**In the Supreme Court of the United States**

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Patrick S. Crick,

Petitioner,

v.

State of Washington,

Respondent.

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On Petition For Writ Of Certiorari
To The Ninth Circuit Court Of Appeals

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# PETITION FOR WRIT OF CERTIORARI

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PATRICK S. CRICK
PETITIONER, PRO SE
734 BERNE LN SE
OLYMPIA, WA 98513
(360)789-6323

## QUESTIONS PRESENTED

1. This Court has well settled that use of "fabricated evidence" by a State "virtually" voids a criminal judgment ab initio. But what effect does the use of fabricated evidence have on the State's finality interests? Or does an interest in "finality" outweigh the prejudice inherent to use of fabricated evidence?
2. This Court has held cause for untimeliness could be shown when post-conviction counsel was not merely negligent, but had abandoned representation without notice to the petitioner, thereby resulting in the loss of state remedies. But is some specific level of negligence required to meet this "abandonment" test, or can "garden variety" negligence be applied equally to every occurrence where a state or federal remedy is foreclosed by counsel's self-serving departure from representation without notice?

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The decision of the District Court, Western District of Washington can be found in the appendix, page 1 (hereinafter cited as App.). The Report and Recommendation of the District Court can be found at App. 4. Both Washington Appellate Court decisions were unreported but can be found at App. 17. Relevant, portions of the trial transcripts follow as Attachment 1.

## JURISDICTION

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. 1254(a) in that the claims alleged herein arise under the laws of the United States. Mr. Crick's timely motion for certificate of appealability was denied by the Ninth Circuit Court on March 29th, 2019. This Court has supplemental jurisdiction pursuant to 28 U.S.C. S 1257 to hear and determine Mr. Crick's state law claims because these claims are related to petitioner's Federal claims and rise out of a common nucleus of related facts and form part of the same case or controversy under Article III of the United States Constitution.

## CONSTITUTIONAL PROVISIONS

Section one of the Fourteenth Amendment to the United States Constitution provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Petitioner Patrick Crick was tried for a state law offense of child molestation in the first degree[1]. At the outset of, and throughout Mr. Crick's trial, the complaining witness and two State witnesses who are the parents of the complaining witness testified under oath to questions elicited by the government[2]. The trial court records recount the relevant facts[3]:

(K. Beckmyer — Direct, CP. p. 133)

Q. Okay. Could you think of any specific times when it was made available for you to go over there and you didn't?

A. I think — I don't know for sure, but I remember one time, I, I think it was them or somebody else was having a Christmas family party thing and I wasn't allowed to go and I was just happy that I wasn't allowed to go.

(B. Beckmyer — Direct, CP. p. 299 through 300)

Q. Thank you. Okay. And so, what, what were the timing and circumstances that connected those two things, Kimlyn getting in trouble and opportunities to have contact with Tracy and Patrick's family?

A. Getting in trouble meant she could not go to Christmas events at Tracy and Patrick's house.

Q. Had she ever been excluded from a Christmas event before in her life?

(M. Beckmyer — Direct, CP. p. 252 through 253)

Q. Now, was there ever any other incident besides the fact that she ended up not going to Christmas that caused you to observe that she didn't want to have contact with Patrick and Tracy?

(DEFENSE OBJECTION OMITTED)

A. Yes.

[1]As the State solely on testimonial evidence to convict Mr. Crick, the underlying facts of the crime or not be relevant to questions presented by this petition. They were efficiently summarized by the Washington Court of Appeals. See App. 17.

[2]This testimony was given as evidence of credibility for the make-or-break witness of the State and is the gravamen of the questions presented by this petition for that reason.

[3]This Court, of course, largely defers to a state court's finding of fact. Culombe v. Connecticut, 367 U.S. 568, 603, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961) (Where [a state court has] made explicit findings of fact, those findings conclude us and form the basis of our review — with one caveat, necessarily, that we are not to be bound by findings wholly lacking support in evidence"). In any event, the Washington Supreme Court's recitation of the facts are not supported by the trial transcript because no findings of fact concerning the photos was conducted outside the recorded colloquy without the presence of the jury.

Mr. Crick was convicted at trial. During the hearing on his motion for rest of judgment and new trial the clerk's record reveals a witness for the State coming forward with a photograph which depicts the complaining witness in attendance at a Christmas event[4]. No fact finding was conducted to determine if this depiction contained evidence of impeachment. However, the trial court did preserve the photograph by ordering it, submitted to the record.[5]

Mr. Crick appealed to the Second Division of the Washington Court of Appeals, which upheld the judgment of conviction. Subsequently Mr. Crick petitioned for discretionary review through his paid appellate counsel. This petition was denied by the Supreme Court of Washington because counsel failed to timely meet a procedural deadline. The fact of this error was withheld from Mr. Crick for several months and did cause any future state direct appeal relief to be foreclosed. However, let the record reflect that under Washington State statutes, Mr. Crick was not dilatory in bringing his personal restraint petition, which the State concedes was timely and fully exhausted.

[4]Sans an evidentiary hearing to determine if this picture contains probative value for the purpose of impeachment, the picture on its face demonstrates that impeachment evidence probably exists.

[5]A colloquy held at this hearing also provides on the record an identity for the author of this picture. The author has not been examined to determine any facts about this picture other than she wrote a date on the back of the photo.

In Mr. Crick's personal restraint petition (hereinafter cited as PRP), he cited numerous opinions of this Court, including Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct., 1173, 3 L.Ed.2d 1217 (1959). The Washington Court of Appeals nevertheless applied a "frivolous petition" standard of review and held the petitioner "fails to present an arguable basis for collateral relief either in law or in fact, given the constraints of the personal restraint petition vehicle." (quoting In re Pers. Restraint of Khan, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015).

On discretionary review to the Washington Supreme Court, Mr. Crick again cited in his brief the same opinions of this Court. Although the singular opinion of the Deputy Commissioner acknowledged the Napue opinion, the Deputy Commissioner below found that "the photographs were not date stamped, and Mr. Crick did not effectively refute the State's assertion that the photographs were not taken at the family home where the Christmas celebration occurred". But the Deputy Commissioner gave no reference to the quoted Napue requirement that a "prosecutor" not the "defendant" is imbibed with the constitutional "responsibility and duty to correct what he knows to be false and elicit the truth", Napue, 360 U.S. at, 269—70.[6]

[6]Mr. Crick specifically argued that the prosecutor should have known the collective testimony of the Beckmyers' was false when the picture in question appeared because the fact presented to the jury was not K. Beckmyer did not want to attend, but in fact she "did not attend" the 2011 family Christmas event, a fact now in controversy.

Because the omissions of counsel occurred after the conclusion of Mr. Crick's appeal of right, the District Court where Mr. Crick sought habeas review was the first non-appellate court available for relief. Accordingly, Mr. Crick expediently filed his motion for habeas review within days of the Washington Supreme Court's decision. However, the Western District nevertheless applied the AEDPA's "statute of limitations standard of review and held that petitioner's judgment and sentence became final on July 8, 2015, and the statute of limitations expired on July 8, 2016. This holding was based on the court's decision that Mr. Crick's appellate counsel's conduct only amounted to "garden variety negligence, not professional misconduct warranting equitable tolling". See App. 4. But in the District Court inquiry it applied the high equitable tolling bar set by Holland v. Florida, 560 U.S. 631, 632 (2010), but did not weigh this Court's holding in Maples v. Thomas, 565 U.S. 266, 132 S.Ct. 912, 181 L.Ed.2d 807 (2012), where this Court ruled:

[abandonment by post-conviction counsel constitutes an extraordinary circumstance beyond [petitioner's] control' because although an attorney is normally the prisoner's agent, and the principle typically bears the risk of negligent conduct on the part of his agent under well-settled principles of agency law, [a] markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default' . Under agency principles a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him.

Seemingly, the District Courts ruling focused on counsel failure to meet the deadline, it does not however give any discussion why counsel's subsequent conduct in failing to notify Mr. Crick of this error, or his failure to withdraw as counsel of record when he had effectively abandoned the case. Like Maples, Mr. Crick was in that instant deprived of his right to personally receive notice by the Supreme Court of Washington, a fact acknowledged by the District Court. App. 4, at, 10—11. Mr. Crick filed a timely motion for certificate of appeal. The Ninth Circuit Court of Appeals denied Mr. Crick's motion on March 29, 2019.

## REASONS FOR GRANTING THE PETITION

This case addresses a most critical right: the right to fair due process which is free of fabricated evidence. This Court has repeatedly recognized the fundamental nature of this right, noting, for example, that "the government may not knowingly use false evidence to obtain a criminal conviction", and "a State may not allow false evidence to go uncorrected when it appears at trial. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

In United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), this Court characterized the line of cases Like Napue v. Illinios, as finding it fundamentally unfair to the accused where the State's case is based knowingly on false testimony. Collecting similar pronouncements from the decisions of this Court, indeed,

> [where fraud is found, the party that used fraud should be deprived of the benefit the judgement and any inequitable advantage gained.

Marshall v. Holmes, 141 U.S. 589, 596, 12 S.Ct. 62, 35 L.Ed. 870 (1891).

> in a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example... If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself.

Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928).

I. Most courts have held that the AEDPA's limitation period - with its accompanying tolling provisions promotes the exhaustion of state remedies while respecting the interest in finality of state court judgments. But the Western District Court of Washington consistently weighs the AEDPA's limitation period in favor of preserving finality even where protection of due process provisions should outweigh this interest. This Court should grant the writ of certiorari to clarify whether a State's interest in a judgment's finality is forfeited when the state fails to elicit the truth, or fails to correct evidence it should know to be false, and to protect the critical right of fundamental fairness in, and protection of, due process.

Although the interests served by the AEDPA's finality requirement is important, it is not absolute. The limitations period under the AEDPA is not a jurisdictional bar, in fact, the limitation period only intends to promote "comity, finality, and federalism [. Holland v. Florida, 560 U.S. 631, 645, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010); Williams v. Taylor, 529 U.S. 420, 436, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Accordingly, the AEDPA's limitations period does not absolutely require district courts to dismiss based upon untimeliness. Day v. Mcdonough, 547 U.S. 198, 126 S.Ct. 1675, 1681, 164 L.Ed.2d 376 (2006). When, then, does a State forfeit finality of its judgment, thereby permitting habeas review?

This Court has discussed the AEDPA's limitation period. It held that:

[a federal court may hear the merits of untimely claims if the failure to hear the claims would constitute a "miscarriage of justice."

McQuiggin v. Perkins, U.S. 133 S.Ct. 1924, 1931-32, 185 L.Ed.2d 1019 (2013).

This Court discussed the miscarriage of justice exception alternatively:

> This "miscarriage of justice" exception is limited to habeas petitioners who can show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent."

Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). However, this exacting standard "permits review only in the 'extraordinary' case, but "does not require absolute certainty about the petitioner's guilt or innocence." House v. Bell, 547 U.S. 518, 538, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006).[7] Rather, "where post-conviction evidence casts doubt on the conviction by undercutting the reliability of the proof of guilt, but not affirmatively proving innocence, that can be enough to pass through the Schlup gateway to allow consideration of otherwise barred claims." Lee v. Lampert, 653 F.3d 929, at 938 (2011) (citing Sistrunk v. Armenakis, 292 F.3d 669, 673 (9th Cir. 2002) (en banc), cert. denied, 537 U.S. 1115, 123 S.Ct. 874, 154 L.Ed.2d 792 (2003)).

[7]"[A] petitioner may pass through the Schlup gateway by promulgating evidence that significantly undermines or impeaches the credibility of a witness at trial, if all the evidence, including new evidence, makes it 'more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt'. Schlup, 513 U.S. at 327. The Fourteenth Amendment Due Process Clause protects a criminal from conviction "except upon proof beyond a reasonable doubt

of every fact necessary to constitute the crime with which he is charged. "In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Compare Revised Code of Washington, RCW 10.58.020, "presumption of innocence"

[E]very person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt.... (emphasis added).

Under either formulation, Crick's assertion of innocence is credible where the picture in question collaborates with the affidavit of Rhiannen Conrad because they collectively demonstrate the State made misrepresentations of facts to the trial court concerning Kimlyn Beckmyer's attendance to the 2011 Christmas event. Again, the gravamen of the instant due process violation is the failed correction of false testimony when it appeared. It is inconceivable that evidence of fabricated testimony would not, as an objective matter, affect a factfinder's assessment of a witness's credibility. As the make-or-break witness, Kimlyn's testimony was crucial to the outcome of the trial because the State's case only relied on her credibility. Therefore, had the jury been given reasonable doubt as to the competence of her testimony, Mr. Crick may not have been convicted. By the fact the jury found Mr. Crick guilty, Kimlyn's testimony affected the judgment of the jury. This picture not only demonstrates a probable fabrication of evidence, but it's absence at trial also undermines the confidence in the jury's verdict.

In Washington State, most courts applying the "finality" test are statutorily required to weigh a judgment's "facial validity"[8] before looking for a statute of limitations trigger event.[9] Under either state formulation, the state interest in finality can be outweighed by errors within the "four corners" of the judgment and beyond.[10]

However, the Western District Court is not under any statutory obligation to first weigh "facial validity" before preserving the AEDPA's goal of comity, finality, and federalism. A fact that has allowed manifest judgment errors to go unchecked because district courts have been given carte blanche authority to look no further than finality when determining whether or not to approve review of habeas claims, even in cases where this Court has held vitiation of a judgment should be "virtually automatic".

Our constitution requires a state to assure that a citizen has a fair and impartial trial, to ensure the truth is elicited, and to insure

[8]Under RCW 10.73.090 finality cannot be established if a judgment is not constitutionally sound.

[9]Here RCW 10.73.090(3)(b) is again inapposite to the AEDPA as it initiates the limitations trigger date after an appellate court issues a mandate disposing of a timely direct appeal. Under 28 U.S.C. §2244(d)(1)(A), the limitations period begins before the appellate court disposes of a timely direct appeal. If comity is to be served the appellate court would be given opportunity to fully resolve its direct appeal matters.

[10]Compare In re Pers. Restraint of Stoudmire, 141 Wn.2d 342 (2000).

due process against occurrences of manifest injustices. See Napue v.Illinois, 300 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).[11]

But the Western District Court of Washington has turned Napue on its head- a conviction can presumptively rely on false evidence, and a state's interest in finality can presumptively outweigh its duty to correct false evidence when it appears.

The District Court of Washington accomplished this feat by presumably ignoring the manifest Napue claim within Mr. Crick's habeas petition, and seemingly looking for no more than date of finality thereby shifting the burden of the Napue holding to Mr. Crick. By looking no further than finality, the District Court foreclosed any opportunity to meet the miscarriage of justice test when it ruled to deny Mr. Crick a certificate of appealability. This ruling has effectively given Washington State's interest in finality; and disinterest in correction; a universal application, and ensures that its generic overriding interest will override Mr. Crick's right to protection under due process. And so long as faulty judgments can establish finality, the essence of Napue type cases - State misconduct - will not be tested. Indeed, by routinely looking no further than a state's interest in finality as a matter of standing policy, the federal rights guaranteed by the Fourteenth Amendment become illusory.

[11][a] prosecutor's 'responsibility and duty to correct what he knows to be false and elicit the truth,' Napue, 360 U.S. at 269-70, requires [him] to act when put on notice of the real possibility of false testimony. Id. In the instant case when the picture was discovered the Beckmyer's collective testimony should have been investigated, it was not.

This Court should grant the writ of certiorari to clarify that is a constitutionally sound judgment's progeny not its predecessor, and provide clear insight into whether uncorrected Napue type errors outweigh a state's interest in finality as a real consequence of failing to correct the error when it, arose. This Court should grant the writ of certiorari to protect the right of fundamental fairness and preserve finality as it was intended - a method by which to preserve judgments which do not offend due process.[12]

[12]" Without justice, finality is nothing more than a bureaucratic achievement, so we should resist the temptation to 'prostrate ourselves at the altar of finality, draped in the sacred shroud of judicial restraint, when the facts indicate that a particular result is completely unjust." Spencer v. U.S., 773 F.3d 1132 (11th Cir. 2014).

II. The Western District Court of Washington has presumptively drawn an inflexible line between "garden variety" and "gross" negligence in cases where post-conviction counsel abandons his client without notice, and the abandonment foreclosed further state remedies. But this Court has held that abandonment without notice which forecloses state remedies, is egregious attorney misconduct that warrants equitable tolling. This Court should grant the writ of certiorari to resolve this split authority and provide guidance by establishing a procedure for determining abandonment factors.

Under well—settled principles of agency law, a principal typically bears the risk of negligent conduct on the part of his agent. The emerging view under the lower courts is that an attorney's negligence, for example, miscalculation of filing deadline, would not constitute an "extra-ordinary circumstance" under equitable tolling law. Citing Maples v. Thomas, 565 U.S. 266, 281 (2012). Similarly, the Washington Western District Court has found in the instant case that "counsel's failure to inform Mr. Crick that the Washington Court of Appeals had denied the motion for reconsideration amounted to garden variety negligence, not professional misconduct warranting equitable tolling." (emphasis added).

This emerging view is hardly universal. Many courts have found that a "failure to inform a client that his case has been decided, particularly where that decision implicates the client's ability to bring further proceedings and the attorney has committed himself to his client

of such a development, constitutes attorney abandonment."[13] This latter view comports with this Court's pronouncements on the subject, as recognized by Maples v. Thomas, 565 U.S. 266, 132 S. Ct. 912, 181 L.Ed.2d 807 (2012) (holding abandonment by post-conviction counsel constituted an extraordinary circumstance beyond petitioner's control that justified lifting the state procedural bar to his federal petition. Id. at 924, 927.[14]

[13] E.g. Gibbs v. Legrand, 767 F.3d 879, 886 (9th Cir. 2014). Although the Western District Court carefully detailed the Gibbs factors, the court seemingly did not correctly consider all of the post-conviction events in proximity to counsel's failure to meet the filing deadline. Presumably, the district court did not acknowledge the fact that counsel failed to inform Mr. Crick that his post-conviction petition had been decided, and that he had been foreclosed from seeking further relief - to include seeking a writ of certiorari - because counsel had failed to competently represent his interests. Arguably, had the district court weighed this Gibbs factor, Mr. Crick's habeas petition would have been granted equitable tolling exceptions. It is noteworthy that counsel was "retired" by the Washington Bar Association for similar conduct committed at or about the same time as the ones prejudicing Mr. Crick.

[14] "Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him. "Id. at 924.

It is clear that this Court intended for 'attorney abandonment' to be included among the extraordinary circumstances exclusions which equitably tolled the AEDPA's one-year limitations period. Holland v. Florida, 560 U.S. at 652-53 (2010).[15]

Equitable tolling, of course, places the burden squarely upon those seeking exclusion from the AEDPA's limitation period. Miranda v.Castro, 292 F.3d 1063, 1065 (9th Cir. 2002).[16]

[15] Cf. Foley. v. Biter, 793 F.3d 998, 1003 (9th Cir. 2015) (finding equitable tolling warranted where counsel failed to communicate with client, failed to notify client that his habeas petition had been denied, and failed to withdraw as counsel so client could be served directly)

[16]There is no room for doubt that post-conviction counsel was contractually obligated to timely file Mr. Crick's PCR petition. Nor can it be disputed that counsel did not fulfill that obligation by timely filing the petition. The record equally demonstrates counsel did not notify his client of this fatal error, as well as the fact that the appellate court had denied the petition for that error. As a matter of record, Mr. Crick's ability to seek post—conviction relief, as well as federal relief, was foreclosed as a consequence of counsel's error. See 28 U.S.C. §2254(b)(1)(A). Therefore, the factual predicate of Mr. Crick's ineffective assistance of appellate counsel claim arose 'hen counsel deliberately misled his client and deprived him of the opportunity to take action to preserve his rights. Compare Cmty. Dental Servs. v. Tani, 282 F.3d 1164, 1169—71 (9th Cir. 2002) (defining "gross negligence" by an attorney as, "neglect so gross that it is inexcusable"

In weighing the AEDPA's limitation period against Mr. Crick's ineffective assistance of counsel claim, the district court looked to two factors. First, the court determined petitioner was notified of counsel's untimely filing error because he received a copy of the post-conviction petition — therefore the untimely filing was attributed through the agency principle to the petitioner. Second, the court determined that counsel's "garden variety" negligence did not pose as a barrier to filing a federal claim. See App. 4

The district court's ruling that counsel's errors does not bar Mr. Crick's ability to file a federal petition is untenable as it does not comport with 28 U.S.C. §2254(b)(1)(A). Ordinarily, a federal court may not grant a petition for writ of habeas unless a petitioner has exhausted available state remedies. To exhaust state remedies, a petitioner must afford the state courts the opportunity to rule upon the merits of his federal claims by "fairly presenting" them to the state's "highest" court in a procedurally appropriate manner. Baldwin v. Reese, 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004).

Accordingly, Mr. Crick's ineffective assistance of counsel claim occurred after the AEDPA's statute of limitations period had been triggered by the appellate court's affirmation of sentence. Therefore, finality of the conviction legally required Mr. Crick to seek post-conviction review. Under Washington collateral attack laws, review of petitioner's federal claims could only be had by the filing of a timely PRP. The habeas court's record holds the State's concession

to the fact that Mr. Crick did timely seek and exhaust his federal claims before the state courts.

However, instead of tolling the statute of limitations period during petitioner's properly pursued post—conviction relief pursuant to 28 U. S.C. §2254(d)(2), as guided by this Court in Carey v. Safford, 536 U.S. 214, 216, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002), the district court ruled petitioner's post-conviction petition was already untimely for the purpose of the AEDPA's statute of limitations period. Although the state statute of limitations period, and the AEDPA's limitation periods are triggered differently, under either formulation the post-conviction counsel's negligence occurred on July 8, 2015 when he, as claimed by the habeas petition, failed to notify his client that his right to due process had been foreclosed due to errors committed by counsel. Again, under Washington's limitations laws it is the mandate which initiates the post-conviction one-year trigger date, and in this case petitioner's PRP was timely for that reason.

The issues presented herein grow more compelling with each judgment of conviction in Washington State. Already the State is challenged with increasing numbers of cases before its courts, and attorney's case-loads have become overwhelming to even the most professional attorneys. As case-loads pile up, so does the opportunity for error, this in turn has caused appellate attorneys to see an ever growing number of constitutional violations which require review.

this fact could not have been better illuminated by the district court's pronouncement that the omissions of Mr. Crick's post-conviction counsel amounted to "garden variety" negligence - presumably determined by the status quo. If attorneys are given free rein to be negligent by an ever-changing view of negligence by the reviewing courts, then effective assistance of counsel may become the aberration, rather than the constitutionally protected norm.

This Court has already held there is a markedly different situation presented when attorneys' abandon their clients without notice, thereby foreclosing the progress of due process for their clients. Maples, 132 S.Ct. at 922, 927. This Court should grant the writ of certiorari to reaffirm that negligence can be "virtual abandonment" which constitutes an "extraordinary" exclusion to the AEDPA's limitations period; that a client cannot be faulted for failing to act on his own behalf when counsel gives no notice that he "had better fend for himself."

## CONCLUSION

The Western District Court of Washington has approved the barring of habeas petitions, on the grounds that the AEDPA has an overriding interest in finality of state criminal judgments. This can include judgments obtained by constitutional deprivations. This ruling conflicts with the opinions of numerous federal Courts of Appeal and state appellate courts that hold finality should be obtained by a constitutionally sound judgment that was obtained through proper due process. This Court should grant the writ of certiorari to resolve this conflict and to protect the fundamental right to due process.

A considerable number of federal and state appellate courts have held that foreclosures of due process which are the consequence of counsel negligence, is tantamount to virtual abandonment that can override the AEDPA's limitations period. But the Western District Court of Washington has reached the opposite conclusion, joining what has been called the "emerging view". This Court should grant the writ of certiorari to end this conflict in the lower courts and provide them the necessary clear guidance.

Patrick Crick
Petitioner, Pro Se
734 Berne LN. SE
Olympia, WA. 98513
(360) 789-6323