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DEC 24 2007

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

NO. 80755-8  
Cowlitz Co. Cause NO. 03-1-00997-8

**SUPREME COURT OF STATE OF  
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

**TERRY LEE WINTERSTEIN**

Petitioner

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STATE OF WASHINGTON  
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**RESPONSE TO PETITION FOR REVIEW**

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**I. IDENTITY OF RESPONDENT**

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court deny review of the September 11, 2007, published Court of Appeals opinion in State v. Winterstein, 140 Wn.App. 676, 166 P.3d 1242 (2007). This decision upheld the petitioner's conviction for manufacturing methamphetamine.

**II. COURT OF APPEALS DECISION**

The Court of Appeals correctly decided this matter, holding that under Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the search of the petitioner's residence was lawful as agents of the Department of Corrections (DOC) had specific and articulable facts supporting their belief that the petitioner resided at the address in question. The Court of Appeals further correctly held that under the doctrine of inevitable discovery, as set forth in State v. Warner, 125 Wn.2d 876, 889 P.2d 479 (1995), suppression was not warranted even if the search was somehow defective.

**III. STATEMENT OF THE CASE**

The State agrees with the factual and procedural history as set forth by the petitioner.

**IV. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS DECISION**

Under RAP 13.4(b) a petition for review will be accepted by the Supreme Court only:

- (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) if the decision of the Court of Appeals is in conflict with a decision of another Court of Appeals; or
- (3) if a significant question of law under the Constitution of the State of Washington or the United States is involved; or
- (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should deny review because the issues raised in the instant petition do not implicate any of the grounds for review mandated by RAP 13.4(b).

- a. **The Court of Appeals decision that Terry v. Ohio applied to this case does not implicate any of the grounds of rap 13.4(b)**

The Court of Appeals holding that Terry v. Ohio governed whether

DOC had authority of law to enter the petitioner's residence is not in conflict with any of the decisions of this Court or of any decisions of another division of the Court of Appeals. Instead, this holding is based on established law.

RCW 9.94A.631 states, in pertinent part, that "[i]f there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, an offender may be required to submit to a search and seizure of the offender's person, residence, automobile, or other personal property." This statute clearly contemplates a Terry standard for searches of probationer's homes, and Washington case law supports this proposition. State v. Campbell, 103 Wn.2d 1, 22-23, 691 P.2d 929 (1984); State v. Cochran, 27 Wn.App. 664, 620 P.2d 116 (1980); see also United State v. Conway, 122 F.3d 841 (9th Cir. 1997) (holding that search of residence where probationer was suspected to live was lawful under Washington statutes and Fourth Amendment, as DOC has reasonable suspicion that the probationer was residing at the location searched).

Thus, the application of a Terry standard to warrantless searches of a probationer's home is well established and beyond dispute. There is no reason under RAP 13.4(b) that this Court should reconsider such a well-settled issue of law. The Court should deny this portion of petitioner's request.

**b. The Court Of Appeals Application Of The Terry Standard To These Facts Does Not Implicate Any Of The Grounds Of Rap 13.4(B)**

The Court of Appeals applied the Terry reasonable suspicion standard to these facts, and found that DOC had a sufficient basis to believe that the petitioner was residing at 646 Englert Rd. The petitioner complains that this decision is contrary to Washington law. However, at its core, this complaint is a disagreement with the way the Court of Appeals has interpreted the facts at issue. This type of factual dispute is not the sort of claim that RAP 13.4(b) deems appropriate for review by this Court. This claim does not involve any conflict of legal authority or a dispute of general import, but instead deals only a very narrow and

particularized factual analysis. As such, the Court should reject this part of the petition as lacking sufficient merit for review.

Indeed, it is clear that the Court of Appeals correctly held there was a reasonable suspicion that the petitioner resided at 646 Englert Rd. CCO Rongen had previously contacted the petitioner at that address, and believed him to reside there. Notwithstanding the petitioner's arguments, it is difficult to envision how DOC's knowledge that the petitioner had resided at that address is insufficient to establish a reasonable suspicion he could be found there. See Conway, 122 F.3d 841. There is no reason for this Court to review a claim so lacking in merit.

**c. The Court Of Appeals Did Not Err By Applying The Doctrine Of Inevitable Discovery, As This Doctrine Is Well Established In Washington**

The petitioner argues that the Court of Appeals erred by holding that the search of 646 Englert Rd was also justified under the doctrine of inevitable discovery. Further, the petitioner is aggrieved that this issue was raised sua sponte by the Court of Appeals, and appears to imply that this is somehow improper. However, it is a basic principle that an appellate court

may affirm on any basis, even a reason not relied upon by the lower court. State v. Norlin, 134 Wn.2d 570, 951 P.2d 1131 (1998); see also Cheney v. City of Mountlake Terrace, 87 Wn.2d 338, 552 P.2d 184 (1976). Given this, the petitioner's complaint is baseless.

The petitioner also claims that Washington has never adopted the doctrine of inevitable discovery. This claim flies in the face of numerous appellate decisions. In State v. Warner, 125 Wn.2d 876, 889 P.2d 479 (1995), this Court held that statements obtained in violation of the Fifth Amendment were admissible as they would have been inevitably discovered absent the violation. While the Warner court did not specifically reference the Washington constitution, it strains credulity to think this Court would approve a doctrine that it felt offended our state constitution.

Similarly, in State v. Coates, 107 Wn.2d 882, 735 P.2d 64 (1987), this Court noted that Art. I, § 7 did not appear to be in conflict with the rule of inevitable discovery.

The instant decision is also in accord with decisions of all three divisions of the Court of Appeals. In State v. Richman, 85 Wn.App. 568, 576, 933 P.2d 1088, rev. denied, 133 Wn.2d 1028 (1997), the court held that the doctrine of inevitable discovery applied under Art. I, § 7, noting that “we can see no jeopardy to individual rights in the inevitable discovery doctrine, because central to the doctrine is the concept that the *same* evidence would have been eventually gathered by constitutionally permissible means.” See also State v. Reyes, 98 Wn.App. 923, 993 P.2d 921 (2000) (noting existence of doctrine of inevitable discovery in Washington); State v. Smith, 113 Wn.App. 846, 55 P.3d 686 (2002), rev. denied, 149 Wn.2d 1014 (2003).

Additionally, this Court has indisputably approved another exception to exclusionary rule of Art. I, § 7, the independent source doctrine. State v. O’Bremski, 70 Wn.2d 425, 423 P.2d 530 (1967); State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005). Given that this exception to the protections of Art. I, § 7 passes constitutional muster, inevitable discovery should be equally acceptable. This rationale is perhaps one

reason this Court has declined to grant review on this issue previously. See Smith, rev. denied, 149 Wn.2d 1014 (2003); Richman, rev. denied, 133 Wn.2d 1028 (1997).

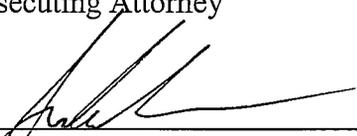
Finally, the Court of Appeals did not affirm the trial court solely on the basis of inevitable discovery, but instead identified this doctrine as further support for its ruling. As such, this holding is not essential to the Court of Appeals decision to affirm and granting review on this issue would not affect the outcome of the decision. Thus, this issue does qualify for review under RAP 13.4(b).

**V. CONCLUSION.**

The issues raised in the instant petition do not qualify for review by this Court under RAP 13.4(b). These issues are either controlled by settled law or highly factual. There are no reviewable issues for this Court to decide. The petitioner's request for review should be denied.

Respectfully submitted this 20<sup>th</sup> day of December, 2007

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