

NO. 65130-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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In Re Personal Restraint Petition Of

NADDER BARON HAGHIGHI,

Petitioner.

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**STATE'S SECOND RESPONSE  
TO PERSONAL RESTRAINT PETITION**

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A. ISSUES PRESENTED

1. Whether this personal restraint petition should be dismissed where the change in the law that Haghghi claims warrants reconsideration of his suppression motion (State v. Winterstein<sup>1</sup>), is not retroactively applicable to this case and even if it would apply, he has not established a constitutional violation or prejudice in this case, where the evidence was obtained via a valid search warrant and where absent the challenged evidence, overwhelming evidence supported the jury's verdicts.

2. Whether this personal restraint petition should be dismissed where Haghghi has conceded that retroactive application of Winterstein is not warranted under the analysis of Teague v. Lane<sup>2</sup>?

3. Whether the claim that retroactive application of every change in state constitutional law is mandated by RAP 16.4(d) should be dismissed as unsupported by legal authority.

4. Whether the claim of ineffective assistance of appellate counsel is time-barred because it was first raised in a brief filed after the time for collateral attack expired.

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

<sup>2</sup> 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

5. Whether, even if the claim of ineffective assistance of appellate counsel is considered, it has not been established.

B. STATEMENT OF THE CASE

The statement of procedural and substantive facts included in the State's original response is incorporated by reference. The following are additional relevant procedural facts.

After the State filed its original response, this Court dismissed all of Haghghi's claims except the retroactive application of Winterstein. Appendix 2A (Order) at 4-5.

Haghghi did not raise a claim of ineffective assistance of appellate counsel in his original petition. The Brief of Petitioner, which raises that claim for the first time, was filed on May 13, 2011, more than 19 months after the mandate was issued. See Appendix C to State's original response (mandate, 9/25/2009).

C. ARGUMENT

An appellate court will grant substantive review of a personal restraint petition only when the petitioner makes a threshold showing of constitutional error from which he has suffered actual prejudice or nonconstitutional error which constitutes a fundamental

defect that inherently resulted in a complete miscarriage of justice. In re Pers. Restraint of Cook, 114 Wn. 2d 802, 813, 792 P.2d 506 (1990). In a personal restraint petition, the petitioner bears the burden of showing prejudicial error. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986), rev. denied, 110 Wn. 2d 1002 (1988). Bare allegations unsupported by citation to authority, references to the record, or persuasive reasoning cannot sustain this burden of proof. Brune, 45 Wn. App. at 363.

1. WINTERSTEIN DOES NOT APPLY AND EVEN IF WINTERSTEIN APPLIED, HAGHIGHI HAS NOT ESTABLISHED GROUNDS FOR RELIEF.

The State addressed the issue of the retroactive application of State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009), in its original response and incorporates the relevant facts and argument in that section of its response by reference. In summary, the State contends that any new rule adopted by Winterstein rejecting the inevitable discovery rule is not applicable in this collateral attack as to these convictions, which were final when that case was decided. Moreover, the analysis in Winterstein does not require application of an exclusionary rule in cases such as this, in which there is no violation of the Washington Constitution. Finally, Haghighi has not

sustained his burden of establishing prejudice where other unchallenged bank records and the testimony of bank employees and each of the victims established overwhelming evidence of his guilt independent of the challenged records. The supporting facts and authority are detailed in the State's original response.

2. HAGHIGHI DOES NOT CLAIM THAT WINTERSTEIN IS A WATERSHED RULE OF CRIMINAL PROCEDURE, WHICH WOULD REQUIRE RETROACTIVE APPLICATION TO CASES ALREADY FINAL.

Haghighi concedes that his convictions were final when the Supreme Court decided Winterstein. Pet. Br. at 12.

Pursuant to Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), new rules of procedure do not apply retroactively to convictions that are already final unless the new rule constitutes a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Schiro v. Summerlin, 542 U.S. 348, 352, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) (citing Teague, 489 U.S. at 311).

To qualify as a watershed rule, a new rule must satisfy two requirements: (1) the new rule must be necessary to prevent an "impermissibly large risk" of an inaccurate conviction; and (2) the

rule must “alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” Whorton v. Bockting, 549 U.S. 406, 418, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007) (quoting Summerlin, 542 U.S. at 356).

Because the rule established by Winterstein excludes relevant evidence, it cannot be said to decrease the risk of an inaccurate conviction. Quite the reverse is true: it increases the chances that a guilty person will escape conviction.

Further, the holding of Winterstein does not alter bedrock procedural principles essential to a fair trial. It does not implicate procedural fairness. The United States Supreme Court's adherence to the inevitable discovery exception to the exclusionary rule<sup>3</sup> illustrates that the opposite rule of Winterstein is not a rule of bedrock fundamental fairness.

That is, the rule established by Winterstein does not satisfy either of the two required elements of a watershed rule of criminal procedure. Under the Teague analysis, it does not apply retroactively on a collateral attack.

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<sup>3</sup> Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984).

While Haghghi does not explicitly concede that the rule of Winterstein is not a watershed rule of criminal procedure, he makes absolutely no argument that it is a watershed rule, instead relying on an independent state retroactivity analysis. Thus, the argument that retroactive application of Winterstein is warranted under Teague retroactivity analysis should be dismissed for failure to provide any analysis or legal authority in support of it. In re Pers. Restraint of Williams, 111 Wn.2d 353, 364-65, 759 P.2d 436 (1988).

3. RAP 16.4(c)(4) DOES NOT ESTABLISH AN INDEPENDENT STATE RETROACTIVITY ANALYSIS.

Haghghi asserts that Teague retroactivity analysis is not applicable to this case, and that a different analysis applies in determining the retroactivity of new rules of state law. He argues that RAP 16.4(c)(4) establishes that standard. That claim is without merit. Washington courts have consistently applied the federal Teague analysis to retroactivity issues and the court rule describing the scope of available relief in a collateral attack does not represent a broader substantive retroactivity standard.

The Washington Supreme Court has explained its retroactivity analysis as follows: "[W]e have attempted from the outset to stay in step with the federal retroactivity analysis." In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 324, 823 P.2d 492 (1992) (citing In re Sauve, 103 Wn.2d 322, 326-28, 692 P.2d 818 (1985)).

Recently, the Court reaffirmed that generally it has followed federal retroactivity analysis. State v. Abrams, 163 Wn.2d 277, 290, 178 P.3d 1021 (2008). The Court in Abrams noted that RCW 10.73.100(6)<sup>4</sup> permits collateral relief after the normal time bar has lapsed if there has been a significant change in the law that is material to the conviction, and if the legislature expressly provides for retroactivity or if a court finds sufficient reasons to require retroactivity. Id. at 291. The court observed, "We have interpreted this statutory language consistent with *Teague*." Id. (citing State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627 (2005)).

Haghighi relies on dictum in Evans, supra, as the basis for his argument that there is a different retroactivity analysis for issues of State law. The Court there stated, "There may be a case where

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<sup>4</sup> The statute is set out in full in Appendix 2B.

our state statute [RCW 10.73.100(6)] would authorize or require retroactive application of a new rule of law when *Teague* would not."<sup>5</sup> 154 Wn.2d at 448. The Court recognized that RCW 10.73.100(6) addresses only the timeliness of claims raised in collateral attacks, but indicated that the statute gives some guidance to the legislature's assessment of the proper scope of retroactivity. Evans, 154 Wn.2d at 448-49 n.5. Finally, the Court held that compelling reasons were not offered in that case to warrant retroactive application of the jury trial requirements of Apprendi v. New Jersey<sup>6</sup> or Blakely v. Washington.<sup>7</sup> Evans, 154 Wn.2d at 449. The Court stated, "The law favors finality of judgments, and courts will not routinely apply 'new' decisions of law to cases that are already final." Id. at 443 (citing St. Pierre, supra).

Haghighi has not cited any case that applies a rule retroactively on collateral attack based on a retroactivity analysis other than Teague. Haghighi agrees that RCW 10.76.100(6) simply establishes an exception to the time limit for filing a collateral

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<sup>5</sup> While Haghighi argues that a different retroactivity analysis should apply to rules of state law, the dictum in Evans is not limited to issues of state law, since that case involved the application of United States Supreme Court cases. Both St. Pierre, supra, and In re Pers. Restraint of Taylor, 105 Wn.2d 683, 717 P.2d 755 (1986), applied federal retroactivity analysis to new rules of state law.

<sup>6</sup> 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

<sup>7</sup> 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

attack. Pet. Br. at 13-14 n.8. He also acknowledges that RAP 16.4(c)(4) uses the same standard, but asserts that the court rule establishes that he is "entitled to relief" from his conviction based on application of that standard, irrespective of Teague analysis. Id. at 13 n.8, 13-16.

The full text of RAP 16.4 is set out in Appendix 2C. Haghghi relies on RAP 16.4(c)(4), which provides, in context:

(a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioner's restraint is unlawful for one or more of the reasons defined in section (c).

...

(c) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons:

...

(4) 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 proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or

....

(d) Restrictions. The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

RAP 16.4.

RAP 16.4 is a procedural rule establishing the scope of issues that the appellate courts will consider on collateral attack. RAP 16.1 (a), (c). The Supreme Court in Abrams explained that it interpreted the identical language in RCW 10.73.100(6) in a manner consistent with Teague. 163 Wn.2d at 291. There is no reason to interpret the language of the Court's own rule differently. Indeed, the term "sufficient reasons" is so broad that it would offer no guidance without reference to established retroactivity analysis.

Examination of other subsections of RAP 16.4(c) illustrates that the provisions of the rule do not establish an independent basis for relief. For example, RAP 16.4(c)(3) addresses newly discovered evidence, providing that appropriate relief will be granted if the restraint is unlawful because "[m]aterial facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction." However, a petitioner must establish much more than this to obtain relief based on newly discovered evidence. See In re Pers. Restraint of Lord, 123 Wn.2d 296, 319-20, 868 P.2d 835 (1994).<sup>8</sup> Likewise, RAP

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<sup>8</sup> Newly discovered evidence is grounds for relief in a personal restraint petition, if the defendant shows that the evidence: (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material, and (5) is not merely cumulative or impeaching. Lord, 123 Wn.2d at 319-20.

16.4(c)(5), providing that relief will be granted if "other grounds exist," does not establish a substantive standard.

Moreover, RAP 16.4(d) specifically provides that the appellate court "will only grant relief . . . if such relief may be granted under RCW 10.73.090, .100 and .130." The Washington Supreme Court in Abrams, supra, observed that it has interpreted the statutory language of RCW 10.73.100(6) in a manner consistent with Teague. 163 Wn.2d at 291. Thus, by the terms of the rule, the limitations of Teague also would apply to RAP 16.4(c)(4).

Even if a different state standard for retroactivity may be applied, the analysis in Evans indicates that any variation from Teague analysis would be unusual and would not be justified absent compelling reasons. 154 Wn.2d at 448-49. The two reasons offered by Haghghi fall short. First, the State's history of independent interpretation of the right to privacy may explain the decision in Winterstein but is unrelated to the policy favoring finality of judgments. Second, that the Winterstein decision was issued relatively soon after Haghghi's convictions became final is a reason only applicable to this particular case -- there is no authority for the proposition that the circumstances of a particular defendant would warrant retroactive application of a rule that was not being applied

retroactively to all defendants whose convictions were final. Such a rule would require litigation of retroactivity of every rule as to every petitioner and would defeat the substantial public interest in finality of convictions.

This case presents the least compelling argument for retroactive application of Winterstein. The Court in Winterstein itself approved its prior holding in State v. Bonds, that the exclusionary rule should not be applied when police action in another state did not violate the Washington Constitution. See Winterstein, 167 Wn.2d at 632-33, approving State v. Bonds, 98 Wn. 2d 1, 10-15, 653 P.2d 1024 (1982). The Allstate Bank records were properly seized pursuant to a lawful warrant. There has been no challenge to the sufficiency of the affidavit supporting the warrant in this case, or the authority of the judge to issue the warrant. The trial court found that there was ample probable cause to issue the warrant, that Judge Shaffer had authority to issue it, and that it was valid on its face. (Appendix F to original response.)

Haghighi has not established that an independent state retroactivity standard exists, or that compelling reasons warrant retroactive application of the rule of Winterstein to cases that were final when that decision was issued.

4. THE CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IS WITHOUT MERIT.

Haghighi's claim of ineffective assistance of his appellate counsel should be dismissed because it is untimely. Even if this claim is considered, Haghighi has not established that the conduct of his appellate counsel was deficient or that it affected the result of his case in the Court of Appeals.

a. The Claim Of Ineffective Assistance Of Appellate Counsel Is Untimely And Barred By RCW 10.73.090.

Haghighi's claim of ineffective assistance of appellate counsel is untimely under RCW 10.73.090 and, therefore, he is barred from bringing this claim.

RCW 10.73.090(1) provides that no motion for collateral attack on a criminal conviction may be filed more than a 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. For purposes of this rule, the decision in Haghighi's case became final when the appellate court issued its mandate. RCW 10.73.090(3). The mandate issued on September 25, 2009. See Appendix C to State's original response.

Haghighi did not raise a claim of ineffective assistance of appellate counsel in his original petition. The Brief of Petitioner, which raises that claim for the first time, was filed on May 13, 2011, more than 19 months after the mandate was issued.

When a personal restraint petition is timely filed but an additional issue is first raised by the petitioner in an amended petition filed beyond the one year time limit, consideration of the issue is barred by RCW 10.73.090. In re Pers. Restraint of Davis, 151 Wn. App. 331, 335-37, 211 P.3d 1055 (2009), rev. denied, 168 Wn.2d 1043 (2010); In re Pers. Restraint of Bonds, 165 Wn.2d 135, 143-44, 196 P.3d 672 (2008). A brief of petitioner constitutes an amended petition if it adds a claim not previously raised. Davis, 151 Wn. App. at 335 n.6.

The Court of Appeals in Davis rejected a claim of ineffective assistance of appellate counsel first raised in a brief filed after the one year time limit, finding that the claim was time-barred. Id. at 335-37. It is irrelevant that the petitioner was not represented by counsel when the original petition was filed. Id. at 336-37; Bonds, 165 Wn.2d at 143.

Haghighi's claim of ineffective assistance of appellate counsel was untimely filed, and it should be rejected as time-barred under RCW 10.73.090.

b. Haghighi Has Not Established Ineffective Assistance Of Appellate Counsel.

Haghighi claims that his appellate attorney was ineffective for failing to adequately address the issue of inevitable discovery under the state constitution. Haghighi has not established that the failure to raise the issue was deficient performance or that he was actually prejudiced by that failure. Haghighi offers no authority for the proposition that the details of the advice given as to a possible petition for review can be the basis of a finding of deficiency.

To establish ineffective assistance of counsel at trial or on appeal, a defendant must show both that defense counsel's representation was deficient, *i.e.*, that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that deficient representation prejudiced the defendant. Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000); In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d

674 (1984)). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. In judging the performance of trial counsel, courts must begin with a strong presumption that the representation was effective. Id.; Hutchinson, 147 Wn.2d at 206. Every effort should be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Strickland, 466 U.S. at 689.

Failure to raise "all possible non-frivolous issues" on appeal does not constitute ineffective assistance of counsel. In re Pers. Restraint of Brown, 143 Wn.2d 431, 452, 21 P.3d 687 (2001). The Supreme Court has noted that "the exercise of independent judgment in deciding which issues may be the basis of a successful appeal is at the heart of the attorney's role in our legal process." In re Pers. Restraint of Lord, 123 Wn.2d at 314. Appellate counsel should not raise every nonfrivolous claim, but should select from

among potential nonfrivolous issues in order to maximize the chance of success on appeal. Smith v. Robbins, 528 U.S. at 288.

In order to be successful in his claim of ineffective assistance of appellate counsel, a petitioner must show that the issue not raised was clearly stronger than issues that counsel did present. Smith v. Robbins, 528 U.S. at 288. Haghghi's appellate counsel displayed competence in raising multiple challenges to Haghghi's conviction and sentence. See Appendix B to State's original response (court's opinion on direct appeal).

It was reasonable to choose to raise other issues instead of an issue which the Court of Appeals already had repeatedly rejected. In his declaration attached to the Brief of Petitioner, appellate counsel states that he was aware of the cases "questioning whether the inevitable discovery doctrine applied under our state constitution" but "did not think this [case] was a good vehicle for challenging inevitable discovery because there was a warrant." Pet. Br. Appendix D, pp. 1-2. This intelligent assessment of the case was anything but deficient.

While Haghghi suggests that counsel should have foreseen the impending change in the law in Winterstein, the law imposes no such requirement of precognition. The issue statement on the

Supreme Court's docket described the issue in Winterstein as follows: "Did the warrantless search of Winterstein's residence by his probation officer violate Winterstein's constitutional rights?" Appendix 2D (Supreme Court docket). Thus, the manner in which the Court framed the issue for public review indicated that the Court was focused on the constitutionality of the search, not the application of the exclusionary rule.

Moreover, Haghighi has not established the prejudice prong of his ineffective assistance claim. In addition to overcoming the strong presumption of competence and showing deficient performance, the petitioner must affirmatively show prejudice. Strickland, 466 U.S. at 693. Petitioner must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694. Speculation that a different result might have occurred is not sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006). Given that the Court of Appeals already had rejected this argument, there has been no showing that a different result would have occurred in this case.

Counsel was appointed to represent Haghighi only in the Court of Appeals but provided extensive advice about the availability of a petition for review. Pet. Br. Appendices A, B, E.

Haghighi cites no authority for the proposition that the specifics of advice about potential further review may constitute deficient performance, but even if it could, the thorough advice in this case cannot be faulted for failure to provide a detail that in hindsight is significant.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to dismiss the personal restraint petition.

DATED this 15<sup>TH</sup> day of August, 2011.

Respectfully submitted,

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King County Prosecuting Attorney

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# **Appendix 2A**

# **Appendix 2A**

The Court of Appeals  
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December 22, 2010

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**REC'D**

DEC 23 2010

King County Prosecutor  
Appellate Unit

CASE #: 65130-7-1  
Personal Restraint Petition of Nadder Baron Haghighi

Counsel:

Enclosed please find a copy of the order entered by this court in the above case today.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

law

enclosure

cc: *Dummers*

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

IN THE MATTER OF THE	)	No. 65130-7-1
PERSONAL RESTRAINT OF	)	
NADDER BARON HAGHIGHI,	)	ORDER OF PARTIAL DISMISSAL
	)	AND REFERRAL
	)	
_____Petitioner.	)	

Petitioner Nadder Baron Haghighi filed a personal restraint petition challenging his sentence in King County Superior Court No. 06-1-10032-4 KNT. His judgment and sentence for one count of first degree theft and six counts of unlawful issuance of checks or drafts (UICD) became final on September 25, 2009, when this court filed the mandate in his direct appeal. He contends that there has been a significant change in the law regarding an issue material to his convictions. Specifically, he urges this court to retroactively apply the holding of our Supreme Court's decision in State v. Winterstein, 167 Wn.2d 620, 631-36, 220 P.3d 1226 (2009), holding that the inevitable discovery rule is contrary to article I, section 7 of the Washington Constitution. Because his petition raises a non-frivolous issue, the portion of the petition addressing the potential retroactive application of Winterstein should be referred to a panel of this court for a determination on the merits. RAP 16.11(b), (c).

Posing as a wealthy entrepreneur, Haghighi wrote a series of bad checks. After several people provided copies of fraudulent checks to the police and identified Haghighi by photo montage, a superior court judge approved a search warrant for Haghighi's bank records. The search warrant affidavit identified Haghighi's account with

Allstate Bank, located in Illinois. Kent Police Detective Robert Kaufmann faxed the search warrant to Allstate's Illinois office, and Allstate provided the records.

Before trial, Haghghi moved to suppress the bank records as the fruits of an illegal search, asserting that Officer Kaufmann did not have authority to execute the warrant in the state of Illinois, which was undisputedly outside the jurisdiction of his office. The trial court found that a seizure occurred with the faxing of the warrant, and that the seizure occurred in Illinois. The trial court also found that the seizure did not violate article I, section 7 of the Washington Constitution or the Fourth Amendment, because the evidence presented to the magistrate demonstrated there was probable cause to justify the search. The court concluded that “[i]n the absence of a constitutional violation, the remedy appears to be suppression of the records[.]”

However, relying on the inevitable discovery rule<sup>1</sup> and the independent source rule,<sup>2</sup> the trial court denied Haghghi's motion to suppress the bank records. The court specifically found that Haghghi's identity was not at issue, and that police had documents that would “inevitably lead to the bank records, including copies of the bounced checks with the bank, and bank account numbers at issue listed[.]”

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<sup>1</sup> Under the inevitable discovery rule, evidence that would normally be suppressed is admissible if the State can prove by a preponderance of the evidence that the police did not act unreasonably or in an attempt to accelerate discovery, and the evidence would have been inevitably discovered under proper and predictable investigatory procedures. See Winterstein, 167 Wn.2d at 631–36.

<sup>2</sup> Under the independent source rule, evidence tainted by unlawful governmental action is not subject to suppression, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action. State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005).

In Haghghi's direct appeal to this court, he argued that the trial court erred by not excluding the records, because the State did not prove that the records would have been inevitably discovered. In affirming his convictions, this court held that under these circumstances, "the trial court properly concluded the State would have discovered Haghghi's bank records." This court observed that the trial court "heard extensive argument and considered comprehensive briefing on Haghghi's suppression motion," and did not abuse its discretion in refusing to exclude the evidence.

Haghghi now claims he is unlawfully detained, citing our Supreme Court's decision in Winterstein which rejected the "inevitable discovery" rule as contrary to the Washington Constitution. Winterstein, 167 Wn.2d at 631-36. A petitioner in a personal restraint petition is generally prohibited from renewing an issue that was raised and rejected on direct appeal, unless the interests of justice require relitigation of that issue. See In re Pers. Restraint of Davis, 152 Wn.2d 647, 671, 101 P.3d 1 (2004). A significant change in the law material to a court order may, in some instances, provide such a justification. See, e.g., In re Pers. Restraint of Rowland, 149 Wn. App. 496, 506, 204 P.3d 953 (2009) (observing that RCW 10.73.100(6) preserves access to collateral review in cases where there has been a "significant change in the law" that is material to a court order).

In the instant case, the critical inquiry is whether the Supreme Court's December 2009 holding in Winterstein should be applied retroactively to Haghghi's convictions, which became final on September 25, 2009. Generally, we follow the lead of the United States Supreme Court when deciding whether to give retroactive application to newly articulated principles of law. State v. Abrams, 163 Wn.2d 277, 178 P.3d 1021 (2008);

State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627 (2005). The United States Supreme Court declared that a “new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review ... with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.” Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). The Court has identified only two exceptions to the general rule of nonretroactivity of new rules of criminal procedure for cases on collateral review: (1) if the new rule places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or (2) if the new rule requires observance of procedures that are “implicit in the concept of ordered liberty.” Teague v. Lane, 489 U.S. 288, 311, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). The first exception is inapplicable to the instant case.

As for the second exception, the Teague Court declared that it is “to be reserved for watershed rules of criminal procedure[.]” Teague, 489 U.S. at 311. This exception is “extremely narrow.” Schiro v. Summerlin, 542 U.S. 348, 352, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). In order to qualify as watershed, a new rule must meet two requirements: First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction; second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. Whorton v. Bockting, 549 U.S. 406, 415, 127 S. Ct. 1173, 167 L.Ed.2d 1 (2007).

Whether our Supreme Court’s decision in Winterstein announces a watershed rule, justifying retroactive application to Haghighi’s convictions, presents a non-frivolous issue. The petition may be determined on the record before the court. Accordingly,

counsel should be appointed and the petition should be referred to a panel of this court for determination on the merits. RAP 16.11(b).

Haghighi also asserts that his exceptional sentence was erroneously imposed. He raises no specific argument on this issue, and cites no relevant authority. The claim is clearly frivolous. A personal restraint petition must set out the facts underlying the challenge and the evidence available to support the factual assertions. In re Pers. Restraint of Rice, 118 Wn.2d 876, 885–86, 828 P.2d 1086 (1992). Unsupported assertions or vague allegations are not sufficient. Rice, 118 Wn.2d at 886.

Now therefore, it is hereby

ORDERED that the petition is dismissed as to all issues except the application of State v. Winterstein; it is further

ORDERED that this sole remaining issue is referred to a panel for review and determination. It is further

ORDERED that Nielsen, Broman & Koch is appointed to represent Haghighi with respect to the issue referenced herein; it is further

ORDERED that the court administrator/clerk of this court shall set the briefing schedule.

Done this 22<sup>nd</sup> day of December, 2010.

  
\_\_\_\_\_  
Acting Chief Judge

2010 DEC 22 PM 2:10  
CLERK OF SUPERIOR COURT  
JANIS L. HARRIS

# **Appendix 2B**

# **Appendix 2B**

**RCW 10.73.100: Collateral attack--When one year limit not applicable**

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.

# **Appendix 2C**

# **Appendix 2C**

**RAP 16.4: PERSONAL RESTRAINT PETITION--GROUNDS FOR REMEDY**

(a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioner's restraint is unlawful for one or more of the reasons defined in section (c).

(b) Restraint. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

(c) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons:

(1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or

(4) 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 proceeding or civil proceeding instituted by the state or local

government, and sufficient reasons exist to require retroactive application of the changed legal standard; or

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or

(6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(7) Other grounds exist to challenge the legality of the restraint of petitioner.

(d) Restrictions. The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

# **Appendix 2D**

# **Appendix 2D**



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9:00 A.M.

Olympia

October 23, 2008

**TWO CASES ONLY - IN AM - NO AFTERNOON CASES**

<b>Case No. 1 - 80498-2</b>	<b><u>COUNSEL</u></b>
In re the Detention of:  David T. Fair, Petitioner.	James Reese, III  Sara Olson/Todd Bowers/Sarah Sappington
<b>SYNOPSIS:</b> Fair, a convicted sex offender, had been in prison for twelve years when the State sought to commit him as a sexually violent predator. Does due process require the State to prove Fair is currently dangerous?	

<b>Case No. 2 - 80755-8</b>	<b><u>COUNSEL</u></b>
State of Washington, Respondent, v. Terry Lee Winterstein, Petitioner.	Hon. Susan Baur James Smith  Anne Mowry Cruser
<b>SYNOPSIS:</b> Did the warrantless search of Winterstein's residence by his probation officer violate Winterstein's constitutional rights?	

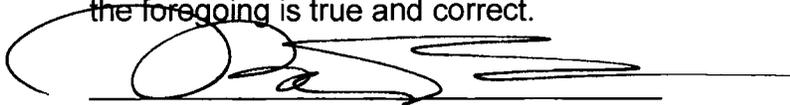
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy P. Collins, the attorney for the petitioner, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the State's Second Response to Personal Restraint Petition, in PERSONAL RESTRAINT PETITION OF NADDER BARON HAGHIGHI, Cause No. 65130-7-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name  
Done in Seattle, Washington

08/15/20  
Date

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 AUG 15 PM 4:52