$\_\_\_\_\_ after taxes over the past year.
5. That I have:  
 a. Undischarged debts in the amount of \$\_\_\_\_\_.  
 b. No debts.
6. That I am without other means to prosecute said PRP and desire that public funds be expended for that purpose.
7. That I can contribute the following amount toward the expense of review:  
\$\_\_\_\_\_.
8. The following is a brief statement of the nature of the case and the issues sought to be reviewed: **See attached brief.**
9. I ask the court to provide the following at public expense, the following: all filing fees, preparation, reproduction, and distribution of briefs, preparation of verbatim report of proceedings, and preparation of necessary clerk's papers.
10. I authorize the court to obtain verification information regarding my financial status from banks, employers, or other individuals or institutions, if appropriate.
11. I certify that I will immediately report any change in my financial status to the court.
12. I certify that this PRP is being filed in good faith.

I, Le'Taxione, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

9-20-07 WSR  
Date and Place

Le'Taxione  
Signature of Petitioner