

No. 65130-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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IN RE THE PERSONAL RESTRAINT  
PETITION OF:

BARON NADDER HAGHIGHI,

Petitioner

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BRIEF OF PETITIONER

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## A. SUMMARY OF ARGUMENT

Article I, section 7 jealously guards individual privacy and requires the court to suppress evidence seized without authority of law. The police seized personal banking records from Baron Haghghi's bank accounts. Although they had a search warrant, the police did not have authority of law to obtain Mr. Haghghi's bank records from a bank's offices in Illinois. The trial court and Court of Appeals ruled that the evidence was illegally seized but the doctrine of inevitable discovery allowed the court to admit the illegally seized evidence against Mr. Haghghi at trial.

Weeks after the Court of Appeals decision became final, the Supreme Court ruled that article I, section 7 does not permit courts to use the inevitable discovery doctrine as the basis to admit evidence. This interpretation of article I, section 7 should apply to Mr. Haghghi's case. It demonstrates the constitutional violation that occurred in Mr. Haghghi's trial. It represents a significant change in the law because it overrules Court of Appeals precedent. The interest of justice dictates that Mr. Haghghi receive the protections of article I, section 7 under the independent requirements of our state constitution. Furthermore, Mr. Haghghi received ineffective assistance of counsel on appeal when his

attorney failed to raise and preserve a meritorious issue that involved evidence essential to the State's case against him.

B. ISSUES PRESENTED

1. The Supreme Court ruled in Winterstein<sup>1</sup> that the Fourth Amendment's doctrine of inevitable discovery is incompatible with the requirements of article I, section 7. The trial court used inevitable discovery as the basis to admit illegally seized bank records in Mr. Haghighi's case and the Court of Appeals affirmed. Does Winterstein constitute a change in the law that should apply to Mr. Haghighi?

2. Before Winterstein, the Court of Appeals adhered to the doctrine of inevitable discovery as a basis to admit illegally seized evidence even though the Supreme Court had questioned whether inevitable discovery would apply in Washington under our state constitution. Under RAP 16.4(d), a change in the law applies to a case final when the change is announced if sufficient reasons exist. Does Winterstein demonstrate the requirements of article I, section 7 that have existed since the time of the framing of our constitution and should also apply to Mr. Haghighi?

3. When an appellate attorney fails to raise a meritorious issue in a direct appeal, his performance is deficient. In his direct appeal, Mr. Haghighi did not independently challenge the application of inevitable discovery under article I, section 7. The Supreme Court was considering the constitutionality of inevitable discovery during Mr. Haghighi's direct appeal, but Mr. Haghighi's attorney did not file a petition for review after the Court of Appeals affirmed his convictions based on inevitable discovery. Where a challenge to inevitable discovery under article I, section 7 is meritorious, was the failure to raise the issue, preserve it by filing a petition for review, or advise Mr. Haghighi of the consequences of not filing a petition for review ineffective assistance of counsel?

4. A petitioner is entitled to relief from unlawful restraint if the ineffective assistance of counsel creates a reasonable probability of a different outcome in the case or a constitutional error causes actual prejudice. Mr. Haghighi was convicted of seven counts of unlawful issuance of bank checks and one count of first degree theft. The State used illegally seized Allstate bank records as its central proof against Mr. Haghighi to prove that he intended to defraud the people whom he gave checks, and also introduced

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<sup>1</sup> State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009).

more than 70 unrelated checks obtained from the bank to prove his intent under ER 404(b). Is it reasonably probable that the admission of illegally seized banking records affected the outcome of the case, and was Mr. Haghghi prejudiced by the State's use of these records to prove its case against him?

C. STATEMENT OF CASE

Before his trial, Mr. Haghghi objected to the State's seizure of his personal banking records from Allstate Bank. Findings of Fact at 1.<sup>2</sup> The trial court agreed that the police had not properly seized his bank records. Id. at 3. Although the police obtained a search warrant, they did not comply with procedures for lawfully serving the warrant on an out-of-state bank. Id. (Conclusion of Law D: "the warrant was not legally enforceable"). Allstate maintained its records in Illinois, and the officer simply faxed the warrant to the bank in Illinois and followed up by personally requesting additional materials. Id. at 2.

The trial court ruled that even though the seizure of Mr. Haghghi's bank records was unlawful, the evidence gathered was admissible at trial under the inevitable discovery exception to the

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<sup>2</sup> The trial court's Written Findings of Fact and Conclusions of Law on CrR 3.6 Motion to Suppress Physical Evidence are attached to the State's Response to Mr. Haghghi's PRP, as Appendix F.

exclusionary rule. Id. at 4-5. Mr. Haghghi objected on several grounds, specifically explaining that the Washington Supreme Court has not adopted “the inevitable discovery doctrine.” 10/24/07RP 47-48.<sup>3</sup>

Mr. Haghghi was charged with seven counts of unlawful issuance of bank checks and one count of first degree theft for checks written on the Allstate account. At trial, the State introduced detailed records from Allstate, including notices that the bank had sent to Mr. Haghghi regarding insufficient funds in his account and its letters closing the account. 10/29/07RP 5-55; Exs. 1-15. The State also introduced 77 checks written on the Allstate accounts, in addition to the checks underlying the individual charges, under the theory that these additional checks were material evidence showing Mr. Haghghi’s intent to defraud the complainants by a common scheme or plan of writing many checks that he never could have satisfied under his Allstate bank account. 10/24/07RP 57-59, 62; 10/29/07RP 40-43. At the close of the State’s case, Mr. Haghghi’s lawyer argued that the charges should be dismissed because “the records here were unlawfully seized. And without that evidence,

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<sup>3</sup> The volumes of proceedings related to the trial have been transferred to this PRP, at the State’s request. Mr. Haghghi has filed a motion to transfer the transcript from the CrR 3.6 hearing that occurred on October 23 and 24, 2007.

there would be no sufficient proof of the crimes charged.”

10/30/07RP 36.

On appeal, Mr. Haghghi challenged admission of the bank records. COA 61436-3-I, Brief of Appellant, at 35-42. He argued the Supreme Court “has not yet decided whether the inevitable discovery doctrine applies under article I, section 7 under any set of circumstances.” Id. at 38. The Court of Appeals held, “the trial court properly concluded the State would have discovered Haghghi’s bank records” as inevitable discovery. State v. Haghghi, COA 61436-3-I, 2009 WL 2515775, \*7-8 (2009) (unpublished).

Mr. Haghghi did not file a petition for review. His lawyer told him that the inevitable discovery issue was not meritorious and would not be a basis for the Supreme Court to grant review. See Letters of August 17, 2010 and August 20, 2011 (attached as Appendix A and B, respectively). His lawyer said he would not file a petition for review for Mr. Haghghi on whether inevitable discovery was a legitimate basis to admit illegally seized evidence. Id. His lawyer never told him that it was possible the Supreme Court would view inevitable discovery differently than the Court of Appeals or that there was a case pending in the Supreme Court

involving inevitable discovery. See Petitioner’s Declaration, attached as App. C; Declaration of Casey Grannis, App. D. Two months later, the Supreme Court held that Washington Constitution does not permit courts to admit illegally seized evidence under the doctrine of inevitable discovery. State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). Haghghi promptly filed a personal restraint petition and this Court appointed counsel.<sup>4</sup>

This personal restraint petition is Mr. Haghghi’s first such petition. He is presently serving a 96-month prison sentence for his convictions in this matter.

#### D. ARGUMENT

##### 1. THE INEVITABLE DISCOVERY DOCTRINE DOES NOT EXCUSE ILLEGAL POLICE ACTION UNDER ARTICLE I, SECTION 7

a. Washington does not recognize the inevitable discovery exception to the exclusionary rule. In Winterstein, the Supreme Court held that the doctrine of inevitable discovery is “incompatible” with article I, section 7 of our Constitution.<sup>5</sup> 167 Wn.2d at 636. Inevitable discovery is a Fourth Amendment

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<sup>4</sup> This Court initially appointed the original appellate attorney to represent Mr. Haghghi in his PRP in an order dated December 22, 2010, but that attorney withdrew citing a conflict of interest, presumably referring to the apparent ineffective assistance of counsel.

doctrine, under which a court may admit illegally obtained evidence at trial if the State can establish that the evidence “ultimately or inevitably would have been discovered by lawful means.” Id. at 634 (quoting Nix v. Williams, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984)); U.S. Const. amend. IV.<sup>6</sup> Our Constitution is more protective of individual privacy than the Fourth Amendment and is interpreted independently.

Article I, section 7 guarantees individual privacy rights without exception. Winterstein, 167 Wn.2d. at 635. It protects the individual’s right of privacy by mandating that “whenever the right is unreasonably violated, the remedy must follow.” Id. at 632 (quoting State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). It also “protects the integrity of the judicial system by not tainting the proceedings with illegally obtained evidence.” Id. The remedy of excluding illegally obtained evidence has strong historical roots and is a “nearly categorical” requirement under our Constitution. Id. at 632, 635.

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<sup>5</sup> Article I, section 7 provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

<sup>6</sup> The Fourth Amendment states,  
The right of the people to be secure in their persons, houses,  
papers, and effects, against unreasonable searches and  
seizures, shall not be violated, and no Warrants shall issue, but  
upon probable cause, supported by Oath or affirmation, and

The Fourth Amendment is principally concerned with deterring improper police tactics, and it does not require the exclusion of evidence where it would not further the deterrence rationale on which the rule is based. United States v. Calandra, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). On the other hand, article I, section 7 is not premised on deterring police misconduct. Instead, it is concerned with protecting personal rights rather than curbing governmental actions. White, 97 Wn.2d at 110.

The exclusionary rule of article I, section 7 is more exacting than its federal counterpart, and without exception requires “immediate application . . . whenever an individual’s right to privacy” has been violated. Id. at 111-12.

Winterstein explained that the doctrine of inevitable discovery is “necessarily speculative” in its requirements. 167 Wn.2d at 634. Furthermore, it does not disregard illegally obtained evidence, which is contrary to our cases that require a remedy following a governmental intrusion into an individual’s private affairs without authority of law. Id. Because article I, section 7 jealously guards and carefully draws any exceptions to its requirement that the authorities obtain “authority of law” before intruding upon a

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particularly describing the place to be searched, and the persons

person's private affairs, the doctrine of inevitable discovery does not comport with the bedrock principles and historical application of Article I, section 7. Id.

Before Winterstein, several Court of Appeals decisions had relied on inevitable discovery. Id. at 634-35 (citing State v. Avila-Avina, 99 Wn.App. 9, 17, 991 P.2d 720 (2000); State v. Reyes, 98 Wn.App. 923, 930, 993 P.2d 921 (2000); State v. Richman, 85 Wn.App. 568, 577, 933 P.2d 1088 (1997)). In Richman, the Court of Appeals held that inevitable discovery adequately protects individual privacy as required by article I, section 7. 85 Wn.App. at 574-77. Winterstein overruled Richman and its Court of Appeals progeny, finding their reasoning "flawed." 167 Wn.2d at 635.

Winterstein was not the first time the Supreme Court expressed doubt about the validity of inevitable discovery under article I, section 7. In State v. O'Neill, 148 Wn.2d 564, 592, 62 P.3d 489 (2003), the Supreme Court refused to apply inevitable discovery. In O'Neill, the court ruled Article I, section 7 requires that a custodial arrest must occur before the police have legal authority to search a person incident to the arrest. The prosecution claimed the same evidence would have been inevitably discovered

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or things to be seized.

because the officer had probable cause and would have arrested Mr. O'Neill anyway. Id. at 591. The O'Neill Court rejected this analysis, ruling that it would render meaningless the requirement of article I, section 7 that the police must possess the lawful authority first, before conducting any search. Even though the Supreme Court refused to apply the inevitable discovery doctrine in O'Neill and indicated it doubted whether the doctrine was consistent with article I, section 7 in any case, no Court of Appeals cases decided after O'Neill questioned the viability of this doctrine. See e.g., State v. Winterstein, 140 Wn.App. 676, 693, 166 P.3d 1242 (2007) (reversed by Winterstein, 162 Wn.2d at 636); State v. Spring, 128 Wn.App. 398, 407 n.26, 115 P.2d 1052 (2005).

b. The constitutional violation explained in Winterstein applies to Mr. Haghighi. “[I]t is well established that a constitutional issue can be raised for the first time in a PRP if the petitioner demonstrates actual prejudice.” In re Pers. Restraint of Nichols, \_ Wn.2d \_, 2011 WL 1598634, \*2 (April 28, 2011). As explained in detail in section 3, *infra*, the Court of Appeals erroneously relied on the doctrine of inevitable discovery to rule that the illegally seized evidence was properly admitted against Mr. Haghighi at trial and this evidence was a central part of the State’s

case. Unlike the petitioner in Nichols, Mr. Haghighi litigated this issue in the Court of Appeals but did not prevail because the Court of Appeals relied on its now-abrogated precedent. He may raise this constitutional issue in his PRP and should receive relief due to the actual prejudice caused by the State's use of illegally seized evidence to obtain a conviction.

c. Additionally, the Supreme Court's rejection of inevitable discovery applies to Mr. Haghighi even though his direct appeal was final shortly before *Winterstein*. *Winterstein* overruled a number of Court of Appeals cases and it marks a clear and decisive change in the law under Court of Appeals precedent. 167 Wn.2d at 635 (overruling *Avila-Avina*, *Reyes*, and *Richman*).

In Washington, a change in the law is automatically extended to any case not yet final. *State v. Robinson*, \_\_ Wn.2d \_\_, 2011 WL 143460, \*4-5 (April 14, 2011) (appellant "entitled" to retroactive benefit of change in law occurring during direct appeal). A case is "final" when the mandate issues in a direct appeal or when the time expires for a person to have filed a petition for certiorari, 90 days after the date of the decision. *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992).

Mr. Haghghi's case was final, by a few weeks, when Winterstein was decided.<sup>7</sup>

A change in the law may apply to a case that is already final where it is a "significant" change in the law that is material to the conviction and either the court or legislature find "sufficient reasons" for retroactive application. RAP 16.4(c)(4); RCW 10.73.100(6).<sup>8</sup> For changes in federal law, Washington courts have followed the federal law requirements of retroactivity as announced in Teague v. Lane, 489 U.S. 288, 311, 107 S.Ct. 1060, 103 L.Ed.2d 334 (1989). State v. Evans, 154 Wn.2d 438, 448, 114 P.3d 627 (2005). Under Teague, a new rule is given retroactive application if it is "implicit in the concept of ordered liberty," implicating the fundamental fairness of the trial. 489 U.S. at 311; St. Pierre, 118 Wn.2d at 326.

In Evans, the defendant sought retroactive application of a change in federal constitutional law: the right to have a jury

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<sup>7</sup> The Court of Appeals decided Mr. Haghghi's case on August 17, 2009, and issued its mandate on September 25, 2009. Finality includes the possibility of filing a petition for certiorari 90 days from the date of the final decision, which would be November 16, 2009. The Supreme Court decided Winterstein 17 days later, on December 3, 2009.

<sup>8</sup> RAP 16.4(c)(4) provides that a person is entitled to receive relief from a conviction if:

There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, ... and sufficient reasons exist to require retroactive application of the changed legal standard.

determine facts that increase a person's standard range sentence as announced in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The Evans Court followed the retroactivity analysis used by federal courts to decide the retroactivity of this federal constitutional principle.

The court also acknowledged that changes in state law may not be governed by federal retroactivity law. Evans, 154 Wn.2d at 449. Teague is "grounded in" concerns of "federal-state relations," and the United State Supreme Court's desire not to interfere with a state's self-governance. Id. at 228-49 (quoting Collins v. Youngblood, 497 U.S. 37, 41, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)); see also Teague, 489 U.S. at 308-10 (expressing concern about costs on state courts of federal court interferences in state court proceedings).

It does not make sense to automatically use the federal standard for retroactivity when deciding how to apply changes in state law. Evans, 154 Wn.2d at 449. Mr. Evans was raising a Sixth Amendment claim and the court therefore used Teague's federal retroactivity doctrine. Id. Unlike Evans, Mr. Haghighi raises an

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RCW 10.73.100(6) uses the same standard as an exception to the one-year deadline for filing a PRP.

issue of state constitutional law, and this issue is interpreted independently of the federal constitution or federal common law.

It serves the interests of justice to reexamine an issue “if there has been an intervening change in the law.” In re Pers. Restraint of Davis, 152 Wn.2d 647, 671 n.15, 101 P.3d 1 (2004). Although in In re Pers. Restraint of Taylor, 105 Wn.2d 683, 691, 717 P.2d 755 (1986), the court turned to federal retroactivity law to decide whether a change in the law should apply to cases final at the time of the change, it did not analyze the reason why federal law should govern the interpretation and application of state constitutional law. It did not discuss RAP 16.4 or RCW 10.73.100. The change in the law announced in Winterstein is a clear break from Court of Appeals precedent, and as explained in Evans, the question of whether it applies to Mr. Haghighi should be based on state interests not federal law.

The rules of appellate procedure are interpreted liberally for the purpose of promoting justice. Robinson, 2011 WL 1434607 at \*5. RAP 16.4(c)(4) directs the court to apply a significant change in Court of Appeals case law to Mr. Haghighi’s case. Federal legal principles are not at stake. Article I, section 7 protects “those privacy interests which citizens of this state have held, and should

be entitled to hold, safe from governmental trespass absent a warrant.” State v. Myrick, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984). Washington has a long history of independently interpreting the right to privacy under the state constitution. Sufficient reasons exist for the Supreme Court interpretation of the exclusionary rule to apply to Mr. Haghghi’s case.

Furthermore, the circumstances of Mr. Haghghi’s case present compelling reasons why he should benefit from the law as set forth in Winterstein. The decision in Winterstein was issued shortly after the Court of Appeals decision in Mr. Haghghi’s case. If he had filed a petition for review after the August 12, 2009 Court of Appeals decision, his case would not have been final by December 3, 2009, when Winterstein was decided, and there would be no dispute that Winterstein controlled his case. See Robinson, 2011 WL 1434607 at \*4. There are compelling circumstances for applying this change in the law to his case. See Evans, 154 Wn.2d at 449.

2. THE RETROACTIVE APPLICATION OF WINTERSTEIN WOULD BE IRRELEVANT IF MR. HAGHIGHI HAD RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

a. Mr. Haghighi has the right to effective assistance

of counsel on appeal. Where a state guarantees the right to appeal a conviction, the Fourteenth Amendment requires the effective assistance of counsel on appeal. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Douglas v. California, 372 U.S. 353, 358, 83 S.Ct. 814, 9 L.E.d.2d (1963). Article I, section 22 of the Washington Constitution provides for a right to appeal; therefore, Mr. Haghighi was entitled to the effective assistance of counsel on appeal. State v. Rolax, 104 Wn.2d 129, 135, 702 P.2d 1185 (1995).

An attorney's performance constitutes ineffective assistance of counsel when her actions "fell below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Padilla v. Kentucky, \_ U.S. \_, 130 S.Ct. 1473, 1482, 176 L.Ed.2d 284 (2010) (quoting Strickland, at 688 & 694).

b. Mr. Haghighi's attorney failed to preserve a meritorious legal issue that would have required reversal. If an appellate attorney "failed to raise an issue with underlying merit, then the first prong of the ineffective assistance test is satisfied." In re Pers. Restraint of Dalluge, 152 Wn.2d 773, 787, 100 P.3d 279 (2004) (citing In re Pers. Restraint of Maxfield, 133 Wn.2d 332, 945 P.2d 196 (1997)).

In Maxfield, the appellate attorney on direct appeal challenged the constitutionality of a search as a violation of the Fourth Amendment and article I, section 7, but did not brief the Gunwall factors required to demonstrate an independent state constitutional violation. 133 Wn.2d at 336. In his direct appeal, the court ruled that it would not consider Maxfield's article I, section 7 claim due to his failure to analyze the Gunwall criteria. State v. Maxfield, 125 Wn.2d 378, 394, 886 P.2d 123 (1994).

Maxfield filed a PRP presenting the Gunwall analysis absent from the direct appeal, and arguing that his appellate attorney was ineffective for failing to adequately brief the Gunwall factors. 133 Wn.2d at 344. The Supreme Court agreed that appellate counsel failed to present a meritorious legal issue, and therefore counsel had not performed adequately. Id.

Likewise, appellate counsel representing Mr. Haghighi failed to present and preserve a meritorious issue, as demonstrated by the decision in Winterstein. Additionally, attorneys are required to be familiar with the law and developments in the law. RPC 1.1, cmt. 6 (“a lawyer should keep abreast of changes in the law and its practice.”). They must inform their clients of the significant, material consequences of their actions. See Padilla, 130 S.Ct. at 1482.

Similarly to Maxfield, Mr. Haghighi’s attorney’s opening brief shows he understood the Supreme Court had expressed doubt about the viability of inevitable discovery, but unreasonably, he did not squarely present the state constitutional issue to the Court of Appeals or preserve the issue by filing of petition for review, as he himself admits. See Declaration of Casey Grannis (App. D). In fact, he told Mr. Haghighi that the issue did not merit filing a petition for review. See Letters of August 17 and 20, 2010 (Apps. A and B).

In his opening brief, Mr. Haghighi’s attorney acknowledged that the Supreme Court had “not yet decided” whether inevitable discovery “applied under article I, section 7 under any set of circumstances,” citing O’Neill. Brief of Appellant, p. 38. Mr. Haghighi’s trial attorney had specifically objected to the trial judge’s reliance on the inevitable discovery doctrine and argued it was a

Fourth Amendment doctrine that had not been approved by the Supreme Court under article I, section 7. 10/24/07RP 47-48. By citing O'Neill, Mr. Haghghi's appellate attorney knew that the Supreme Court had refused to apply inevitable discovery to justify a search conducted without authority of law. Further, he knew the Supreme Court had at least left open the question of whether it would approve of inevitable discovery as a basis for admitting unlawfully obtained evidence. An examination of O'Neill shows that the Supreme Court had rejected the reasoning of Court of Appeals cases that relied on inevitable discovery.

In O'Neill, the Supreme Court rejected the very analysis used by the Court of Appeals in Richman, which was the first case to hold that inevitable discovery does not violate article I, section 7. 148 Wn.2d at 592. Richman found that inevitable discovery was consistent with Article I, section 7 because it deters the police. 85 Wn.App. at 577. By contrast, O'Neill rejected inevitable discovery because with it, "there is no incentive for the State to comply with the requirement[ ] that the arrest precede the search." 148 Wn.2d at 592. Where Richman was confident that the rule would not erode the privacy rights of the Constitution, O'Neill was certain that it was contrary to our Constitution. Thus, O'Neill expressly rejected

the legal underpinning of Richman, and the cases relying on Richman which the Court of Appeals used as the basis for upholding Mr. Haghighi's search.

Shortly after O'Neill, the Supreme Court granted review of another case to resolve "the issue of whether the inevitable discovery exception to the exclusionary rule complies with article I, section 7." State v. Gaines, 154 Wn.2d 711, 716 n.5, 116 P.3d 993 (2005). But the court did not reach the inevitable discovery issue in Gaines, because it found the evidence was legally obtained. Id. The grant of review in Gaines further signaled that the Supreme Court questioned whether inevitable discovery was compatible with article I, section 7.

In Winterstein, the Supreme Court presented its holding as "consistent" with its precedent, rather than a new rule. 167 Wn.2d at 636. It explained that in O'Neill, "we recognized that there is no established inevitable discovery exception under article I, section 7." Id. at 635. The Court then held, "consistent with this precedent, we reject inevitable discovery because it is incompatible with the nearly categorical exclusionary rule under article I, section 7." Id. at 636.

Mr. Haghighi's appellate counsel did not argue that the Court of Appeals should independently analyze inevitable discovery under article I, section 7, even though the trial attorney raised this very objection and the appellate attorney himself recognized in his opening brief that the Supreme Court had questioned whether inevitable discovery would apply under the state constitution. This is an issue that had merit, and the failure to raise a meritorious issue demonstrates the deficient performance necessary to show ineffective assistance of appellate counsel. Maxfield, 133 Wn.2d at 344.

Appellate counsel should have known Winterstein was pending. The State's Response Brief informed Mr. Haghighi's attorney that (1) the Court of Appeals upheld a search under the inevitable discovery doctrine in Winterstein and (2) the Supreme Court had granted review. Brief of Respondent, p. 35 (noting State v. Winterstein, 140 Wn.App. 676, 693, 166 P.3d 1242 (2007), "rev. granted, 163 Wn.2d 1033 (2008),” stands for proposition that inevitable discovery permits court to admit evidence if there is reasonable probability it would have been discovered by lawful means). Even when the State's brief told appellate counsel that the Supreme Court was deciding a case that involved inevitable

discovery, appellate counsel did not realize Winterstein was under review, tell Mr. Haghighi that Winterstein was under review, or file a petition for review. App. D. He did not explain that if Mr. Haghighi did not file a petition for review, he would not benefit from any change in the law.<sup>9</sup> Instead, he told Mr. Haghighi that the inevitable discovery issue lacked merit and was not worthy of filing a petition for review.

Appellate counsel did not present the Court of Appeals with any reason to depart from its precedent applying inevitable discovery. Furthermore, counsel did not file a petition for review, or tell Mr. Haghighi that he needed to file a petition for review to preserve the issue that was pending in the Supreme Court.<sup>10</sup> See Declaration of Petitioner (App. C). Counsel's failure to file a petition for review in these circumstances, or explain the consequences of failing to do so to Mr. Haghighi, is unreasonable.

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<sup>9</sup> Supreme Court briefs are available for the public to view on its website, [www.courts.wa.gov](http://www.courts.wa.gov). Winterstein was argued in the Supreme Court on February 26, 2009. See <http://templeofjustice.org/2009/state-v-winterstein/> (last accessed April 22, 2011).

<sup>10</sup> RAP 13.4(b) provides that the Supreme Court will grant review of cases where the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; the case raises a significant question of constitutional law; or the petition involves an issue of substantial public interest that should be determined by the Supreme Court. The Court of Appeals decision conflicted with O'Neill, raised a significant question of state constitutional law, and there was substantial public interest in the issue, as demonstrated by the Court's grant of review in Gaines, where it did not reach the issue but granted review of it.

Appellate attorneys have a duty to communicate with their clients and explain the consequences of their actions. See e.g., In re Pers. Restraint of McCready, 100 Wn.App. 259, 263, 996 P.2d 658 (2000) (attorney’s “failure to advise Mr. McCready of the available options and possible consequences [of rejecting plea offer] constitutes ineffective assistance of counsel”). While filing a petition for review is not mandatory, an appellate attorney is professionally obligated to explain to her client what rights may be waived by failing to file a petition for review. For example, a federal habeas claim or petition for certiorari require that issues are exhausted in state courts. Shumway v. Payne, 136 Wn.2d 383, 390, 964 P.2d 349 (1998). An issue is exhausted only when review is sought to the highest court in the state. Id. Failing to file a petition for review necessarily impacts a client’s ability to prevail in a collateral attack. Prevailing professional norms require an appellate attorney to explain the availability of filing a petition for review and the consequences of failing to file one. See e.g., Quick, Lori, Sixth District Appellate Program, Ethical Duties of Appellate Counsel Toward Clients (“upon receiving the Court of

Appeal's opinion, appellate counsel does have a duty to inform the client as to whether and why a petition for review should be filed").<sup>11</sup>

Failing to raise an issue on direct appeal that would require reversal constitutes deficient performance, as the court ruled in

Orange:

had Orange's appellate counsel raised the constitutional violation on appeal, the remedy for the presumptively prejudicial error would have been, as in Bone-Club, remand for a new trial. Consequently, we agree with Orange that the failure of his appellate counsel to raise the issue on appeal was both deficient and prejudicial and therefore constituted ineffective assistance of counsel.

In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004); see also Maxfield, 133 Wn.2d at 344 (failure to raise meritorious issue establishes deficient performance).

Similarly, Mr. Haghighi's appellate attorney failed to raise a meritorious issue for no reasonable strategic reason. He could have simply preserved the issue by filing a petition for review or informing Mr. Haghighi that he could preserve the issue by filing his own petition for review. Had he done so, Mr. Haghighi's case would not have been final when Winterstein was decided.

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<sup>11</sup> Available at: <http://www.sdap.org/downloads/research/criminal/ethics4.pdf> (last accessed April 21, 2011). Although this guide to professional norms of appointed appellate counsel is from a California appellate office, the guidelines are neutrally stated and indicate the basic requirements of competent performance.

Counsel failed to pursue this issue even though he was aware that the Supreme Court had signaled it did not view the inevitable discovery doctrine as compatible with our Constitution and even though the prosecution made him aware that the issue was pending in the Washington Supreme Court. He did not advise Mr. Haghghi of the legal reasons for filing a petition for review based on the need to preserve this developing issue. The attorney's failure to raise, preserve, or advise Mr. Haghghi of the need to preserve the meritorious issue denied Mr. Haghghi effective assistance of counsel on appeal. The prejudice resulting from the attorney's deficient performance is discussed below.

3. THE ADMISSION OF ILLEGALLY SEIZED EVIDENCE AFFECTED THE RESULT OF THE CASE AND SHOWS THE UNLAWFULNESS OF MR. HAGHIGHI'S RESTRAINT

a. The illegally seized evidence was central to the State's case. The prosecutor detailed the evidence gained by the search warrant during her closing argument, thus highlighting its importance to the State's case. She explained that the police "tracked down other victims based on the records received in response to a search warrant for the defendant's bank records from Allstate bank." 10/30/07RP 82. She explained that Detective

Kaufman served the warrant on Allstate bank and in return, learned Mr. Haghghi had opened four accounts with Allstate in two days. *Id.* at 84-85. In response to the warrant, the detective received copies of Allstate checks involving complainants in this case, as well as 77 additional checks written off the closed Allstate account. *Id.* at 85.

The Allstate bank records were the centerpoint of the State's case against Mr. Haghghi and were introduced in bulk and in detail during his trial. See Exs. 2-15. Beyond the individual checks used to establish the charged offenses, the State introduced 77 additional checks under ER 404(b), to show Mr. Haghghi's intent to defraud and common scheme or plan. 10/24/07RP 57-58, 62. The Allstate records showed when Mr. Haghghi opened the accounts, the lack of money in the accounts, and when he was informed that the accounts were closed, all of which was important to showing that he wrote checks on the accounts even after he knew they were closed. 10/29/07RP 7-61.

At the end of the State's case-in-chief, Mr. Haghghi's attorney moved to dismiss the charges on the ground that the "records here were unlawfully seized. And without that evidence, there would be no sufficient proof of the crimes charged." 10/30/07

RP 36. This argument by defense counsel after the State rested its case demonstrates that the records from Allstate were the crux of the case and critical to establishing the element of intent to defraud.

As the prosecution explained to the jury, “You can’t look at the charges in isolation. It is the total picture that informs you of the defendant’s intent to commit the crime” of unlawful issuance of a bank check. 10/30/07 RP 40. This argument by the prosecution illustrates that its theory rested on the jury cumulating the evidence developed from the Allstate bank records to show Mr. Haghighi intended to defraud and intentionally wrote checks knowing he did not have the funds in the accounts to pay the promised amounts.

b. The bank records were seized without authority of law. Winterstein dictates that evidence seized without the authority of law must be suppressed. 167 Wn.2d at 636. As the trial court ruled, simply obtaining a search warrant does not excuse the police from acting with legal authority. 10/24/07RP 45. The warrant must be properly executed. See State v. Richards, 136 Wn.2d 361, 373, 962 P.2d 118 (1998) (warrant invalidly executed if police enter without knocking and waiting). A warrant does not give police the authority of law to seize evidence if it is executed after time for execution has expired or issued by a judge who lacks legal

authority to issue such a warrant. State v. Canady, 116 Wn.2d 853, 857, 809 P.2d 203 (1991).

Bank records are private records of the account holder. They contain intimate details of the person's life, and cannot be searched by the State absent lawful authority. State v. Miles, 160 Wn.2d 236, 244-46, 156 P.3d 864 (2007) ("a person's banking records are within the constitutional protection of private affairs."). The State did not properly execute the warrant when it seized Mr. Haghghi's bank records by faxing the warrant to Illinois and then repeatedly requested further information from the bank based on the warrant, and it conceded as much in the trial court. 10/23/07RP 22, 34-35.

The State also argued in the trial court that because the search occurred in Illinois, there was no illegality in Washington. However, the location of the search does not determine whether there was an intrusion of an individual's private affairs by Washington police. State v. Boland, 115 Wn.2d 571, 580, 800 P.2d 1112 (1990). The critical question is whether the police had authority of law to obtain Mr. Haghghi's personal banking records. Although they had a search warrant, that warrant did not give them the legal authority to obtain evidence in Illinois. See State v.

Barker, 143 Wn.2d 915, 922, 25 P.3d 423 (2001) (arrest without “authority of law” even though police had probable cause because police motives were pre-textual); see also O’Neill, 148 Wn.2d at 592 (search invalid even though probable cause to arrest where police do not have “authority of law” to search). Here, the police acted without lawful authority when they did not “domesticate” the warrant or otherwise receive lawful authority before demanding Allstate bank provide it with Mr. Haghighi’s records. Findings of Fact at 3. A violation of the requirement that the police have authority of law before intruding upon an individual’s private affairs “requires suppression of the evidence obtained.” Barker, 143 Wn.2d at 922.

The State’s claim that State v. Bonds, 98 Wn.2d 1, 653 P.2d 1024 (1982), saves the fruits of the illegal search is unavailing. Although the court in Bonds declined to suppress statements gathered as a fruit of an illegal arrest in Oregon, the Bonds Court stressed the narrow scope of its holding. Id. at 14 (“we reiterate our determination to exercise our supervisory powers to exclude evidence for such violations in the future”). Winterstein further explained that Bonds has been relegated to being considered an

“exceptional case” and its rejection of inevitable discovery controls.  
167 Wn.2d at 633.

c. The prejudicial error requires granting Mr. Haghghi’s PRP. A person is entitled to relief by way of a PRP where the person is unlawfully restrained as defined in RAP 16.4. Mr. Haghghi is currently confined at the Washington State Penitentiary, where he is serving the 96-month sentence imposed in the case at bar. Therefore, he is restrained pursuant to RAP 16.4(b).

Restraint is unlawful where it occurs “in violation of the Constitution of the United States or the Constitution or laws of the State of Washington.” RAP 16.4(c). Mr. Haghghi’s restraint is unlawful because it occurred in violation of his constitutional right to privacy as protected by article I, section 7 and his right to the effective assistance of counsel on appeal as protected by the Sixth and Fourteenth Amendments, as well as article I, section 22.

Because Mr. Haghghi received ineffective assistance of counsel on appeal, he is entitled to relief when there is a reasonable probability that the result would be different had the evidence not been introduced at trial. State v. Sandoval, \_ Wn.2d

\_, \_P. 3d \_, 2011 WL 917173, \*2 (March 17, 2011). When a petitioner has not had a prior chance to raise a claim before a judge, such as an ineffective assistance of counsel issue, he is not required to show actual and substantial prejudice to obtain relief in a PRP. Id. Alternatively, in considering the violation of Mr. Haghghi's rights under article I, section 7, he is entitled to relief if he is actually and substantially prejudiced by the failure to correctly apply article I, section 7 to his case. Id.

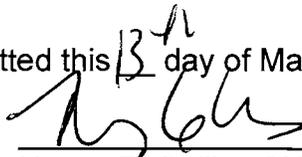
The prosecution's reliance on the Allstate banking records to prove the charges against Mr. Haghghi is readily apparent. His trial attorney moved to dismiss the case after the State rested on the fact "there would be no sufficient proof of the crimes charged" without the illegally seized evidence, thereby demonstrating the importance of that evidence to the State's case. 10/30/07 RP 36. The prosecutor detailed the information gained by the search warrant in her closing argument, introduced 77 other checks as material evidence showing Mr. Haghghi's intent to defraud under ER 404(b), and insisted that the jury look at the total picture, not each individual check, to determine the unlawfulness of Mr. Haghghi's behavior. It is reasonably probable that the admission of the Allstate bank records affected the jurors' deliberations, and

its admission actually and substantially prejudiced Mr. Haghighi. This error requires a new trial without the benefit of illegally obtained evidence.

E. CONCLUSION

Mr. Haghighi is unlawful restrained and is entitled to relief by way of a PRP. This Court should grant Mr. Haghighi's PRP and order his convictions reversed and the case remanded for a new trial.

Respectfully submitted this 13<sup>th</sup> day of May 2011.



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Nancy P. Collins (WSBA 28806)  
Washington Appellate Project – 91052  
Attorneys for Petitioner

## **APPENDIX A**

LAW OFFICES OF  
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K. CAROLYN RAMAMURTI  
JARED B. STEED

August 17, 2009

Baron Nadder Haghghi  
No. 7211125  
Monroe Correctional Complex  
Minimum Security Unit  
P.O. Box 7001  
16700 177th Ave SE  
Monroe, WA 98272

Re: State v. Haghghi (No. 61436-3-1)

Dear Mr. Haghghi:

The Court of Appeals issued a decision in your case. Unfortunately, you lost most of your appeal. A copy of the decision is included with this letter. The Court of Appeals decided the case as follows:

- (1) The State provided adequate notice of its intent to seek an exceptional sentence;
- (2) The trial court used adequate procedures to determine competency;
- (3) Trial counsel was not ineffective in failing to raise a diminished capacity defense;
- (4) The trial court correctly admitted the bank records under the inevitable discovery doctrine and did not need to conduct an evidentiary hearing;
- (5) One of your convictions for unlawful issuance of a bank check must be vacated on double jeopardy grounds. Your case will be remanded to the trial court to vacate that count but not for resentencing on the exceptional sentence.
- (6) The issues raised in your statement of additional grounds lack merit.

At this point, there are two options. First, you may file a motion to reconsider with the Court of Appeals. Such a motion is appropriate if the Court has misunderstood or overlooked an important point of fact or law. Unfortunately, we do not believe a motion would be of any benefit in your case. Therefore, our office will not be filing one. You do have the right, however, to file your own if you desire. It must be done within **20 days** of the Court's decision and should be filed with the Court of Appeals and served on the prosecutor's office.

The second option is to file a Petition for Review with the Washington Supreme Court. The Supreme Court accepts only a small percentage of cases for review. Review may be accepted if (1) the Court of Appeals decision conflicts with a Supreme Court decision; (2) the Court of Appeals decision conflicts with another Court of Appeals decision; (3) a significant question of constitutional law is involved; or (4) the issue is of substantial public interest.

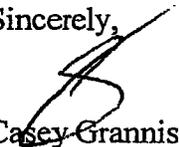
My office was assigned to represent you in the Court of Appeals. Our assigned representation does not extend to seeking review in the Supreme Court. In the exercise of our discretion, we will at times seek review on behalf of a client in the Supreme Court if the issue falls into one of the categories described above, there is a decent chance the Supreme Court will accept review, and there is a decent chance you will win.

I will discuss your case with my colleagues and then come to a decision on whether to file a Petition for Review on your behalf. I will send out another letter informing you of our decision within a couple days.

If my office decides not to file a Petition for Review on your behalf, please be aware that you may file your own. It must be filed within **30 days** of the Court of Appeals decision. It should be filed at the Court of Appeals and served on the prosecutor's office. You must exhaust all state court remedies, including a Petition for Review, if you are going to seek relief in federal court through a habeas corpus action.

Please let me know if you have any questions.

Sincerely,



Casey Grannis  
Attorney at Law

enc.

## **APPENDIX B**

LAW OFFICES OF  
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August 20, 2009

Baron Nadder Haghghi  
No. 7211125  
Monroe Correctional Complex  
Minimum Security Unit  
P.O. Box 7001  
16700 177th Ave SE  
Monroe, WA 98272

Re: State v. Haghghi (No. 61436-3-I)

Dear Mr. Haghghi:

I consulted my colleagues about whether our office will file a petition for review on your behalf. My office is willing to conditionally file a petition for review raising one issue: the trial court violated your due process rights in failing to hold an adequate hearing on your competency to stand trial. Let me explain. A similar issue on competency is currently pending in the Supreme Court in the case of State v. Heddrick. If the Heddrick decision comes out before the deadline for filing a petition for review in your case, and that decision undermines the issue in your case, then we will not file a petition for review. If the Heddrick decision does not come out before the deadline, or if the decision does come out and it helps your case, then my office is willing to file a petition for review raising the competency issue only.

In our judgment, the other issues raised in the Court of Appeals do not merit a petition for review, either because they are unlikely to be granted review or because you are unlikely to win in the Supreme Court if review were granted.

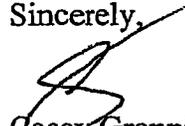
Only one petition for review may be filed. If you want to raise additional issues, you may file your own petition for review or hire a private attorney to do it for you. If you decide to do that, my office will not file a petition for review. As I wrote in my last letter, the petition for review must be filed within **30 days** of the Court of Appeals decision.

Please let me know by September 4 what you want to do. In making that decision, please be aware I am not sure what would happen if you were to win on the competency issue in the Supreme Court. That is because the law in this area is unsettled. I anticipate that the most likely outcome in your case, even if you were to win in the Supreme Court on the competency issue, is that your case would be sent back to the trial court for a proper hearing on the issue of whether you were competent to stand trial. If the trial court were to find you were competent (and assuming any appeal of that finding were to lose), then you would not receive a new trial.

Please contact me and let me know what you want to do. If I do not hear from you by September 4, I will assume that you want my office to file a petition for review on your behalf raising the competency issue.

I spoke with your mother today on the phone about the Court of Appeals decision and the options for challenging that decision. She asked that I let you know that.

Sincerely,

A handwritten signature in black ink, appearing to read 'Casey Grannis', written over the word 'Sincerely,'.

Casey Grannis  
Attorney at Law

## **APPENDIX C**

RECEIVED  
05-01-2011

RECEIVED

MAY 05 2011

Washington Appellate Project

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE: PERSONAL RESTRAINT	)	No. 65130-7-I
OF:	)	
	)	PETITIONER'S
	)	DECLARATION
	)	
NADDER BARON HAGHIGHI,	)	
Petitioner.	)	

I am the petitioner the above-captioned personal restraint petition.

I hereby swear and affirm the following is true to the best of my recollection:

I was represented by Casey Grannis in COA No. 61436-3-I.

When the Court of Appeals issued its decision in my direct appeal, I received a copy of the decision.

My attorney did not tell me that there were any pending cases in the Supreme Court involving the doctrine of inevitable discovery.

The doctrine of inevitable discovery was an important issue in my appeal and my trial.

If I had known that there was a chance that the Court of Appeals ruling on inevitable discovery might be affected by any pending Supreme Court cases, I would have filed a petition for review

  
 \_\_\_\_\_  
 NADER BARON HAGHIGHI  
 04-29-2011  
 \_\_\_\_\_  
 DATE

## **APPENDIX D**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

IN RE: PERSONAL RESTRAINT	)	No. 65130-7-I
OF:	)	
	)	DECLARATION OF
	)	CASEY GRANNIS
	)	
NADDER BARON HAGHIGHI,	)	
Petitioner.	)	

---

I, Casey Grannis, hereby swear and affirm the following is true to the best of my recollection:

1. I was the attorney who represented Mr. Haghighi in his direct appeal, COA No. 61436-3-I.

2. I raised an issue in the appeal involving whether the trial court properly applied the inevitable discovery doctrine to admit evidence that was illegally seized by the police.

3. The Court of Appeals issued a decision ruling, in part, that the evidence was properly admitted under the inevitable discovery doctrine.

4. At the time I filed the appeal, I was aware there was prior Supreme Court case law questioning whether the inevitable discovery doctrine applied under our state's constitution.

5. I do not recall whether I knew that the case of State v. Winterstein was pending in the Supreme Court on the issue of inevitable discovery at the time the Court of Appeals issued its decision.

6. After the Court of Appeals decision, I told Mr. Haghighi that he had the right to file a petition for review.

7. I did not tell him that there was a case pending in the Washington Supreme Court involving inevitable discovery.

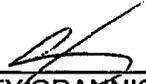
8. I discussed Mr. Haghighi's case with colleagues regarding whether I should file a petition for review but I do not remember whether we discussed the suppression issue.

9. I did not file a petition for review raising any issues in the Supreme Court.

10. Even if I knew Winterstein was pending in the Supreme Court on the issue of inevitable discovery, I would not have filed a petition for review. I did not think this was a good vehicle for challenging inevitable discovery because there was a warrant.

11. I did not encourage Mr. Haghighi to file a petition for review to preserve the issue of inevitable discovery.

12. Based on my familiarity with the record, I believe that the evidence seized from the Allstate bank in Illinois was critical to the State's case and it would have been hard for the State to prove its case if the evidence had been suppressed.

  
\_\_\_\_\_  
CASEY GRANNIS

\_\_\_\_\_  
DATE

May 11, 2011

## **APPENDIX E**

LAW OFFICES OF  
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September 14, 2009

Baron N. Haghighi  
No. 7211125  
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Minimum Security Unit  
P.O. Box 7001  
16700 177th Ave SE  
Monroe, WA 98272

Re: State v. Haghighi (No. 61436-3-I)

Dear Mr. Haghighi:

I write to follow up on our telephone discussion today and in response to your letter dated September 9, 2009. In that letter, you inform me that you want my office to go ahead and file a petition for review on the competency issue.

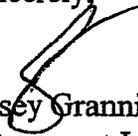
As my August 20 letter stated, my office was willing to file a petition for review on the competency issue if the Heddrick decision did not come out by the filing deadline or if the Heddrick decision came out and it helped your case. On the other hand, the letter also stated my office would not file a petition for review on the competency issue if the Heddrick decision came out before the filing deadline and the decision undermined your case.

The Washington Supreme Court issued a decision in Heddrick on September 10. The issue in Heddrick is essentially the same as yours: whether the trial court violates due process when it fails to conduct an evidentiary hearing on the defendant's competency to stand trial after finding reason to doubt competency. The Supreme Court held a trial attorney waives the right to a competency hearing by failing to request one, and so there is no due process violation. That analysis applies to your case. Your trial attorney did not request a competency hearing. The issue is therefore waived.

In light of Heddrick, a petition for review on the competency issue in your case would be useless. I informed you of the significance of the Heddrick decision on the telephone today and my office's decision not to file a petition for review on the competency issue as a result of that decision.

My substantive involvement with your direct appeal is now over, although I formally remain your attorney for the direct appeal in the Court of Appeals until the mandate terminating review is issued. If you do not file a petition for review, the mandate will probably issue anywhere between the next few days and the next few weeks.

Sincerely,



Casey Grannis  
Attorney at Law

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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IN RE THE PERSONAL RESTRAINT PETITION OF	)	
	)	
NADDER HAGHIGHI,	)	NO. 65130-7-I
	)	
Petitioner.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13<sup>TH</sup> DAY OF MAY, 2011, I CAUSED THE ORIGINAL **BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DONNA WISE KING COUNTY PROSECUTING ATTORNEY SVP UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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[X] NADDER HAGHIGHI 721125 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 13<sup>TH</sup> DAY OF MAY 2011.

X \_\_\_\_\_ 

**Washington Appellate Project**  
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1511 Third Avenue  
Seattle, WA 98101  
☎(206) 587-2711