

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
4/23/2020 4:43 PM  
BY SUSAN L. CARLSON  
CLERK

NO. 97456-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

*In re the Personal Restraint of*

VINCENT L. FOWLER,

Petitioner.

---

ON DISCRETIOANRY REVIEW FROM  
THE COURT OF APPEALS, DIVISION II  
Court of Appeals No. 51029-4-II  
Superior Court No. 13-1-00466-4

---

SUPPLEMENTAL BRIEF OF RESPONDENT

---

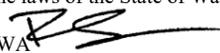
CHAD M. ENRIGHT  
Prosecuting Attorney

RANDALL A. SUTTON  
Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 337-7174

SERVICE

John Henry Browne  
801 2nd Ave Ste 800  
Seattle, WA 98104-1573  
Email: johnhenry@jhblawyer.com

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED April 23, 2020, Port Orchard, WA   
**Original e-filed at the Supreme Court; Copy to counsel listed at left.**  
**Office ID #91103 kcpa@co.kitsap.wa.us**

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT .....3

    A. FOWLER FAILS TO SHOW THE COURT OF APPEALS ERRED IN NOT EXERCISING ITS “INHERENT POWER” TO EQUITABLY TOLL HIS UNTIMELY CLAIMS.....3

        1. Fowler did not raise the issue below of whether Davis permitted the Court of Appeals to extend the time to file his personal restraint petition until his motion for reconsideration. ....3

        2. Fowler may not raise a new theory for the first time in a petition for review, and fails to explain why his “inherent power” contention is not subject to equitable tolling precedent.....6

    B. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT’S PRECEDENT AND FOWLER FAILS TO SHOW THAT THAT PRECEDENT SHOULD BE OVERRULED.....6

IV. CONCLUSION.....9

## TABLE OF AUTHORITIES

### CASES

<i>In re Bonds</i> , 165 Wn.2d 135, 196 P.3d 672 (2008).....	5, 7, 8
<i>In re Davis</i> , 188 Wn.2d 356, 395 P.3d 998 (2017).....	3, 4, 5, 6
<i>In re Fowler</i> , 9 Wn. App. 2d 158, 442 P.3d 647 (2019).....	3
<i>In re Haghghi</i> , 178 Wn.2d 435, 309 P.3d 459 (2013).....	5, 7, 8
<i>In re Hoisington</i> , 99 Wn. App. 423, 993 P.2d 296 (2000).....	7
<i>Millay v. Cam</i> , 135 Wn.2d 193, 955 P.2d 791 (1998).....	8
<i>State v. Benn</i> , 161 Wn.2d 256, 165 P.3d 1232 (2007).....	6
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	2
<i>State v. Fowler</i> , 185 Wn.2d 1016, 368 P.3d 170 (2016).....	2
<i>State v. Harris</i> , 4 Wn. App. 2d 506, 422 P.3d 482 (2018).....	6
<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 391 P.3d 409 (2017).....	6
<i>State v. Johnson</i> , 188 Wn.2d 742, 399 P.3d 507 (2017).....	8, 9
<i>State v. Littlefair</i> , 112 Wn. App. 749, 51 P.3d 116 (2002).....	5, 7

### STATUTORY AUTHORITIES

RCW 10.73 .....	7
RCW 10.73.090 .....	2, 4
RCW 10.73.100. ....	8

### RULES AND REGULATIONS

RAP 12.4(c) .....	5
-------------------	---

## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether Fowler fails to show that the Court of Appeals erred in failing to apply his “inherent power” theory to allow his untimely personal restraint claims where he never argued it below until his motion for reconsideration?

2. Whether Fowler fails to show that this Court’s requirements for equitable tolling set forth in existing precedent, which the Court of Appeals correctly applied, is both incorrect and harmful?

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

The Court of Appeals set forth a summary of the procedural history of the case in its opinion:

Fowler was accused of sexually assaulting two children, and was convicted of two counts of first degree child molestation and one count of first degree rape of a child. The trial court imposed discretionary legal financial obligations (LFOs). Fowler appealed.

On August 18, 2015, Division Three of this court affirmed Fowler’s convictions on direct appeal. *State v. Fowler*, No. 33227-6-III, slip op. at 1, 2015 WL 4911843 (Wash. Ct. App. Aug. 18, 2015) (unpublished), <http://www.courts.wa.gov/opinions/pdf/332276.unp.pdf>. On September 16, Fowler’s direct appeal counsel filed a petition for review with our Supreme Court. In September, Fowler’s brother Darryl Fowler retained a different attorney, John Crowley, to represent Fowler in additional postconviction matters.

On March 31, 2016, our Supreme Court granted review “only on the issue of imposition of discretionary legal financial obligations” and remanded to the superior

court to “reconsider the imposition” of discretionary LFOs consistent with *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). *State v. Fowler*, 185 Wn.2d 1016, 368 P.3d 170 (2016). On October 19, the superior court entered an order amending Fowler’s judgment and sentence, which amended the imposition of LFOs, and stated that “all other conditions of the Judgment and Sentence remain in effect.” Br. of Resp’t at App. E.

On May 22, 2017, the WSBA filed a complaint against Crowley for numerous violations of the Rules for Enforcement of Lawyer Conduct. On July 18, Crowley resigned in lieu of discipline. On October 9, Fowler retained current counsel.

On October 18, current counsel filed a document he described as a “placeholder” petition in this court. This document did not raise any issues, but instead described Crowley’s nonfeasance on this case and stated, “Given the above, the grounds for relief are yet unclear. More time is required to obtain prior counsel’s file, diagnose issues, conduct investigation, if necessary, and then prepare and file the petition.” Pet. for Review at 4.<sup>1</sup>

On November 21, we issued the followed ruling:

Petitioner has filed a “placeholder petition” and requests that this court grant him an extension of time in which to file his complete petition. We consider this as a motion to file a supplemental petition and grant the motion. Petitioner should file his supplemental petition, in which he must address why this court should consider waiving the one-year time bar (RCW 10.73.090) or establish that the issues he raises in his supplemental petition are not subject to the time-bar, within 60 days of the date of this ruling.

Ruling by Commissioner re “Placeholder Petition,” *State v. Fowler*, No. 51029-4-II, at 1 (Nov. 21, 2017).

On January 23, 2018, this court granted additional time to file a supplemental petition, subject to the

---

<sup>1</sup> The original placeholder personal restraint petition bore the caption “Petition for Review.” Presumably this was a typo.

conditions of this court’s November 21 ruling. Ruling Granting Extension of Time, State v. Fowler, No. 51029-4-II, at 1 (Jan. 23, 2018). On March 26, 2018, current counsel filed a supplemental petition arguing ineffective assistance of counsel.

*In re Fowler*, 9 Wn. App. 2d 158, 160-62, 442 P.3d 647 (2019).

### III. ARGUMENT

The will rely primarily on its briefing below and the opinion of the Court of Appeals. The State offers the following to address specific claims raised in the petition for review.

#### A. FOWLER FAILS TO SHOW THE COURT OF APPEALS ERRED IN NOT EXERCISING ITS “INHERENT POWER” TO EQUITABLY TOLL HIS UNTIMELY CLAIMS.

Fowler argues in his petition for review that the Court of Appeals opinion conflicts with a footnote in *In re Davis*, 188 Wn.2d 356, 395 P.3d 998 (2017). However, Fowler did not invoke *Davis* below until his motion for reconsideration, and the Court of Appeals never addressed it. Instead, it ruled on the issue framed by Fowler: whether the untimeliness of his petition should be overlooked under the doctrine of equitable tolling.<sup>2</sup>

*1. Fowler did not raise the issue below of whether Davis permitted the Court of Appeals to extend the time to file his personal restraint petition until his motion for reconsideration.*

In *Davis* this Court observed in a footnote that the Court had

---

<sup>2</sup> That issue is addressed at Point B, *infra*.

“inherent power to grant a *timely filed* motion for extension of time.” *Davis*, 188 Wn.2d at 362 n.2 (emphasis supplied). First, regardless of whether placeholder petition could be deemed a motion for extension of time, it was not timely. As discussed more thoroughly in the court below, *see* PRP Response, at 8-11, even the placeholder petition, filed on October 18, 2017, was untimely because the time for filing ran from when the mandate of the Court of Appeals issued on May 2, 2016. A timely petition, or a *timely* motion for extension of time would therefore have had to have been filed by May 2, 2017.

Moreover, Fowler did not file a timely motion for an extension of time. Instead he filed an empty “placeholder” petition, which, without citation to any authority, sought additional time:

For the foregoing reasons, Mr. Fowler respectfully requests that this court grant additional time to prepare his petition, which will, ultimately, request his relief from confinement-most likely for ineffective assistance of trial counsel.

PRP, at 4. The Court of Appeals, exercising its discretion, treated the request as a motion to supplement the petition, but with the caveat that “he must address why this court should consider waiving the one-year time bar (RCW 10.73.090) or establish that the issues he raises in his supplemental petition are not subject to the time-bar, within 60 days of the date of this ruling.” *Fowler*, 9 Wn. App. 2d at 161-62.

Instead of filing his supplemental petition within the 60 days

allotted, on January 22, 2018, Fowler filed a motion for extension of time to file his supplemental petition. In that motion he addressed for the first time why the Court of Appeals should consider his claims despite their untimeliness. At no point did he cite to *Davis* or argue that the Court of Appeals had inherent authority to extend the time for filing the petition. Instead, he argued that he was entitled to invoke the doctrine of equitable tolling, citing to *In re Bonds*, 165 Wn.2d 135, 141, 196 P.3d 672 (2008), *In re Haghghi*, 178 Wn.2d 435, 449, 309 P.3d 459 (2013), *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002), and a number of federal cases on equitable tolling. *Motion for Extension of Time to File Supplemental Petition* (Jan. 22, 2018), at 4-9.

Fowler filed his supplemental brief on March 26, 2018. There, he repeated his arguments regarding equitable tolling virtually verbatim from his extension motion. *See* Supplemental Brief (COA), at 17-23. At no point did he argue that *Davis* permitted or required the Court of Appeals to allow him an extension to file his untimely claims.

Only after the Court of Appeals dismissed his petition did Fowler raise his contention regarding *Davis*. RAP 12.4(c) provides that The a motion for reconsideration “should state with particularity the points of law or fact which the moving party contends the court has *overlooked or misapprehended*.” It follows that a point not previously raised is not a

proper matter for reconsideration. *Cf. State v. Harris*, 4 Wn. App. 2d 506, 519 n.7, 422 P.3d 482 (2018) (Court of Appeals does not review issues first raised and argued in a reply brief).

***2. Fowler may not raise a new theory for the first time in a petition for review, and fails to explain why his “inherent power” contention is not subject to equitable tolling precedent.***

It is well-settled that a party may not raise an issue for the first time in a motion for review to this Court. *State v. Houston-Sconiers*, 188 Wn.2d 1, 21 n.6, 391 P.3d 409 (2017); *State v. Benn*, 161 Wn.2d 256, 262 n. 1, 165 P.3d 1232 (2007). Moreover, neither *Davis* nor Fowler himself suggest any contours governing the “inherent power” on which Fowler purports to rely. Nor has the State found any precedent other than the cases addressing equitable tolling that does. Since Fowler suggested no other framework, he cannot seriously contend that the Court of Appeals erred in applying that framework to his claim. As will be discussed below, the Court of Appeals correctly applied the doctrine of equitable tolling to his untimely claims.

**B. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT’S PRECEDENT AND FOWLER FAILS TO SHOW THAT THAT PRECEDENT SHOULD BE OVERRULED.**

Fowler also faults the Court of Appeals for requiring that a petitioner seeking equitable tolling show that an external impediment

prevented the timely filing of the personal restraint petition. Because this holding is completely in accord with this Court's jurisprudence, and he fails to show that jurisprudence is incorrect or harmful, his claim should be rejected.

The thrust of Fowler's argument seems to be that *Bonds*, which rejected more expansive readings of the doctrine found in *In re Hoisington*, 99 Wn. App. 423, 993 P.2d 296 (2000), and *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002), should be disregarded because it was a plurality opinion. But Fowler gives short shrift to *In re Haghghi*, 178 Wn.2d 435, 446, 309 P.3d 459 (2013).

In *Haghghi*, a majority of the Supreme Court adopted these standards for invocation of the equitable tolling doctrine:

Consistent with the general rules and policies governing PRPs, we find it both unwise and unnecessary to expand the doctrine beyond the traditional standard. RCW 10.73.090's time bar promotes finality of judgments, a principle especially important in this context because a petitioner cannot obtain federal habeas corpus relief until his or her judgment is final. Any lower standard would require the courts to constantly define the doctrine's boundaries and call into question the statutorily established finality.

*Haghghi*, 178 Wn.2d at 448. Further the Court determined that "the general framework governing PRPs" required a more limited role for equitable tolling than in other contexts. *Haghghi*, 178 Wn.2d at 448. The Court observed that a personal restraint petitioner has the right to make

numerous timely challenges in the form of appeals or other motions, but could also take advantage of other means of suspending the statute of limitations, such as the grounds listed in RCW 10.73.100. *Id.* To construe the doctrine expansively would thus provide limited benefit to petitioners at the cost of unnecessary ambiguity in the law. *Id.* Thus the Court limited its applicability to a limited set of circumstances:

Consistent with the narrowness of the doctrine's applicability, principles of finality, and the multiple avenues available for postconviction relief, we apply the civil standard [for equitable tolling] and require the predicates of bad faith, deception, or false assurances.

*Haghighi*, 178 Wn.2d at 448-49.

As noted, the Court in *Haghighi* adopted the “bad faith, deception, or false assurances” civil standard of equitable tolling. That standard was set forth in *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). *See Bonds*, 165 Wn.2d at 141. *Millay* required the party invoking the doctrine to show both the exercise of diligence *and* bad faith, deception, or false assurances by the opposing party. *Millay*, 135 Wn.2d at 206. The Court explicitly noted that “due diligence” requires “more than good faith.” *Id.*

Fowler would jettison this Court recent precedent announced in *Haghighi*. However, this Court does “not lightly set aside precedent.” *State v. Johnson*, 188 Wn.2d 742, 756, 399 P.3d 507 (2017). Instead, the Court requires “a clear showing that an established rule is incorrect and

harmful before it is abandoned.” *Johnson*, 188 Wn.2d at 757. The Court may also abandon our precedent when its legal underpinnings have changed or disappeared altogether. *Id.* Fowler fails to show, indeed, he fails to even argue, that either of these circumstances applies here. As such this Court should decline to overrule its existing precedent.

#### IV. CONCLUSION

For the foregoing reasons, and those set forth in the opinion below and the State’s brief filed in the Court of Appeals, the State respectfully requests that the judgment and sentence of the trial court be upheld.

DATED April 23, 2020.

Respectfully submitted,  
CHAD M. ENRIGHT  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS', with a long horizontal stroke extending to the right.

RANDALL A. SUTTON  
WSBA No. 27858  
Deputy Prosecuting Attorney  
kcpa@co.kitsap.wa.us

**KITSAP CO PROSECUTOR'S OFFICE**

**April 23, 2020 - 4:43 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 97456-0  
**Appellate Court Case Title:** Personal Restraint Petition of Vincent L. Fowler  
**Superior Court Case Number:** 13-1-00466-4

**The following documents have been uploaded:**

- 974560\_Briefs\_20200423164258SC442369\_7973.pdf  
This File Contains:  
Briefs - Respondents Supplemental  
*The Original File Name was fowlerwscsuppbrief.pdf*

**A copy of the uploaded files will be sent to:**

- johnhenry@jhblawyer.com
- lorie@jhblawyer.com

**Comments:**

---

Sender Name: Randall Sutton - Email: rsutton@co.kitsap.wa.us  
Address:  
614 DIVISION ST  
PORT ORCHARD, WA, 98366-4614  
Phone: 360-337-7211

**Note: The Filing Id is 20200423164258SC442369**