

No. 85992-2

IN THE WASHINGTON SUPREME COURT

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IN RE PERSONAL RESTRAINT PETITION OF  
CHARLES WEBER,  
Petitioner.

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BRIEF OF *AMICUS CURIAE* WASHINGTON  
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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## I. INTRODUCTION

More than three centuries ago, the French thinker Francois-Marie Arouet, commonly known as Voltaire, wrote: “[T]is much more Prudence to acquit two Persons, tho’ actually guilty, than to pass Sentence of Condemnation on one that is virtuous and innocent.” Voltaire, *Zadig ou la Destinee* 53 (1747). Just a few years later, the English jurist William Blackstone announced his famous ratio: “It is better that ten guilty persons escape than one innocent suffer.” Blackstone, *Commentaries on the Laws of England* (1753-1765). Then, in 1785, Benjamin Franklin echoed this same principle and explained: “it is better [one hundred] guilty Persons should escape than that one innocent Person should suffer.” Franklin *Works* 293 (1970) (*quoting* March 14, 1785 Letter from Benjamin Franklin to Benjamin Vaughn). Concern about the injustice that results from the conviction and condemnation of an innocent person has long been a cornerstone of this country’s criminal justice system.

The interest in protecting the finality of criminal judgments is an important one. Nevertheless, the Washington Association of Criminal Defense Lawyers (“WACDL”) maintains that this policy must yield, as a matter of fundamental due process, to the manifest injustice that would result from the continued incarceration of a demonstrably innocent person. WACDL ask this Court to acknowledge that innocence does matter – and that there is a strong public interest in ensuring that innocent persons are not condemned to prison. First, the Court should confirm that Washington

law recognizes a freestanding constitutional claim to have a conviction set aside on grounds of actual innocence. Second, the Court should hold that a petitioner who brings a valid “actual innocence” is entitled to equitable tolling of an otherwise time-barred petition for post-conviction relief.

## **II. STATEMENT OF THE CASE**

WACDL adopts the statement of the case from Weber’s Opening Brief in Support of Personal Restraint Petition.

## **III. ARGUMENT**

### **A. Background**

In his influential 1970 article, Judge Henry Friendly provocatively asked why innocence was seemingly irrelevant to federal habeas corpus review. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970). Friendly posed the question whether the petitioner’s guilt or innocence should have any bearing on the availability of federal habeas corpus relief. For most of its long history, federal habeas has known no such “innocence” limitation.

In the decades since Judge Friendly first asked this vital question, the United States Supreme Court has acknowledged that evidence of innocence may play an important role in federal post-conviction proceedings. In *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), the Court assumed without deciding that “in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to pursue

such a claim.” 506 U.S. at 417. Just two years later, the Court again addressed innocence, ruling in *Schlup v. Delo*, 513 U.S. 298, 314-15, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), that actual innocence may excuse the procedural default of some other constitutional claim. The Court has since confirmed that proof of innocence could create a “gateway” to permit a reviewing court to consider an otherwise defaulted claim. *See House v. Bell*, 547 U.S. 518, 536-37, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006).

Yet, the federal courts remain relatively unwilling to consider claims of actual innocence. *See, e.g.*, Note, *Claiming Innocence*, 82 Minn. L.Rev. 1629 (2008). In an era where innocence can sometimes be proved with great certainty, a state trial court is often in the best position to assess a claim of actual innocence. Indeed, why have constitutional criminal procedural protections ensuring against the risk of convicting the innocent if courts must remain powerless to provide relief to an innocent prisoner?

Recent history regrettably demonstrates that many innocent persons have been wrongly convicted in the state criminal courts throughout our country.<sup>1</sup> For example, one study found 196 non-DNA exonerations occurred from 1989 through 2003. *See* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L.

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<sup>1</sup> *See generally* Note, *Protecting the Innocent: Post-Conviction DNA Exoneration*, 36 Hastings Const. L.Q. 285 (2009); *Achieving Justice: Freeing the Innocent, Convicting the Guilty* (ABA 2006); Myrna S. Raeder, *Introduction to Wrongful Convictions Symposium*, 37 Sw. L. Rev. 745 (2008); Myrna S. Raeder, Andrew E. Taslitz, and Paul C. Giannelli, *Convicting the Guilty, Acquitting the Innocent: Recently Adopted ABA Policies*, 20 Crim. Just. 14 (Winter 2006); Myrna S. Raeder, *What Does Innocence Have to Do with It? A Commentary on Wrongful Convictions and Rationality*, 2003 Mich. St. L. Rev. 1315.

& CRIMINOLOGY 523, 524 (2006). *See also* “Innocence and the Death Penalty” (available at <http://www.deathpenaltyinfo.org/>).

Wrongful convictions cast doubt on the reliability and fairness of the criminal justice system, and expose public safety failures because perpetrators, who include serial rapists and murderers, remain at large to pursue new victims. Thus, all of us, not just wrongfully convicted defendants, are harmed by these systemic breakdowns. WACDL submits that the State of Washington has a great interest in correcting any wrongful conviction.

**B. The Court Should Recognize a Freestanding Constitutional Claim of Innocence**

Blind faith in the justice system might lead one to assume that so long as the courts protect the constitutional rights of the accused no innocent person will ever be wrongly convicted. As a result of new technology (especially DNA testing), however, it is well recognized that innocent men and women are recurrently incarcerated and convicted even in the absence of factual or constitutional error.

While the United States Supreme Court has yet to recognize a freestanding constitutional claim to have a conviction set aside on grounds of actual innocence<sup>2</sup>, several state courts have recognized the existence of

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<sup>2</sup> The Supreme Court has not finally resolved the issue of whether there is a federal Constitutional right to be released upon proof of actual innocence. As Chief Justice Roberts recently observed, “Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet.”

such a right.<sup>3</sup> These States tend to ground the source of that constitutional right in the due process clause, and have held that there is a substantive due process right not to be punished for a crime when, subsequent to their trial, it has been convincingly shown that they are innocent.<sup>4</sup> Also, several courts have noted that punishment of an actually innocent person is “cruel and unusual” within the meaning of the state constitution.

This case raises the question of whether actual innocence is a claim of constitutional magnitude under the Washington Constitution. WACDL respectfully submits that this Court should recognize the existence of such a claim, while at the same time setting an appropriately demanding threshold for the quantum of proof of such innocence which is to be required before relief can be granted. While there are multiple potential

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*District Attorney's Office v. Osborne*, 577 U.S. \_\_\_, 129 S.Ct. 2308, 2321, 174 L.Ed.2d 38 (2009) (citations omitted).

<sup>3</sup> See *Montoya v. Ulibarri*, 163 P.3d 476, 484 (N.M. 2007); *New York v. Cole*, 765 N.Y.S.2d 477, 485 (N.Y. Sup. Ct. 2003); *Summerville v. Warden, State Prison*, 229 Conn. 397, 641 A.2d 1356 (Conn. 1994); *People v. Washington*, 665 N.E.2d 1330, 1336 (Ill. 1996); *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389 (Tex. Crim. App. 1994); *Ex Parte Elizondo*, 72 S.W.3d 671 (Tex. Crim. App. 2002); *Ex parte Franklin*, 72 S.W.3d 671, 675 (Tex. Crim. App. 2002); *State v. Conway*, 816 So.2d 190 (La. 2002) (per curiam); *Trotter v. State*, 907 So.2d 397, 401 (Miss. App.), *cert. denied*, 910 So.2d 574 (Miss. 2005); *State ex. Rel. Amrine v. Roper*, 102 S.W.4d 541, 547 (Mo. 2003) *State v. Pope*, 80 P.2d 1232, 1240-42 (Mont. 2003); *Slaughter v. State*, 108 P.3d 1052, 1054 (Okla. Crim. App. 2005); *State v. Coleman*, 2005 WL 1797040 at ¶ 12 (Ohio App.), *appeal not allowed*, 840 N.E.2d 203 (Ohio 2005); *cert. denied*, 125 S. Ct. 1622 (2005). See also *In re Clark*, 855 P.2d 729, 760 (Cal. 1993); *Bell v. United States*, 871 A. 2d 1199, 1201 (D.C. 2005); *Jones v. State*, 591 So.2d 911, 915 (Fla. 1991).

<sup>4</sup> In some similar contexts, this Court has concluded that Washington's Due Process Clause, Article 1, Section 3, is more protective than the federal counterpart. See, e.g., *State v. Bartholomew*, 101 Wn.2d 631, 641, 683 P.2d 1079 (1984).

sources of such a state constitutional right, WACDL suggests that the starting point should be Art. 1, § 32, which informs *all* constitutional analysis of those liberties guaranteed by the Washington Constitution.

Art. 1, § 32 states simply:  
A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.

*Id.* While seldom invoked, this Court has stated that this provision serves as “an admonition not only to the legislature, but also to the courts, to constantly keep in mind the fundamentals of our republican form of government . . .” *Wheeler School District v. Hawley*, 18 Wn.2d 37, 137 P.2d 1010 (1943). By adopting this section, “the people . . . have directly charged [this Court] with a duty to be mindful of people’s sovereign rights.” *State ex rel. Mullen v. Howell*, 107 Wash. 167, 181 P. 920 (1919).

In *State v. Seeley*, 132 Wn.2d 776, 809, 940 P.2d 604 (1997), this Court held that the historical pedigree of constitutional language directing consideration of “fundamental principles” could be traced back to the Virginia Declaration of Rights written by founding father George Mason.<sup>5</sup> At least ten other states have adopted similar provisions in their state constitutions. *See id.* at 809, n.21. Significantly, however, “unlike some state constitutions, Washington did not limit the return to fundamental principles to those ‘of the constitution.’” *Id.* at 809-10. Thus, it has been persuasively argued that art. 1, § 32 requires the consideration of

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<sup>5</sup> *Virginia Const.*, art. 1, § 15. By 1889, nine states had adopted similar provisions in their state constitutions.

fundamental principles that are *not* explicitly recognized in other provisions of the State Constitution:

The original proposed Washington Constitution by Liard Hill contained only 31 sections in art. I. [Citation]. Section 32 was proposed by George Turner, whose later speeches as a U.S. Senator lead to the conclusion that Turner, like others of his day, believed that constitutional interpretation often required a return to natural law principles *beyond the four corners of the constitution*. See *Id.* (citing 32 CONG. REC. 783, 785, 789 (1899) (statements of Senator Turner against United States imperialism in the Philippines)).

Respondent notes that Brian Snure has argued persuasively that the phrase “frequent recurrence to fundamental principles” suggests that the framers retained the notion that natural rights should be considered when protecting individual rights. [Citation].<sup>6</sup> Snure states that “[s]ection 32 designates extra-constitutional fundamental principles as essential to the security of individual rights.” [Citation]. Additionally, Justice Utter, in his concurring opinion in *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wn.2d 413, 439, 780 P.2d 1282 (1989), argued that section 32 was evidence of the framers' belief in natural law, stating “the notion of fundamental principles was central to natural law theories at the time [the constitution was adopted]. That the principles are not spelled out further indicates that the framers looked to other non-governmental sources for the origin of the rights listed in the constitution.” *Id.* Justice Utter used this clause as a substantive basis for the protection of rights. *Id.* Thus, Respondent argues that by adopting art. I, § 32 the framers intended to expand the scope of individual rights protected by the constitution.

*Seeley*, 132 Wn.2d at 810-11.

One fundamental principle deeply imbedded in Anglo-American common law is the maxim that it is far better that many guilty persons go

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<sup>6</sup> See Brian Snure, “A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and The Washington State Constitution,” 67 Wash. L. Rev. 669 (1992).

unpunished than to wrongly punish one innocent person. This principle was recognized more than a century ago when the Supreme Court announced the constitutional requirement of instructing a criminal jury on the presumption of innocence and the burden of proof:

Lord Hale (1678) says: 'In some cases presumptive evidence goes far to prove a person guilty, though there be no express proof of the fact to be committed by him; but then it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die.' 2 Hale, P. C. 290. He further observes: 'And thus the reasons stand on both sides; and, though these seem to be stronger than the former, yet in a case of this moment it is safest to hold that in practice, which hath least doubt and danger,-'Quod dubitas, ne feceris.'" 1 Hale, P. C. 24.

Blackstone (1753-1765) maintains that 'the law holds that it is better that ten guilty persons escape than that one innocent suffer.' 2 Bl. Comm. c. 27, marg. p. 358, ad finem.

*Coffin v. United States*, 156 U.S. 432, 456, 15 S.Ct. 394 (1895).

This "fundamental principle" of Anglo-American law is a common law rule. As such, it is not included within the text of any provision of the Washington Constitution. WACDL contends, however, that notwithstanding the failure to mention this common law principle in the state constitutional text, it nevertheless is a right guaranteed by art. 1, § 32.

Further support for the principle that there is a fundamental right not to be imprisoned for a crime one did not commit can be derived from the common law recognition of the writ of *coram nobis*. The availability of a writ of *coram nobis* in Washington State appears to be an unsettled question. The last time the issue was mentioned was in *State v. Angevine*,

62 Wn.2d 980, 983, 385 P.2d 329 (1963), where this Court noted that the availability of the writ in this State was unsettled and declined to address the issue. However, in at least two cases, this Court recognized that at common law the writ was used to correct errors of fact:

The writ of *coram nobis*, where available, lies for an error of fact not apparent on the record, not attributable to applicant's negligence, and which, if known to the court, would have prevented rendition of the judgment.

*State v. Domanski*, 31 Wn.2d 277, 280, 196 P.2d 344 (1948). *Accord State v. Pethoud*, 53 Wn.2d 276, 277, 332 P.2d 1092 (1958).

It is settled that the writ of *coram nobis* is available in the federal courts to correct factual errors made by a federal trial court. In *United States v. Morgan*, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954), the Supreme Court considered whether the writ was available in federal court despite the fact that it was "not specifically authorized by any statute enacted by Congress . . ." *Id.* at 506. The Court concluded that since the All Writs Act authorized the issuance of "all other writs not specifically provided for by statute, which . . . [are] agreeable to the principles and usages of law," that federal courts *did* have the power to issue writs of *coram nobis*. *Id.* at 511. Moreover, in reaching this decision the Court *rejected* the contention that by enacting legislation that permitted prisoners to challenge their convictions on the ground that they violated the Constitution or the laws of the United States pursuant to 28 U.S.C. § 2255 that Congress had meant to preclude convicts from bringing *coram nobis* petitions to challenge their convictions. *See id.*

As the *Morgan* Court noted, the procedure of *coram nobis* existed to correct cases of injustice where there had been a factual mistake:

***The writ of coram nobis was available at common law to correct errors of fact. It was allowed without limitation of time for facts that affect the validity and regularity of the judgment,*** and was used in both civil and criminal cases. While the occasions for its use were infrequent, no one doubts its availability at common law.

*Morgan*, 346 U.S. at 507 (emphasis added).

In Washington, it appears that for a period of time this Court had some concern that by enacting certain statutes expressly authorizing some post-conviction procedures such as motions for new trial, that the Legislature had meant to preclude litigants from employing other procedures to obtain relief, such as a common law writ of *coram nobis*. See, e.g., *Humphreys v. State*, 129 Wash. 309, 312, 224 P. 937 (1924). But in 1975 the Legislature enacted a new Criminal Code which expressly states that common law rules and procedures are still to be recognized:

The provisions of the common law relating to the commission of crime and punishment thereof, insofar as not inconsistent with the Constitution and statutes of this state, shall supplement all penal statutes of this state . . .

RCW 9A.04.060. See, e.g., *State v. Smith*, 72 Wn.App. 237, 864 P.2d 406 (1993) (common law rule of legal efficacy supplements the provisions of the penal statute covering forgery). Similarly, just as the creation of the personal restraint petition procedure did not displace or repeal the availability of common law writs of habeas corpus, *Tolliver v. Olsen*, 109 Wn.2d 607, 611, 746 P.2d 809 (1987), they did not displace the

availability of the common law writ of *coram nobis*, which can be sought either in the trial court or in the appellate courts under the label of a personal restraint petition.

Over the years, this Court has noted that the “differing functions of state and federal habeas corpus.” *In re Restraint of Runyan*, 121 Wn.2d 432, 441, 853 P.2d 424, 441 (1993) (also noting that the 1-year time limit in 10.73.090 is not a blanket limitation). Even if the federal courts are to ultimately conclude the United States constitution does not permit a free-standing claim of innocence, this Court should find that Washington law authorizes a claim of innocence.

C. **The Court Should Confirm that the Limitations Period in RCW 10.73.090 Must Be Tolled When a Petitioner Presents a Colorable Showing of Innocence.**

Many post-conviction petitioners find their claims procedurally defaulted in federal court based on a failure to properly present the constitutional claim in state court. These procedural bars are typically justified out of concerns for federalism and comity to state courts.

In 1986, the Supreme Court implemented the actual innocence exception to the procedural default rule. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 245, 88 L.Ed.2d 254 (1986). Murray had not properly exhausted his constitutional claim because he had failed to raise it on direct appeal in state court. Consequently, the Court concluded that his claim was procedurally defaulted. Nevertheless, the Court explained that “[i]n appropriate cases” the principles of comity and finality that inform

the concepts of cause and prejudice “must yield to the imperative of correcting a fundamentally unjust incarceration.” 477 U.S. at 495. To ensure that this occurs, the Court provided that, “in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.” 477 U.S. at 496.

The Court established a “gateway” actual innocence claim in *Schlup*. There, the petitioner, who had been convicted of murder and sentenced to death, filed a second habeas petition, which alleged he was innocent of the murder and a constitutional error at trial led to his conviction, in federal court after his first petition had been dismissed. *Schlup* was procedurally barred from raising his Sixth Amendment right to counsel claim because of his failure to raise it on appeal in state court. The Court, nonetheless, concluded that a habeas petitioner’s claim could be heard if it was combined with a colorable showing that of actual innocence. A “gateway” innocence claim must be grounded in “new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial.” 513 U.S. at 324.

In so ruling, the Court confirmed that “[t]he paramount importance of avoiding the injustice of executing one who is actually innocent thus requires application of the *Carrier* standard.” *Id.* at 325-26. The Court slightly refined *Carrier*'s “probability” test to hold that in order for a

habeas petitioner to meet the actual innocence exception, he “must show that it is *more likely than not* that no reasonable juror would have found [him] guilty beyond a reasonable doubt” based on the entire record, including evidence presented at the habeas hearing in district court. *See id.* at 327.<sup>7</sup>

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA), which drastically altered habeas law by significantly restricting the availability of the writ to state prisoners. One of the main restrictions was the imposition of a one-year statute of limitations upon the filing of a federal habeas petition. *See* 28 U.S.C. § 2244(d)(1). Although the federal statute does not provide an actual innocence exception to the limitations period, some courts have begun to recognize that a petitioner who brings a valid actual innocence claim should be entitled to equitable tolling of an otherwise time-barred habeas petition. *See, e.g., Doe v. Menelee*, 391 F.3d 599 (2<sup>d</sup> Cir. 2004); *Souter v. Jones*, 385 F.3d 577 (6<sup>th</sup> Cir. 2005); *Maloy v. Roe*, 296 F.3d 770,775 (9<sup>th</sup> Cir. 2002); *Neuendorf v. Graves*, 110 F.Supp.2d 1144, 1157 (E.D. Iowa 2000). *See also Friedman v. Rehal*, 618 F.3d 142, 159 (2<sup>d</sup> Cir. 2010).<sup>8</sup>

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<sup>7</sup> This Court has cited *Schlup* for the proposition that “actual innocence” may constitute a rare “narrow exception allowed for consideration of a successive [personal restraint] petition” in “extraordinary cases[s].” *In re Turay*, 153 Wn.2d 44, 54–55, 101 P.3d 854 (2004) (alteration in original) (*quoting Schlup*, 513 U.S. at 321).

<sup>8</sup> Numerous commentators have argued that the federal courts should recognize an actual innocence exception to hear habeas petitions for petitioners with valid claims after the AEDPA’s one-year statute of limitations has passed. *See, e.g., Limin Zheng, Comment, Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 Cal.

The doctrine of equitable tolling permits a court to toll a statute of limitations when extraordinary circumstances make rigid application of the statute unfair.<sup>9</sup> Originally, English courts of equity created the doctrine of equitable tolling to ensure that parties could not profit from their own fraud.<sup>10</sup> Modern courts, however, apply the doctrine to a broader set of facts. Courts may equitably toll a statute of limitations when some external obstacle prevents a party from meeting the strict requirements of a statute of limitations despite diligent efforts. *See id.* at 682-83. Although the equitable tolling doctrine is not a judicial license to ignore a congressional statute of limitations, it does permit courts to correct the injustices occasionally engendered by statutes of limitation.<sup>11</sup>

Under RCW 10.73.090, the time limit for a collateral attack on a judgment and sentence is one year after the judgment becomes final. *See, e.g., In re Restraint of Bonds*, 165 Wn.2d 135, 196 P.3d 672 (2008) (discussing this statute of limitations period). In *Bonds*, the Court noted that “[e]quitable tolling is a remedy that permits a court to allow an action

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L.Rev. 2101, 2111 (2002); Virginia E. Harper-Ho, Comment, Tolling of the AEDPA Statute of Limitations: Bennett, Walker and the Equitable Last Resort, 4 Cal. Crim. L. Rev. 2, 26 (2001); Lisa L. Bellamy, *Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 Am. J. Crim. L. 1, 36 (2004).

<sup>9</sup> *See, e.g., Davis v. Johnson*, 158 F.3d 806, 810 (5<sup>th</sup> Cir. 1998) (stating that the AEDPA filing deadline is subject to equitable tolling). *See generally* Comment, *Equitable Tolling of Statutory Benefit Time Limitations: A Congressional Intent Analysis*, 64 Wash. L. Rev. 681 (1989).

<sup>10</sup> *See e.g., Note, Justice at the Margins: Equitable Tolling of Washington’s Deadline for Filing Collateral Attacks on Criminal Judgments*, 75 Wash. L. Rev. 675, 684 (2000).

<sup>11</sup> *See, e.g., Gibson v. Klinger*, 232 F.3d 799, 808 (10<sup>th</sup> Cir. 2000) (noting that equitable tolling would be appropriate if a defendant is actually innocent).

to proceed when justice requires it, even though a statutory time period has elapsed.” *Id.* (quoting *In re Restraint of Carlstad*, 150 Wn.2d 583, 593, 80 P.3d 587 (2003)). There, however, a majority of this Court ultimately concluded that the equitable tolling exception would not apply under the peculiar facts presented in that case. *See, e.g.*, 165 Wn.2d at 143-44 (plurality); 165 Wn.2d at 144-45 (Alexander, J., concurring).<sup>12</sup>

Equitable considerations are at their peak where a demonstrably innocent person has been convicted as a result of constitutionally defective legal process. As Justice O’Connor has observed, the Supreme Court “continuously has recognized that the ultimate equity on the prisoner’s side [is] a sufficient showing of actual innocence.” *Withrow v. Williams*, 507 U.S. 680, 700, 113 S.Ct. 1645, 123 L.Ed.2d 407 (1993) (O’Connor, J., concurring in part and dissenting in part). Such a showing “is normally sufficient, standing alone, to outweigh other concerns and justify adjudication of the prisoner’s constitutional claim.” *Id.*

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<sup>12</sup> The four-justice lead opinion and two-justice concurrence agreed only in the result. It is noteworthy that a majority of the Court’s justices – the two concurring justices and the three dissenting justices – agreed that the remedy of equitable tolling would be available in circumstances beyond the limited situations suggested by the plurality. *See* 165 Wn.2d at 144-45 (Alexander, J., concurring); 165 Wn.2d at 145-51 (Sanders, J. dissenting). In fact, the concurring opinion of Justice Alexander is the narrowest ground for relief and thus controlling on this issue. *See, e.g., In re Francis*, 170 Wn.2d 517, n.7, 242 P.3d 866 (2010). When there is no majority opinion and a case is decided on the basis of a plurality opinion and one or more concurring opinions, “the holding of the court is the position of the justice(s) concurring on the narrowest grounds.” *Kitsap Alliance v. Central Puget Sound Growth Management*, 152 Wn.App. 190, 197, 217 P.3d 365 (2009). *Accord Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998); *W.R. Grace & Co. v. Department of Revenue*, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999).

Taken together, these principles make plain that the one-year statute of limitations provided by RCW 10.73.090 must be equitably tolled where, a prisoner “supplements his constitutional claim with a colorable showing of actual innocence,” *Kuhlmann v. Wilson*, 477 U.S. 436, 454, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), or demonstrates that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *See, e.g., Schlup*, 513 U.S. at 327.

Equitably tolling Washington’s filing deadline in extraordinary circumstances strikes a favorable balance between finalizing criminal judgments and avoiding unjust incarcerations. The legislature enacted RCW 10.73.090 to streamline the collateral attack process. By its very terms, the one-year time limit achieves this goal by encouraging rapid filing; courts can simply dismiss late petitions as procedurally defective. Nevertheless, this desire for finality should not be interpreted too broadly – especially in light of the astonishingly high rate of wrongful convictions.

Use of the equitable tolling doctrine would not frustrate the purpose of the statute, because it applies only in extraordinary cases, mitigating the harsh consequences of rigid adherence to the one-year deadline. More importantly, without the possibility of equitable tolling, our criminal justice system would most certainly fail that small number of innocent inmates who, because of forces out of their control, could not file their petitions on time. While these cases may occur only at the margins, the mere fact that they exist begs for a judicial safeguard.

#### IV. CONCLUSION

Throughout the history of western civilization there is perhaps no more compelling story about the need to correct the injustice of a punishment wrongfully imposed upon an innocent man than the Old Testament story of Job. Notwithstanding his complete innocence, Job was punished when God allowed Satan to inflict completely undeserved punishments upon him. When Job complained to the Lord, the Lord's response was intriguing but ultimately revealing of the nature of justice. On the one hand the Lord berated Job for having the temerity to question his action, and demanded that Job answer such impossible questions as "Where was thou when I laid the foundations of the earth? Declare, if thou hast understanding." Job 37:4. But at the same time, God rectified the injustice that he had done by giving Job "twice as much as he had before," and by "bless[ing] the latter end of Job[<sup>'</sup>s life] more than his beginning." Job 42:10, 42:12. Even more compelling, the Lord scolded the three friends of Job who had failed to argue in support of Job's claim for relief from his unjust punishment.

[T]he Lord said to Eliphaz the Temanite, My wrath is kindled against thee and against thy two friends: for ye have not spoken as you ought about me, as my servant Job hath.

Job 42:7. Here, at the end of the story, the Lord acknowledged that Job was correct to protest against the injustice of the punishment of an innocent man, and that a righteous system of justice will always act to correct such a miscarriage of justice.

The courts of this State should do no less. In a proper case, upon a convincing showing of actual innocence, a wrongfully convicted person who is in fact innocent should be granted relief and relieved of all punishment. When Job cried out for justice, he was angry because God seemed not to hear his plea:

My thoughts today are resentful,  
For God's hand is heavy on me in my trouble.  
If only I knew how to find him, how to enter his court,  
I would state my case before him, and set out my  
arguments in full;  
Then I should learn what answer he would give  
And find out what he had to say.

Job 23:1-5.

Ultimately, Job did find God, did enter his Court, his claim of innocence was heard, and his good name was restored. Upon a proper showing of actual innocence, the courts of this State, like the court of the Almighty, should be open for rectification of a true miscarriage of justice. Article 1, §§ 3 & 32 require no less.

DATED this 6<sup>th</sup> day of October, 2011.

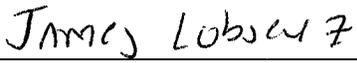
Respectfully submitted,

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**PROOF OF SERVICE**

Todd Maybrown swears the following is true under penalty of perjury under the laws of the State of Washington:

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DATED at Seattle, Washington this 6<sup>th</sup> day of October, 2011.

  
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