

No. 85992-2

THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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IN RE THE PERSONAL RESTRAINT PETITION OF

CHARLES WEBER,

PETITIONER.

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REPLY BRIEF OF PETITIONER WEBER

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ORIGINAL

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Petitioner, Charles Weber, by and through his attorney, Michael C. Kahrs, of the Kahrs Law Firm, P.S., replies to the State's Response seeking relief from personal restraint.

## **I. INTRODUCTION**

In its Response, the State claimed Weber presented a mixed petition and it should be dismissed. Petitioner will show that he did not present a mixed petition and this Court must consider each claim. He will then show the new evidence presented is sufficient to establish, at a minimum, a reference hearing is appropriate. He will finally show that this State must recognize a freestanding actual innocence exception and at a minimum, provide him the opportunity to show at a reference hearing that the unproven facts asserted by the State are just that – unprovable.

## **II. ARGUMENT**

- A. WEBER HAS NOT FILED A MIXED PETITION BECAUSE HIS INEFFECTIVE ASSISTANCE ARGUMENT IS BASED UPON EITHER HIS NEW EVIDENCE OR THE EQUITABLE TOLLING UNDER CARTER.

The State has argued that Weber has filed a mixed petition, making claims of ineffective assistance of counsel and newly discovered evidence. Response Brief, p. 9. Weber has not filed a mixed petition because he always claimed that the new evidence only opened the door under RCW

10.73.100(1) to consider the ineffective assistance of counsel claim.<sup>1</sup> Weber never claimed the new evidence was a claim in and of itself. Weber also claimed that even if the new evidence exception to the statute of limitations was not permitted, District II's decision permitting equitable tolling based upon actual evidence would permit this Court to consider the ineffective assistance of counsel claim. *In re the Pers. Restraint of Carter*, 154 Wn. App. 907, 230 P.3d 181, *review granted*, 170 Wn.2d 1001 (2010).

Besides the actual innocence claim, Weber has also argued he is entitled to relief from his sentence because of his freestanding actual innocence claim. This claim should be considered if this Court considers and dismisses the ineffective assistance of counsel claim.

1. Weber Argued That the New Evidence Permits This Court to Consider the Ineffective Assistance of Counsel Claim in Accordance With RCW 10.73.100(1).

On the new evidence exception to the one year time bar, Weber cited to RCW 10.73.100(1) for the proposition that the new evidence permits this Court to consider his ineffective assistance of counsel claim. Weber argued the new evidence permits this Court to consider this claim due to the statutory exception, even though it was past the statute of limitations. The evidence

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<sup>1</sup>There is no argument that the ineffective assistance of counsel claim was filed past the statute of limitations controlling post-conviction relief, RCW 10.73.090.

was then used to show that the failure of his trial counsel directly led to his conviction. Opening Brief, p. 28. Weber has always been clear that it was the new evidence that statutorily places the ineffective assistance of counsel claim before this Court. Weber quoted *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001) which quoted *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981), for the five prongs to determine when new evidence may be considered in accordance with RCW 10.73.100(1). Weber has appropriately argued the new evidence exception to the one year time bar of RCW 10.73.090 is applicable to his claim of ineffective assistance of counsel.

2. Carter Is Still Good Law Permitting Equitable Tolling of the Time Bar Based On an Actual Innocence Claim.

In the alternative, Weber argued that his actual innocence provided the equitable tolling necessary for this Court to consider the ineffective assistance of counsel claim, notwithstanding the time bar of RCW 10.73.090. *See In re Carter*, 154 Wn. App. 907. Equitable tolling permits this and other courts to consider constitutional claims that would otherwise be time barred if it did not meet the statutory exemptions set forth in RCW 10.73.090.

In support of its argument that this except to the time bar should not be applied, the State cited several cases which, if examined closely, are not applicable and even lend weight to approval of this time bar exception.

The State chose to focus on this Court's discussion in *Turay*. *In re Personal Restraint of Turay*, 153 Wn.2d 44, 54-55, 101 P.3d 854 (2004). Turay was a resident at the Special Commitment Center being held as a sexually violent predator in accordance with RCW 71.09. He claimed that actual innocence would permit this Court to consider the issues he put before it. While the State has touted *Turay* as the be-all and end-all on the actual innocence exception in Washington, *Turay's* holding was limited only to those confined due to civil statutes. This Court explicitly excluded those, like Weber, who are challenging a criminal conviction.

We also find no basis here for any exception comparable to the actual innocence exception under federal law. Turay is not confined pursuant to a criminal conviction, and there is no issue of innocence to consider.

*Id.* at 56. The State clearly expanded its argument well beyond the reasoning in *Turay* to attempt to encompass those who, like Weber, have a criminal conviction and claim innocence.

The State also argued that other states had concluded that the procedural door using actual innocence has no application in this case. Unfortunately, the State again has missed the point by a country mile. In Massachusetts, because the petitioner had another avenue of approach, the actual innocence exception of *Schlup v. Delo* was considered not appropriate. *Bates v. Commonwealth*, 751 N.E.2d 843, 845 (Mass. 2001) (*citing Schlup*

*v. Delo*, 513 U.S. 298 (1995)). Because Weber is asking this Court to first examine the ineffective assistance of counsel claim under the new evidence exception to the time bar before deciding whether or not to consider the actual innocence equitable tolling, *Bates* is not relevant.

The other case cited, *Beach v. Day*, 913 P.2d 622 (Mont. 1996), also is not relevant. *Schlup* was not considered in *Beach* because no new evidence was presented that was any different than evidence previously presented during the five year period in which Montana accepts petitions for post-conviction relief. The *Beach* Court even relied on res judicata to not grant Beach even consideration, much less a remedy. *Id.* at 624-25. If Beach had presented new evidence of his actual innocence, it undoubtedly would have been accepted like such evidence was accepted in *State v. Perry*, 758 P.2d 268 (Mont. 1988).

In *Perry*, a motion for a new trial had been made. The state argued it must be treated as a request for post-conviction relief which would have effectively shut Perry out of any relief. *Id.* at 272-73. The Montana Supreme Court rejected this argument, stating the following:

Although Perry could not have brought his claim until the recantation occurred in 1986, the State would have us find that Perry's only means of redress is a petition for post-conviction review and that the statutory clock on such petitions ran in 1978. We decline to do so. Under the interpretation urged by the State, a defendant held in violation of his constitutional rights would be deprived of a method of

redress regardless of his diligence or the justness of his claim. We do not believe such a result to be the intent of the legislature nor consistent with our State Constitution.

*Id.* (citing 1972 Montana Constitution, Art. II, Sec. 17). Our constitution can surely offer no less protection.

Weber was clear in his opening brief that he was presenting two procedural doors to post-conviction relief based upon his ineffective assistance of counsel claim. The first door consisted of the new evidence exception of RCW 10.73.100(1) which permits consideration of issues past the one year time bar in RCW 10.73.090. If that door didn't work, there was the second door based on the equitable tolling permitted by the decision in *Carter* based on a claim of actual innocence which permits consideration of claims past the one year time bar of RCW 10.73.090. Either door, when opened, permits this Court consider the merits of Weber's ineffective assistance of counsel claim. And Weber's claim clearly merits review. As shown in the original brief, this new evidence is critical:

It has now been shown, by the testimony of Larson, that he was not at the scene of the crime. The testimony of Meth, Strickland, and Larson establishes that an individual, Boxer, looked so like Weber as to have the same physical features, tattoo, and almost the same nickname. Testimony of Meth establishes that Boxer was bald at the time of the party, just like the description Manzo gave in the initial police report. Testimony by weapons expert Hayes establishes the shooter was most likely left-handed, unlike Weber who is right-handed. Testimony of Larson establishes Boxer was at the party at the time of the shooting. All this evidence is new and

was not presented to the trier of fact.

Opening Brief, p. 28. The evidence presented shows that Weber's alibi claim was supported by more than the one original trial witness. If this Court will not consider the statutory exception under RCW 10.73.100(1) based on new evidence, it can consider the new evidence based upon the actual innocence exception.

3. The Evidence Weber Presented Has Met the Burden Procedurally Required for This Court to Find His Trial Counsel Was Ineffective.

As previously shown, Weber has presented new evidence showing that his claim that he was not at the party at the time of the shooting was accurate. This new evidence included the statement by the missing witness mentioned in the original police reports, Andreas (Andrew Larsen), that he knew Weber from school and Weber was not there when the shooting took place.<sup>2</sup> If that wasn't convincing enough, the fact that the shooter had a shaved head, was most likely left-handed, and was known by a second nickname; while Weber had hair in his booking photograph, is right-handed, and didn't have a second nickname; and that none of this was challenged at trial, clearly establishes that Weber wasn't the shooter and his trial counsel was ineffective both during the investigatory part of the case and during the

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<sup>2</sup>Not surprisingly, the State has completely ignored the testimony of Andrew Larsen.

trial for his failure to follow-up on these critical facts which differentiate the shooter from Weber.

While it must be acknowledged that a situation involving two individuals with the same sounding nickname and the same tattoo located in the same location of the body seems, on first blush, to be unlikely, closer examination shows it actually is very possible. One need only look at the popularity of these two features to realize how possible it really is.

“Crazy White” is a Mexican phrase which is very popular. While it has at least three spellings, they apparently are pronounced the same. The spellings are Heuro Loco, Güero Loco, and Wedo Loco. One only needs to do a Google search to find that this nickname is very common and there is a rapper from Indiana who goes by Güero Loco.<sup>3</sup> Declaration of Michael Kahrs, Exhibit A-C. Weber has presented evidence showing he was not at the party and was therefore not the shooter, and presented descriptive evidence of the person who was at the party and who was the shooter. He proved his alibi defense with the statement by the one individual identified in the police report, Andrew Larson, and with his booking photographs.

As for the montage results, the critical element of identification at trial was the tattoo. But the original lineup was deceptive for the reasons cited by

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<sup>3</sup>The Google search turned up a total of approximately 23,379 results. The rapper’s web site is [gueroloco.com](http://gueroloco.com).

Dr. Loftus in his report, including the fact that Manzo had met Weber previously at the same location.

As for the individuals who made statements, the State attempts to brush them off as possible gang members without providing any evidence of their possible gang membership. Given that the police maintain a gang database, the failure to provide any evidence to support such a claim clearly supports the proposition that the witnesses are not gang members. Also, the only evidence provided to support the testimony of Manzo is the testimony of an individual who tried to identify a car which looked somewhat like the car that Weber drove.

It is also questionable whether or not the police even did a search for any other suspects. Evidence shows that the police was aware of at least one other individual with the nickname "Güero." Declaration of Michael C. Kahrs, Exhibit 2. No mention either in the police reports or in the Response by the State mentions any further investigation.

**B. WEBER HAS MADE HIS BURDEN OF PRESENTING SUFFICIENT NEW EVIDENCE TO SHOW HE IS INNOCENT OF THE CRIME OF CONVICTION.**

If this Court finds that the ineffective assistance of counsel claim is procedurally time barred or it does not meet the requirements to order a new trial pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), it must then consider whether or not Weber is actually innocent of the crime of

conviction. This is required to address those situations where a fair trial was conducted, and yet an innocent man or woman was convicted. While it is hoped that this situation is rare, even in rare situations where this problem exists, the innocent must have an avenue through our court system for that innocence to be considered. To not provide such an avenue would go directly against our sense of justice. As the New Mexico Supreme Court stated,

The principles of federalism which informed the majority's decision in *Herrera*, do not constrain this Court in our determination of whether the protections within the New Mexico Constitution allow a habeas corpus petitioner to assert a freestanding claim of actual innocence. Rather than being concerned with principles of federalism, the New Mexico Constitution is obligated to protect our State's sovereignty. Intrinsic within state sovereignty is an interest protecting the credibility of the state judiciary.

*Montoya v. Ulibarri*, 163 P.3d 476 (N.M. 2007) (citing *Herrera v. Collins*, 506 U.S. 390 (1993)). Our State should do no less.

C. AT A MINIMUM, WEBER IS ENTITLED TO A REFERENCE HEARING TO DETERMINE HIS INNOCENCE.

Weber has previously provided in his opening brief the prism through which our appellate courts determine whether or not to refer a case for a reference hearing. *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). Weber has provided sufficient evidence for this Court to rule that his trial counsel was ineffective or that he is actually innocent. However, since he has also met the threshold showing of actual prejudice, at a

minimum Weber is entitled to a reference hearing with its subpoena power and putting witnesses through the crucible of testifying under oath.

### III. CONCLUSION

For the reasons stated above, Weber was neither provided effective assistance of trial counsel nor should he have ever been convicted because he is innocent of the charges against him. Weber is entitled to a new trial because his trial counsel was ineffective. If his trial counsel is found effective, Weber is entitled to his freedom because he is actually innocent. Under either theory, if this Court believes it needs more information, Weber is entitled to a reference hearing.

### IV. PARTY DECLARATION

MICHAEL C. KAHRs, attorney for Charles Weber, Petitioner, does hereby declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of his ability.

Respectfully submitted this 16<sup>th</sup> day of August, 2011.

  
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