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No. 97456-0

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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VINCENT L. FOWLER,  
Petitioner

v.

STATE OF WASHINGTON,  
Respondent

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*In the Matter of the Personal Restraint Petition of Vincent L. Fowler*  
Division Two of the Court of Appeals No. 51029-4-II

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**SUPPLEMENTAL BRIEF OF PETITIONER VINCENT FOWLER**

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## I. INTRODUCTION

Equitable tolling, which permits a court to waive a statutory time limits such as RCW 10.73.090, is *warranted* in narrow circumstances when justice requires. Where, as here, the untimeliness is due to the bad faith, deception, or false assurances of another—with no limitations—equitable tolling is *required*.

Vincent Fowler was charged with serious child sex offenses. Although he was offered a plea deal involving a sentence of time-served, he would not plead guilty to crimes he did not commit and thus chose to assert his constitutional right to trial. Trial counsel, though, failed to prepare for trial. As a result of his ineffective assistance, Mr. Fowler is now serving an indeterminate sentence with a minimum term of 162 months and a maximum of lifetime imprisonment.

After trial counsel failed him, Mr. Fowler's family made the regrettable decision to retain John Crowley as post-conviction counsel. Crowley, too, not only failed Mr. Fowler, but actually abandoned him.

Then, when Mr. Fowler finally had the opportunity to litigate his ineffective assistance of trial counsel claim, Division Two also failed him by applying a standard divorced from this Court's prior jurisprudence.

Mr. Fowler now comes before this Court respectfully requesting, at the very least, reaffirmation of the standard set forth in this Court's most

recent treatment of equitable tolling in *In re Haghghi*, 178 Wn.2d 435, 309 P.3d 459 (2013)—that equitable tolling applies where the petitioner exercises diligence and the untimeliness is attributable to the bad faith, deception, or false assurances of another, without qualification—and reversal and remand to Division Two for consideration on the merits.

More preferable, though, is adoption of the federal standard, which requires the same diligence by the petitioner but extends to any extraordinary circumstances that prevented timely filing, and remand for consideration on the merits. This more expansive test applies to egregious attorney errors—including the present case—as well as mental defects suffered by petitioners which prevented timely filing, and any other sort of exceptional circumstance that should give rise to a claim in equity.

## **II. ISSUES FOR WHICH REVIEW HAS BEEN GRANTED**

1. Whether Division Two's decision conflicts with this Court's decision in *In re Pers. Restraint of Davis*, 188 Wn.2d 356, 395 P.3d 998 (2017), *abrogated on other grounds* in *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018), as to the courts' inherent powers to waive the one-year time limit imposed by RCW 10.73.090 and whether reversal and remand for consideration on the merits is required?
2. Whether Division Two's decision conflicts with this Court's decisions in *Davis, supra*; *Haghghi, supra*; *In re Carter*, 172 Wn.2d 917, 263 P.3d 1241 (2011); and *In re Bonds*, 165 Wn.2d 135, 196 P.3d 672 (2008), which hold that equitable tolling is appropriate where justice requires, the petitioner exercises due diligence, and the untimeliness is due to the bad faith, deception, or

false assurances of another and whether reversal and remand for consideration on the merits is required?

3. Whether this Court should harmonize its jurisprudence regarding ineffective assistance of post-conviction counsel and equitable tolling with prevailing federal standards and whether reversal and remand for consideration on the merits is required?

### **III. STATEMENT OF THE CASE**

Mr. Fowler was convicted by jury of two counts of first-degree child molestation and one count of first-degree rape of a child. The court imposed 162 months at sentencing on January 10, 2014.<sup>1</sup> He unsuccessfully appealed, and then filed a petition for review, which this Court granted in part. *State v. Fowler*, 185 Wn.2d 1016, 368 P.3d 170 (2016). The trial court entered its Order Modifying Judgment and Sentence on October 19, 2016.

Mr. Fowler hired John Crowley on September 2, 2015.<sup>2</sup> Crowley, though, did nothing on the case except take payment, make false assurances, and refer to “Vinnie” as “Victor.”<sup>3</sup> Due to misconduct in this and other cases, the Washington State Bar Association initiated disciplinary proceedings. Rather than defend against the charges, effective September 18, 2017, Crowley permanently retired in lieu of

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<sup>1</sup> See Supplemental PRP (“Supp. PRP”) filed on March 23, 2018 at Exhibit A.

<sup>2</sup> See PRP (“PRP”) filed on October 18, 2017 at Exhibit 1, Fee Agreement.

<sup>3</sup> See Supp. PRP at Exhibits D & F, Declarations of Vincent and Darryl Fowler.

disbarment.<sup>4</sup> Notably, several of the sustained counts conclude that he accepted payment for services, but failed to communicate with the client or perform his contractual obligations. *See id.*

Unable to contact Crowley and with the deadline approaching, on October 6, 2017, Mr. Fowler’s family met with John Henry Browne, who relayed the unfortunate news about Crowley. On October 9, 2017—over two years after hiring Crowley—the Fowlers hired current counsel. *See id.*

On October 18, 2017, Mr. Fowler filed a timely “placeholder” PRP requesting additional time to file due to Crowley’s misconduct and because he lacked the case file. Mr. Fowler specifically asked for “additional time to prepare his petition, which will ... request his relief from confinement—*most likely for ineffective assistance of trial counsel.*” *See PRP at 4* (emphasis added). By Ruling dated November 21, 2017, the Court granted 60 additional days and requested briefing as to why it should waive the one-year statute of limitations established in RCW 10.73.090.

In the meantime, counsel unsuccessfully attempted to contact Crowley. Counsel then reached out to appellate counsel, and one month later, in mid-December, received the appellate record.

On January 3, 2018, counsel requested a copy of Mr. Fowler’s file from trial counsel, Craig Kibbe. On January 10, 2018, counsel requested an

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<sup>4</sup> *See PRP at Ex. 2, Resignation Form of John Rodney Crowley.*

update. On January 16, 2018, Kibbe promised that he was sending the file, which would arrive by January 18, 2018; it did not. In further correspondence *in early February*, Kibbe disclosed that he no longer had the file as he had given it to Crowley for Mr. Fowler’s resentencing. Kibbe failed to respond to any communications thereafter.

On January 22, 2018, Mr. Fowler filed a Motion for Extension of Time to File Supplemental Petition (Mtn.) and requested application of equitable tolling due to Crowley’s abandonment and his “bad faith, deception, or false assurances.”<sup>5</sup> Mr. Fowler explicitly noted that the misconduct must be attributed to another, but not necessarily the State.<sup>6</sup> He analogized to relief from judgment in the civil realm<sup>7</sup> and also cited to abundant unequivocal federal authority that attorney misconduct and abandonment are grounds for application of equitable tolling of the analogous one-year time bar for federal habeas petitions.<sup>8</sup> He also asserted that RAP 18.8 applied.

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<sup>5</sup> *Id.* at 5 (citing *Haghighi, supra*, at 449).

<sup>6</sup> *Id.* (citing *Bonds, supra*, at 142) (citing *State v. Littlefair*, 112 Wn.App. 749, 762-63, 51 P.3d 116 (2002); *In Re Pers. Restraint of Hoisington*, 99 Wn.App. 423, 993 P.2d 296 (2000) (applying equitable tolling where the court thrice failed to address petitioner’s meritorious attack on his guilty plea)).

<sup>7</sup> *Id.* at 8-9 (citing *Barr v. MacGugan*, 119 Wn.App. 43, 45-48, 78 P.3d 660 (2003) (accord relief from final civil judgment where “an attorney’s condition effectively deprives a diligent but unknowing client of representation”) (add’l citations omitted)).

<sup>8</sup> *Id.* at 5 (citing, e.g., *Maples v. Thomas*, 565 U.S. 266, 132 S.Ct. 912, 923 181 L.Ed.2d 807 (2012); *Holland v. Florida*, 560 U.S. 631, 649, 130 S.Ct. 2549, 2568, 177 L.Ed.2d 130 (2010); *Gibbs v. Legrand*, 767 F.3d 879, 885 (9thCir.2014); *Spitsyn v. Moore*, 345 F.3d 796, 798 (9thCir.2003); *Baldayaque v. United States*, 338 F.3d 145 (2d Cir.2003)).

Mr. Fowler—*consistent with his statement in his initial filing that relief is required “most likely for ineffective assistance of trial counsel”*—claimed that trial counsel was ineffective by failing to: (1) adequately investigate the case and call an exculpatory witness, leading the state to obtain an adverse missing witness instruction; and (2) introduce evidence that the alleged victims had been sexually abused by their own brother, the investigation of which led to the girls accusing Mr. Fowler of similar acts and also led to the criminal conviction of their brother. *See id.* at 11-19.

By Ruling dated January 23, 2018, the Court granted an extension until March 23, 2018, but subject to the Court’s prior order.

Present counsel then submitted several requests under the Public Records Act (PRA) and contacted the Kitsap County Prosecuting Attorney’s Office. Counsel also located and interviewed Monica Boyle, the “missing witness,” as well as visited Mr. Fowler at Stafford Creek and followed up on the information he provided. Although files arrived as late as March 21, 2018, Mr. Fowler filed the Supplement on March 23, 2018—but still without trial counsel’s notes, reports, investigative records and the like. He repeated his claims, but with declarations with proposed testimony from three exculpatory witnesses who trial counsel failed to contact, including the “missing witness.” *See id.* at 7-13, 16, 24-39.

The State responded: pursuant to *Bonds, supra*, Mr. Fowler’s petition was untimely for lack of State involvement and because he failed to act with diligence; RAP 18.8 did not apply; and trial counsel Kibbe was effective as supported by his own disingenuous, self-serving declaration.<sup>9</sup>

Mr. Fowler countered that equitable tolling requires only bad faith, false deception, *or* misconduct *by another* and due diligence.<sup>10</sup> Specifically as to *Bonds*, he stressed that this Court, in a unanimous decision with a two-justice concurrence, clarified: (1) all justices agreed that equitable tolling is valid; (2) the *plurality* held that equitable tolling is available only where justice requires, the aggrieved party exercises due diligence, and there is “‘bad faith, deception, or false assurances’ **by another**””; (3) the concurrence agreed that equitable tolling was inapplicable, but would have expanded the doctrine beyond the predicates of bad faith, deception, or false assurances; and (4) the dissent held that equitable tolling was proper on the facts and whenever justice requires. *Id.* at 9-10 (adding emphasis) (*citing Carter, supra*, at 928-29). The *Carter* Court thus “recognize[d] that equitable tolling of the time bar may be available in contexts broader than

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<sup>9</sup> See Brief of Respondent at Appendix M. Although Kibbe was unable to produce his file, represented that he forwarded the file to Crowley, and could not recall any details of the case in his exchanges with present counsel, in his declaration *on behalf of the State*, he somehow remembered that his investigator interviewed one of the witnesses and composed a report—the contents of which he also somehow remembered. He had also represented, on the record, that he did not think evidence of Nestor Gatchalian as an other suspect could overcome the rape shield statute—easily disprovable with five minutes of actual legal research. See Supp. PRP at 11, 31-38.

<sup>10</sup> See Reply dated August 17, 2018 at 8 (*citing Littlefair, supra; Hoisington, supra*).

those recognized by the *Bonds* plurality,” but still “only in the narrowest of circumstances and where justice requires.”<sup>11</sup>

This Court more recently held that equitable tolling requires only “the predicates of bad faith, deception, or false assurances.”<sup>12</sup>

Mr. Fowler asserted that he acted with due diligence given his: (1) efforts at the earliest possible time to secure post-conviction counsel; (2) lack of funds to hire another attorney; (3) lack of education; (4) incarceration and lack of direct access to legal assistance; (5) counsel’s false assurances; and (6) counsel’s failure to communicate.<sup>13</sup> Also, without his file, it was “unrealistic to expect [him] to prepare and file a meaningful petition on his own within the limitations period.”<sup>14</sup>

Mr. Fowler argued that in addition to being ineffective, trial counsel falsely represented to the court that he researched the applicability of the rape shield law. *See id.* at 1-4, 16-25. Mr. Fowler also submitted an Affidavit from expert attorney John Henry Browne. *See id.* at Ex. A.

On June 11, 2019, Division Two held that equitable tolling requires “bad faith, deception, or false assurances *caused by the opposing party*—here, the State”; “placeholder” petitions are unauthorized; and courts cannot waive statutory limitation periods. *Matter of Fowler*, 9

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<sup>11</sup> *Id.* (quoting *Carter*, *supra*, at 929).

<sup>12</sup> *Id.* at 10 (quoting *Haghighi*, *supra*, at 449).

<sup>13</sup> *Id.* at 13-14 (citing *Baldayaque*, *supra*, at 153).

<sup>14</sup> *Id.* at 14-15 (citing *Spitsyn*, *supra*, at 801-802).

Wn.App.2d 158, 164-65, 442 P.3d 647 (2019), *review granted sub nom. In re Fowler*, 195 Wn.2d 1007, 458 P.3d 790 (2020). The Court, though, also held that “Washington courts require bad faith, deception, or false assurances caused by the opposing party or the court.” *Id.* at 166-67.

On July 1, 2019, Mr. Fowler filed a motion for reconsideration asserting that *Fowler*: (1) conflicts with *Davis, supra*, as to the authority of courts to waive statutory limitations periods and (2) conflicts with other published cases from this Court and the appellate courts which do not require state action. Division Two denied the Motion on July 10, 2019.

On August 9, 2019, Mr. Fowler filed his Motion for Discretionary Review. This Court granted review on March 5, 2020.

#### IV. ARGUMENT

##### A. **REMAND FOR CONSIDERATION ON THE MERITS IS REQUIRED BECAUSE *FOWLER* CONFLICTS WITH *DAVIS*'S HOLDING THAT COURTS CAN WAIVE OR EXTEND STATUTORY LIMITATIONS PERIODS**

As Division Two’s opinion conflicts with the holding in *Davis, supra*, this Court should reaffirm that courts possess inherent authority to waive statutory limitations periods under RAP 18.8, reverse Mr. Fowler’s convictions, and remand for consideration on the merits.

In *Davis*, one month before the deadline, Davis moved for an extension of time to file his PRP, which the Court granted. He then *timely*

filed his PRP *six months after the one-year time limit* and “successfully moved for an order specifying that the court had extended the statutory time limitations.” 188 Wn.2d at 362. The Court first dismissed the State’s contentions that *Bonds, supra*, and *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 952 P.2d 116 (1998), foreclosed consideration of untimely PRPs. *Id.* at 362 n.2. As the Court held:

The superior court and the Supreme Court in Washington have original jurisdiction to consider habeas challenges. Wash. Const. art. IV, §§ 4, 6. The time limits in RCW 10.73.090-.100 are designed to protect the finality of judgments while permitting consideration of many potentially meritorious collateral challenges .... **We find exercising our inherent power to grant a timely filed motion for extension of time is consistent with this design and reject the State’s argument.**

*Id.* at 362 n.2 (citation omitted) (emphasis added)

In *Davis*, then, the Court considered all substantive arguments even though the petitioner failed to raise *any* claims prior to the one-year time bar. The State knew that Davis was going to file a petition due to his “placeholder” petition and request for an extension, but he failed to raise any issues before expiration of the time limit. This Court nonetheless granted the motion for an extension of time to file.

The appellate courts possess concurrent inherent powers.<sup>15</sup>

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<sup>15</sup> See Const. art. IV § 30; RAP 16.3(c); RAP 16.5(a); RCW 2.06.030; RCW 2.28.150.

Here, the circumstances are analogous to *Davis*, but Mr. Fowler noted in his timely initial pleading that his supplement would “most likely” claim ineffective assistance—and it did.<sup>16</sup> The State thus had notice of the nature of the claims whereas in *Davis* it did not.

This case, in addition, features egregious attorney misconduct. In *Davis*, the Court appointed *qualified* counsel, who raised numerous substantive issues. Crowley, by contrast, did nothing—except take the Fowlers’ money, offer false representations, and make empty promises. If the exercise of inherent authority was appropriate in *Davis*, which involved an ordinary request for an extension, here certainly presents an appropriate situation for a Court to exercise its inherent powers to waive the strict one-year time limit.

Division Two, by contrast, held that it lacks “authority to waive statutory limitation periods under RAP 18.8.” *Fowler, supra*, at 651-52 (citing, e.g., *Benn, supra*, at 939). This holding thus directly conflicts with *Davis*. The *Fowler* Court also relied upon *Benn*, but *Davis* specifically held that *Benn does not* contain such holding. 188 Wn.2d at 362 n.2.

Division Two’s untenable opinion thus warrants correction by this Court, reaffirmation of the courts’ inherent authority to waive statutes of limitations, and remand for consideration on the merits.

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<sup>16</sup> See *In re Wilson*, 169 Wn.App. 379, 387, 279 P.3d 990 (2012) (ineffective assistance argument raised after the one-year limit not new claim and related to instructional claim).

**B. REMAND FOR CONSIDERATION ON THE MERITS IS REQUIRED BECAUSE *FOWLER* CONFLICTS WITH MANY DECISIONS FROM THIS COURT HOLDING THAT EQUITABLE TOLLING APPLIES WHEN AN UNTIMELY FILING IS CAUSED BY MISCONDUCT *OF ANOTHER***

As Division Two’s opinion that equitable tolling requires state or court involvement conflicts with the holdings in *Davis, supra; Haghighi, supra; Carter, supra; and Bonds, supra*, this Court should rearticulate its most recent pronouncement in *Haghighi* and reverse and remand for consideration on the merits.

Division Two held that “Washington courts require bad faith, deception, or false assurances *caused by the opposing party or the court.*” *Fowler, supra*, at 651 (*citing Bonds, supra*, at 141; *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998) (emphasis added)). This standard, however, is absent from any prior jurisprudence by this or any other court.

First, the *Bonds plurality* highlighted that this Court previously “suggested a rule, synonymous to the rule in civil cases, which would make equitable tolling available only in instances where the petitioner missed the filing deadline **due to another’s malfeasance**. The Court of Appeals, however, has applied equitable tolling *less sparingly.*” 165 Wn.2d at 142 (emphases added) (*citing Littlefair, supra; Hoisington, supra*).

As previously noted, the *Carter* Court made clear that “equitable tolling of the time bar may be available in contexts broader than those

recognized by the *Bonds* plurality,” but “only in the narrowest of circumstances and where justice requires.” *Id.* This is the proper standard, which conflicts with Division Two’s decision.<sup>17</sup>

In *Haghighi*, this Court refused to expand the doctrine, holding only that equitable tolling is apt “when justice requires its application and when the predicates of bad faith, deception, or false assurances are met, and where the petitioner has exercised diligence in pursuing his or her rights.” 178 Wn.2d at 447 (citing *Bonds*, 165 Wn.2d at 140-41). Equitable tolling was inapt because Haghighi knew all of the facts relevant to his untimely claim of ineffective assistance of appellate counsel claim when he filed his initial appeal and nothing prevented him from raising the claim in his timely filed PRP. *Id.* at 449. The Court also briefly noted that on the merits, the Court found the claim meritless. *Id.* at 449 n.5.

Haghighi also argued that his ineffective assistance of appellate counsel claim should relate back, analogous to the civil process. *Id.* at 446. The Court, though, relying on *Benn, supra*, and *Bonds, supra*, held that those cases foreclose the possibility of adding a later claim and having it “relate back” to the initial claim. *Id.*<sup>18</sup>

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<sup>17</sup> See *State v. Johnson*, 173 Wn.2d 895, 904, 270 P.3d 591 (2012) (“A plurality has little precedential value and is not binding.”) (add’l citation omitted).

<sup>18</sup> In dissent, Justice McCloud noted this Court’s inconsistent jurisprudence regarding amendments to PRPs beyond the one-year time limit. 178 Wn.2d at 451 (McCloud, J., dissenting in part) (citing *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 471 n.1, 965

*Davis*, in turn, explicitly disavowed that *Benn* and *Bonds* impose a mandatory rule barring consideration of claims after the RCW 10.73.090 one-year deadline elapsed. 188 Wn.2d at 362 n.2. Rather, the Court held that exercising its “inherent power to grant a timely filed motion for extension of time is consistent with the purposes of RCW10.73.090-100. *Id.* (citation omitted).

Division Two’s decision thus conflicts with several of this Court’s prior opinions—especially *Carter’s* seemingly definitive analysis and the most recent iteration in *Haghighi*—so that reversal and remand for consideration on the merits is warranted.

**C. THIS COURT SHOULD ADOPT THE MORE FAIR, JUST, AND EQUITABLE FEDERAL STANDARDS AS TO**

While egregious attorney errors, mental defects, and other extraordinary circumstances that prevent timely filing are sufficient for application of equitable tolling in the federal realm, the same is debatable in Washington. Where, for example, an attorney completely abandons a post-conviction client who acts diligently, equitable tolling should apply. The same is true of an inmate who suffered a mental or physical defect that prevented timely filing. This is the case in the federal realm, and should also be the case here in Washington.

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P.2d 593 (1998) (this Court “expressly stated” it permitted an amendment outside the time limit—even after the implementation of RCW 10.73.090 in 1996); *In re Pers. Restraint of Vandervlugt*, 120 Wn.2d 427, 430–31, 436, 842 P.2d 950 (1992)).

**1. Ineffective Assistance of Post-Conviction Counsel**

While federal courts, like Washington courts, *generally* prohibit claims of ineffective assistance of post-conviction counsel, the Supreme Court recently held that where, as here, the state procedural framework

makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct review ... ‘procedural default with not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.’

*Trevino v. Taylor*, 569 U.S. 413, 429, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013) (*quoting* *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 1320, 182 L.Ed.2d 272 (2012)).

While certain errors of counsel are apparent on the record and subject to direct appeal, most claims of ineffective assistance are based on matters beyond the record and thus must be raised in a personal restraint petition.<sup>19</sup> In addition, the “first opportunity to raise an ineffective assistance of appellate counsel claim is often on collateral review.”<sup>20</sup> The Washington scheme, then, is analogous to the Texas scheme which the *Trevino* Court found lacking. *See Trevino, supra*, at 423-425 (noting that even Texas courts found that “the inherent nature” of most ineffective

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<sup>19</sup> *See, e.g., State v. McFarland*, 127 Wn.2d 322, 35, 899 P.2d 1251 (1995).

<sup>20</sup> *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 787, 100 P.3d 279 (2004).

assistance of trial counsel claims “means that the trial court record will often lack the necessary information to substantiate the claim).

Here, as all of the issues raised by Mr. Fowler in support of his ineffective assistance claim are based on matters beyond the record, his sole recourse was through a PRP. But, due to Crowley’s malfeasance, Mr. Fowler had no counsel or ineffective counsel. Under federal precedent, then, there is sufficient cause to excuse his failure to comply with the one-year time limit.

This Court should adopt a similar, if not identical, standard.

**2. Equitable Tolling**

**a. Washington Cases Support Adoption of the Federal Standard**

In *Littlefair, supra*, the Court held that equitable tolling was proper where mistakes by defense counsel, the court, and, arguably, immigration officials prevented timely filing. 112 Wn.App. at 762. The Court found that equitable tolling of RCW 10.73.090 is supported by (1) federal cases—which hold that “an analogous statutory time limit for filing a writ of habeas corpus is subject to equitable tolling”—and (2) a commentator who has studied that statute “in depth.” 112 Wn.App. at 758. That expert concluded, in part, that

the state and federal collateral attack filing deadlines are analogous statutes; because Washington law is virtually silent on whether

RCW 10.73.090 is subject to equitable tolling, state courts should follow the reasoning of the wealth of federal authority holding that the federal time limit can be equitably tolled.<sup>21</sup>

As the state and federal statutes are analogous and equitable tolling is a remedy in equity, the standards should likewise be analogous.

**b. Analogous Federal Cases**

While no Washington case is directly on point, cases from the federal realm are clear that attorney misconduct and abandonment are grounds for application of equitable tolling of the analogous one-year time bar for federal habeas petitions. *See, e.g., Maples, supra; Holland, supra;* 560 U.S. 631, 649, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010); *Gibbs, supra.*

In federal courts, equitable tolling is warranted where (1) “petitioner has been pursuing his rights diligently” and (2) some extraordinary circumstance stood in petitioner’s way and prevented timely filing. *Gibbs*, 767 F.3d at 885 (*quoting Holland*, 560 U.S. at 649).

In, two appointed post-conviction relief attorneys left their firm, left no forwarding address, failed to inform the court or the client, and let the time to appeal lapse. 132 S.Ct. at 916-17. The Court agreed that there was cause to excuse the procedural default in state court: “Abandoned by

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<sup>21</sup> *Id.* at 758-59 (*quoting* Mark A. Wilner, *Justice at the Margins: Equitable Tolling of Washington's Deadline for Filing Collateral Attacks on Criminal Judgements*, 75 Wash.L.Rev 675, 695 (2000); *see also In re Marriage of Olsen*, 183 Wn.App. 546, 557, 333 P.3d 561 (2014) (*citing Maples, supra* and *Holland, supra*, and holding that a client should not be responsible for procedural default where the lawyer abandoned the client).

counsel, [petitioner] was left unrepresented at a critical time for his state postconviction petition, and he lacked a clue of any need to protect himself *pro se*.” *Id.* at 917. While a client is typically subject to his or her attorney’s negligence, a “markedly different situation is presented ... when an attorney abandons his client without notice, and thereby occasions the default.” *Id.* at 922. “Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.” *Id.* at 923 (*quoting Holland, supra*, at 2568) (Alito, J., concurring).

The *Holland* Court, in turn, emphasizing the “need for flexibility” inherent in equitable procedure, found that “professional misconduct ... could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling.” 560 U.S. at 651. The Court noted that many lower courts had already “specifically held that unprofessional attorney conduct may, in certain circumstances, prove ‘egregious’ and can be ‘extraordinary’ even though the conduct in question may not satisfy the Eleventh Circuit’s rule.”<sup>22</sup>

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<sup>22</sup> *Id.* (*citing, e.g., Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001) (ordering hearing as to whether client who was “effectively abandoned” by lawyer merited tolling); *Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 128 F.3d 1283, 1289 (9th Cir. 1997) (allowing tolling due to a last minute change in representation that was beyond the client’s control); *United States v. Martin*, 408 F.3d 1089, 1096 (8th Cir. 2005) (equitable tolling proper where attorney retained files, made misleading statements, and engaged in similar conduct); *see also Gibbs, supra* (equitable tolling applied due to attorney abandonment); *Spitsyn*, 375 F.3d at 798-801 (in a case arising from Washington, the

Recent cases from the Ninth Circuit further demonstrate the limitations in our current jurisprudence on equitable tolling and show why a more expansive standard is required. *See, e.g., Milam v. Harrington*, 953 F.3d 1128 (9th Cir. 2020) (holding that equitable tolling for mental impairment is available in myriad circumstances, including where the petitioner retained post-conviction counsel) (citation omitted); *Luna v. Kernan*, 784 F.3d 640, 646 (9th Cir. 2015) (reiterating that “acts or omissions that transcend garden variety negligence and enter the realm of ‘professional misconduct’ may give rise to extraordinary circumstances if the misconduct is sufficiently egregious.” (citing *Holland, supra*, at 631; *Spitsyn, supra*, at 800)). Such misconduct includes “affirmatively misleading a petitioner to believe that a timely petition has been or will soon be filed can constitute egregious professional misconduct.” *Id.* at 647 (citations omitted).

Under Division Two’s deficient holding, by contrast, equitable tolling is never available where the untimeliness is due to one’s own attorney—even if that attorney committed serious misconduct as in *Luna*

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Court applied equitable tolling “where an attorney was retained to prepare and file a petition, failed to do so, and disregarded requests to return the files pertaining to petitioner’s case until well after the date the petition was due” because without his file, petitioner could not have prepared and filed a meaningful petition on his own before the limitations period); *Baldyague, supra* (equitable tolling proper where counsel failed to: file a habeas petition, conduct legal research, or communicate with the client). **The facts here are nearly identical.**

or even where the attorney completely abandons the petitioner as in *Holland and the present case*.

Mr. Fowler thus respectfully requests, generally, that this Court adopt the federal standard and, more specifically, that this Court determine that equitable tolling is proper in cases of attorney abandonment and serious misconduct and applies here.

V. CONCLUSION

For the foregoing reasons, Mr. Fowler respectfully requests that this Court: (1) reaffirm that courts possess inherent authority to waive or extend RCW 10.73.090's one-year time limit; (2) hold that equitable tolling applies when fault can be attributed to another, without qualification, and, more generally, to exceptional circumstances in the interests of justice; (3) adopt the federal standards regarding procedural default of post-conviction claims due to the ineffectiveness or abandonment of post-conviction counsel and equitable tolling; and (4) reverse and remand for consideration on the merits.

DATED this 16th day of April, 2020.

Respectfully submitted,

/s Craig Suffian

Craig Suffian, WSBA #52697

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on April 16, 2020, I served or caused to be served electronically by filing through the Portal a copy of the Supplemental Brief of Petitioner upon all parties and the following counsel of record:

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DATED at Seattle, Washington, this 16th day of April, 2020.

LAW OFFICES OF JOHN HENRY BROWNE, P.S.

/s/ Kimberly Hennessey  
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**LAW OFFICES OF JOHN HENRY BROWNE, P.S.**

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