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NO. 87529-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF

NADDER BARON HAGHIGHI,

Petitioner.

BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys (“WAPA”) represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. Those persons are also responsible by law for responding to collateral attacks upon criminal convictions that are filed in state courts. *See* RAP 16.6(b).

WAPA is interested in cases, such as this, that have wide-ranging impact on the criminal justice system. Recognition of the limited nature of the jurisdiction that has been conferred upon the courts by the legislature with regard to collateral attacks upon criminal convictions will foster respect for the courts by ensuring the finality of judgments.

II. ISSUES PRESENTED

1. Whether this Court’s rejection of the inevitable discovery exception to the exclusionary rule should be applied retroactively on collateral attack?
2. Whether the petitioner has established that the one-year time limit in RCW 10.73.090 should be equitably tolled?
3. Whether appellate counsel’s failure to predict a future favorable change in the law violates a defendant’s right to the effective assistance of

counsel?

III. STATEMENT OF THE CASE

WAPA is satisfied with, and adopts the statement of the case provided by the State in its briefs.

IV. ARGUMENT

A. Washington Has Never Retroactively Applied a New Rule Mandating the Suppression of Evidence to an Already Final Case

A court's authority to reopen a judgment in a criminal case arises from either a statute or the constitution. The constitutional authority, which is contained in article 1, § 13, is very narrow and does not permit challenges that go beyond the face of a final judgment of a court of competent jurisdiction. *In re Runyan*, 121 Wn.2d 432, 441-42, 853 P.2d 424 (1993). Between 1855 and 1947, statutes similarly limited a court's authority to open a final judgment to issues of facial invalidity. Laws of 1854, p. 213, §445 (codified as Remington's Revised Statutes § 1075).¹ This restriction

¹Laws of 1854, p. 213, §445 (codified as Remington's Revised Statutes § 1075), provided that:

No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of confinement has not expired, in either of the cases following:

1. Upon any process issued on any final judgment of a court of competent jurisdiction. . .

This Court upheld the constitutionality of R.R.S. § 1075 in *In re Lybarger*, 2 Wash. 131, 25 P. 1075 (1891).

foreclosed the retroactive application of any new article I, § 7 rule, as a violation of such a rule would not be visible on the face of the judgment. *See generally In re Grieve*, 22 Wn.2d 902, 911-12, 158 P.2d 73 (1945) (“allegations that the petitioner was convicted . . . because the trial judge refused to suppress evidence secured without a search warrant . . . furnish[es] no basis for the issue of a writ of habeas corpus by the courts of this state to release a petitioner detained by virtue of a judgment and sentence fair on its face.”).

In 1947, the Legislature authorized courts, for the first time, to examine constitutional claims asserted in a collateral attack when the judgment is fair on its face. Laws of 1947, ch. 256, § 3.² This new authority, however, did not herald the retroactive application of new article I, § 7 rules

²In 1947, the legislature added the following language to R.R.S. § 1075:

No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following:

(1) Upon any process issued on any final judgment of court of competent jurisdiction except when it is alleged in the petition that rights guaranteed the petitioner by the Constitution of the State of Washington or of the United States have been violated.

Laws of 1947, chapter 256, § 3.

Once the legislature acted to expand jurisdiction beyond that preserved by Const. art. I, § 13, Const. article 4, § 4 allowed the Court to adopt procedural rules for dealing with the *legislatively* expanded scope of jurisdiction. *Holt v. Morris*, 84 Wn.2d 841, 529 P.2d 1081 (1974), *overruled on other grounds*, *Wright v. Morris*, 85 Wn.2d 899, 540 P.2d 893 (1975). To the extent any procedural rules regarding collateral attacks conflict with the legislature’s substantive grant of authority, the statute controls. *See, e.g., In re Personal Restraint of Johnson*, 131 Wn.2d 558, 563-65, 933 P.2d 1019 (1997).

to final decisions. A claim that evidence was obtained by an illegal search would not be considered in a habeas corpus proceeding. *Mason v. Cranor*, 42 Wn.2d 610, 613, 257 P.2d 211 (1953). In fact, a defendant could not even assert a new article I, § 7 rule regarding the seizure of evidence in a direct appeal as any ground for suppression that was not asserted prior to or during the trial was considered waived. See, e.g., *State v. Jackovick*, 56 Wn.2d 915, 916, 355 P.2d 976 (1960); *State v. Robbins*, 37 Wn.2d 431, 432, 224 P.2d 345 (1950); *State v. Gunkel*, 188 Wash. 528, 535, 63 P.2d 376 (1936).

Retroactivity of new constitutional rules did not become an issue in Washington until *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601(1965), established the principle that, since the Constitution neither prohibits nor requires new federal constitutional rules to be retroactive, it might be appropriate to apply some rules prospectively only. Since *Linkletter*, the federal retroactivity analysis underwent numerous iterations. See *In re St. Pierre*, 118 Wn.2d 321, 324-26, 823 P.2d 492 (1992). Washington, from the outset, has stayed in step with federal retroactivity analysis. *Id.* at 324.

Currently, this Court applies the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). Under this test, Haghghi is not entitled to the retroactive application of *State v.*

Winterstein,³ as that decision neither alters the range of conduct or the class of persons that may be punished nor constitutes a watershed rule that implicates the fundamental fairness and accuracy of the criminal proceeding. *See generally State v. Markel*, 154 Wn.2d 262, 268-69, 111 P.3d 249 (2005).

Haghighi, aware that he cannot succeed under the *Teague* test, urges this Court to apply the *Chevron Oil*⁴ balancing test. Petitioner's Supplemental Brief, at 13. The 1971 *Chevron Oil* test, however, has never been applied by this Court to criminal matters.

Prior to this Court's adoption of the *Teague* test, this Court considered whether to give retroactive effect to new search laws. As a general rule, this Court determined that "those decisions limiting the government's ability to obtain and use otherwise probative evidence against the defendant" will only apply prospectively. *In re Haverty*, 94 Wn.2d 621, 625, 618 P.2d 1011 (1980). This Court adhered to this principle in *In re Sauve*, 103 Wn.2d 322, 692 P.2d 818 (1985), finding that retroactive application of a new Fourth Amendment rule would have a negative effect on the administration of justice by undermining the finality of litigation and resulting in a large number of collateral attacks. *Sauve*, 103 Wn.2d at 328-29. The Court also determined that it was unreasonable to expect police to foresee the new rule and the

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

⁴*Chevron Oil v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971).

suppression of evidence has little to do with the truth-finding function of a criminal trial. *Id.*

This Court reached the same conclusion in *In re Taylor*, 105 Wn.2d 683, 717 P.2d 755 (1986), *overruled by In re Personal Restraint of Nichols*, 171 Wn.2d 370, 375-76, 256 P.3d 1131 (2011).⁵ *Taylor* presented the question of whether the article I, § 7 automobile search rules announced in *State v. Ringer*⁶ should apply retroactively to a case that was final when *Ringer* was announced. The *Taylor* court applied three criteria for determining whether a new rule should apply retroactively on collateral review:

(a) whether the purpose of the new rule would be served by retroactive application, (b) what was the extent of reliance by law enforcement authorities on the old standards, and (c) what effect would retroactive application of the new standards have on the administration of justice.

Taylor, 105 Wn.2d at 691, citing *Stovall v. Denno*, 388 U.S. 293, 297, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). The Court found that the new *Ringer* rule, like other rules designed to prevent the unreasonable search and seizure of evidence, should only apply prospectively. *Taylor*, 105 Wn.2d at 691-92.

In the instant case, the police officers obtained a valid warrant for Haghghi's bank records. Their only error was in how that warrant was

⁵*Nichols* recognized that the retroactivity balancing test utilized in *Taylor* was superseded by the *Teague* test.

⁶*State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983).

executed in Illinois. *See* State's Response to Personal Restraint Petition, Appendix F. Retroactive application of *Winterstein* to their conduct will not increase the truth-finding aspect of the trial. It would, however, open the floodgates to an unknown number of collateral attacks.⁷ This Court has always found that the likelihood of numerous new collateral attacks weighs against the retroactive application of new rules related to searches.

Haghighi has not argued that this Court's policy of applying new search rules prospectively is either wrong or harmful, as to a petitioner whose conviction was final when the new rule was announced. He has not explained why *Teague* should be replaced with a balancing test or, if *Teague* is abandoned and a balancing test applied, why this Court's *Taylor* balancing test should be replaced with the *Chevron Oil* balancing test. Under the doctrine of stare decisis, this Court will reverse itself on an established rule of law only upon a showing that the rule is incorrect and harmful. *State v. Ray*, 130 Wn.2d 673, 678, 926 P.2d 904 (1996). A decision is harmful when it has a detrimental effect on the public interest. *State v. Siers*, 174 Wn.2d 269, 276, 274 P.3d 358 (2012). Thus even if this Court were to grant

⁷This Court has solely applied the *Teague* test when deciding whether an otherwise time-barred collateral attack may proceed pursuant to RCW 10.73.100(6). The Legislature has ratified that decision by not inserting a different test into RCW 10.73.100(6). Abandoning the *Teague* test in favor of the balancing test adopted pursuant to RAP 16.4(d) in *Taylor* could result in differing standards being applied to collateral attacks filed within one year of finality and those filed later, as RCW 10.73.100(6) only applies to the late filed petitions. To date, this Court has avoided that problem with its announcement in *Nichols* recognized that the retroactivity balancing test utilized in *Taylor* was superseded by the *Teague* test. *Nichols*, 171 Wn.2d at 375-76.

Haghighi's request to abandon *Teague* for a balancing test, Haghighi's personal restraint petition must be denied under existing precedent.

B. The Requirements for Equitable Tolling Have Not Been Met in this Case

Haghighi seeks to avoid the retroactivity problem by claiming his appellate attorney provided ineffective assistance of counsel ("IAC"). Haghighi, however, did not assert this ground for relief in a timely manner. *See In re Personal Restraint of Haghighi*, 167 Wn. App. 712, 725-26, 276 P.3d 311, *review granted*, 175 Wn.2d 1021 (2012) (IAC claim first raised 20 months after the mandate issued).

RCW 10.73.090 bars consideration of an IAC claim that is asserted more than one year after the conviction becomes final. *See, e.g., In re Personal Restraint of Weber*, 175 Wn.2d 247, 284 P.3d 734 (2012) (dismissing collateral attack that asserted an IAC claim as time-barred); *Shumway v. Payne*, 136 Wn.2d 383, 400, 964 P.2d 349 (1998) (prohibiting the filing of an IAC claim beyond the 1-year period authorized by RCW 10.73.090); *Runyan*, 121 Wn.2d at 436 (dismissing as time-barred petitioner Runyan's collateral attack that asserted a claim of ineffective assistance of counsel).

There are a number of statutory exceptions to the time limit in RCW 10.73.090. *See* RCW 10.73.100. Haghighi, however, asserted none of these exceptions in the Court of Appeals or in his petition for review. Haghighi did

raise the doctrine of equitable tolling for the first time in his petition for review. In addition to the general rule that this Court does not review issues not raised or briefed in the Court of Appeals,⁸ whether the RCW 10.73.090 time limit should be equitably tolled is a fact-specific question that requires the petitioner seeking tolling to produce evidence of individualized hardship. The record in this case contains no evidence of either individualized hardship or other extraordinary circumstances.

Equitable tolling is a remedy that permits a court to allow an action to proceed when justice requires it, even though a statutory time period has elapsed. *In re Personal Restraint of Bonds*, 165 Wn.2d 135, 141, 196 P.3d 672 (2008). Equitable tolling is used sparingly in collateral attacks so as to not undercut the finality of judgments. *Id.*, at 67. *Accord Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) ("Any invocation of equity to relieve the strict application of a statute of limitation must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes.").

A petitioner seeking the equitable tolling of the RCW 10.73.090 time limit has a high hurdle to overcome. The petitioner must establish, at a minimum, "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." *Bonds*, 165 Wn.2d at

⁸See *State v. Halstein*, 122 Wn. 2d 109, 129-130, 857 P.2d 270 (1993).

146 (Sanders, J., dissenting) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)). A petitioner, in Washington, may also be required to demonstrate bad faith, deception, or false assurances by the defendant. *Bonds*, 165 Wn.2d at 141. To date, no petitioner has satisfied the test for equitable tolling contained in *Bonds*.⁹ Equitable tolling does not eliminate the statute of limitations, it merely extends the period for a length of time equal to the disability. See, e.g., *Hazel v. Van Beek*, 135 Wn.2d 45, 954 P.2d 1301 (1998) (equitable tolling improperly applied where petitioner did not explain how the 1984 bankruptcy action prevented her from enforcing her judgment between August 1984 and November 2, 1993).

The federal courts have determined that the time limitation for filing a federal habeas corpus action set forth at 28 U.S.C. § 2244(d) is subject to equitable tolling. *Holland v. Florida*, ___ U.S. ___, 130 S. Ct. 2549, 2560, 177 L. Ed. 2d 130 (2010). Although the federal courts do not require proof of governmental misconduct, the federal courts do recognize that “[e]quitable tolling will not be available in most cases, as extensions of time

⁹Prior to *Bonds*, the Court of Appeals applied a less stringent test for equitable tolling. See *Bonds*, 165 Wn.2d at 142 (citing *In re Personal Restraint of Holsington*, 99 Wn. App. 423, 431, 993 P.2d 296 (2000), and *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002), review denied, 149 Wn.2d 1020 (2003)). It is doubtful that these Court of Appeals’ decisions survive *Bonds*.

will only be granted if ‘extraordinary circumstances’ beyond a prisoner's control make it impossible to file a petition on time.” *Calderon v. U.S. Dist. Court (Beeler)*, 128 F.3d 1283, 1289 (9th Cir. 1997), *cert. denied*, 523 U.S. 1061 (1998), *overruled in part on other grounds, Calderon v. U.S. Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999) (citing *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996)). Equitable tolling does not eliminate the statute of limitations, it merely extends the period for a brief length of time. *See, e.g., Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999)(no equitable tolling where petitioner waited additional six months to act, after elimination of alleged extraordinary circumstances).

Equitable tolling is not available for “what is at best a garden variety claim of excusable neglect”. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). Application of this principle has led the federal courts to reject equitable tolling predicated upon deficiencies related to petitioner’s pro se status, lack of knowledge and expertise,¹⁰ delay in receiving the state disposition,¹¹ delay in receiving

¹⁰*See, e.g., Johnson v. United States*, 544 U.S. 295, 311, 125 S. Ct. 1571, 161 L. Ed. 2d 542 (2005); *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000), *cert. denied*, 531 U.S. 1194 (2001).

¹¹*See, e.g., Drew v. Department of Corrections*, 297 F.3d 1278 (11th Cir. 2002), *cert. denied*, 537 U.S. 1237 (2003); *Geraci v. Senkowski*, 23 F. Supp.2d 246, 252-53 (E.D. N.Y. 1998), *aff’d*, 211 F.3d 6 (2nd Cir.), *cert. denied*, 531 U.S. 1018 (2000).

transcripts,¹² deficiencies in the prison law library,¹³ erroneous advice from a lawyer,¹⁴ hospitalization,¹⁵ prison lockdowns,¹⁶ the merits of the collateral attack,¹⁷ illiteracy,¹⁸ lack of knowledge of English if a petitioner has access to a translator or other assistance,¹⁹ and prior unsuccessful efforts to be heard.²⁰ Equitable tolling was available when a petitioner's reliance upon prison officials to comply with his instructions regarding timely submitted petition was ignored,²¹ when the court lost a timely filed petition,²² when a petitioner was mentally incompetent to assist his counsel,²³ and when a

¹²See, e.g., *Gassler v. Bruton*, 255 F.3d 492, 495 (8th Cir. 2001).

¹³See, e.g., *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000)(en banc).

¹⁴ See, e.g., *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir.), cert. denied, 534 U.S. 944 (2001) ("attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling").

¹⁵See, e.g., *Rhodes v. Senkowski*, 82 F. Supp.2d 160 (S.D.N.Y. 2000).

¹⁶See, e.g., *Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir.1998), cert denied, 526 U.S. 1040 (1999).

¹⁷See, e.g., *Helton v. Sec'y for the Department of Corrections*, 259 F.3d 1310, 1314-15 (11th Cir. 2001), cert. denied, 535 U.S. 1080 (2002).

¹⁸See, e.g., *Schneider v. McDaniel*, 674 F.3d 1144 (9th Cir. 2012).

¹⁹See, e.g., *Pabon v. Mahanoy*, 654 F.3d 385, 400-02 (3rd Cir. 2011), cert. denied, 132 S. Ct. 2430 (2012).

²⁰See, e.g., *Jones v. Morton*, 195 F.3d 153, 160 (3rd Cir. 1999).

²¹See, e.g., *Miles v. Prunty*, 187 F.3d 1104 (9th Cir. 1999).

²²See, e.g., *Corjasso v. Ayers*, 278 F.3d 874 (9th Cir. 2002).

²³See, e.g., *Calderon v. U.S. Dist. Court (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998), cert. denied, 526 U.S. 1060 (1999), abrogated by *Woodford v. Garceau*, 538 U.S. 202, 206, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003).

petitioner was completely abandoned by his attorneys.²⁴

Here, Haghghi identifies no external impediment to his raising the IAC claim within the statutory one-year period. Although in custody, Haghghi was able to prepare a timely pro se personal restraint petition. Haghghi knew long before the September 25, 2010, expiration of the RCW 10.73.090 time limit²⁵ the facts that underlie his IAC claim: (1) that his appellate counsel raised an inevitable discovery claim in the direct appeal,²⁶ (2) that his appellate counsel did not believe that Haghghi would prevail on this claim in the Washington Supreme Court,²⁷ and (3) that appellate counsel's assessment of success on the inevitable discovery claim proved to be inaccurate.²⁸

Haghghi identifies no external impediment that prevented him from raising the IAC claim in the 193 days between the filing of his initial pro se

²⁴*See Maples v. Thomas*, ___ U.S. ___, 132 S. Ct. 912, 181 L. Ed. 2d 807 (2012) ("extraordinary circumstances" found where the prisoner's attorneys of record abandoned him and he had no reason to suspect that he lacked counsel able and he was willing to represent him during the time permitted for an appeal); *Holland v. Florida*, ___ U.S. ___, 130 S. Ct. 2549, 2563, 177 L. Ed. 2d 130 (2010) ("grossly negligent" attorney conduct may amount to a showing of extraordinary circumstances to warrant equitable tolling).

²⁵In fact, Haghghi possessed the facts that he based his untimely IAC claim on prior to the filing of his March 16, 2010, initial PRP.

²⁶*See* Brief of Petitioner Appendix A (Counsel's August 17, 2009, letter to Haghghi).

²⁷*See* Brief of Petitioner Appendix B (Counsel's August 20, 2009, letter to Haghghi).

²⁸*See* Petitioner's Supplemental Brief Appendix D (Counsel's December 22, 2009, letter to Haghghi).

petition and the expiration of the RCW 10.73.090 time limit. *Haghighi*, 167 Wn. App. at 725-26 (initial PRP filed on March 16, 2010, and mandate issued on September 25, 2009). Haghighi has produced no evidence of incompetency or illness sufficient to extend the one-year time limit contained in RCW 10.73.090, by even one day. His untimely request for equitable tolling must, therefore, be rejected.

C. Haghighi's Ineffective Assistance of Counsel Claim Fails on the Merits

Haghighi contends that his attorney violated his constitutional right to effective assistance of counsel by not filing a petition for review that preserved the inevitable discovery argument and/or by not advising Haghighi that the inevitable discovery argument possessed merit. Haghighi, however, had no constitutional or statutory right to the assistance of counsel with respect to the filing of a petition for review in this Court.

In regard to an individual's right to counsel, it is firmly established that the right to counsel under the Sixth Amendment and under Const. art. 1, § 22 (amend. 10) attaches only at or after the initiation of formal charges. *State v. Kalakosky*, 121 Wn.2d 525, 534, 852 P.2d 1064 (1993). The Sixth Amendment right to counsel, however, ends with sentencing.

After sentencing, the Equal Protection Clause of the Fourteenth Amendment requires that a State must provide an indigent defendant with appointed counsel for the prosecution of his or her first direct appeal as a

matter of right. *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). The State, however, is not required “to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.” *Ross v. Moffitt*, 417 U.S. 600, 612, 616, 94 S. Ct. 2437, 2444-45, 2447, 41 L. Ed. 2d 341 (1974).

While Const. art. 1, § 22's right to counsel extends through the first appeal as a matter of right, it does not extend to discretionary reviews or collateral attacks. *See State v. Koloske*, 100 Wn.2d 889, 892, 676 P.2d 456 (1984); *State v. Mills*, 85 Wn. App. 285, 290, 932 P.2d 192 (1997); *State v. Folden*, 53 Wn. App. 426, 430, 767 P.2d 589, *review denied*, 112 Wn.2d 1022 (1989). The Legislature authorizes the expenditure of public funds to pay for counsel in discretionary reviews, but only after the court in which review is being sought, grants the petition. *See RCW 10.73.150(6) and (7)*.

An attorney whose representation of a defendant is drawing to an end does have a responsibility to withdraw in a manner that does not materially harm the client. *Cf. RPC 1.16(b)(1)*. Haghghi's attorney fulfilled this requirement. Casey Grannis provided timely notice to Haghghi of the Court of Appeal's decision and advised Haghghi of the time limits for filing a motion to reconsider or a petition for review. *See Brief of Petitioner*,

appendices A and B. Mr. Grannis also advised Haghghi that Haghghi would have to prepare any petition for review himself. No more was required.

Haghghi attempts to circumvent the lack of statutory or constitutional right to counsel by arguing that Mr. Grannis was ineffective by not advising Haghghi that the Washington Supreme Court might disagree with the Court of Appeal's application of the inevitable discovery doctrine. Counsel, however, is not ineffective for failing to forecast changes or advances in the law. *See, e.g., In re Personal Restraint Petition of Benn*, 134 Wn.2d 868, 939, 952 P.2d 116 (1998) (counsel could not be faulted for failing to anticipate a change in the law); *Johnson v. Armontrout*, 923 F.2d 107, 108 (8th Cir.), *cert. denied*, 502 U.S. 831 (1991) (same); *Elledge v. Dugger*, 823 F.2d 1439, 1443 (11th Cir. 1987) ("Reasonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop."); *Bullock v. Carver*, 297 F.3d 1036, 1051 (10th Cir.), *cert. denied*, 537 U.S. 1093 (2002) ("we have rejected ineffective assistance claims where a defendant 'faults his former counsel not for failing to find existing law, but for failing to predict future law' and have warned 'that clairvoyance is not a required attribute of effective representation.'") (quoting *United States v. Gonzalez-Lerma*, 71 F.3d 1537, 1542 (10th Cir. 1995)).

Counsel, moreover, is not required to preserve an issue after a higher court has granted review of an intermediary appellate court's decision but not yet passed upon the propriety of the lower court's reasoning. *See United States v. McNamara*, 74 F.3d 514, 516-17 (4th Cir. 1996) (counsel was not constitutionally deficient for following controlling law of circuit that willfulness was not an element of structuring financial transactions to avoid currency reporting requirements even though Supreme Court had granted certiorari on that issue at time legal advice was given; "an attorney's failure to anticipate a new rule of law was not constitutionally deficient"); *Kornahrens v. Evatt*, 66 F.3d 1350, 1359 (4th Cir. 1995), *cert. denied*, 517 U.S. 1171 (1996) (trial counsel in capital case was not constitutionally ineffective for failing to preserve an issue at trial based merely on the Supreme Court's grant of certiorari in a case which raised the issue); *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir. 1991), *cert. denied*, 504 U.S. 920 (1992) (ruling that trial counsel was not ineffective by failing to raise *Batson*²⁹ challenge two days before *Batson* was decided). Haghghi's untimely ineffective assistance of appellate counsel claim fails on the merits.

V. CONCLUSION

WAPA respectfully requests that the Court reaffirm its adherence to the *Teague* test for retroactivity as that rule strikes a fair balance between the

²⁹*Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

interests of the individual and society's interest in the finality of judgements.

Respectfully submitted this 18th day of January, 2013.

A handwritten signature in cursive script that reads "Pamela Beth Loginsky". The signature is written in black ink and is positioned above the typed name.

Pamela B. Loginsky, WSBA 18096
Staff Attorney

OFFICE RECEPTIONIST, CLERK

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To: OFFICE RECEPTIONIST, CLERK; Donna Wise; nancy@washapp.org
Subject: In re Personal Restraint of Haghghi, No. 87529-4

Dear Clerk and Counsel,

Attached for filing is WAPA's motion to file amicus curiae brief, the proposed brief, and a proof of service. Please let me know if you should encounter any difficulty in opening these documents.

Sincerely,

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