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Justice at the Margins: Equitable Tolling of Washington's Deadline for Filing Collateral Attacks on Criminal Judgments

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JUSTICE AT THE MARGINS: EQUITABLE TOLLING OF WASHINGTON'S DEADLINE FOR FILING COLLATERAL ATTACKS ON CRIMINAL JUDGMENTS

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Abstract: RCW 10.73.090 establishes a one-year deadline for appealing a final criminal judgment in Washington State. This Comment argues that this one-year deadline should be subject to the doctrine of equitable tolling, which can prevent a statute of limitation from expiring when extraordinary circumstances preclude timely filing. After examining the text, legislative history, structure, purpose, and policy implications of RCW 10.73.090, this Comment demonstrates that the one-year deadline does not operate as a jurisdictional bar, which would revoke judicial power to hear a postconviction appeal after one year under any circumstances, but instead acts as a statute of limitation subject to equitable tolling. This Comment also argues that the filing deadline should be subject to equitable tolling because the overwhelming majority of federal circuit courts to consider the issue have reached the similar conclusion that the one-year limitation for filing federal habeas corpus petitions can be equitably tolled.

"[S]wift justice demands more than just swiftness."[1]

Imagine being wrongfully incarcerated, mentally disabled, unable to communicate in English, and without the right to counsel. What are your chances of meeting Washington State's one-year deadline for filing a postconviction appeal? Imagine being wrongfully incarcerated, diligent about pursuing your appellate rights, but missing the one-year deadline due to a careless prison official not following mailing instructions. Will the court bend the rules? Can it?

These fact patterns may not be commonplace, but they do occur.[2] We all know that our criminal justice system is not perfect—that innocent persons are sometimes wrongfully incarcerated. While no comprehensive statistics exist, a "conservative" survey estimates the national wrongful conviction rate at 0.5%.[3] This conservative estimate suggests that

1. Henderson v. Bannan, 256 F.2d 363, 390 (6th Cir. 1958) (Stewart, J., dissenting).

2. *See, e.g.*, Miles v. Prunty, 187 F.3d 1104, 1105–06 (9th Cir. 1999) (involving prison officials who carelessly failed to mail habeas corpus petition); Calderon v. United States Dist. Court, 163 F.3d 530, 541 (9th Cir. 1998) (involving mentally incompetent prisoner).

3. Ronald C. Huff et al., *Convicted but Innocent: Wrongful Conviction and Public Policy* 55 (1996) (basing statistic on survey of "very conservative sample," including 41 attorneys general). The estimate suggests that courts are 99.5% accurate in felony cases. *See id.* at 61.

currently more than 10,000 prisoners are wrongfully incarcerated.[4] Practitioners estimate that the wrongful conviction rate may be as high as ten percent,[5] necessarily implying 200,000 wrongful convictions.[6] These figures suggest that Washington prisons house between 73 and 1454 wrongfully convicted inmates.[7] While increasing access to the appellate system might provide one solution, our lawmakers have done just the opposite by limiting the time period within which inmates can bring postconviction appeals.[8]

This Comment argues that Washington courts can apply the doctrine of equitable tolling to Washington's one-year time limit for bringing a postconviction appeal. Equitable tolling would prevent the one-year time limit from expiring when extraordinary circumstances prevent a timely filing.[9] Equitable tolling therefore acts as a basic measure of fairness to increase the likelihood that such circumstances do not block access to the appellate system. Part I of this Comment describes the criminal appeals process for defendants convicted in Washington and outlines the deadline for filing appeals in state and federal court. Part II describes the doctrine of equitable tolling and the statutory construction analysis courts use to determine when equitable tolling may be applied. Part II also outlines the relevant circumstances in which Washington courts follow federal law, and describes how federal courts have equitably tolled the federal filing deadline for postconviction appeals. Part III raises two distinct but mutually supportive arguments to show that Washington's one-year period for bringing a postconviction appeal should be subject to equitable tolling. First, the text, legislative history, structure, purpose,

4. *See* Kay Lazar, *Nation's Bogus Convictions May Number in the Thousands*, Boston Herald, May 9, 1999, at 24, *available in* 1999 WL 3397863; *see also* Huff, *supra* note 3, at 62.

5. *See* Memorandum from Frederick Leatherman to Innocence Project Northwest (Aug. 1999) (on file with author) (basing 10% estimate on, *inter alia*, DNA exclusion rates reported in recent U.S. Department of Justice report). Mr. Leatherman, a prominent Seattle criminal defense attorney, co-founded Innocence Project Northwest, a nonprofit organization that represents factually innocent, indigent prisoners in collateral attack proceedings. For the exclusion rates in the report, see Peter Neufeld & Barry C. Scheck, *Forward Commentary* to *Edward Conners et al., U.S. Dep't of Justice, Convicted by Juries, Exonerated by Science* at xxviii–xxix (1996). *See also* Conners et al. at 20.

6. For the present national prison population, see Jesse Katz, *A Nation of Too Many Prisoners?*, L.A. Times, Feb. 15, 2000, *available in* 2000 WL 2211053 (estimating population at two million).

7. *See* Washington State Dep't of Corrections, *Prison Population* (visited Jan. 18, 2000) <http://www.wa.gov/doc/Content/pop.html> (reporting that as of January 1, 2000, there were 14,535 inmates in Washington prisons).

8. *See* Wash. Rev. Code § 10.73.090 (1998).

9. *See infra* Part II.

and policy of the one-year time bar indicate that equitable tolling would not contravene legislative intent. Second, the Washington and federal postconviction filing deadlines are analogous; because Washington law is virtually silent on whether its statute is subject to equitable tolling, Washington courts should look to the wealth of federal authority holding that the federal statute can be equitably tolled. In the face of proposed legislation further limiting access to criminal appeals,[10] this Comment advocates for judicial discretion to equitably toll otherwise untimely postconviction petitions for the sake of justice at the margins.

I. THE CRIMINAL APPEALS PROCESS FOR DEFENDANTS CONVICTED IN WASHINGTON STATE COURTS

The Washington State criminal appeals process can be divided into two distinct procedures: direct appeals and collateral attacks.

A. Direct Appeals in Washington State Courts

When defendants in state criminal matters have been tried and convicted, they have a legal right to appeal the trial court judgment, seeking relief usually from the court of appeals.[11] This is called a "direct appeal," as it stems from the original trial proceeding, and convicted defendants generally may raise only those issues on direct appeal that were first raised at the trial court.[12] For example, attorneys who fail to object to the admissibility of certain evidence during trial may not appeal the admission of that evidence.[13] For convicted defendants electing not to appeal, criminal judgments become final when filed with the clerk of the trial court.[14]

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10. *See* H.B. 2088, 56th Leg., Reg. Sess. (Wash. 1999) (stating, *inter alia*, that "[t]he time for filing a [collateral attack] is jurisdictional") (pending as of April 17, 2000).

11. *See* Wash. Const. art I, § 22; *see also* Wash. R. App. P. 4.1(a). Direct supreme court review is allowed in certain cases, for example, capital cases. *See* Wash. R. App. P. 4.2(a).

12. *See* Wash. R. App. P. 2.5(a); State v. McFarland, 127 Wash. 2d 322, 332–33, 899 P.2d 1251, 1255 (1995); *see, e.g.*, State v. Haggerty, No. 41734-7-I, 1999 WL 1081277, at *1 n.1 (Wash. Ct. App. Nov. 29, 1999) (refusing to hear ineffective-assistance-of-counsel claim on direct appeal because matter was not contained in trial record). *But see* Wash. R. App. P. 2.5(a) (providing that lack of trial court jurisdiction, failure to establish facts upon which relief can be granted, and manifest error affecting constitutional right can be raised for first time on direct appeal).

13. *See, e.g.*, State v. Stevens, 58 Wash. App. 478, 485–86, 794 P.2d 38, 42 (1990).

14. *See* Wash. Rev. Code § 10.73.090(3)(a) (1998).

If convicted defendants do appeal and the court of appeals affirms the trial court judgment, defendants may petition the Supreme Court of Washington for discretionary review of the appellate court's decision.[15] Unlike with appeals of trial court judgments, defendants have no legal right to supreme court review of adverse appellate decisions.[16] If defendants do not petition for review, or if the supreme court refuses to consider the appeal, the court of appeals issues a mandate to the trial court terminating the direct appeal,[17] which makes the trial court judgment final.[18] If the supreme court grants a petition for review, it considers only issues raised in the petition.[19] If the supreme court affirms the appellate court, it issues its own mandate to the trial court finalizing the criminal judgment.[20]

The last possible relief on direct appeal lies with the U.S. Supreme Court. Like state supreme courts, the U.S. Supreme Court may deny requests for review.[21] Only if the state appellate decision depends on a federal question, such as the constitutionality of a Washington statute, may the U.S. Supreme Court grant a writ of certiorari, and thus agree to hear the appeal.[22] In most cases, certiorari is denied.[23] When the Court denies certiorari, convicted defendants have exhausted all direct appeal opportunities and the trial court judgment becomes final.[24]

B. Collateral Attacks in Washington State Courts

Following direct appeal, when the trial court judgment is deemed final,[25] convicted defendants may attack the judgment collaterally in state court.[26] This attack is "collateral" because it is a process distinct from the

15. *See* Wash. R. App. P. 13.1(a).

16. *See id.*

17. *See* Wash. R. App. P. 12.5(b).

18. *See* Wash. Rev. Code § 10.73.090(3)(b) (1998).

19. *See* Wash. R. App. P. 13.7(b).

20. *See* Wash. R. App. P. 12.5(c); *see also* Wash. Rev. Code § 10.73.090(3)(b).

21. *See* Sup. Ct. R. 10.

22. *See id.*

23. *See id.*

24. *See* Wash. Rev. Code § 10.73.090(3)(c) (1998).

25. *See supra* notes 14, 18, 20, 24, and accompanying text; *see also infra* text accompanying note 39.

26. *See generally* Wash. R. App. P. 16.3–.15 (governing personal restraint petitions in appellate court); Wash. Rev. Code §§ 7.36.010–.250 (1998) (governing state habeas corpus in superior court); *see also infra* note 30 and accompanying text.

original criminal case, allowing prisoners to raise issues not addressed at trial or on direct appeal.[27] Before state prisoners can obtain relief by collateral attack, all other remedies must be inadequate.[28] If the court believes a prisoner is "unlawfully restrained," it has broad discretion to grant appropriate relief as justice requires.[29] In Washington, collateral attack means "any form of postconviction relief other than a direct appeal," and includes "a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment."[30] While each of these forms of collateral attack has a distinct purpose and is generally guided by different rules,[31] all are governed by the same statutory filing deadline.[32]

In general, petitions for collateral attack must be filed within one year from the date the criminal judgment becomes final.[33] Prior to 1989, no time period restricted the filing of collateral attacks in Washington.[34] In 1989, the state legislature instated the one-year deadline[35] to promote the finality of criminal judgments and to help manage the overwhelming flow of petitions.[36] The statute applies to all petitions filed after July 23,

27. *See, e.g.*, State v. Harper, 64 Wash. App. 283, 289 n.3, 823 P.2d 1137, 1141 n.3 (1992) (finding that ineffective-assistance-of-counsel matter not addressable on direct appeal can be considered on collateral attack); *see also In re* Gentry, 137 Wash. 2d 378, 388, 972 P.2d 1250, 1256 (1999) (declining to hear issues on collateral attack that were already decided on direct appeal).

28. *See* Wash. R. App. P. 16.4(d).

29. Wash. R. App. P. 16.4(c).

30. Wash. Rev. Code § 10.73.090(2) (1998).

31. *See supra* note 26.

32. *See* Wash. Rev. Code § 10.73.090 (1998).

33. *See* Wash. Rev. Code § 10.73.090(1). RCW 10.73.100 lists certain exceptions to the one-year rule. *See infra* note 40 and accompanying text.

34. *See In re* Cook, 114 Wash. 2d 802, 805, 792 P.2d 506, 508 (1990).

35. *See* Criminal Judgments and Sentences—Collateral Attacks—One Year Time Limit, ch. 395, § 1, 1989 Wash. Laws 2149, 2149. RCW 10.73.090 was introduced in the 1989 regular session of the 51st Legislature as H.B. 1071, adopted in amended version as S.H.B. 1071, and passed as Laws of 1989, ch. 395, § 1.

36. *See* State v. Lee, No. 40457-1-I, 1999 WL 30359, at *4 (Wash. Ct. App. Jan. 25, 1999); *see also In re* Becker, 96 Wash. App. 902, 905, 982 P.2d 639, 640 (1999).

1990,[37] and all persons held in custody must be given notice of the deadlines.[38]

As a result of this 1989 legislation, the statute reads as follows:

> Collateral attack—One year time limit
>
> (1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.[39]

At the same time the legislature created the one-year time limit, it also created exceptions to this limit. RCW 10.73.100 provides exceptions

> based solely on one or more of the following grounds: (1) Newly discovered evidence . . . ; (2) The statute that the defendant was convicted of violating was unconstitutional . . . ; (3) The conviction was barred by double jeopardy . . . ; (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction; (5) The sentence imposed was in excess of the court's jurisdiction; or (6) There has been a significant change in the law . . . .[40]

Washington courts have interpreted RCW 10.73.090 strictly, not allowing exceptions to the one-year limit other than those included in RCW 10.73.100.[41] In *Shumway v. Payne*,[42] the Supreme Court of Washington stated that RCW 10.73.090 created a "mandatory rule that acts as a bar to . . . consideration of [collateral attacks] filed after the limitation period has passed."[43] This interpretation of the time limit is supported by legislative history.[44] When discussing the 1989 legislation,

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37. *See* Wash. Rev. Code § 10.73.130 (1998).

38. RCW 10.73.120 requires the Department of Corrections to attempt to advise its inmates of the one-year time limit. RCW 10.73.110 requires the court at time of sentencing to advise the defendant of the one-year period.

39. Wash. Rev. Code § 10.73.090 (1998).

40. Wash. Rev. Code § 10.73.100(1)–(6) (1998).

41. *See, e.g.*, Shumway v. Payne, 136 Wash. 2d 383, 397–400, 964 P.2d 349, 355–57 (1998); *In re* Well, 133 Wash. 2d 433, 443, 946 P.2d 750, 754 (1997).

42. 136 Wash. 2d 383, 964 P.2d 349 (1998).

43. *Id.* at 397–98, 964 P.2d at 356; *see also Well*, 133 Wash. 2d at 443, 946 P.2d at 754 (stating that RCW 10.73.090 acts as "procedural bar").

44. *See* Final Legis. Rep., S.H.B. 1071, 51st Leg., Reg. Sess. (Wash. 1989) [hereinafter Final Legis. Rep.]. Remaining legislative history does not contradict a strict interpretation. *See* H.B. & S.H.B. 1071, 51st Leg., Reg. Sess. (Wash. 1989); 1 House Journal, 51st Leg., Reg. Sess. 62, 253,

the House Judiciary Committee reiterated that the one-year limit restricts a defendant's right to file a collateral attack, except when a RCW 10.73.100 exception applies.[45]

C. *Collateral Attacks by Washington State Prisoners in Federal Courts*

If a collateral attack in a Washington State court proves unsuccessful, a prisoner may collaterally attack the state trial court judgment in federal district court by filing a petition for federal habeas corpus.[46] A habeas corpus proceeding is a civil action against the official who holds the prisoner to inquire into the legality of confinement.[47] Federal habeas corpus relief will be granted only if the incarceration violates the U.S. Constitution, a treaty, or a law of the United States.[48] If a federal court deems the restraint illegal, it may grant appropriate relief as justice requires.[49]

The U.S. Supreme Court has commonly regarded habeas corpus as a legal remedy governed by equitable principles.[50] The Court

> has not . . . characterized [habeas corpus] "by simple, rigid rules which, by avoiding some abuses, generate others," nor by "interpretations . . . that would suffocate . . . or hobble [the writ's] effectiveness with the manacles of arcane and scholastic procedural requirements." Rather, "[t]he very nature of the writ demands that

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494–95, 2175–76, 2616, 2622 (Wash. 1989); 1 Senate Journal, 51st Leg., Reg. Sess. 492–93, 915, 1232, 1629–30, 2100, 2497–98 (Wash. 1989); Legislative Digest and History of Bills—House, 51st Leg., Reg. Sess. 39 (Wash. 1989).

45. *See* Final Legis. Rep., *supra* note 44.

46. *See* 28 U.S.C. § 2254 (1994 & Supp. IV 1998). Prisoners convicted in federal court may also petition for federal habeas corpus. *See* 28 U.S.C. § 2255 (1994 & Supp. IV 1998). While this Comment focuses on the time period for Washington prisoners filing collateral attacks, both state and federal prisoners are bound by a general one-year time limit for filing federal habeas corpus claims. *See infra* note 53 and accompanying text.

47. *See* Fain v. Duff, 488 F.2d 218, 222 (5th Cir. 1974).

48. *See* 28 U.S.C. § 2254(a).

49. *See* 28 U.S.C. § 2243 (1994).

50. *See* Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986); *see also* James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.2, at 11–13 (3d ed. 1998) ("[R]ecently, the Court has described habeas corpus as governed less by 'statutory developments' than by 'a complex and evolving body of equitable principles informed and controlled by historical usage . . . and judicial decision.'") (quoting McCleskey v. Zant, 499 U.S. 467, 489 (1991)).

> it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected," and that preclusive doctrines and formalities "yield to the imperative of correcting . . . fundamentally unjust incarceration."[51]

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act[52] (AEDPA), which imposes a general one-year limit on state prisoners bringing federal habeas corpus claims.[53] Prior to that time, no statutory time limit applied to filing federal habeas corpus petitions.[54] Under AEDPA, the time limit begins to run when direct appeal concludes and the state court judgment becomes final.[55] The statute does, however, permit exceptions.[56] If state action in violation of the Constitution or federal law prevented a prisoner from filing a petition, the one-year period begins when the impediment is removed.[57] If the U.S. Supreme Court recognizes and retroactively applies a constitutional right asserted by the petitioner, the one-year period begins when the right was initially recognized by the Court.[58] Finally, if newly discovered evidence supports the petitioner's claim, the one-year period begins when the evidence could have been discovered through due diligence by the petitioner.[59]

Congress and the Washington legislature thus have created general one-year time periods within which state prisoners must file collateral attacks. But what if circumstances prevent prisoners from meeting these deadlines? Are courts bound to strictly apply these time periods when doing so produces inequitable results?

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51. Liebman & Hertz, *supra* note 50, § 2.2, at 16–17 (footnotes omitted).

52. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

53. *See* 28 U.S.C. § 2244(d)(1) (1994 & Supp. IV 1998); *see also* 28 U.S.C. § 2255 (1994 & Supp. IV 1998) (imposing general one-year limit for federal prisoners).

54. *See* Liebman & Hertz, *supra* note 50, § 5.1b, at 218 (citing Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)).

55. *See* 28 U.S.C. § 2244(d)(1)(A).

56. *See* 28 U.S.C. § 2244(d)(1)(B)–(D).

57. *See* 28 U.S.C. § 2244(d)(1)(B).

58. *See* 28 U.S.C. § 2244(d)(1)(C).

59. *See* 28 U.S.C. § 2244(d)(1)(D).

II. THE DOCTRINE OF EQUITABLE TOLLING

> *"Limitation[] periods are by their very nature harsh because they cut off a person's rights without regard to the merits of [the] claim. The doctrine of equitable tolling has evolved to temper this harsh result."*[60]

A. History and Purpose of the Doctrine

The doctrine of equitable tolling stops a statute of limitation[61] from expiring when justice requires.[62] Discretionary application of equitable tolling depends on the particular facts of a case and is not governed by bright-line rules;[63] courts must determine whether a case manifests appropriate "rare and exceptional circumstances" to justify equitable tolling.[64] Courts apply the doctrine when petitioners are prevented from timely asserting their legal rights due to opposing parties' wrongful conduct or when extraordinary circumstances outside of petitioners' control make it impossible to comply with filing deadlines.[65] For example, the Ninth Circuit Court of Appeals equitably tolled the filing deadline for an otherwise expired federal habeas corpus claim when the attorney pursuing the petitioner's claim withdrew from the case and left behind unusable work product for replacement counsel—an extraordinary "turn of events over which [the petitioner] had no control."[66]

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60. Richard Parker & Ugo Colella, *Revisiting Equitable Tolling and the Federal Tort Claims Act: The Impact of* Brockamp *and* Beggerly, 29 Seton Hall L. Rev. 885, 886 (1999) (citing Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990)).

61. For consistency, this Comment uses "statute of limitation" and not "statute of limitations." Likewise, this Comment uses "limitation period" and not "limitations period."

62. *See* Oshiver v. Levin, Fishbein, Sedran, & Berman, 38 F.3d 1380, 1390 (3d Cir. 1994); *see also* Millay v. Cam, 135 Wash. 2d 193, 206, 955 P.2d 791, 797 (1998) ("[T]his court allows equitable tolling when justice requires."); State v. Duvall, 86 Wash. App. 871, 874, 940 P.2d 671, 674 (1997) ("The doctrine of equitable tolling permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed.").

63. *See* Fisher v. Johnson, 174 F.3d 710, 713 (5th Cir. 1999).

64. *Id.* (quoting Davis v. Johnson, 158 F.3d 806, 811 (5th Cir. 1998)).

65. *See* Coleman v. Johnson, 184 F.3d 398, 402 (5th Cir. 1999); Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996).

66. Calderon v. United States Dist. Court, 128 F.3d 1283, 1289 (9th Cir. 1997).

Equitable tolling allows a court to hear an action when literal application of a statute of limitation would be inequitable.[67] Historically, courts of equity imposed limitation periods but would not allow parties to profit from their own bad conduct.[68] For example, the House of Lords held that when a defendant concealed a fraudulent bond transaction from the plaintiff for nine years, the defendant could not equitably assert the statute of limitation as a defense.[69] Modern courts have invoked their power to grant equity by tolling in other circumstances.[70] In the context of prisoners filing collateral attacks, courts modify the doctrine of equitable tolling from its traditional form to cover inequitable circumstances caused by people or entities—such as lawyers, prison officials, or courts—that have adversely affected petitioners' ability to file timely.[71] Courts routinely dismiss untimely petitions, rather than permit equitable tolling, when petitioners fail to act with due diligence to meet the filing deadline.[72] When petitioners prove that they acted with due diligence,[73] however, federal courts considering late habeas petitions and Washington courts in non-collateral attack contexts have equitably tolled statutes of limitation in a variety of cases.[74] For example, when a petitioner collaterally attacked a state court conviction in federal court

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67. *See Coleman*, 184 F.3d at 402; *see also Millay*, 135 Wash. 2d at 206, 955 P.2d at 797; *Duvall*, 86 Wash. App. at 874, 940 P.2d at 674.

68. *See* David D. Doran, Comment, *Equitable Tolling of Statutory Benefit Time Limitations: A Congressional Intent Analysis*, 64 Wash. L. Rev. 681, 682 (1989).

69. *See* Booth v. Earl of Warrington, 2 Eng. Rep. 111, 111–13 (1714).

70. *See* Note, *Statutes of Limitations and Opting Out of Class Actions*, 81 Mich. L. Rev. 399, 405 n.22 (1982).

71. *See, e.g.*, *supra* text accompanying note 66; *see also infra* note 75.

72. *See* Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990) (permitting no equitable tolling where failure to file timely was due to attorney's being out of office and claimant filed within 30 days of personally receiving notice). The Court stated:

> We have allowed equitable tolling [when] the [petitioner] has actively pursued his judicial remedies . . . or where the [petitioner] has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the [petitioner] failed to exercise due diligence in preserving his legal rights. . . . [T]he principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect.

Id.; *see also* Fisher v. Johnson, 174 F.3d 710, 715 (5th Cir. 1999) ("Equity is not intended for those who sleep on their rights."). For Washington decisions, see *Hazel v. Van Beek*, 135 Wash. 2d 45, 61, 954 P.2d 1301, 1308 (1998), *Gunnier v. Yakima Heart Ctr., Inc.*, 134 Wash. 2d 854, 864–65, 953 P.2d 1162, 1168 (1998), and *Duvall*, 86 Wash. App. at 876, 940 P.2d at 674.

73. Determining due diligence entails a fact-specific inquiry involving various principles beyond the scope of this Comment.

74. *See infra* notes 75 and 77.

alleging mental incompetency, the Ninth Circuit held that the federal filing deadline should be equitably tolled until a reasonable time after a court determined competency.[75] In *State v. Duvall*,[76] the Washington court of appeals equitably tolled the period for a court to order restitution almost 200 days beyond the statutory time limit because the defendant received notice at sentencing of the later restitution order, showed no prejudice by the later order, and failed to evidence bad faith or lack of due diligence by the State.[77] However, the Supreme Court of Washington has never determined whether the one-year time limit for filing collateral attacks in Washington is subject to equitable tolling. In fact, only eight Washington cases discuss the doctrine.[78]

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75. *See* Calderon v. United States Dist. Court, 163 F.3d 530, 541 (9th Cir. 1998). For other examples of courts equitably tolling the federal habeas corpus filing deadline, see *Miles v. Prunty*, 187 F.3d 1104, 1106 (9th Cir. 1999) (equitably tolling deadline when prison officials did not comply with petitioner's instructions to mail petition and petitioner exercised due diligence by submitting petition to prison authorities within 17 days of deadline), *Lopez v. INS*, 184 F.3d 1097, 1100 (9th Cir. 1999) (stating that where petition is filed late due to fraud perpetrated on petitioner, statute of limitation is equitably tolled until date fraud is discovered and that this equitable doctrine is read into every federal statute of limitation), *Fisher*, 174 F.3d at 715 ("In the right circumstances, a delay in receiving information might call for equitable tolling—such as if the prison did not obtain copies of AEDPA for months and months, or if an essential piece of information was delayed near the filing deadline."), *Calderon*, 163 F.3d at 541 (equitably tolling deadline when petitioner reasonably relied on prior court order), *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (implying that lack of access to legal materials could support equitable tolling if petitioner could specifically show how access was denied), and *Torres v. Miller*, No. 99 Civ. 0580 MBM, 1999 WL 714349, at *7 (S.D.N.Y. Aug. 27, 1999) (providing examples based on petitioner's illness); *see also supra* note 66 and accompanying text.

76. 86 Wash. App. 871, 940 P.2d 671 (1997) (reconsidering 84 Wash. App. 439, 928 P.2d 459 (1996)).

77. *See id.* at 876, 940 P.2d at 674–75. For other Washington examples, see *Millay v. Cam*, 135 Wash. 2d 193, 206, 955 P.2d 791, 797 (1998) (holding that "the statutory redemption period [for real property] may be equitably tolled when the redemptioner in possession submits a grossly exaggerated statement of the sum required to redeem and the prospective redemptioner cannot with due diligence ascertain the sum required to redeem within the time remaining") and *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wash. 2d 805, 811–13, 818 P.2d 1362, 1364–66 (1991) (applying equitable tolling to Washington age-discrimination statute but finding no tolling warranted on lack of due-diligence grounds, because plaintiff knew of remedy within six months of alleged discriminatory act but waited three years to file suit and did not make claim that EEOC misled her; nevertheless, the court stated that "we do not rule out the possibility there may be cases in which the filing deadline . . . may be equitably tolled"). *See also infra* note 229.

78. *See Millay*, 135 Wash. 2d at 205–08, 955 P.2d at 796–98; Hazel v. Van Beek, 135 Wash. 2d 45, 61–64, 954 P.2d 1301, 1308–10 (1998); Gunnier v. Yakima Heart Ctr., Inc., 134 Wash. 2d 854, 864–66, 953 P.2d 1162, 1168 (1998); *Douchette*, 117 Wash. 2d at 810–13, 818 P.2d at 1364–66; Prekeges v. King County, No. 41974-9-I, 1999 WL 675962, at *4 (Wash. Ct. App. Aug. 30, 1999); *Duvall*, 86 Wash. App. at 874–76, 940 P.2d at 673–75; Finkelstein v. Security Properties, Inc., 76

B. *Statutory Construction Determines Whether Equitable Tolling May Apply to Limitation Periods*

Federal and Washington case law requires that before applying the doctrine of equitable tolling,[79] courts must determine that the legislature intended a time limitation to function as a statute of limitation and not a jurisdictional bar.[80] In enacting jurisdictional bars, the legislature restricts the length of time during which a court has power to adjudicate cases.[81] If the legislature intends a time limitation to operate as a jurisdictional bar, courts have no authority to hear untimely petitions and cannot apply equitable tolling.[82] A statute of limitation, on the other hand, merely defines the period within which parties must file claims.[83] If the legislature intends a time limit to act as a statute of limitation, courts retain power to equitably toll the time period.[84] To determine whether the legislature intended a time limit as a jurisdictional bar or a statute of limitation, and ultimately whether the time limit can be equitably tolled, courts must ascertain legislative intent by analyzing the relevant statute's text, legislative history, structure, purpose, and overall policy implications.[85]

1. *Time Periods Can Be Equitably Tolled Only If the Legislature Intended a Statute of Limitation and Not a Jurisdictional Bar*

The U.S. Supreme Court and Washington courts have determined that a jurisdictional time limit is not subject to equitable tolling; however, if a time limit operates like a statute of limitation, it can be equitably tolled.[86] For example, in *Zipes v. Trans World Airlines, Inc.*,[87] the U.S. Supreme

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Wash. App. 733, 739–40, 888 P.2d 161, 166–67 (1995); McMaster v. Farmer, 76 Wash. App. 464, 469–70, 886 P.2d 240, 242–43 (1994), *overruled on other grounds by* Freitag v. McGhie, 133 Wash. 2d 816, 947 P.2d 1186 (1997). *But see infra* note 229.

79. *See infra* Part II.B.1.

80. In this Comment, "jurisdictional bar" is used interchangeably with "jurisdictional time limit," "jurisdictional limit," or "limitation on jurisdiction."

81. *See Black's Law Dictionary* 853 (6th ed. 1990); *see also* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982); *Duvall*, 86 Wash. App. at 874, 940 P.2d at 673–74.

82. *See, e.g., Duvall*, 86 Wash. App. at 874, 940 P.2d at 673–74; *see also Zipes*, 455 U.S. at 393.

83. *See Black's Law Dictionary* 927.

84. *See, e.g., Duvall*, 86 Wash. App. at 874, 940 P.2d at 674; *see also Zipes*, 455 U.S. at 393.

85. *See infra* Part II.B.2.

86. *See infra* notes 87–101 and accompanying text.

87. 455 U.S. 385 (1982).

Court held that the filing deadline for administrative claims brought before the EEOC may be equitably tolled.[88] The Court stated that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to . . . equitable tolling."[89]

While *Zipes* left open the question of whether time limits for suits filed in a court of law can be subject to equitable tolling,[90] the Court answered this question in *Irwin v. Department of Veterans Affairs*.[91] In *Irwin*, the Court held that the thirty-day period for bringing an employment discrimination case against the government could be equitably tolled,[92] but that the doctrine did not excuse the petitioner's failure to file his claim timely.[93] *Irwin* established a rebuttable presumption that statutes of limitation are subject to equitable tolling.[94]

Washington courts similarly have found that statutes of limitation are subject to equitable tolling but jurisdictional limits are not.[95] For example, in *Douchette v. Bethel School District No. 403*,[96] the supreme court held that the three-year statute of limitation for filing a civil action under the Washington law against age discrimination[97] was subject to equitable tolling.[98] After considering the *Zipes* holding and legislative purposes for enacting age discrimination statutes, the *Douchette* court found that the Washington statute contained an ordinary statute of limitation and not a jurisdictional bar and therefore could be equitably tolled in appropriate cases.[99] Likewise, in *State v. Duvall*,[100] the court of

88. *See id.* at 393.

89. *Id.*

90. *See id.*

91. 498 U.S. 89 (1990).

92. *See id.* at 94–96. The filing deadline at issue in *Irwin* stated that "[w]ithin thirty days . . . an employee . . . may file a civil action." *Id.* (quoting 42 U.S.C. § 2000e-16(c)).

93. *See id.* at 96 (finding lack of diligence when reason for late filing was attorney's absence from office in which EEOC notice was properly received).

94. *See id.* at 95–96.

95. Of the eight Washington decisions addressing equitable tolling, four refer to this point specifically. *See infra* notes 96–101 and accompanying text; *cf. infra* note 229. For the other four cases, see *infra* note 139.

96. 117 Wash. 2d 805, 812 P.2d 1362 (1991).

97. *See* Wash. Rev. Code § 49.60.180 (1998).

98. *See Douchette*, 117 Wash. 2d at 811, 818 P.2d at 1364.

99. *See id.* (resting on *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187, 193 (3d Cir. 1977), decision on federal age-discrimination statute, where Third Circuit stated that "the ADEA is remedial and

appeals restated the principle that "[i]f the Legislature intended the [time] period as a jurisdictional limit, then the court was without power to determine restitution after [the period] expired . . . ; if the Legislature intended the . . . period to operate as an ordinary statute of limitations, then the limit is subject to . . . equitable tolling."[101]

2. *Ascertaining Legislative Intent by Statutory Construction*

The U.S. Supreme Court and Washington courts have employed statutory construction to determine whether a legislature intended a statutory time limit to operate as a statute of limitation or a jurisdictional bar. In particular, courts have looked to the statute's text, structure, legislative history, purpose, and policy considerations surrounding its enactment.[102]

In applying statutory construction in non-habeas circumstances,[103] the U.S. Supreme Court has looked to the text, legislative history, and policy considerations of various time limits.[104] For example, in *United States v. Brockamp*,[105] the Court analyzed these factors to hold that § 6511 of the Internal Revenue Code of 1986 was not subject to equitable tolling.[106] Resting on *Irwin*,[107] the Court asked: "Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?"[108] The Court answered the question affirmatively, because § 6511 is set forth "in unusually emphatic form," unlike the simple language in the *Irwin*

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humanitarian legislation which should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment").

100. 86 Wash. App. 871, 940 P.2d 671 (1997).

101. *Id.* at 874, 940 P.2d at 673–74; *see also* Hazel v. Van Beek, 135 Wash. 2d 45, 61, 954 P.2d 1301, 1308 (1998); McMaster v. Farmer, 76 Wash. App. 464, 469, 886 P.2d 240, 242 (1994), *overruled on other grounds by* Freitag v. McGhie, 133 Wash. 2d 816, 947 P.2d 1186 (1997).

102. *See infra* notes 105–38 and accompanying text.

103. The U.S. Supreme Court has not addressed whether the one-year deadline for filing a federal habeas corpus petition is subject to equitable tolling. For federal circuit court decisions on this topic, see *infra* note 153 and accompanying text.

104. *See infra* notes 105–23 and accompanying text.

105. 519 U.S. 347 (1997).

106. *See id.* at 348. *Brockamp* involved two similar tax refund cases. In both cases, the taxpayer filed an administrative claim for a tax refund after the statute of limitation ran. The taxpayers both claimed that they could not make the deadline due to their respective disabilities and asked for an equitable tolling of the time limit. *See id.* at 348–49.

107. *See supra* notes 91–94 and accompanying text.

108. *Brockamp*, 519 U.S. at 350 (emphasis in original).

statute of limitation.[109] Moreover, the Court found that the text of the tax statute expressly states that time-barred refunds "shall be considered erroneous."[110] The Court also noted that § 6511 contains exceptions to its time limits, but no exception includes equitable tolling.[111] In summary, the Court stated that "[s]ection 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate . . . that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote."[112]

The *Brockamp* Court also put forth a broader, policy-based justification for its holding that § 6511 cannot be equitably tolled.[113] The Court explained that tax law does not generally embrace particularized, case-specific exceptions based on equitable principles.[114] In support, the Court cited to legislative history in which Congress deleted a provision excusing tax deficiencies in the estates of insane or deceased persons due to the difficulty of defining incompetence.[115] While the *Brockamp* Court held that § 6511 was not subject to equitable tolling, it did restate the general principle that most limitation periods can be equitably tolled.[116] Interpreting the *Brockamp* holding in the context of whether to toll equitably the federal habeas corpus filing deadline, a federal district

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109. *Id.* Section 6511, quoted in pertinent part by the Court, required that a

> [c]laim for . . . refund . . . of any tax . . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed . . . within 2 years from the time the tax was paid. . . . No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed . . . unless a claim for . . . refund is filed . . . within such period. . . . If the claim was filed by the taxpayer during the 3-year period . . . the amount of the credit of refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return . . . . If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

Id. at 351 (citation omitted). For the text of the *Irwin* time limit, see *supra* note 92.

110. *Id.* at 351 (citing 26 U.S.C. § 6514).

111. *See id.*

112. *Id.* at 352.

113. *See id.*

114. *See id.*

115. *See id.* (citing H.R. Conf. Rep. No. 69-356, at 41 (1926)).

116. *See id.* at 350.

court recently stated that in the absence of the factors mentioned in *Brockamp*,

> [i]t [would be] reasonable to assume that Congress intended that the ordinary common law principles of equitable tolling would apply . . . so that the rigidity and arbitrariness inherent in any statute of limitations would not go untempered by principles of elementary fairness and the specifics of individual situations. The lesson repeatedly learned over many centuries—that law must be leavened with equity—cannot have been lost on Congress.[117]

In *United States v. Beggerly*,[118] the Supreme Court, resting primarily on the text of the statute, held that the doctrine of equitable tolling would not apply in an action brought under the Quiet Title Act (QTA), which provides a twelve-year limitation period.[119] In *Beggerly*, the plaintiffs knew of the government's land claim for more than twelve years before they brought suit challenging it.[120] The Court, citing *Brockamp*, stated that "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute."[121] Because the QTA's twelve-year period expressly begins to run when the plaintiff should have known of the government's claim, the Court found that the statute, in effect, had already allowed for equitable tolling.[122] Finally, the Court also considered "the unusually generous nature" of the twelve-year limitation period.[123]

Some Washington courts have followed the U.S. Supreme Court's statutory construction model for determining whether the state legislature intended a time limit to act as a statute of limitation or a jurisdictional bar.[124] For example, in *State v. Duvall*,[125] an inmate objected to a

117. Vasquez v. Greiner, 68 F. Supp. 2d 307, 309–10 (S.D.N.Y. 1999).

118. 524 U.S. 38 (1998).

119. *See id.* at 49.

120. *See id.* at 48.

121. *Id.*

122. *See id.*

123. *Id.* at 48–49.

124. Of the eight Washington decisions discussing equitable tolling, four performed some form of statutory construction analysis to determine the legislative intent behind the limitation period. *See infra* notes 125–38 and accompanying text. For the other four cases, see *infra* note 139.

125. 84 Wash. App. 439, 928 P.2d 459 (1996), *modified on reconsideration*, 86 Wash. App. 871, 940 P.2d 671 (1997).

restitution order entered 257 days after sentencing.[126] The court ruled that the sixty-day period for entering restitution under state law is not jurisdictional but instead operates like an ordinary statute of limitation and that tolling the period was warranted.[127] The court stated that the language, history, and prior interpretation of the relevant statute suggested that the state legislature did not intend the sixty-day period to operate as an absolute jurisdictional bar.[128] The court noted that "[i]n the same statute . . . the Legislature also provided that the offender shall remain under the court's jurisdiction for up to 10 years, and during that time the court may modify the award."[129] The court also considered the general policy behind the restitution statute.[130] The court stated that the general policy "is to require the offender 'to face the consequences of his criminal conduct'" and found that this language shows legislative intent to create judicial discretion over when to order restitution.[131]

Using a similar constructionist approach, the Washington court of appeals in *McMaster v. Farmer*[132] held that Washington's Uniform Fraudulent Transfers Act (UFTA) was not subject to equitable tolling.[133] In making this determination, the court considered a provision in the text that clearly states UFTA actions are "extinguished" unless brought within the requisite time period.[134] After considering legislative comments to UFTA, the court determined that the statute of limitation bars the remedy sought and the right to seek a remedy.[135] Finally, the court explained that the policy of the statute shows "a clear preference for finality and uniformity over . . . flexibility . . . ."[136]

Other Washington courts, while considering the plain language of a statutory time limit, have also looked beyond the text of the statute to

126. *See id.* at 441, 928 P.2d at 460.

127. *See id.* at 444–45, 928 P.2d at 462.

128. *See id.* at 443, 928 P.2d at 461.

129. *Id.*

130. *See id.*

131. *Id.* (quoting State v. Davison, 116 Wash. 2d 917, 922, 809 P.2d 1374, 1377 (1991)).

132. 76 Wash. App. 464, 886 P.2d 240 (1994), *overruled on other grounds by* Freitag v. McGhie, 133 Wash. 2d 816, 947 P.2d 1186 (1997).

133. *See id.* at 469–70, 886 P.2d at 242–43 (interpreting Wash. Rev. Code § 19.40.091).

134. *See id.* at 469, 886 P.2d at 242 (quoting Wash. Rev. Code § 19.40.091).

135. *See id.* (quoting Unif. Fraudulent Transfers Act § 9 cmt. 1, 7A U.L.A. 665–66).

136. *Id.* at 470, 886 P.2d at 243.

ascertain legislative intent in determining whether to equitably toll a limitation period. In determining whether to equitably toll the limitation period governing a state discrimination claim, the state supreme court considered the underlying policies and purposes of the statute.[137] In the context of the limitation period governing statutory redemption of real property, the court again looked to legislative purpose and stated that "[i]n Washington equitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations."[138] Therefore, like federal courts, when determining whether a limitation period should be subject to equitable tolling, Washington courts attempt to ascertain legislative intent through statutory construction.[139]

C. *Washington Courts Have Looked to Analogous Federal Law for Persuasive Authority in Collateral Attack and Equitable Tolling Contexts*

Washington courts have expressed a desire to look to federal law for nonbinding guidance on state collateral attack and equitable tolling issues.[140] In at least one case, *In re Cook*,[141] the state supreme court went

137. *See* Douchette v. Bethel Sch. Dist. No. 403, 117 Wash. 2d 805, 812–13, 818 P.2d 1362, 1365 (1991); *see also supra* note 99 and accompanying text.

138. Millay v. Cam, 135 Wash. 2d 193, 206, 955 P.2d 791, 797 (1998).

139. In four cases, Washington courts dismissed equitable tolling claims but did not rigorously construe the statute to determine legislative intent. *See* Hazel v. Van Beek, 135 Wash. 2d 45, 61, 954 P.2d 1301, 1308 (1998); Gunnier v. Yakima Heart Ctr., Inc., 134 Wash. 2d 854, 864–65, 953 P.2d 1162, 1168 (1998); Prekeges v. King County, No. 41974-9-I, 1999 WL 675962, at *4 (Wash. Ct. App. Aug. 30, 1999); Finkelstein v. Security Properties, Inc., 76 Wash. App. 733, 740, 888 P.2d 161, 167 (1995). Nevertheless, in each of these cases, the court assumed *arguendo* that the doctrine of equitable tolling applies to the limitation period at issue and then dismissed the claim on the merits, for example, by showing that the plaintiff failed to act with due diligence in pursuing the claim. *See, e.g.*, *Finkelstein*, 76 Wash. App. at 740, 888 P.2d at 167 ("Assuming, without deciding, that equitable tolling may be applied in this type of situation, it would not apply to the facts of this case."). Thus, these cases do not actually address whether the limitation period is subject to equitable tolling; these cases hold only that *if* equitable tolling applies, similarly situated plaintiffs would be procedurally barred.

140. In other contexts, Washington courts have also been guided by federal law when the Washington law is substantially analogous to federal law. *See, e.g.*, Karst v. City of Seattle, No. 41504-2-I, 1999 WL 508299, at *6 (Wash. Ct. App. July 19, 1999) (discrimination law) ("Because our discrimination laws substantially parallel Title VII, we may look to federal law for nonbinding guidance."); Somer v. R.Y. Woodhouse, 28 Wash. App. 262, 272, 623 P.2d 1164, 1170 (1981) (state agency procedure) ("Since no Washington authority adequately addresses the question . . . we look to federal law for guidance.").

141. 114 Wash. 2d 802, 792 P.2d 506 (1990).

so far as to overrule existing state law, justifying the decision on, *inter alia*, federal interpretation of analogous federal law.[142] The *Cook* court replaced with federal precedent the then-current state precedent that automatically barred a nonconstitutional argument in a state collateral attack if the argument was not made during trial or on direct appeal.[143] In support of its decision to adopt federal law, the court reasoned that "[i]n other [collateral attack] cases, . . . interpretation of similar federal rules [has] been looked to for guidance."[144] In *In re Haverty*,[145] the Supreme Court of Washington construed Washington Rules of Appellate Procedure language in light of a federal decision interpreting an identical phrase found in the "analogous" federal statute.[146] The supreme court has also used federal age discrimination law in determining whether the limitation period governing the Washington Law Against Discrimination can be equitably tolled.[147] The court stated that "the federal cases provide helpful analysis."[148] While the supreme court disregarded arguments based on federal habeas corpus jurisprudence in *In re Runyan*,[149] the issue in the case concerned the constitutionality of the collateral attack statute's one-year period, and "the federal suspension clause [of the U.S. Constitution] does not serve the same purpose as our own state suspension clause [in the Washington Constitution]."[150] Thus, in the contexts of state collateral attack and equitable tolling, when there is an absence of state authority and federal law is substantially similar,[151] Washington courts have looked to federal law for guidance.[152]

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142. *See id.* at 812, 792 P.2d at 511.

143. *See id.*

144. *Id.* at 812 n.3, 792 P.2d at 511 n.3 (citing *In re* Haverty, 101 Wash. 2d 498, 502–03, 681 P.2d 835, 838–89 (1984)).

145. 101 Wash. 2d 498, 681 P.2d 835 (1984).

146. *See id.* at 502–03, 681 P.2d at 838–39.

147. *See* Douchette v. Bethel Sch. Dist. No. 403, 117 Wash. 2d 805, 811, 818 P.2d 1362, 1364–65 (1991).

148. *Id.* at 811, 818 P.2d at 1365.

149. 121 Wash. 2d 432, 440–41, 853 P.2d 424, 429–30 (1993).

150. *Id.* at 441, 853 P.2d at 429. The "suspension clauses" refer to the U.S. and Washington constitutional prohibitions against suspending the privilege of writs of habeas corpus. *See* U.S. Const. art 1, § 9; Wash. Const. art. 1, § 13.

151. As discussed *infra* in Part III.B, the Washington and federal time limits for collateral attacks serve a virtually identical purpose.

152. *Cf. infra* note 229.

D. *Federal Courts Permit Equitable Tolling for Late Habeas Corpus Petitions*

While the U.S. Supreme Court has not addressed equitable tolling of the federal habeas corpus time limit, all federal circuit courts considering the issue have held that the one-year filing period for federal habeas corpus petitions should operate like a statute of limitation—not a jurisdictional bar—and hence be subject to equitable tolling.[153] These courts rest their decisions on *Irwin*, *Brockamp*, and *Beggerly*, and find that the text, structure, legislative history, and purpose of the one-year time bar compel equitable tolling in extraordinary situations.[154] The circuit courts have found that the text of the statute is not jurisdictional in nature, because Congress called the time limit a "period of limitations" or "limitations period," and did not imply any limitation on jurisdiction.[155] The Ninth Circuit has characterized the time limitation as "neither detailed nor technical; it reads like an everyday, run-of-the-mill statute of limitations."[156] Courts also have concluded that the structure of the statute supports a finding that the statute is not jurisdictional, as Congress placed the time-limitation provision in a separate section from the provision pertaining to district court jurisdiction.[157] Additionally, courts have found that the legislative history supports the view that the limitation period is similar to a statute of limitation, because there are no references to jurisdictional limitations and members of Congress refer to

153. *See* Morgan v. Money, No. 99-3251, 2000 WL 178421, at *2 (6th Cir. Feb. 8, 2000); Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999); Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999); Moore v. United States, 173 F.3d 1131, 1134 (8th Cir. 1999); Davis v. Johnson, 158 F.3d 806, 810–11 (5th Cir. 1998); Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616, 617–18 (3d Cir. 1998); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998); *see also* Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999) (narrowing application of doctrine). The First Circuit has expressly left the question open. *See* Libby v. Magnusson, 177 F.3d 43, 48 n.2 (1st Cir. 1999). The Second, Fourth, and D.C. Circuits have not yet discussed the issue. However, district courts in the Second Circuit apply the doctrine based on the reasoning of other circuits. *See, e.g.*, Vasquez v. Greiner, 68 F. Supp. 2d 307, 309 (S.D.N.Y. 1999); Torres v. Miller, No. 99 Civ. 0580 MBM, 1999 WL 714349, at *5 n.5 (S.D.N.Y. Aug. 27, 1999).

154. *See* cases cited *supra* note 153.

155. *See, e.g.*, *Sandvik*, 177 F.3d at 1271; *Davis*, 158 F.3d at 811; *Miller*, 145 F.3d at 618; Calderon v. United States Dist. Court, 128 F.3d 1283, 1288 (9th Cir. 1997).

156. *Calderon*, 128 F.3d at 1288 n.4.

157. *See, e.g.*, *Sandvik*, 177 F.3d at 1271; *Davis*, 158 F.3d at 811; *Miller*, 145 F.3d at 618; *see also Calderon*, 128 F.3d at 1289 ("[T]he Act's . . . structure—points in the same direction: [the statute's] one-year timing provision is a statute of limitations subject to equitable tolling, not a jurisdictional bar.").

the period as a statute of limitation.[158] While the purpose of the federal one-year limit is "to curb the *abuse* of the writ of habeas corpus," the Third Circuit found that this purpose is consistent with finding that the time limit is a statute of limitation subject to equitable tolling, because equitable tolling is a discretionary doctrine applied only in extraordinary circumstances.[159] Finally, courts have bulwarked their decisions to equitably toll the limitation period upon finding more unyielding statutes already subject to equitable tolling.[160]

III. THE WASHINGTON COLLATERAL ATTACK FILING DEADLINE SHOULD BE SUBJECT TO THE DOCTRINE OF EQUITABLE TOLLING

RCW 10.73.090, which governs the one-year collateral attack deadline, should be subject to equitable tolling for two reasons. First, the statute's text, legislative history, structure, purpose, and policy implications indicate that the time limit is a statute of limitation, not a jurisdictional bar, and thus can be equitably tolled.[161] Second, the state and federal collateral attack filing deadlines are analogous statutes;[162] 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.[163]

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158. *See, e.g.*, *Miller*, 145 F.3d at 618 (stating that "congressional conference report does not refer to jurisdiction, and statements by various members of Congress refer to the period as a statute of limitations") (citations omitted); *Calderon*, 128 F.3d at 1288 (stating that legislative history "speaks with equally resounding clarity. Neither the conference report, nor any statements of individual House or Senate members, describe the one-year limitation as a restriction on federal court jurisdiction.") (citations omitted); *see also Sandvik*, 177 F.3d at 1271 ("Section 2255's limit shares a legislative history with § 2244 . . . that makes clear that both statutes were intended to be ordinary statutes of limitation and not jurisdictional bars.") (footnote omitted).

159. *Miller*, 145 F.3d at 618 (citation omitted) (finding that time limit serves this purpose, because "[i]t provides a one-year limitation period that will considerably speed up the habeas process while retaining judicial discretion to equitably toll in extraordinary circumstances").

160. *See, e.g.*, *Davis*, 158 F.3d at 811; *Calderon*, 128 F.3d at 1288.

161. *See infra* Part III.A.

162. *See infra* Part III.B.

163. *See infra* Part III.B.

A. *Statutory Construction Illustrates That the Legislature Intended RCW 10.73.090 as a Statute of Limitation*

To determine whether RCW 10.73.090 is subject to the doctrine of equitable tolling, Washington courts should apply statutory construction to ascertain whether the legislature intended a statute of limitation or a jurisdictional bar. Modern equitable tolling jurisprudence, as applied by federal and Washington courts, prescribes this analysis.[164] Moreover, a comprehensive statutory construction analysis is the best way to determine legislative intent.[165]

Although Washington law is unclear as to whether RCW 10.73.090 can be equitably tolled, after applying statutory construction, courts should find that the one-year time limit operates like a statute of limitation, not a jurisdictional bar, and hence should be subject to equitable tolling.[166] Subjecting RCW 10.73.090 to equitable tolling would not impede the time limit's purpose of controlling the flow and promptness of collateral attacks.[167]

1. *The Text of RCW 10.73.090 Shows Legislative Intent to Enact a Statute of Limitation*

The text of RCW 10.73.090 evidences legislative intent to create a statute of limitation and not a jurisdictional bar.[168] First, the title of the section is "Collateral Attack—One year time limit," and the text refers to the limit in terms of the petitioner's filing deadline;[169] the statute does not imply any cutoff of the reviewing court's jurisdiction. For example, the statute plainly states that "[n]o *petition* . . . may be filed more than one year after the judgment becomes final . . . ."[170] When explaining exceptions to the time limit, the legislature states that in certain circumstances "[t]he time limit specified in RCW 10.73.090 does not apply to a *petition* . . . ."[171] The legislature's express reference to the time

164. *See supra* Part II.B.

165. *See* Union Elevator & Warehouse Co. v. State, 96 Wash. App. 288, 294, 980 P.2d 779, 782 (1999).

166. *See infra* Part III.A.1–3; *cf. infra* note 229.

167. *See infra* Part III.A.4.

168. For the relevant text of RCW 10.73.090, see *supra* text accompanying note 39.

169. *See* Wash. Rev. Code § 10.73.090 (1998).

170. Wash. Rev. Code § 10.73.090(1) (emphasis added).

171. Wash. Rev. Code § 10.73.100 (1998) (emphasis added).

limit's application to the filing of the petition illustrates that the time limit does not apply to a court's jurisdiction, authority, or power to hear the case.[172] Even assuming that the object of the one-year time limit is ambiguous, the rule of lenity[173] requires that textual ambiguities be resolved in favor of the petitioner.[174] In an equitable tolling context, this rule would mean that the deadline does not refer to a jurisdictional limit.

Second, unlike the "detailed and technical" tax statute in *Brockamp*,[175] which the Court determined was not subject to equitable tolling,[176] the one-year deadline in RCW 10.73.090 is more akin to the simple time limit in *Irwin*, which was subject to equitable tolling.[177] Like the *Irwin* statute, RCW 10.73.090 is a straightforward, bright-line statute providing the general rule that petitioners have one year to file collateral attacks.[178] The statute in *Brockamp*, on the other hand, involved a multitude of differing periods with varying ramifications, all predicated on the diverse factual status of claimants.[179] Unlike the *Brockamp* tax statute, RCW 10.73.090 applies to all inmates filing collateral attacks, unless their claims fall under a RCW 10.73.100 exception in which case no deadline applies.[180] While RCW 10.73.100 does not reference equitable tolling, express exceptions provide only one set of considerations in determining

172. *Cf.* Addleman v. Board of Prison Terms & Paroles, 107 Wash. 2d 503, 509, 730 P.2d 1327, 1331 (1986) ("A court may not read into a statute those things which it conceives the Legislature may have left out unintentionally."); King County v. City of Seattle, 70 Wash. 2d 988, 991, 425 P.2d 887, 889 (1967) (stating that courts are not to read into statutes matters that are not there).

173. The rule of lenity is a judicial doctrine requiring courts to construe ambiguous criminal statutes in favor of the accused. *See In re* Hopkins, 137 Wash. 2d 897, 901, 976 P.2d 616, 617–18 (1999).

174. *See In re* Well, 133 Wash. 2d 433, 447, 946 P.2d 750, 756 (1997) (Sanders, J., dissenting) (applying rule of lenity to interpret RCW 10.73.090).

175. *See supra* note 109 and accompanying text.

176. *See supra* note 106 and accompanying text.

177. *See supra* note 92 and accompanying text.

178. *See supra* Part I.B.

179. *See supra* note 109 and accompanying text.

180. *See supra* note 37 and accompanying text.

whether a statute can be equitably tolled.[181] RCW 10.73.100 also does not purport to be an exhaustive list.[182]

Finally, other textual indicators show that RCW 10.73.090 was meant to operate as a statute of limitation and not a jurisdictional bar. Unlike the statute in *Beggerly*,[183] equitable tolling accords with the text of RCW 10.73.090, as none of its provisions or exceptions suggest that the legislature intended to build in equitable considerations, rendering equitable tolling superfluous. Moreover, RCW 10.73.090 does not contain any provision that "extinguishes" claims, like the UFTA limitation period in *McMaster*.[184] Lastly, but quite significantly, Washington courts routinely call the one-year time limit a "procedural bar"[185] and a "statute of limitation,"[186] and have never characterized the statute as a limit on their authority.[187] Thus, an examination of the text of RCW 10.73.090 illustrates that the legislature intended the one-year time limit to operate as a statute of limitation, not a jurisdictional bar.

2. *The Structure of RCW 10.73.090 Illustrates Legislative Intent to Enact a Statute of Limitation*

The structure of the Washington collateral attack statute also demonstrates legislative intent that the one-year deadline provide a

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181. *See* United States v. Brockamp, 519 U.S. 347, 351 (1997); *see also* Carlisle v. United States, 517 U.S. 416, 435 (1996) (Ginsburg, J., concurring) (implying that even in face of putative, *exclusionless* limitation periods, equitable tolling may apply).

182. RCW 10.73.100 states only that the one-year deadline "does not apply" in the six named situations. Plainly speaking, this does not mean that the deadline "does not apply" in unnamed situations as well. The fact that the legislature enacted RCW 10.73.100 in this manner arguably shows it surmised other exceptions could apply. *See also* cases cited *supra* note 172.

183. *See supra* notes 118–23 and accompanying text.

184. *See supra* note 134 and accompanying text.

185. *See, e.g.*, *In re* Well, 133 Wash. 2d 433, 443, 946 P.2d 750, 754 (1997) (stating that when petition is untimely pursuant to RCW 10.73.090–.100, "the petition is procedurally barred").

186. *See, e.g.*, Shumway v. Payne, 136 Wash. 2d 383, 397–98, 964 P.2d 349, 356 (1998) ("RCW 10.73.090 subjects collateral attacks . . . to a one-year statute of limitation. . . . The statute of limitation [is] . . . in RCW 10.73.090(1)."); *id.* at 397–99, 964 P.2d at 356 (calling time period a "statute of limitation" numerous times); *In re* Runyan, 121 Wash. 2d 432, 445, 853 P.2d 424, 432 (1993) ("[T]his statute of limitations on petitions for collateral review is constitutional."); State v. Otto, No. 16996-1-III, 1999 WL 1028782, at *3 (Wash. Ct. App. Nov. 12, 1999) ("The one-year time limit of RCW 10.73.090 is a statute of limitation for any collateral attack."); *see also In re* Pirtle, 136 Wash. 2d 467, 471 n.1, 965 P.2d 593, 598 n.1 (1998); *In re* Benn, 134 Wash. 2d 868, 884 n.3, 939–40, 952 P.2d 116, 125 n.3, 152 (1998); *In re* Becker, 96 Wash. App. 902, 903, 982 P.2d 639, 639 (1999); State v. Burton, 92 Wash. App. 114, 118, 960 P.2d 480, 482 (1998).

187. *See also infra* note 229.

statute of limitation rather than a jurisdictional bar. The source of court jurisdiction over collateral attack proceedings is found not in RCW 10.73.090, but in Washington Rule of Appellate Procedure 16.3(c) and Article 4, section 4, of the Washington Constitution.[188] The express laws governing jurisdiction and filing deadlines are structurally distinct. The legislature is presumed to know applicable rules of appellate procedure when promulgating legislation pertaining to the right to appeal a criminal judgment.[189] Had the legislature intended to enact a jurisdictional bar, it should have clearly stated so, at least by referring to appellate rule 16.3(c). However, due to the clear structural distinction between the source of jurisdiction over postconviction proceedings and the source of the one-year limit governing the timeliness of petitions, RCW 10.73.090 implies no restriction on jurisdiction.[190]

3. *The Legislative History of RCW 10.73.090 Implies Legislative Intent to Enact a Statute of Limitation*

Legislative history supports the conclusion that the collateral attack statute was meant as a statute of limitation and not a limitation on jurisdiction.[191] RCW 10.73.090 was passed as Laws of 1989, chapter 395, section 1.[192] In section 3 of the same chapter, the legislature amended RCW 7.36.130, which restricts court jurisdiction to hear untimely requests to review custody orders.[193] In section 3, the legislature stated that "[n]o court . . . shall inquire into the legality of any judgment or process whereby the party is in custody."[194] If the legislature intended section 1 to be a jurisdictional bar, it would have used language similar

188. *But see* Wash. Rev. Code § 7.36.040 (1998) (implementing Washington Constitution Article 4, section 4, grant of state habeas corpus jurisdiction); Wash. Rev. Code § 10.73.140 (1998) (limiting judicial consideration of successive petitions).

189. *See* State v. Thompson, 93 Wash. App. 364, 367, 967 P.2d 1282, 1283 (1998).

190. A similar structural argument is made regarding the equitable tolling of the federal statute. *See supra* note 157 and accompanying text.

191. *See infra* notes 192–97 and accompanying text.

192. *See supra* note 35.

193. *See* Criminal Judgments and Sentences—Collateral Attacks—One Year Time Limit, ch. 395, § 3, 1989 Wash. Laws 2149, 2150.

194. Criminal Judgments and Sentences—Collateral Attacks—One Year Time Limit, ch. 395, § 3, 1989 Wash. Laws 2149, 2150.

to that of section 3.[195] Furthermore, the House Journal, Senate Journal, Legislative Digest, and Final Bill Reports contain no references to, or even implications of, a jurisdictional limitation on hearing collateral attacks.[196] Like the text of the statute, the Final Legislative Report implies that the object of the time limit is not court jurisdiction but the filing of the petition, like a statute of limitation.[197]

4. The Policy Implications and Legislative Purpose of RCW 10.73.090 Are Consistent with Equitable Tolling

The legislative policies and purposes behind the enactment of the collateral attack filing deadline accord with equitable tolling.[198] Washington courts have explained that the legislature enacted RCW 10.73.090 to "encourage[] prompt collateral attacks and control[] the flow of post-conviction collateral relief petitions."[199] "This is important because collateral relief undermines finality and sometimes costs society the right to punish admitted offenders."[200] Subjecting RCW 10.73.090 to equitable tolling would allow courts to hear cases where *extraordinary circumstances* prevented petitioners from filing collateral attack petitions in a timely fashion.[201] In the vast majority of cases—that is, the *ordinary* cases—equitable tolling would not apply. In these ordinary cases, the goals of finality and streamlining the collateral attack process would still be achieved.[202]

While ruling on equitable tolling claims would require judicial resources, it would not place an undue burden on the courts or the state.[203] Under the current system, inmates can file as many collateral attacks as they wish, even after one year, and courts must at least process

195. This argument, while similar to the structural argument in Part III.A.2, rests on the basic canon of construction that when a legislature uses different language, it intends different meanings. *See* Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc., 125 Wash. 2d 305, 313, 884 P.2d 920, 924–25 (1994).

196. *See* legislative materials cited *supra* note 44.

197. *See supra* note 45 and accompanying text.

198. *See infra* notes 199–207 and accompanying text.

199. *In re* Becker, 96 Wash. App. 902, 905, 982 P.2d 639, 640 (1999) (citations omitted).

200. *Id.* at 640–41 (internal quotations and alterations omitted) (citing Shumway v. Payne, 136 Wash. 2d 383, 399, 964 P.2d 349, 357 (1998)).

201. *See supra* notes 65–77 and accompanying text.

202. *See supra* note 159; *see also* Calderon v. United States Dist. Court, 128 F.3d 1283, 1288 (9th Cir. 1997).

203. *See infra* notes 204–07 and accompanying text.

them.[204] For courts to consider a successive collateral attack on the merits, however, petitioners must raise new grounds and show good cause why these grounds were not raised in a previous petition.[205] Moreover, courts can dismiss frivolous petitions without requiring the state to respond.[206] Courts in most cases would easily be able to dismiss equitable tolling claims on the merits by showing a lack of due diligence or extraordinary circumstances.[207] Finally, because the requirements for equitable tolling are rigorous, abuse of the doctrine would be highly unlikely, and the incentive would remain for inmates to file within the one-year deadline. Equitable tolling in extraordinary cases is therefore not inconsistent with the general policy of encouraging prompt filings of collateral attacks.

5. *Conclusion: Statutory Construction Shows That RCW 10.73.090 Can Be Equitably Tolled*

Federal and state precedent dictate that courts may apply equitable tolling to a limitation period only if the legislature intended a statute of limitation and not a jurisdictional bar.[208] Equitable tolling jurisprudence requires a statutory construction analysis to determine legislative intent.[209] After analyzing the text, structure, legislative history, policy implications, and purpose of Washington's one-year time limit for bringing collateral attacks, courts should find that this one-year limit operates like a statute of limitation and is thus subject to equitable tolling.[210]

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204. *See* Wash. Rev. Code § 10.73.140 (1998).

205. *See* Wash. Rev. Code § 10.73.140.

206. *See* Wash. Rev. Code § 10.73.100 (1998).

207. *See, e.g., supra* note 72 and accompanying text.

208. *See supra* Part II.B.1.

209. *See supra* Part II.B.2.

210. *See supra* Part III.A.1–4.

B. *Federal Habeas Corpus Jurisprudence Should Persuade Washington Courts to Apply the Doctrine of Equitable Tolling to RCW 10.73.090*

After considering the limitations law of federal habeas corpus, Washington courts should find that RCW 10.73.090 can be equitably tolled.[211] In history, content, and purpose, federal collateral attack law in the limitation context is analogous to Washington collateral attack law and thus should be considered highly persuasive and instructive.[212] Prior to the enactment of the state and federal one-year time limits, neither jurisdiction contained any filing deadline.[213] Not only do Washington and federal laws share a general one-year filing deadline, they also share similar exceptions.[214] For example, federal law provides an exception for a change in law,[215] as does Washington law;[216] federal law also provides an exception based on newly discovered evidence,[217] similar to Washington law.[218]

Unlike the difference in purpose between the state and federal suspension clauses noted in *Runyan*,[219] a difference that convinced the *Runyan* court not to consider federal law,[220] the purposes for enacting filing deadlines for Washington and federal collateral attacks are substantially similar. The Washington state legislature enacted its time limit to "encourage[] prompt collateral attacks and control[] the flow of post-conviction collateral relief petitions,"[221] and Congress enacted the federal time limit to "speed up the habeas process"[222] and "curb abuse of

211. Washington courts look to analogous federal law when the state law lacks precedent, *see supra* Part II.C, and federal courts permit equitable tolling. *See supra* Part II.D.

212. *See infra* notes 213–23 and accompanying text.

213. *See supra* text accompanying notes 34 and 54.

214. *See supra* notes 39–40, 55–59, and accompanying text.

215. *See supra* text accompanying note 58.

216. *See supra* text accompanying note 40.

217. *See supra* text accompanying note 59.

218. *See supra* text accompanying note 40.

219. *See supra* text accompanying note 150.

220. *See supra* text accompanying note 150.

221. *In re* Becker, 96 Wash. App. 902, 905, 982 P.2d 639, 640 (1999) (citations omitted).

222. Fisher v. Johnson, 174 F.3d 710, 713 (5th Cir. 1999); Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616, 618 (3d Cir. 1998).

the writ of habeas corpus."[223] Thus, the history, content, and purpose of the Washington law and its federal counterpart are analogous.

Washington courts look to analogous federal law for guidance when federal courts have addressed an issue on which state law is silent.[224] While Washington law is virtually silent on whether RCW 10.73.090 should be subject to equitable tolling,[225] a wealth of federal authority supports equitable tolling of the analogous federal law.[226] Moreover, the reasoning federal courts use to justify equitable tolling of the federal statute is reasoning that when independently applied to RCW 10.73.090 also supports equitable tolling.[227] Therefore, Washington courts should likewise find that the one-year time bar for bringing a collateral attack on a criminal judgment may be equitably tolled.

IV. CONCLUSION

Equitably tolling Washington's collateral attack 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.[228]

By applying a statutory construction analysis and considering federal habeas corpus jurisprudence, Washington courts should find that RCW 10.73.090 is a statute of limitation subject to equitable tolling.[229] Use of

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223. *Fisher*, 174 F.3d at 713 (citing H.R. Conf. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944); *Miller*, 145 F.3d at 618 (same).

224. *See supra* Part II.C.

225. *But see infra* note 229.

226. *See supra* Part II.D.

227. *See supra* Part III.A.

228. *See supra* notes 3–7 and accompanying text.

229. After certification for publication of this Comment, but before actual publication, Division Three of the Washington Court of Appeals found that RCW 10.73.090 is subject to equitable tolling. *See In re* Hoisington, No. 18621-1-III, 2000 WL 197890, at *5 (Wash. Ct. App. Feb. 22, 2000). The court then tolled the time limit, as previous courts neglected to rule on the petitioner's properly raised issue in prior timely appeals. *See id.* Although the court reached the correct conclusion, its

the equitable tolling doctrine would not frustrate the purpose of the statute, for equitable tolling 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 state criminal justice system would most certainly fail that small number of possibly 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.

reasoning remained wanting. The court considered only (1) that RCW 10.73.090 does not expressly contain the word "jurisdiction," and (2) that the legislature separated RCW 10.73.090 from RCW 10.73.140, which limits consideration of successive collateral attacks. *See id.* at *4. The court misplaced factor (2), because the argument should relate to the source of judicial jurisdiction, not merely a restriction to hear *successive* petitions. *See supra* Part III.A.2. While courts should find factor (1) relevant, it is not conclusive alone. The Asotin County Prosecuting Attorney's Office will be appealing this ruling to the Supreme Court of Washington. *See* Telephone Interview with Ray D. Lutes, Asotin County Prosecutor (Feb. 23, 2000).