

No. 65130-7-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE PERSONAL RESTRAINT
PETITION OF:

BARON NADDER HAGHIGHI,

Petitioner

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITIONER'S REPLY BRIEF

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A. ARGUMENT.

HAGHIGHI IS ENTITLED TO RELIEF BECAUSE THE TRIAL COURT AND COURT OF APPEALS ERRONEOUSLY RELIED ON THE DOCTRINE OF INEVITABLE DISCOVERY TO ALLOW THE STATE TO USE THE FRUITS OF AN ILLEGAL SEARCH

1. The Supreme Court's decision in *Winterstein* was not a new rule under Supreme Court precedent. In *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009), the Supreme Court explained that its holding was "consistent" with its precedent, and not a newly created rule. It noted that in *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003), "we recognized that there is no established inevitable discovery exception under article I, section 7." 167 Wn.2d at 635. Consequently, it ruled that "we reject inevitable discovery because it is incompatible with the nearly categorical exclusionary rule under article I, section 7." Id. at 636.

Winterstein did not announce a new rule for purposes of Supreme Court jurisprudence. It marked a departure from Court of Appeals precedent. But the State cites no cases that mandate a *Teague*¹ retroactivity analysis when the Supreme Court disagrees

¹ *Teague v. Lane*, 489 U.S. 288, 107 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

with a Court of Appeals decision and addresses an issue consistent with its own long-standing precedent.

The Supreme Court had signaled on several occasions that the doctrine of inevitable discovery did not apply under our state constitution. See O'Neill, 148 Wn.2d at 592 (rejecting inevitable discovery doctrine); see also State v. Gaines, 154 Wn.2d 711, 716 n.5, 116 P.3d 993 (2005) (granting review in case regarding application of inevitable discovery but resolving case on other grounds). The Supreme Court was not only not bound by contrary Court of Appeals decisions as the prosecution's argument implies, on the occasions when the issue presented itself, it indicated it disagreed with the principle that a constitutional violation would be excused based on a claim of inevitable discovery. The retroactivity analysis on which the State's brief rests involves a scenario where a new rule is a clear break from established jurisprudence from the highest court, and it is inapposite.

Upon application of Winterstein to the case at bar, the trial court erred in holding that illegally seized evidence was admissible under the doctrine of inevitable discovery. 167 Wn.2d at 636;

Findings of Fact at 4-5.² The illegally seized bank records were the centerpoint of the State's case against Haghghi and were introduced in bulk and in detail during his trial. See Trial Exs. 2-15; 10/24/07RP 7-62. Haghghi is being unlawfully detained due to the incorrect and unconstitutional reliance on the notion that inevitable discovery principles permitted the State to introduce the improperly obtained bank records, and he should receive relief.

2. If applied, retroactivity analysis should rest on the fundamental principles at stake in applying our state constitutional privacy protections. Alternatively, Haghghi contends that if Winterstein is construed as a new rule, the United States Supreme Court has invited states to allow broader application of new constitutional rules than mandated under federal law. Danforth v. Minnesota, 552 U.S. 264, 288-89, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008). Consistent with our Supreme Court's analysis in State v. Evans, 154 Wn.2d 438, 448, 114 P.3d 627 (2005), other states have developed *state* law to govern retroactivity in state postconviction proceedings, based on their own jurisprudential weighing of the import and injustice of applying a recent decision to

² 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

cases final before a decision announced a new rule. See e.g., State v. Smart, 202 P.3d 1130, 1140 (Alaska 2009); State v. Whitfield, 107 S.W.3d 253, 268 (Mo. 2003) (“[A]s a matter of state law, this Court chooses not to adopt the Teague analysis ...”); Colwell v. State, 59 P.3d 463, 471 (Nev. 2002) (explaining different concerns state courts have than federal courts regarding finality and fair application of state law); Cowell v. Leapley, 458 N.W. 514, 518 (S.D. 1990) (“We find the Teague rule to be unduly narrow as to what issues it will consider on collateral review.”); State v. Lark, 567 A.2d 197, 199 (N.J. 1989) (applying state standards to retroactive application of case interpreting state court rule).

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

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

Response to Mr. Haghighi's PRP, as Appendix F.

In Evans, the Supreme Court recognized that the federal principles underlying Teague would not be dispositive of purely state law concerns. 154 Wn.2d at 449. In Evans, and in *dicta* in another case cited by the prosecution, State v. Abrams, 163 Wn.2d 277, 178 P.3d 1021 (2008), the Court used a Teague analysis. But both cases were controlled by federal constitutional law. Evans, 154 Wn.2d at 444; Abrams, 163 Wn.2d at 285. In Evans, the Court expressly reserved the ability to depart from Teague when the issues involve state law. 154 Wn.2d at 449. Haghghi's case presents that very scenario, absent from Evans or Abrams, involving a well-established independently analyzed state constitutional provision that expressly departs from federal constitutional law. As explained in Petitioner's Brief, our state's interest in enforcing its constitution and the rights guaranteed since the time of the framing of the constitution presents sufficient reason to apply the state constitutional right to be free from unjustified intrusions in his private affairs legal standard as discussed in Winterstein to Haghghi, as contemplated by RAP 16.4(c)(4). Thus, the Court should invalidate the seizure of his private bank records and prohibit their introduction as evidence against him based on article I, section 7.

3. Haghighi's appellate attorney's failure to pursue and explain the inevitable discovery issue is not a new claim subject to a new time bar. The State asserts that Haghighi is time barred from contending that his appellate attorney performed deficiently by: failing to pursue the issue of inevitable discovery under article I, section 7; never informing Haghighi that the Supreme Court had not accepted this doctrine; and neither filing a petition for review on the matter nor telling Haghighi that he had an interest in filing a petition for review on this issue. It cites as authority In re Pers. Restraint of Bonds, 165 Wn.2d 135, 196 P.3d 672 (2008), and In re Pers. Restraint of Davis, 151 Wn.App. 331, 211 P.3d 1055, rev. denied, 168 Wn.2d 1043 (2010). Neither case applies.

In both Bonds and Davis, the petitioner was barred from raising entirely new claims after the one year time limit elapsed. Mr. Bonds amended his petition by raising a closed courtroom issue that had never been previously asserted in his case in any form. 164 Wn.2d at 138. Mr. Davis's original PRP argued that his attorney improperly failed to challenge the sufficiency of the evidence on direct appeal, and he later added a new claim that his attorney was ineffective for failing to assign error to an "act on

appearances” self-defense instruction. Both Bonds and Davis involved separate, distinct claims raised in an amended petition.

Haghighi does not raise a new claim, instead, he adds an alternative legal theory to the claim already presented.

Instructively, federal courts have a developed body of law governing when a new argument in a collateral attack relates back to the original petition. When a new claim arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, an amended argument will relate back to the original petition. Fed.R.Civ.P. 15(c)(2). As the United States Supreme Court explained in Mayle v. Felix, 545 U.S. 644, 664, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005), “[s]o long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order.”

The arguments presented in the brief filed by counsel relate back to the petition Haghighi filed. They rest on the same core legal issue, involving the application of Winterstein and the inevitable discovery analysis used as the basis to admit illegally seized evidence. When this Court appointed Haghighi’s prior attorney, from his direct appeal, to represent him in this personal restraint petition, his attorney explained to the court:

I write to alert you to the existence of a conflict in a recent appointment. Our office was appointed on 12/22/2010 in the above-mentioned case [of Haghghi's PRP]. However the issue of this case is ineffective assistance of counsel regarding one of our attorneys.

Letter, dated Jan. 6, 2011, from Eric Nielsen of Nielsen, Broman, and Koch. Mr. Nielsen's office withdrew and the undersigned counsel was appointed because the core issue implicated the effectiveness of Haghghi's counsel in his direct appeal. This withdrawal illustrates the core, interrelated issue of effective assistance of counsel that underlies Haghghi's timely filed petition.

Because Haghghi is not raising new claims, but rather is more fully explaining the legal authority on which his properly raised claims rest, he is not barred by the statute of limitations. Haghghi filed his petition in a timely fashion and moved for the appointment of counsel. This Court appointed counsel so that a potentially meritorious issue involving the erroneous application of the doctrine of inevitable discovery could be pursued. Once counsel is appointed, that appointment should permit the meaningful assistance of counsel, including offering additional legal support for the claim raised in the original petition, which rests on the same core issue.

For the reasons explained in Petitioner's Brief, his appellate attorney's failure to pursue a central legal issue of state constitutional law that he had acknowledged in his briefing was unresolved by the Supreme Court provides a basis to grant Haghghi relief. See In re Pers. Restraint of Maxfield, 133 Wn.2d 332, 344, 945 P.2d 196 (1997). His failure to explain to his client the risks of not pursuing the illegal seizure, or apprising his client that the issue was either unresolved or pending in a case before the Supreme Court constitutes a deficient performance. The outcome would have been different had counsel properly advised Haghghi of the reasons and repercussions involved in filing a petition for review. The State notes that the "issue presented" on the Supreme Court's website did not include the inevitable discovery issue for Winterstein, as if that obviates counsel's need to be aware of the issue. However, the State had cited the Court of Appeals decision in Winterstein as authority for its inevitable discovery analysis in its Response Brief filed in the direct appeal, and pointed out that review had been granted. See COA 61436-3-1, Brief of Respondent, p. 35. Briefs filed in all Supreme Court cases since June 2006 are available on the Supreme Court's website, and those briefs included the inevitable discovery

analysis.³ The Supreme Court brief filed in Winterstein argued that the Court of Appeals erred in holding there is an inevitable discovery exception to article I, section 7.⁴ As explained in the brief of petitioner previously filed, Haghighi's claims are properly before the Court and he is entitled to relief.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Petitioner's Opening Brief, Barron Haghighi respectfully requests this Court grant his petition for relief from unlawful restraint, order the suppression of illegally obtained records, and remand the case for further proceedings.

DATED this 26th day of August 2011.

Respectfully submitted,



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³ See http://www.courts.wa.gov/appellate_trial_courts/coaBriefs

⁴ Id. (searching under case title, State v. Winterstein, Petitioner's Supplemental Brief, Table of Contents, at 1).

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DIVISION ONE**

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **REPLY 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:

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