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NO. 87529-4

THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: PERSONAL RESTRAINT OF NADDER BARON HAGHIGHI

STATE OF WASHINGTON,

Respondent,

v.

NADDER BARON HAGHIGHI,

Petitioner.

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

PETITIONER'S ANSWER TO AMICUS BRIEF
FILED BY WASHINGTON ASSOCIATION OF PROSECUTING
ATTORNEYS

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 ORIGINAL

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A. ARGUMENT.

1. WAPA misunderstands the timeliness of Mr. Haghighi's PRP.

Nadder Baron Haghighi filed a timely personal restraint petition (PRP) within one year of the date his direct appeal ended. RCW 10.73.090.¹ He raised the same core legal issue for which this Court has granted review – whether the State's reliance on the theory of inevitable discovery violated his rights under article I, section 7, as made plain by State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). See PRP at 4. Because Mr. Haghighi's PRP was timely filed, WAPA's lengthy discussion about the time limitations on filing a collateral attack is irrelevant.

The only issue regarding the timeliness of the PRP is one that WAPA does not address: whether by adding an alternative theory premised on the same core legal issue on which Mr. Haghighi is entitled to relief, involving the ineffective assistance of appellate counsel, Mr. Haghighi's claim of ineffective assistance of counsel is properly before the Court. This issue is addressed in Mr. Haghighi's

¹ He filed his pro se PRP on March 16, 2010; the Court of Appeals mandate in his direct appeal had been entered on September 25, 2009.

supplemental brief, at 23-26. It was similarly addressed by the Court of Appeals in In re Pers. Restraint of Wilson, 169 Wn.App. 379, 387-88, 279 P.3d 990 (2012). Because Mr. Haghighi is not raising an entirely new legal claim, but rather further explaining the grounds that entitle him to relief based on the issue as raised in the timely filed PRP, his PRP should be considered timely filed. WAPA takes no position on this point.

2. If equitable tolling is pertinent, WAPA's discussion of the controlling standards is misleading.

Although the requirements of equitable tolling are irrelevant if Mr. Haghighi's amended legal theory involving ineffective assistance of counsel is considered a legal argument stemming from the same core issue as the original claim, WAPA mischaracterizes the case law developments defining the parameters of equitable tolling.

Equitable tolling allows a court, for good cause and in the interest of fairness, to modify the harsh application of a time limitation on equitable grounds where the claimant has been reasonably diligent and the respondent has not been unduly prejudiced. Holland v. Florida, ___ U.S. ___, 130 S.Ct. 2549, 2563, 17 L.Ed.2d 130 (2010). It is a flexible concept that it not governed by mechanical rules. Id. One area where

courts have granted equitable relief is based on an attorney's deficient performance, such as "failing to fulfill a basic duty of client representation." Doe v. Busby, 661 F.3d 1001, 1012 (9th Cir. 2011).

A petitioner's diligence for equitable tolling is "reasonable diligence," not extreme or exceptional diligence. Holland, 130 S.Ct. at 2565; Doe, 661 F.3d at 1014 ("Reasonable diligence does not require a petitioner to identify the legal errors in his attorney's advice and thereupon fire the attorney because such errors would have been evident to a trained lawyer.").

In Bonds, this Court issued a splintered ruling on the requirements of equitable tolling. Four justices defined "equitable tolling" as requiring bad faith, deception, or false assurances; two justices felt this standard was too strict; and three justices thought that a manifestly unfair result and diligence by the accused satisfied the equities required. In re Pers. Restraint of Bonds, 165 Wn.2d 135, 144, 196 P.3d 672 (2008) (plurality); Id. at 144-45 (Justices Alexander and Fairhurst, concurring); Id. at 146 (Justice Sanders, joined by Justices Chambers and Stephens, dissenting).

WAPA asserts that Bonds alters prior case law that applied what it terms as a more lenient standard of equitable tolling. WAPA Amicus

at 10 n.9. But as this Court acknowledged in In re Pers. Restraint of Carter, 172 Wn.2d 917, 928-29, 263 P.3d 1241 (2011), “the majority of justices in Bonds . . . recognize[d] that equitable tolling of the time bar may be available in contexts broader than those recognized by the Bonds plurality.”

The U.S. Supreme Court issued its opinion in Holland after Bonds was decided. In Holland, the Court pronounced the lower court’s equitable tolling standard “too rigid” where it had used a test of “bad faith [and] dishonesty.” 130 S.Ct. at 2563. “‘The flexibility’ inherent in equitable procedure” requires a rule enabling “courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices.” Id. (internal citation omitted). This is the test that should be applied here, consistent with Bonds and with this Court’s prior jurisprudence. See e.g., Carter, 172 Wn.2d at 929, 931 (adopting more lenient approach to actual innocence exception to collateral attack deadline for reasons of equities).

WAPA also erroneously complains that Mr. Haghighi did not properly raise the issue of equitable tolling in the Court of Appeals. The prosecution first raised the issue of equitable tolling in its response brief to counsel’s supplemental brief filed in the Court of Appeals, and Mr.

Haghighi replied by explaining why the State was invoking the doctrine based on an improper application of Bonds. See Petitioner's Reply at 7-9. WAPA is wrong that Mr. Haghighi is raising an issue for the first time on review in this Court when the issue was presented before the Court of Appeals.

3. WAPA's extended discussion of the narrow limits of collateral review overstates these limits and ignores this Court's regular reliance on the interest of justice in determining the scope of issues on review.

In Schwab, this Court approved of a trial judge reinstating a conviction that had been dismissed for double jeopardy reasons years earlier. State v. Schwab, 163 Wn.2d 664, 185 P.3d 1151 (2008). The court reasoned that the "interest of justice" authorized the court to revisit a prior final judgment. Id. at 674, 676.

In Carter, this Court agreed that a petitioner may challenge a sentence entered 10 years earlier under an "actual innocence exception" to the other procedural screens such as the time limitation for filing a PRP, if he could show that he was actually innocent of the facts used to impose the conviction or sentence of life without the possibility of parole. 172 Wn.2d at 923. This opinion was premised on considerations of equity, on the ground that it "would represent a manifest injustice" to

impose such a harsh sentence notwithstanding considerations of finality. Id.

In Haverty, this Court applied a change in the law to a parole revocation hearing, when that change happened after the parole revocation at issue, because the change in the law involved the integrity and reliability of the fact-finding process. In re Pers. Restraint of Haverty, 94 Wn.2d 621, 627, 618 P.2d 1011 (1980) (the new opinion's "purpose of preserving the integrity of the [parole] revocation process is one often given retroactive application").

WAPA overstates its case when it begins its amicus brief with a lengthy discussion of the narrow grounds on which a collateral attack may occur. Indeed, the author of the WAPA brief has presented this same argument in other cases, word-for-word in parts, yet this Court has not adopted the standard WAPA urges.² Instead, this Court examines the specific facts of each case and the circumstances of the legal error. While equitable tolling is undoubtedly a narrow standard, it

² See, e.g., In re Pers. Restraint of Skylstad, S.Ct. No. 78156-7 (WAPA Amicus at 3-15); In re Pers. Restraint of Bonds, S.Ct. No. 80995-0 (WAPA Amicus at 4-14); State v. Bueno, S.Ct. No. 87297-0 (WAPA Amicus at 7-12); In re Pers. Restraint of Stenson, S.Ct. 83606-0 (RAP 16.9 Response to Sixth Personal Restraint Petition at 25-27 (brief authored by WAPA's counsel)).

is not an impossible one, and it rests on considerations of equity as well as the obstacles the petitioner has faced in bringing the issue to the Court.

As a matter of retroactivity, WAPA claims that only procedural changes in the law may be imposed retroactively, but RCW 10.73.100 lists exceptions to the one year time bar for filing a PRP, and it states that material changes in the law “whether substantive or procedural” may be a basis for a PRP if the court determines that “sufficient reasons” exist for its retroactive application. RCW 10.73.100(6).

Mr. Haghighi’s claim is properly before the Court as a matter of equitable tolling because he relied on the advice of counsel when he filed a pro se PRP asking for relief based on the ends of justice, which is what counsel advised him to do. See, e.g., In re Greening, 141 Wn.2d 687, 701, 9 P.3d 206 (2000) (applying more lenient standard to procedural bar for successive PRPs when petitioner was *pro se*). Mr. Haghighi’s attorney withdrew from the case based on his acknowledgement of his own ineffective assistance of counsel without telling Mr. Haghighi that was his reason for withdrawing. Supplemental Brief, App. E. The ensuing delay was minimal, as another appointed counsel became familiar with the case and raised the issue of ineffective

assistance of counsel. Mr. Haghighi acted with reasonable diligence; he protested the application of inevitable discovery under article I, section 7 in the trial court and raises a claim that relates back to the claim originally filed in his PRP. Under these circumstances, he should not be procedurally barred from presenting his claim in a PRP. Furthermore, the substance of the holding of the Court's opinion in Winterstein should apply to Mr. Haghighi for the reasons explained in his supplemental brief in this Court and in the Court of Appeals.

4. Mr. Haghighi had the right to effective assistance of counsel on appeal.

Even on appeal, “[t]he constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client.” Anders v. California, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

Here, appellate counsel's performance was deficient for several reasons, the most important of which WAPA wholly ignores. First, appellate counsel did not argue that the broader protections of article I, section 7 governed the application of the theory of inevitable discovery, even though this Court had ruled that article I, section 7 does not permit the State to rely on a claim of inevitable discovery. State v. O'Neill,

148 Wn.2d 564, 592, 62 P.3d 489 (2003). As this Court held in Maxfield, failing to present a meritorious claim that a search violated article I, section 7 on appeal constitutes deficient performance. In re Pers. Restraint of Maxfield, 133 Wn.2d 332, 344, 945 P.2d 196 (1997).

Second, appellate counsel did not accurately inform Mr. Haghighi of the consequences of failing to file a petition for review. Even without a controlling, dispositive case from the Supreme Court, appellate counsel renders deficient performance when he should have known to raise an issue on appeal based analogous cases. In re Pers. Restraint of Morris, __ Wn.2d __, 288 P.3d 1140, 1145 (2012). Mr. Haghighi's "appellate counsel had but to look at this court's [article I, section 7] jurisprudence to recognize the significance of' admitting evidence that was not seized pursuant to lawful procedures. Id.; see, e.g., O'Neill, 148 Wn.2d at 592 n.11; State v. Tibbles, 169 Wn.2d 364, 370, 236 P.3d 885 (2010) (search cannot be justified by having probable cause to arrest); State v. Smith, 119 Wn.2d 675, 684 n.5, 835 P.2d 1025 (1992) ("Washington courts have not adopted the inevitable discovery rule."); State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982) (article I, § 7 protects the individual's right of privacy by

mandating that “whenever the right is unreasonably violated, the remedy must follow”).

WAPA focuses on the lack of explicit right to have counsel file a petition for review, noting that the statute authorizing payment for appointed counsel covers both the appeal in the Court of Appeals, and review in the Supreme Court once granted, but not the intermediate step of seeking review in the Supreme Court. WAPA at 15 (citing RCW 10.73.150). The duties of competent counsel are not defined solely by what obligations are set forth in a statute, or even whether they are given additional public funds for their efforts. An attorney’s obligation is to accurately inform a client of the relevant consequences of a legal ruling and to ensure that the client makes deliberate choices based on available information. Just as counsel’s failure to communicate a plea offer to a client before it has lapsed is deficient, regardless of whether counsel is paid for that conversation; or counsel’s advice that the accused reject a plea offer based on counsel’s misunderstanding of a viable defense is deficient, so is counsel’s failure to raise and pursue a meritorious issue on appeal. See Lafler v. Cooper, __U.S. __, 132 S.Ct. 1376, 1383, 1390-91, 182 L.Ed. 2d 398 (2012); Missouri v. Frye, __U.S. __, 132 S.Ct. 1399, 1404, 1410-11, 182 L.Ed.2d 379 (2012).

An attorney's duty to apply changes in the law to a client's circumstances, and render accurate advice is essential to competent performance. See Padilla v. Kentucky, __ U.S. __, 130 S.Ct. 1473, 1480, 1484, 176 L.Ed.2d 284 (2010) (due to "changes in immigration law," attorney's failure to keep abreast of law and advise client of its ramifications in case is deficient performance). The failure to file a petition for review has significant consequences; an appellant is procedurally barred from obtaining review of a state court conviction in federal court, as well as from receiving the benefit of pending cases. See O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999) (state petitioner must make "complete round" of State's established appellate review process for federal review). On the other hand, there is nothing the appellant gains by failing to file a petition for review, other than having the appeal end sooner.

Mr. Haghghi does not fault his appellate lawyer for failing to anticipate an unknowable change in the law. Instead, he asserts that the right to counsel includes the rights (1) to a lawyer who is abreast of developments in the law and explains such issues to the client before refusing to further participate in the direct appeal; (2) to be advised of the consequences of the termination of direct review; (3) to a lawyer

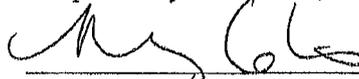
who raises meritorious issues in an appeal. Just as in Morris, where counsel's failure to apply an analogous case constituted deficient performance, or Maxfield, where counsel failure to present a viable claim under the state constitution, counsel's failure to raise and pursue the questionably applicability of inevitable discovery under article I, section 7 constitutes deficient performance.

B. CONCLUSION.

For the foregoing reasons, Mr. Haghighi respectfully requests this Court hold that the court violated his right to be free from intrusions into his private affairs that are not authorized by law.

DATED this 8th day of February 2013.

Respectfully submitted,



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF)
)
)
NADDER HAGHIGHI,) NO. 87529-4
)
)
Petitioner.)

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In re the PRP of Nadder Haghighi
No. 87529-4

Please accept the attached documents for filing in the above-subject case:

Petitioner's Answer to Amicus Brief

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