

Supreme Court No. 87529-4
(COA No. 65130-7-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT OF BARON NADDER HAGHIGHI

STATE OF WASHINGTON,

Respondent,

v.

BARON NADDER HAGHIGHI,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

Baron Haghighi, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Haghighi seeks review of the published Court of Appeals decision dated April 16, 2012, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. A “new rule” is a decision that breaks with the past rather than applying precedent to different facts. In Winterstein,¹ this Court ruled that because article I, section 7 has long required that police officers obtain “authority of law” before intruding upon a person’s private affairs, the State may not skirt this requirement by claiming it would have “inevitably discovered” the same information had it acted lawfully. Where article I, section 7’s independent construction rests on well-established common law and the intent of the framers of the constitution, did the Court of Appeals

¹ State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009).

erroneously hold that this Court created a “new rule” in

Winterstein?

2. Winterstein settled a conflict in case law between the Court of Appeals, which had used the Fourth Amendment doctrine of “inevitable discovery,” and this Court, which had expressly held that “inevitable discovery” was contrary to the state constitution and could not substitute for the authority of law required to search a person’s private affairs. Did the Court of Appeals misapply the principles of retroactivity when it declared that Winterstein was a “new rule” by virtue of overturning Court of Appeals decisions, when it was entirely consistent with and predicated on prior Supreme Court decisions?

3. Principles of retroactivity under the United States Supreme Court decision in Teague² are based on the federal courts’ deference to state courts. This Court signaled in State v. Evans³ that federal retroactivity standards do not necessarily control when this Court may use state law to apply a recent decision to cases final before the new decision. Under RAP 16.4 and RCW 10.73.100, a substantial change in the law may provide relief in a PRP if this Court believes it serves the interest of justice

to do so. Should state law principles govern whether Winterstein applies to Haghghi?

4. This Court adopted equitable tolling in Bonds⁴ as a measure of deciding whether a petitioner may add a new legal claim to a personal restraint petition (PRP), but a divided Court disagreed as to its definition. After Bonds, the United States Supreme Court rejected the standard of equitable tolling used by the plurality decision in Bonds. Should this Court accept review to clarify the definition of equitable tolling and further address whether this standard must be met when, unlike Bonds, the petitioner is merely making alternative legal arguments premised on the same common core of operative facts raised the original petition?

5. Recent United States Supreme Court cases clarify the responsibilities of an attorney to give competent advice when the client is relying on that advice. Haghghi received misleading and incorrect legal advice from his appellate attorney regarding filing a petition for review and PRP. Did appellate counsel's performance violate his right to counsel under article I, section 22 and the Sixth and Fourteenth Amendments?

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

³ State v. Evans, 154 Wn.2d 438, 114 P.3d 627 (2005).

⁴ In re Pers. Restraint of Bonds, 165 Wn.2d 135, 196 P.3d 672 (2008).

D. STATEMENT OF THE CASE.

At Baron Haghghi's trial, the court ruled that police officers had unlawfully seized his bank records but the records were admissible at trial under the inevitable discovery exception to the exclusionary rule. Conclusions of Law at 4-5.⁵ In his direct appeal, Haghghi's attorney challenged the legality of the state's seizure of these bank records. COA 61436-3-I, Brief of Appellant, at 35-42. He argued the Supreme Court "has not yet decided whether the inevitable discovery doctrine applies under article I, section 7 under any set of circumstances." *Id.* at 38. The Court of Appeals held, "the trial court properly concluded the State would have discovered Haghghi's bank records" as inevitable discovery. State v. Haghghi, COA 61436-3-I, 2009 WL 2515775, *7-8 (2009) (unpublished).

Haghghi did not file a petition for review. His lawyer told him that the inevitable discovery issue was not meritorious and would not be a basis for the Supreme Court to grant review. See Letters of August 17, 2010 and August 20, 2011 (attached to Brief of Petitioner, as Appendix A and B, respectively). His lawyer never told him that the Supreme Court had signaled it viewed inevitable

⁵ 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 Response to Mr. Haghghi's PRP, as Appendix F.

discovery differently than the Court of Appeals or that there was a case pending in the Supreme Court involving inevitable discovery. Id. (declarations attached as Apps. C and D).

Two months after the Court of Appeals mandate and two weeks after the decision became final for purposes of retroactivity, this Court held that article I, section 7 does not permit courts to admit illegally seized evidence under the doctrine of inevitable discovery. Winterstein, 167 Wn.2d at 636. Haghghi's lawyer on appeal told him about the Winterstein decision and informed him he could file a personal restraint petition arguing the "ends of justice" entitled him to relief. PRP Ex. 1 (letter from counsel to Haghghi). Following this advice, Haghghi filed a PRP on March 6, 2010, and asked for relief based on the "ends of justice." On December 22, 2010, the Court of Appeals appointed Haghghi's original attorney on direct appeal as counsel. That attorney's firm advised the Court of Appeals there was a conflict of interest, because "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. This letter was not copied to Haghghi.

However, when newly appointed counsel for Haghghi tried to include the issues of his appellate attorney's ineffective assistance of counsel, the Court of Appeals ruled he could not raise this claim because he had not made that specific argument in his original PRP or asked to amend his PRP before the one-year time limit running from the date of the entry of the mandate. Slip op. at 14-15. Even though the ineffective assistance of counsel claim related solely to the inevitable discovery issue that was the core claim in the PRP, and it took almost one year for the Court of Appeals to appoint conflict-free counsel, the Court of Appeals refused to treat the ineffective assistance of counsel as part of the original claim.

The Court of Appeals also ruled that Winterstein is a new rule that does not apply to Haghghi because his direct appeal was final weeks before Winterstein was decided. Slip op. at 7-8. It reasoned that Winterstein did not meet the strict requirements retroactivity mandated by Teague.

The facts are further set forth in the Court of Appeals opinion, pages 1-3; Brief of Petitioner, pages 4-7, 18-23; and Petitioner's Reply Brief, pages 8-9. The facts as outlined in each of these pleadings are incorporated by reference herein.

E. ARGUMENT.

1. **The requirement of excluding evidence that was seized without authority of law under article I, section 7 is not a new rule that requires retroactive application**

a. The Court of Appeals refused to apply the protections of article I, section 7 under a misguided application of Teague

A decision applies retroactively when it is “merely an application of the principle that governed” a prior Supreme Court decision. Teague, 489 U.S. at 307.

It has long been the case that article I, section 7 protects the individual's right of privacy by mandating that “whenever the right is unreasonably violated, the remedy must follow.” Winterstein, 167 Wn.2d. Id. at 632 (quoting State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). The remedy of excluding illegally obtained evidence has strong historical roots and is a “nearly categorical” requirement under our Constitution. Id. at 632, 635.

In State v. Snapp, Wn.2d __, P.3d __, 2012 WL 1134130 (April 5, 2012), this Court said, “[a]s we have so frequently explained, article I, section 7 is not grounded in notions of reasonableness. Rather, it prohibits any disturbance of an individual's private affairs without authority of law.” Id. at *8. The

common law origins of the article I, section 7 mean that the Court is not announcing a new rule when it explains the scope of constitutional privacy protections that inhere from the roots of the constitution and its adoption. While the Fourth Amendment is based on evolving determinations of reasonableness, and new rules may be announced under this approach, article I, section 7 does not change its protections merely because society alters its expectations of what a reasonable intrusion of privacy entails.

The decision in Winterstein was a fact-specific application of the long-standing principle that the authority of law permitting a search and seizure must exist at the time of the incursion and its violation must be remedied. Winterstein was not the first time this Court explained that the Fourth Amendment doctrine of inevitable discovery does not apply under article I, section 7. In State v. O'Neill, 148 Wn.2d 564, 592, 62 P.3d 489 (2003), this Court refused to apply inevitable discovery. The O'Neill Court ruled that inevitable discovery cannot apply because it would “undermine” the requirement of article I, section 7 that the police must lawfully arrest a person before searching that person incident to arrest. Id. In O'Neill, the Court also explicitly stated that it was not bound by, or

even persuaded by, Court of Appeals decisions that applied the doctrine of inevitable discovery. Id.

The “mere existence of conflicting authority does not necessarily mean a rule is new.” Williams v. Taylor, 529 U.S. 362, 410, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The test for determining whether a holding was dictated by precedent is an objective one. Id. If the holding did not break new ground or impose a new obligation on the government, it is not a new rule. Teague, 489 U.S. at 301. Winterstein did not break new ground, even though several Court of Appeals decisions had applied a different rule. Winterstein reaffirmed the principles discussed in O’Neill and White, which were premised on long-standing common law.

If Winterstein announced a new rule, it would have only applied going forward. Instead, Winterstein applied article I, section 7 to a setting it had not expressly addressed in prior cases. The holding was dictated by precedent. Accordingly, the holding of Winterstein should apply to Haghghi. The Court of Appeals adopted a highly constrained view of Teague to hold that Winterstein was a new rule that could not apply to Haghghi. The published Court of Appeals opinion should be reviewed because it is a novel ruling on the retroactive application of article I, section 7.

b. Teague is a federal rule of deference to state courts and does not govern this Court's interpretation of our state constitution's protects of private affairs.

Teague is premised on the United States Supreme Court's reluctance to tell state legislatures and state courts how to construe their long-standing common law. It rests on the deference federal courts owe to state courts.

This Court has acknowledged that changes in state law may not be governed by federal retroactivity law. Evans, 154 Wn.2d at 449. Teague is "grounded in" concerns of "federal-state relations," and the United State Supreme Court's desire not to interfere with a state's self-governance. Id. at 228-49 (quoting Collins v. Youngblood, 497 U.S. 37, 41, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)); see also Teague, 489 U.S. at 308-10 (expressing concern about costs on state courts of federal court interferences in state court proceedings).

It is nonsensical to defer the United States Supreme Court's standard for retroactivity to determine the application of the state constitution and common law, when the state constitution rests on its meaning from the time of statehood. Teague was premised on deference to state common law and disavowed interest in interfering with state's authority to construe the protections of their

own constitutions Evans, 154 Wn.2d at 449. Mr. Evans was raising a Sixth Amendment claim and the court therefore used Teague's federal retroactivity doctrine. Id. Unlike Evans, Haghghi raises an issue of state constitutional law, and this issue is interpreted independently of the federal constitution or federal common law because evidence shows the constitutional provision was intended to provide such protection from the time of its framing. See State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986) (setting framework for analyzing independent scope of state constitution based on preexisting law and intent of framers).

RCW 10.73.100(6) provides an exception to the one year time limit for filing a collateral attack where there has been a substantial change in the law and the court finds "sufficient reasons exist to require retroactive application of the changed legal standard." RAP 16.4(c)(4) likewise directs the appellate court to grant relief in a personal restraint petition based on the same standard. This principle governs and shows why Haghghi should receive relief if Winterstein is construed as a new law. No federal legal principles are at stake. Article I, section 7 protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a

warrant.” State v. Myrick, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984).

The Court of Appeals decision conflicts with this Court’s decision in Winterstein and with the doctrine of retroactivity. Furthermore, this Court should construe the requirements of article I, section 7 to dictate a different approach than Teague, and instead hold that a substantial change in the law should apply when the interest of justice dictate.

2. The published Court of Appeals decision creates new and unfounded procedural hurdles for a person filing a pro se collateral attack and misconstrues this Court’s plurality ruling in *Bonds*

a. The Court of Appeals decision conflicts with this Court’s decision in *Bonds*.

In Bonds, the petitioner amended his PRP after the one-year time limit elapsed for filing a PRP to add an entirely new legal claim. 165 Wn.2d at 138. His original PRP raised a confrontation clause issue and his amended PRP argued his right to a public trial was violated. Id. The two issues did not overlap in any way. This Court analyzed when a new legal theory could be added to a PRP, and concluded that after the one-year time for filing passed, a new legal theory needed to meet the standards of equitable tolling.

Bonds relied on Benn, a case where the defendant tried to add a challenge to a jury instruction four years after the PRP had been filed.⁶ The Benn Court rejected that request as both untimely and unmeritorious. Id. at 938-41. Instructively, the Court also permitted Benn to amend his PRP to add other issues that developed in the course of the PRP as the factual record was developed. Id.; see also State v. Bisson, 156 Wn.2d 507, 515, 526, 130 P.3d 820 (2006) (accepting newly appointed counsel's amended personal restraint petition adding wholly unrelated issue within statutory time limit); RAP 16.10(c) ("The appellate court may call for additional briefs at any stage of the consideration of the petition.").

Unlike Bonds or Benn, Haghghi was not adding a new legal claim to his PRP. Instead, he was adding an alternative legal theory to the claim already presented. This very issue had been presented to the Court of Appeals as part and parcel of Haghghi's PRP when his originally appointed attorney withdrew from the case because the issue involved his own ineffective assistance.

⁶ In re Pers. Restraint of Benn, 134 Wn.2d 868, 882, 884, 952 P.2d 116 (1998), rev'd sub. nom Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002), cert. denied, 537 U.S. 942 (2002)

Accordingly, Bonds does not hold that Haghghi may not include ineffective assistance of counsel as an alternative explanation of why Winterstein should apply to him. Similarly to Benn, Haghghi should be permitted to add issues that share the same legal core as those originally filed in the PRP. The Court of Appeals decision conflicts with Bonds and creates an unreasonable hurdle for pro se petitioners.

An attorney's failure to properly advise a client may be a basis for equitable tolling. State v. Littlefair, 112 Wn.App. 749, 757-58, 51 P.3d 116 (2002) ("series of mistakes" by counsel led to client's lack of information about immigration consequences of guilty plea and permit late motion to withdraw under principle equitable tolling).

Haghghi was further disadvantaged by his attorney's ineffectiveness because he filed his PRP based on that same attorney's advice. This attorney misled Haghghi: he told Haghghi that he could ask the Court of Appeals to apply Winterstein based on "the ends of justice," yet the ends of justice are not a basis for relief in a PRP. Counsel did not tell Haghghi that his own ineffective assistance might be an issue, even though he told the Court of Appeals that he could not be appointed to the PRP due to

the intertwined question of his own deficient performance. Haghghi relied on counsel's deficient advice in filing this PRP, which further disadvantaged Haghghi based on the deception of his appellate attorney.

b. The doctrine of equitable tolling requires clarification based on the split decision in *Bonds*.

Bonds rested on a four justices who defined "equitable tolling" as requiring bad faith, deception, or false assurances; two justices who thought this standard was too strict but did not explain what standard should apply; and three justices who thought that a manifestly unfair rest and diligence by the accused satisfied the equities required. 165 Wn.2d at 144 (plurality); 165 Wn.2d at 144-45 (Justices Alexander, joined by Justice Fairhurst, concurring); 165 Wn.2d at 146 (Justice Sanders, joined by Justices Chambers, and Stephens, dissenting). Justice Alexander explained that the plurality put too high of a burden on the petitioner, citing Littlefair as an example of a person entitled to equitable tolling. 165 Wn.2d at 144-45.

Consequently, in Bonds, five justices concluded that equitable tolling must be viewed through the prism of the interest of justice and without absolute adherence to the strict demands of

“bad faith, deception, or false assurance.” However, the court did not set a clear rule.

After the decision in Bonds, the United States Supreme Court expressly adopted equitable tolling as available in habeas corpus cases, Holland v. Florida, 60 U.S. ___, 130 S.Ct. 2549, 2562, 17 L.Ed.2d 130 (2010). In Holland, the Supreme Court pronounced the standard of the lower court “too rigid,” where the lower court has used a standard of “bad faith [and] dishonesty” akin to the Bonds plurality. Id. at 2563. Holland reasoned that “[t]he ‘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. (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248, 64 S.Ct. 997, 88 L.Ed.2d 1250 (1944)). Accordingly, the Supreme Court held that “although the circumstances of a case must be ‘extraordinary’ before equitable tolling can be applied, we hold that such circumstances are not limited to those” under a fixed definition of equitable tolling. Id. at 2564.

Further contrary to the strict standard of equitable tolling adopted by a plurality in Bonds, federal courts accept the principle that a related claim, tied to a common core of operative facts, may

be amended at a later date. 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.”). This Court should adopt a similar standard.

Here, Haghghi’s attorney misled Haghghi, and if equitable tolling is required to add the claim of ineffective assistance of counsel, his case presents extraordinary circumstances resulting in a clear injustice notwithstanding his own diligence. His attorney did not tell Haghghi that he needed to file a petition for review to preserve the issue that was pending in the Supreme Court. See Declaration of Petitioner (App. C). Instead, he dissuaded Haghghi from filing a petition *pro se* by telling him it would have no merit. Haghghi was again deceived by this attorney who told him a PRP based on Winterstein could simply seek relief under the “ends of justice” when there is no such predicate for obtaining relief through a PRP. Haghghi was further deceived when his attorney told the Court of Appeals that he may have rendered ineffective assistance and this claim would likely be part of the PRP, yet his attorney did not relate this same information to Haghghi. Haghghi’s diligence as a *pro se* petitioner and the intertwined nature of the claims, all of

which stem from the application of Winterstein to his case, favor review of Haghighi's claims on their merits. The circumstances of the case are extraordinary. This Court should accept review to answer the question left unresolved by Bonds as to the legal standard of equitable tolling to add a claim to a timely filed PRP.

c. The Court of Appeals decision conflicts with new Supreme Court case law dictating the right to effective assistance of counsel on appeal and in collateral review

In several recent cases, the Supreme Court has pronounced the importance of effective assistance of counsel on appeal and created an express framework by which to measure counsel's performance.

In Lafler v. Cooper, _ U.S. __, 132 S.Ct. 1376, 1385, 2012 WL 932019 (2012), the Supreme Court recognized that Sixth Amendment right to counsel applies to "the whole course of a criminal proceeding" when "defendants cannot be presumed to make critical decisions without counsel's advice." In Lafler, the defendant rejected a plea bargain because the attorney unreasonably advised him the prosecution would be unable to prove an essential element at trial. The Supreme Court found this performance deficient, because "the question is not the fairness

and regularity of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance." Id. at 1388.

Similarly, in Missouri v. Frye, _ U.S. __, 132 S.Ct. 1399, 1406, 2012 WL 932020 (2012), the defendant entered valid guilty plea but was prejudiced in so doing because his attorney failed to convey a more favorable plea bargain offer. The Frye Court held that right to effective assistance of counsel obligates defense counsel to adequately communicate at a stage when legal aid and advice would help his client. Id. at 1408-09.

Lafler and Frye demonstrate that Haghighi's appellate attorney owed him a duty that extended beyond simply filing a brief in the Court of Appeals. Counsel was obligated to not mislead Haghighi about current law or the essential requirements of a PRP, Haghighi, to explain the consequences of failing to file a petition for review, and to admit – rather than hide -- the availability of relief premised on ineffective assistance of counsel. This Court should accept review to explain the requirements of effective assistance of counsel on appeal.

F. CONCLUSION.

Based on the foregoing, Petitioner Baron Haghghi respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 16th day of May 2012.

Respectfully submitted,



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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition)	NO. 65130-7-I
)	
of)	DIVISION ONE
)	
BARON NADDER HAGHIGHI, ^[1])	PUBLISHED OPINION
)	
Petitioner.)	FILED: April 16, 2012

LAU, J. — Baron Haghghi's personal restraint petition (PRP) challenges his judgment and sentence for unlawful issuance of checks or drafts (UICD) and first degree theft. The trial court admitted bank records under the inevitable discovery rule. We adhered to that rule on direct appeal in affirming Haghghi's convictions. Haghghi claims that rejection of the inevitable discovery rule in State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009),² decided weeks after his appeal became final, applies retroactively to his case. He also argues deficient performance by his appellate counsel. Because Winterstein does not apply retroactively on collateral review to

¹ In court documents, both "Baron Nadder Haghghi" and "Nadder Baron Haghghi" are used. For consistency in this opinion, we use "Baron Nadder Haghghi."

² In Winterstein, our Supreme Court "reject[ed] the inevitable discovery doctrine because it is incompatible with the nearly categorical exclusionary rule under article I, section 7 [of the Washington Constitution]." Winterstein, 167 Wn.2d at 636.

convictions that were final when Winterstein was decided and the ineffective assistance of counsel claim is time barred, we dismiss Haghghi's petition.

FACTS

The facts of this case are fully discussed in Haghghi's direct appeal. State v. Haghghi, noted at 151 Wn. App. 1047, 2009 WL 2515775. We repeat only the facts necessary to resolve this PRP.

The State charged Haghghi with seven counts of unlawful issuance of checks or drafts and one count of first degree theft. The charges all related to bad checks Haghghi presented to six victims between November 15, 2005, and January 3, 2006. The checks were drawn on accounts Haghghi opened at Washington Mutual Bank and Allstate Bank. The State sought an exceptional sentence based on Haghghi's history of passing bad checks.

Before trial, defense counsel moved to suppress Haghghi's Allstate bank records. A superior court judge had previously approved a search warrant for those records on February 27, 2006. By that point, several victims had identified Haghghi by photomontage and provided copies of fraudulent checks to the police. The search warrant affidavit identified account and check numbers involved. Allstate provided the records after Kent Police Detective Robert Kaufmann faxed the search warrant to Allstate's Illinois office. Defense counsel acknowledged probable cause existed to support the search warrant. He argued that the "extraterritorial search and seizure lacked constitutional authority" and that "its fruits must be excluded." Haghghi, 2009 WL 2515775, at *2. The trial court rejected the constitutional violation claim but found the warrant unenforceable in Illinois premised on the State's failure to follow proper

warrant enforcement procedures. Relying on the inevitable discovery rule, the court denied suppression of the bank records. The court also denied defense counsel's request for an inevitable discovery evidentiary hearing.

The jury convicted Haghghi on all counts. The court imposed exceptional sentences on all counts—96 months on the theft and 60 months on the UIDCs, all to run concurrently.

On appeal, Haghghi primarily claimed that the State failed to prove it would have inevitably discovered his Allstate bank records and that the trial court erred by not conducting an evidentiary hearing. Haghghi, 2009 WL 2515775 at *7. We adhered to the inevitable discovery rule² and held that the trial court properly concluded the State would have discovered Haghghi's bank records despite the warrant's unenforceability. Haghghi, 2009 WL 2515775 at *8.

Shortly after the finality of Haghghi's appeal, our Supreme Court held in Winterstein that the inevitable discovery rule violates article I, section 7 of the Washington Constitution. Haghghi timely filed a PRP in March 2010, alleging Winterstein's retroactive application in his case.³

² Under this 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." State v. Avila-Avina, 99 Wn. App. 9, 17, 991 P.2d 720 (2000).

³ Haghghi made several other arguments in his PRP, but we dismissed his petition as to all issues except Winterstein's retroactivity. See Order of Partial Dismissal and Referral, No. 65130-7-1 (Dec. 22, 2010).

DISCUSSION

To obtain collateral relief by means of a PRP, the petitioner must show that there was a “constitutional error that resulted in actual and substantial prejudice to the petitioner or that there was a nonconstitutional error that resulted in a fundamental defect which inherently results in a complete miscarriage of justice.” In re Pers. Restraint Petition of Woods, 154 Wn .2d 400, 409, 114 P.3d 607 (2005). The petitioner must show by a preponderance of the evidence that the error was prejudicial. In re Pers. Restraint Petition of Lord, 152 Wn.2d 182, 188, 94 P.3d 952 (2004).

Retroactivity

In Haghghi’s case, we affirmed the trial court’s reliance on the inevitable discovery rule before Winterstein held the rule unconstitutional under Washington law. Haghghi contends that Winterstein constitutes a change in the law that applies retroactively to his case. He specifically argues that (1) Winterstein announces no new rule under our state Supreme Court jurisprudence and (2) even if retroactivity analysis applies, state and not federal retroactivity analysis applies to his case. The State counters that Winterstein lacks retroactive application to cases already final when it was decided.

Washington courts attempt to maintain congruence with the United States Supreme Court in analyzing retroactivity. In re Pers. Restraint Petition of Markel, 154 Wn.2d 262, 268, 111 P.3d 249 (2005); see also State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627 (2005) (“Generally, we have followed the lead of the United States Supreme Court when deciding whether to give retroactive application to newly articulated principles of law.”). Under the federal common law retroactivity analysis,

“1. A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break from the past.

“2. A new rule will not be given retroactive application to cases on collateral review except where either: (a) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (b) the rule requires the observance of procedures implicit in the concept of ordered liberty.”

Evans, 154 Wn.2d at 444 (footnote omitted) (quoting In re Pers. Restraint Petition of St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992)). Our Supreme Court more recently applied federal retroactivity analysis in In re Per. Restraint Petition of Scott, No. 82951-9, 2012 WL 663944, at *4 (Mar. 1, 2012) (quoting Evans, 154 Wn.2d at 444).⁴

Under retroactivity analysis, “[a] ‘new rule’ is one that ‘breaks new ground’ or ‘was not dictated by precedent existing at the time the defendant’s conviction became final.” Markel, 154 Wn.2d at 270 (quoting Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (plurality opinion)). “If before the opinion is announced, reasonable jurists could disagree on the rule of law, the rule is new.” Scott, 2012 WL 663944, at *4 (quoting Evans, 154 Wn.2d at 444).

Haghighi acknowledges his convictions were final on direct appeal before Winterstein was decided. He claims,

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^[5] retroactivity analysis when the Supreme Court disagrees with a Court of Appeals decision and addresses an issue consistent with its own long-standing precedent.

⁴ Scott held that State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) (holding that trial judge lacked authority to impose a firearm enhancement based on a jury’s deadly weapon special verdict) is not retroactive. Scott, 2012 WL 663944 at *5.

⁵ Teague v. Lane, 489 U.S. 288, 107 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

Appellant's Reply Br. at 1-2. For this proposition, Haghghi relies on State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003).

In O'Neill, the State argued that a drug pipe and a baggie of cocaine found during an illegal search of the defendant's car were admissible under the inevitable discovery rule. O'Neill, 148 Wn.2d at 573, 591-92. Our Supreme Court held:

[T]he inevitable discovery rule cannot be applied in these circumstances, because it would undermine our holding that a lawful custodial arrest must be effected before a valid search incident to that arrest can occur. If we apply the inevitable discovery rule, there is no incentive for the State to comply with article I, section 7's requirement that the arrest precede the search.

O'Neill, 148 Wn.2d at 592 (emphasis added) (footnote omitted). The court commented in a footnote, "We leave for another case the question whether the [inevitable discovery rule] might apply in another context under article I, section 7, a question we have not decided." O'Neill, 148 Wn.2d at 592 n.11 (emphasis added).

In Winterstein, the State argued that evidence obtained during a warrantless search was admissible under the inevitable discovery rule. Winterstein, 167 Wn.2d at 631. Our Supreme Court noted that in O'Neill, "we recognized that there is no established inevitable discovery exception under article I, section 7." Winterstein, 167 Wn.2d at 635. "We further noted our disapproval of the inevitable discovery doctrine under the circumstances of [O'Neill]." Winterstein, 167 Wn.2d at 635 (emphasis added). The court concluded, "Consistent with this precedent, we reject the inevitable discovery doctrine because it is incompatible with the nearly categorical exclusionary rule under article I, section 7." Winterstein, 167 Wn.2d at 636. In doing so, the court expressly

overruled Court of Appeals decisions that applied the inevitable discovery rule.⁶ Winterstein, 167 Wn.2d at 634-35. The court explained, “The reasoning of these Court of Appeals cases is flawed . . . because it relies on the federal rationale for the inevitable discovery doctrine.” Winterstein, 167 Wn.2d at 635. The court found the federal inevitable discovery analysis “at odds with the plain language of article I, section 7, which we have emphasized guarantees privacy rights with no express limitations.” Winterstein, 167 Wn.2d at 635.

We are unpersuaded by Haghighi’s “no new rule” claim. We conclude Winterstein’s inevitable discovery holding announced a new rule for retroactivity purposes because this holding was not “dictated” by prior precedent. Markel, 154 Wn.2d at 270 (quoting Teague, 489 U.S. at 301). As discussed above, Winterstein referred to its precedent in O’Neill, in which the court expressly left undecided the question of whether the inevitable discovery rule could ever be compatible with article I, section 7. O’Neill, 148 Wn.2d at 592 n.11. O’Neill held that under the particular circumstances before it, the inevitable discovery rule violates article I, section 7. O’Neill, 148 Wn.2d at 592. Until Winterstein, no Washington Supreme Court opinion categorically rejected the inevitable discovery rule as incompatible with article I, section 7. Given O’Neill’s limited holding and the Court of Appeals decisions applying the inevitable discovery rule, “reasonable jurists could disagree on the rule of law . . .”

⁶ These cases were State v. Avila-Avina, 99 Wn. App. 9, 17, 991 P.2d 720 (2000); State v. Reyes, 98 Wn. App. 923, 930, 933, 993 P.2d 921 (2000); State v. Richman, 85 Wn. App. 568, 577, 933 P.2d 1088 (1997).

before Winterstein was decided.⁷ Scott, 2012 WL 663944 at *4 (quoting Evans, 154 Wn.2d at 444). If before the opinion is announced, reasonable jurists could disagree on the rule of law, the opinion is new. Beard v. Banks, 542 U.S. 406, 413, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004). We conclude that Winterstein announced a new rule of law.

We turn next to the retroactivity question. There is no dispute that Winterstein involves no “primary, private individual conduct beyond the power of the state to proscribe.”⁸ Winterstein applies retroactively only if it “requires the observance of procedures implicit in the concept of ordered liberty.” Evans, 154 Wn.2d at 444 (quoting St. Pierre, 118 Wn.2d at 326. This exception is reserved for only a “small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” Markel, 154 Wn.2d at 269 (internal quotation marks omitted) (quoting Schriro v. Summerlin, 542 U.S. 348, 352, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)). The United States Supreme Court has noted, “This class of rules is extremely narrow, and it is unlikely that any . . . ha[s] yet to emerge.” Markel, 154 Wn.2d at 269 (internal quotation marks omitted) (alterations in original) (quoting Summerlin, 542 U.S. at 352); see also In re Pers. Restraint Petition of Rhome, 172 Wn.2d 654, 666, 260 P.3d 874 (2011).

⁷ Haghghi also argues that in State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005), our Supreme Court signaled that the inevitable discovery rule did not apply under our state constitution. But in Gaines, despite granting review in a case involving application of the rule, the court resolved the case on other grounds and did not reach the inevitable discovery issue. Gaines, 154 Wn.2d at 716 n.5.

⁸ I.e., Winterstein did not decriminalize the conduct for which Haghghi was punished. See Rhome, 172 Wn.2d at 666.

“That a new procedural rule is fundamental in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is seriously diminished.” Rhome, 172 Wn.2d at 667 (internal quotation marks omitted) (quoting Summerlin, 542 U.S. at 352). Such a rule must “alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” Rhome, 172 Wn.2d at 667 (emphasis omitted) (internal quotations omitted) (quoting Sawyer v. Smith, 497 U.S. 227, 242, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990)).

We conclude Winterstein does not meet the requirements for a watershed rule of criminal procedure. The exclusion of relevant evidence is not a rule “without which the likelihood of an accurate conviction is seriously diminished.” Rhome, 172 Wn.2d at 667 (internal quotation marks omitted) (quoting Summerlin, 542 U.S. at 352). The Winterstein court held the inevitable discovery rule unconstitutional premised on Washington Constitution, article I, section 7’s guarantee of privacy and personal rights with no express limitations. See Winterstein, 167 Wn.2d at 631-36. Nor does Winterstein “alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” Rhome, 172 Wn.2d at 667 (emphasis omitted) (internal quotation marks omitted) (quoting Sawyer, 497 U.S. at 242). As discussed above, Winterstein specifically addresses privacy under Washington’s Constitution. That the United States Supreme Court⁹ adheres to the inevitable discovery exception to the exclusionary rule supports our conclusion that no bedrock rule of fundamental fairness is implicated here.

⁹ Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984).

Haghighi contends in the alternative that an independent state law retroactivity analysis applies under RAP 16.4(c)(4) and RCW 10.73.100(6). RAP 16.4 is a procedural rule that provides grounds for a petitioner to challenge his or her restraint and states in relevant part:

(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 (emphasis added) (boldface omitted). RCW 10.73.100(6) mirrors the language in RAP 16.4(c)(4), providing an exception to the one-year time limit for collateral attack when there has been a significant change in the law and either the legislature or a court has provided the change be retroactive.¹⁰

Citing dictum in Evans, Haghighi argues for retroactive application of Winterstein based on state law. In Evans, our Supreme Court noted, "There may be a case where [RCW 10.73.100(6)] would authorize or require retroactive application of a new rule of law when Teague would not." Evans, 154 Wn.2d at 448. But the court

¹⁰ As Haghighi's PRP was timely as to the retroactivity issue, RCW 10.73.100(6) does not apply to him. "It does, however, give some guidance to the legislature's assessment of the proper scope of retroactive application of new rules." Evans, 154 Wn.2d at 448 n.5.

declined to reach that issue. It concluded, “[P]etitioners do not make a compelling case that there are reasons for retroactive application that are sufficient under state law.”

Evans, 154 Wn.2d at 449. The court reasoned, “Generally, we have followed the lead of the United States Supreme Court when deciding whether to give retroactive application to newly articulated principles of law.” Evans, 154 Wn.2d at 444. In State v. Abrams, 163 Wn.2d 277, 291, 178 P.3d 1021 (2008), our Supreme Court cited Evans for the proposition that “[w]e have interpreted [RCW 10.73.100(6)] consistent with [the Teague federal retroactivity analysis].” Moreover, RAP 16.4(d) provides that the appellate court “will only grant relief . . . if such relief may be granted under RCW 10.73.090, .100, and .130.” Because the Abrams court interpreted the statutory language of RCW 10.73.100(6) consistent with Teague, the Teague federal retroactivity analysis also applies to RAP 16.4(c)(4). We conclude that RAP 16.4(c)(4) does not establish an independent state retroactivity analysis.

Haghighi cites to no Washington case applying a rule retroactively on collateral attack based on a retroactivity analysis other than Teague.¹¹ See State v. Logan, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) (“Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). Our Supreme Court has consistently applied federal retroactivity analysis to state constitutional questions. See, e.g., St. Pierre, 118 Wn.2d 321 (applying federal retroactivity analysis to state

¹¹ Haghighi cites to cases from other states that have developed state law to govern retroactivity in state collateral attack cases. See Appellant’s Reply Br. at 3-4. But he cites to no such case in Washington.

constitutional claim); Scott, 2012 WL 663944, at *3-4 (same). We decline to depart from binding Supreme Court precedent.

Based on the reasons discussed above, we hold that Winterstein does not apply retroactively on collateral review to convictions that were final when Winterstein was decided and no independent state retroactivity standard exists.

Ineffective Assistance

Haghighi also argues that his appellate counsel failed to advise him to petition for review regarding the inevitable discovery rule's validity under the state constitution before his case became final. The State contends that Haghighi's ineffective assistance claim is time barred under RCW 10.73.090 and, alternatively, that Haghighi fails to establish that counsel was ineffective.

RCW 10.73.090(1) bars review of an untimely collateral attack of a judgment and sentence. "No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one 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." RCW 10.73.090(1).¹² Collateral attack includes the filing of a PRP. RCW 10.73.090(2). The time bar runs from [t]he date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction" if that is the last triggering event. RCW 10.73.090(3)(b). "RCW 10.73.090 is a mandatory rule that acts as a bar to appellate court consideration of PRPs filed after the limitation period has passed, unless the petitioner demonstrates that the petition is based on one of the

¹² RAP 16.4 incorporates the requirements of RCW 10.73.090(1).

exemptions enumerated in RCW 10.73.100.”¹³ In re Pers. Restraint Petition of Bonds, 165 Wn.2d 135, 140, 196 P.3d 672 (2008). RCW 10.73.090’s one-year time limit is not jurisdictional; rather it is a statute of limitations issue. Bonds, 165 Wn.2d at 140.

In Bonds, our Supreme Court held that the principles of timely filing and finality of judgments preclude consideration of arguments made in an untimely amended PRP. Bonds, 165 Wn.2d at 143-44. The court reasoned, “Though the appellate rules do not expressly authorize or prohibit amendment to PRPs, we have accepted amendments to a PRP made within the statutory time limit.” Bonds, 165 Wn.2d at 140. Even if a petitioner does not move to amend his PRP, his opening brief serves as an amended PRP if it adds a claim not raised in his PRP. In re Pers. Restraint Petition of Davis, 151 Wn. App. 331, 335 n.6, 211 P.3d 1055 (2009).

¹³ RCW 10.73.100 provides: “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.”

We issued a mandate on Haghghi's direct appeal on September 25, 2009. He timely filed his initial PRP on March 16, 2010. He failed to raise a claim of ineffective assistance of counsel in his initial PRP. His brief, which raises that claim for the first time, was filed on May 13, 2011—nearly 20 months after we issued our mandate on his appeal. Haghghi raised no potential exceptions or exemptions to RCW 10.73.090's time bar. Accordingly, his ineffective assistance claim is time barred.

Haghghi argues that the ineffective assistance claim he raised in his brief should "relate back" to his original PRP because the arguments in his brief and the original petition "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." Appellant's Reply Br. at 8. He cites to Federal Rule of Civil Procedure 15, which governs amended and supplemental pleadings. That rule provides, "An amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B).

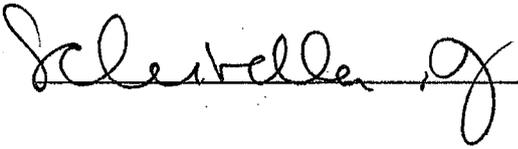
Washington's civil rules contain a similar provision. See CR 15(c). But in In re Personal Restraint Petition of Benn, 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998), our Supreme Court noted, "There is no provision in the rules of appellate procedure similar to CR 15(c) . . . indeed, there is no provision at all regarding amendments to personal restraint petitions." The court emphasized that "postconviction challenges must be brought within one year after a conviction becomes final" and that RCW 10.73.100 allows only "limited exceptions" to RCW 10.73.090's statute of limitation. Benn, 134 Wn.2d at 938. Haghghi cites to no Washington case in which a PRP petitioner was

permitted to "relate back" an untimely argument based on the civil rules. His ineffective assistance claim is time barred.¹⁴

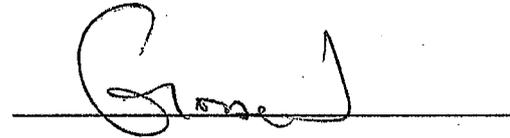
CONCLUSION

Winterstein does not apply retroactively in Haghghi's case and his ineffective assistance claim is time barred. Accordingly, we dismiss his PRP.

WE CONCUR:

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A handwritten signature in cursive script, appearing to read "Jan, J.", written over a horizontal line.

A handwritten signature in cursive script, appearing to read "Stone", written over a horizontal line.

¹⁴ Because we do not reach the merits of Haghghi's ineffective assistance claim, the cases Haghghi cites in his statement of additional authorities, filed after oral argument, are inapplicable.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 65130-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Donna Wise, DPA
King County Prosecutor’s Office-Appellate Unit
- petitioner
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 16, 2012

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