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No. 97456-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF:

VINCENT L. FOWLER,

Petitioner.

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

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A. INTRODUCTION

Lawyers are sworn to uphold the highest ethical standards. When a lawyer, duly licensed by the Washington State Bar Association (“WSBA”), fails to uphold those standards, it is a blot on our profession. When a court has the ability to step in and ameliorate the damage done by an unethical lawyer, it should, and when it fails to do so, the damage is not just to the victim of the lawyer, but also to society in general.

Here, unfortunately, Vincent Fowler was the victim of an unscrupulous lawyer, who took his family’s money but never even attempted to file the Personal Restraint Petition (“PRP”) he promised to file. When his family had to hire a second lawyer, who did everything possible to preserve Mr. Fowler’s rights, the Court of Appeals failed to ameliorate the damage, appearing almost to shift the blame to Mr. Fowler himself for even hiring the lawyer who stole from his family. *In re Pers. Restraint of Fowler*, 9 Wn. App. 2d 158, 167, 442 P.3d 647 (2019), *rev. granted* 195 Wn.2d 1007 (2020) (“Although Fowler has alleged the attorney he hired engaged in egregious behavior, he has failed to establish bad faith, deception, or false assurances by the State.”). With all due respect to the Court of Appeals, this outcome – depriving Mr. Fowler of

access to justice because a lawyer licensed by the WSBA was unethical – can only cause the public to disrespect the legal system. The just outcome is to reverse the Court of Appeals and to remand the case for decision on the merits.

B. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Washington Association of Criminal Defense Lawyers (“WACDL”) is a nonprofit association devoted to improving the legal defense of persons accused of crimes in the State of Washington. The organization has over 800 members who devote a significant portion of their practice to criminal defense work. Many of these members work on post-conviction cases and have significant experience with RCW 10.73.090’s time-bar for filing collateral attack petitions.

C. ISSUES OF CONCERN TO *AMICUS CURIAE*

1. Is the holding of the Court of Appeals’ decision in *Fowler* irreconcilable with this Court’s holding in *In re Pers. Restraint of Davis*, 188 Wn.2d 356, 395 P.3d 998 (2017), *abrogated on other grounds in State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018), that a court has the inherent power to extend the time for filing a PRP?

2. Has the State made a clear showing that *Davis* is both incorrect and harmful and thus should be overruled?

3. Is the holding of *Davis* in accord with deeply rooted principles of justice?

4. What should be the standard for granting extensions of time for filing or amending PRPs?

D. STATEMENT OF FACTS

Amicus accepts the statement of facts set out in the briefs of the parties.

E. ARGUMENT

1. Fowler Is Irreconcilable with Davis

In *Fowler*, a prisoner hired an attorney to prepare and file a PRP. The attorney stopped communicating with the prisoner, failed to do the work and then resigned from the bar in lieu of discipline. The prisoner's family had to hire a new lawyer who, a few days before the expiration of the one-year deadline,¹ filed a so-called "placeholder" petition which

¹ The Court of Appeals held that the deadline was one year from the date the superior court amended the judgment regarding the LFOs. *Fowler*, 9 Wn. App. 2d at 163. Although the State disputes that deadline, *Supplemental Brief of Respondent* at 4, if the deadline was really earlier, then prior counsel's behavior is even more egregious in that he was hired and allowed the deadline to come and go without notice to Mr. Fowler, and this egregiousness actually supports Mr. Fowler's position even more.

raised no substantive claims. Rather, the petition stated, “More time is required to obtain prior counsel’s file, diagnose issues, conduct investigation, if necessary, and then prepare and file the petition.” *Fowler*, 9 Wn. App. 2d at 161; *see also Supplemental Brief of Petitioner Vincent Fowler* at 3-4. Over five months later, counsel then filed a supplemental petition that, for the first time, raised substantive claims. *Fowler*, 9 Wn. App. 2d at 162.

The Court of Appeals dismissed the PRP as untimely because any substantive claims were not raised until after the one year time limit in RCW 10.73.090 had lapsed. The court held that, even under RAP 18.8, “[c]ourts do not have the authority to waive statutory limitation periods.” *Fowler*, 9 Wn. App. 2d at 167. The court also rejected an equitable tolling argument because the required “bad faith, deception, or false assurances” were not “caused by the opposing party or the court.” *Id.* at 166.

The Court of Appeals’ decision, though, directly conflicts with this Court’s holding in *Davis*.² In *Davis*, before the one-year deadline passed, a

² *Davis* post-dates by nearly four years the main case relied on by the State, *In re Pers. Restraint of Haghighi*, 178 Wn.2d 435, 309 P.3d 459 (2013). *Haghighi* never addressed a court’s inherent powers to extend the deadline of RCW 10.73.090, and thus the case has limited relevance to the outcome of this case. *See Berschauer/Phillips* (continued...)

prisoner failed to file a PRP, but filed a motion to extend the time. After the motion was granted, Davis filed a PRP with arguably time-barred claims seven months after the deadline had passed. *Davis*, 188 Wn.2d at 362. Although the State objected to consideration of the claims, this Court rejected its argument, holding that the judicial branch of government had inherent power to extend the time:

In its responsive brief, the State has renewed its argument that “[t]he statute of limitations set forth in RCW 10.73.090(1) is a mandatory rule that bars appellate consideration of personal restraint petitions filed after the limitations period has passed.” *Resp. to Pers. Restraint Pet.* at 5 (citing *In re Pers. Restraint of Bonds*, 165 Wn.2d 135, 196 P.3d 672 (2008) (plurality opinion); *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 952 P.2d 116 (1998)). We do not find that holding in either opinion. The superior court and the Supreme Court in Washington have original jurisdiction to consider habeas challenges. Wash. Const. art. IV, §§ 4, 6. The time limits in RCW 10.73.090-.100 are designed to protect the finality of judgments while permitting consideration of many potentially meritorious collateral challenges. *See In re Pers. Restraint of Coats*, 173 Wn.2d 123, 129-31, 267 P.3d 324 (2011). *We find exercising our inherent power to grant a timely filed motion for extension of time is consistent with this design and reject the State’s argument.*

²(...continued)

Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994) (“In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.”) (citing *Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 69 L. Ed. 411 (1925) (questions which merely lurk in the record, but are neither brought to a court’s attention nor ruled upon, are not considered to have been decided so as to constitute precedent)).

Davis, 188 Wn.2d at 362 n.2 (emphasis added).

The *Davis* Court went on to consider the petitioner's arguments on their merits even though *none* of them were actually raised prior to the one-year time limit. Although the State was on notice that Mr. Davis was likely going to file a PRP of some nature, raising some issue, Davis actually filed no substantive claims at all by the one-year deadline. One year after the issuance of the mandate, the State was in the dark as to the precise nature of the challenges Davis claimed he would make in the future.

The decision in *Davis* on this issue was not *dicta*. "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed." *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 531, 79 P.3d 1154 (2003) (quoting *State v. Potter*, 68 Wn. App. 134, 149 n.7, 842 P.2d 481 (1992)). Conversely, if the statements were necessary to the holding of the case, they are not *dicta*. *Bellevue v. Acrey*, 103 Wn.2d 203, 209, 691 P.2d 957 (1984). In *Davis*, the State sought to bar this Court from reaching the issues raised by Mr. Davis because, it argued, they were time-barred. The Court's resolution of this issue against the State is properly characterized

as a “holding” because it was necessary to resolve this procedural issue before the Court could consider Davis’ substantive issues.

In many respects, the facts in *Davis* are more mundane than those in this case, with Davis’ attorneys simply seeking more time to file the PRP. At least in this case, there was egregious misconduct by a lawyer, with the original lawyer taking Fowler’s family’s money to file a PRP, never filing anything, ceasing communication with his client and then giving up the practice of law, leaving Fowler without counsel at all. Mr. Davis’ lawyers were not so blatantly unprofessional and simply wanted a “garden variety” extension of time.³ The fact that the Court in *Davis* granted a continuance simply to give Mr. Davis’ lawyers more time to file the PRP is significant as it puts to rest the idea even that there has to be extraordinary circumstances, beyond a party’s control, for a court to grant a continuance of RCW 10.73.090’s deadline.

³ In her concurring opinion in *Davis*, Justice Gordon McCloud addressed her perception that Mr. Davis’ lawyers, “dedicated, experienced, hardworking professionals,” were ineffective in their preparation of Mr. Davis’ PRP. *Davis*, 188 Wn.2d at 380 (Gordon McCloud, J., concurring). But her critique had nothing to do with the timing of their filing of the PRP, but rather focused on the lawyers’ lack of preparation of evidence external to the record to show prejudice. *Id.* at 381-93.

2. The State Fails to Demonstrate Why this Court Should Overrule *Davis*

This Court does “not lightly set aside precedent.” *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). *Stare decisis* “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)). Accordingly, this Court will only overrule prior precedent unless there is “a clear showing that an established rule is incorrect and harmful before it is abandoned.” *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

Here, the State does not even begin to try to show that *Davis* is both incorrect *and* harmful.⁴ *Davis* came out nearly three years ago, in

⁴ The State argues that the Court should not consider *Davis* because it is a new “issue” or “theory” since Mr. Fowler did not cite to it in the Court of Appeals. *Supplemental Brief of Respondent* at 5-6. While it is not clear that Mr. Fowler is in fact raising a new issue or theory, as opposed to citing a new case, it is not material. RAP 13.7(b) limits review simply to questions raised in Mr. Fowler’s motion for discretionary review, and Mr. Fowler clearly complied with that requirement. If the State did not want the Court to review the propriety of *Davis*, it should have objected in a properly filed response to Mr. Fowler’s motion for discretionary review. It failed to do so and thus should not be allowed to complain now.

(continued...)

May 2017. The State fails to show that the Court’s decision opened the floodgates for litigation that overburdened the courts or the criminal justice system, that reopened old cases to the prejudice of the State or victims of crimes, or caused any other demonstrated harm. On the other hand, a decision that allows for consideration of meritorious constitutional issues on their merits can only make our society more just and humane.

As for whether *Davis* is incorrect, this Court will not “overrule prior decisions based on arguments that were adequately considered and rejected in the original decisions themselves.” *State v. Johnson*, 188 Wn.2d 742, 757, 399 P.3d 507 (2017) (internal quote and citation omitted). A review of the briefing in *Davis* reveals that the Pierce County Prosecuting Attorney’s Office fought hard to have Mr. Davis’ PRP dismissed on time-bar grounds, devoting many pages of its response brief

⁴(...continued)

The State relies on footnotes in *State v. Houston-Sconiers*, 188 Wn.2d 1, 21 n.6, 391 P.3d 409 (2017) and *State v. Benn*, 161 Wn.2d 256, 262 n. 1, 165 P.3d 1232 (2007). Those footnotes are truly *dicta*, since the Court did not consider new issues that were raised by parties who are ultimately prevailed on the issues they did raise. It also does not appear that the issues raised in those cases were raised in the petitions for review as opposed to being raised for the first time in supplemental briefs, in contravention of RAP 13.7(b). In any case, this Court routinely considers new theories raised for the first time in this Court so long as they relate to the core issues upon which review was granted. See *State v. Iniguez*, 167 Wn.2d 273, 285 n. 4, 217 P.3d 768 (2009); *State v. Mendez*, 137 Wn.2d 208, 217, 970 P.2d 722 (1999), *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007); *State v. Hendrickson*, 129 Wn.2d 61, 69 n.1, 917 P.2d 563 (1996).

to the issue, attaching declarations and pleadings regarding its objections to the extension of time.⁵ The holding of this Court in *Davis*, while in a footnote, was made after extensive briefing and was not a casual afterthought.

The State has not demonstrated that the holding of *Davis* is both harmful and incorrect, and thus its holding is binding.

3. *Davis* is Based on Deeply Rooted Concepts of Justice

This Court's conclusion in *Davis* that a court has inherent power to extend a deadline for collateral attack was not an outlier. Washington courts derive their judicial power from article IV of the state. "The inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy has been granted or not; the power to promulgate rules for its practice, and the power to provide process where none exists." *In re Bruen*, 102 Wash. 472, 476, 172 P. 1152 (1918).

The deadline set out in RCW 10.73.090 is not an inalterable jurisdictional barrier to relief, and this Court has on other occasions

⁵ A copy of the State's brief in *Davis* is on file at the Washington State Law Library.

certainly allowed for the late filing or late amendments of PRPs in various circumstances that satisfy the broad end of justice. *See In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 471 n.1, 965 P.2d 593 (1998) (allowing an amendment to a PRP outside the one-year time limit because the case involved “unusual circumstances” of the change of counsel); *In re Pers. Restraint of Vandervlugt*, 120 Wn.2d 427, 430-31, 436, 842 P.2d 950 (1992) (reviewing a claim brought as an untimely amendment to a timely PRP, and granting relief). Also, as Mr. Fowler has explained throughout his supplemental briefing, RCW 10.73.090 is subject to the doctrine of equitable tolling.

Recognizing the inherent power of a court to extend the deadline in the interest of justice also makes good sense. The principles behind *Davis* – recognizing the finality of judgments but attempting to address a prisoner’s arguments on the merits rather dismissing them on technical procedural grounds – are not unique.⁶ Ultimately, consideration of meritorious claims that were not raised earlier because a lawyer was

⁶ *See* Const. art. I, § 32 (“A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.”); RAP 1.2(a) (“These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).”).

crooked or because a mentally ill or illiterate prisoner was too poor to hire a lawyer to write a petition with proper legalese can only increase respect for the law in general.

Historically, going back to Article 40 of the Magna Carta, the function of the courts was to provide justice: “To no one will we sell, to no one deny or delay right or justice.” *Magna Carta* (1215 version). In a treatise highly influential in colonial America, Sir Edward Coke construed the meaning of “justice” in Article 40 to a requirement that there be a remedy for all wrongs. E. Coke, *Second Institute*, 55-56 (4th ed 1671). While Washington State does not have an explicit “remedy” clause in its constitution (guaranteeing a remedy for every wrong), *see Shea v. Olson*, 185 Wash. 143, 160-61, 53 P.2d 615 (1936), several provisions of the Washington Constitution taken together insure that the rights guaranteed in article I, sections 3, 4, 5, 7, 9, 12, 14, 20, 21 and 22 are not empty platitudes.⁷

⁷ Article I, section 10 (“Justice in all cases shall be administered openly, and without unnecessary delay.”); article I, section 29 (“The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.”); article I, section 30 (“The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.”); article I, section 32 (“A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.”).

RCW 10.73.090's time limits, while previously held to be constitutional,⁸ also need to be measured against the historic right of access to the courts, grounded in the First Amendment, the Fifth Amendment's and/or the Fourteenth Amendment's Due Process and Equal Protection Clauses, Article IV, § 2, cl. 1's Privileges and Immunities Clause and article I, sections 3, 4, 10 and 12 of the Washington Constitution.⁹

As this Court recounted:

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803). The people have a right of access to courts; indeed, it is “the bedrock foundation upon which rest all the people's rights and obligations.” *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991).

⁸ See *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 853 P.2d 44 (1993). Notably, *Runyan* only addressed constitutional issues raised under the state constitutional right to habeas corpus, Const. art. I, § 13, and equal protection under U.S. Const. amend. XIV; Const. art. I, § 12. *Runyan* never analyzed RCW 10.73.090 in light of the constitutional right to access the courts discussed *infra*.

⁹ “It is well established that prisoners have a constitutional right of access to the courts.” *Whitney v. Buckner*, 107 Wn.2d 861, 865, 734 P.2d 485 (1987). See also *Christopher v. Harbury*, 536 U.S. 403, 415 n.12, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002); *Davis v. Cox*, 183 Wn.2d 269, 289-91, 351 P.3d 862 (2015); *Lowy v. PeaceHealth*, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012); *In re Pers. Restraint of Addleman*, 139 Wn.2d 751, 753-54, 991 P.2d 1123 (2000).

Putman v. Wenatchee Valley Medical Center, 166 Wn.2d 974, 979, 216 P.3d 374 (2009); *see also id.* at 980 (discussing inherent power of courts and citing *In re Bruen, supra*).

It should be kept in mind that RCW 10.73.090 is of relatively recent vintage. Prior to the adoption of this statute in 1989¹⁰ and its federal counterpart in 1996,¹¹ it was not uncommon for post-conviction petitions to be filed years, if not decades, after convictions.¹² RCW 10.73.090's effect is to cut off access to the courts by a specific population that is more in need of judicial protection than most people, including cutting off access to justice for people whose convictions may be constitutionally infirm – i.e., who would ordinarily have a route to unlock

¹⁰ Laws of 1989, ch. 395, § 1.

¹¹ 28 U.S.C. § 2244(d).

¹² *See, e.g., United States v. Tucker*, 404 U.S. 443, 444-45 & n.2, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1972) (noting collateral attacks on convictions that were filed 20 to 30 years after convictions); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (*coram nobis* writ granted 40 years after conviction); *Persinger v. Rhay*, 52 Wn.2d 762, 329 P.2d 191 (1958) (writ granted in 1958 for conviction from 1953). Even after the adoption of RCW 10.73.090 in 1989, this Court has still considered, in some circumstances, the merits of a post-conviction petition decades after a conviction is final. *See In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 593-94, 316 P.3d 1007 (1984) (where RCW 10.73.120 not followed, court considered PRP on its merits filed over 20 years after conviction).

the prison doors based upon recognized constitutional violations.¹³ The statute should therefore be viewed with great suspicion and applied sparingly. Moreover, as with any statute in derogation of common law, RCW 10.73.090 should be strictly construed.¹⁴

On the other hand, Washington State has structured its post-conviction system such that indigent prisoners, some with mental health and literacy problems, must file *pro se* PRPs before the court will screen them for “merit” before assigning counsel.¹⁵ This means that many timely petitions are not professionally prepared, may not always use precise language, and are prepared by those without access to investigative and expert resources. Under such circumstances, there is nothing wrong with affording such prisoners a bit more leeway to file an amended petition or to have more time to file the original petition.¹⁶

¹³ This Court once struck down as a violation of article I, section 12, a special statute of limitation in medical malpractice cases (RCW 4.16.190(2)) that had the potential of burdening a particularly vulnerable minority (children). See *Schroeder v. Weighall*, 179 Wn.2d 566, 316 P.3d 482 (2014).

¹⁴ See *Fellows v. Moynihan*, 175 Wn.2d 641, 649, 285 P.3d 864 (2012) (“Statutes that create privileges restricting discovery are in derogation of the common law and the policy favoring discovery, and so must be strictly construed.”).

¹⁵ See *State v. Robinson*, 153 Wn.2d 689, 695-96, 107 P.3d 90 (2005).

¹⁶ Similarly, the restrictions on filing successive petitions are relaxed when a prisoner has not been represented by counsel throughout post-conviction proceedings.
(continued...)

While the issue in this case does not squarely fall within *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), addressing exhaustion of claims and federal habeas petitions, the reasoning of that decision is persuasive:

[A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 17.¹⁷ Following these principles when construing the Court's inherent power to extend the deadline in RCW 10.73.090 makes perfect sense because our system of justice should not be structured to deny a prisoner even entry through the courthouse doors simply because they had the misfortune of hiring a lawyer (as with Fowler's lawyer) who neglected his cases and had to resign, or because person was too poor, too illiterate, too mentally ill, or too isolated to be able to hire a lawyer who would not steal their money and file a properly prepared post-conviction petition.

In *In re Pers. Restraint of Carter*, 172 Wn.2d 917, 928-29, 263 P.3d 1241 (2011), the Court applied these principles when it held that

¹⁶(...continued)
See In re Pers. Restraint of Greening, 141 Wn.2d 687, 700-01, 9 P.3d 206 (2000).

¹⁷ *See also Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013).

“actual innocence,” even in a non-capital, but life without parole case, allowed the Court to apply an “equitable exception” to RCW 10.73.090:

Unlawfully restraining someone for the remainder of his or her life under a persistent offender sentence would represent a manifest injustice necessitating that we look through procedural screens such as the time bar to prevent a forfeiture of liberty.

Carter, 172 Wn.2d at 931.

Davis is simply an extension of *Carter* and allows for the granting of a continuance of RCW 10.73.090’s deadline in cases where the State has no expectation of finality because, before the deadline comes and goes, the prisoner at least files something putting everyone on notice that they are going to challenge the conviction. In the absence of any prejudice to the State, a court has the inherent power to extend the time limit. This is a result which can only further fundamental justice in our legal system.

4. Courts Should Grant Motions to Continue or Amendments to Pro Se PRPs for Good Cause Based on the Circumstances

Statutes of limitations “are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the

loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.” *United States v. Kubrick*, 444 U.S. 111, 117, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979).

In *Davis*, the State was on notice that Mr. Davis was going to file a PRP challenging his conviction and sentence. Although his attorneys wanted more time to craft their petition and the nature of their claims was not even clear when they filed the motion to continue, the State could hardly have been surprised that Davis later filed a PRP setting out the various claims. There was no “repose” that was disturbed by the late-filed petition.

Similarly, in this case, when the new lawyers filed a “placeholder” petition setting out a possible claim of ineffective assistance of counsel by the one-year deadline, when Mr. Fowler’s new lawyers later filed a PRP with more detail, the State could also hardly be surprised that Fowler was applying for post-conviction relief.

In other situations, where a prisoner meets the deadline and files a *pro se* petition, but because of poverty, illiteracy, mental health issues, or barriers to investigate based upon incarceration, but later files additional claims, perhaps because of the assignment of counsel, there is little harm

to allowing for liberal amendment of the PRP to relate back to the initial filing. Again, there can be no surprise to the State because of the notice that the case was not done – that the incarcerated person was still seeking to exercise their options to file for post-conviction relief.

There can be no drawbacks from adopting a rule that gives the power to a court to determine when to waive or extend the time limit for filing for post-conviction relief. A court can consider such factors as (1) the reasons for the delay, (2) the amount of time involved, (3) the prejudice to the State, (4) whether the petitioner has counsel, (5) whether that counsel is effective under the circumstances, (6) the literacy or mental health of the petitioner, (7) the poverty of the petitioner, (8) the incarceration of the petition, (9) the access of the petitioner to investigative and expert resources, and, perhaps most importantly, and (10) whether the petitioner put everyone on notice that they were challenging the conviction before the expiration of the time limit, thus eliminating the surprise to the State. If a person who obtains a continuance or a retroactive amendment of the PRP, and files a meritless PRP, the claims will easily be denied substantively and there is no harm to society. However, if the conviction is truly flawed, then there can be no social benefit to closing off access to

justice, as the Court of Appeals did in this case, because of the elevation of form over fairness.

F. CONCLUSION

For the foregoing reasons, amicus curiae respectfully asks the Court to reverse the decision of the Court of Appeals.

DATED this 30th day of April 2020.

Respectfully submitted,

s/ Neil M. Fox
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Declaration of Service

I hereby certify that on the 30th day of April 2020, I electronically filed the foregoing with the Clerk of the Court using the Appellate Courts Portal which will send notification of such filing and an electronic copy to attorneys of record for the Petitioner, Respondent and any other party.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 30th day of April 2020, at Seattle, WA.

s/ Neil M. Fox

WSBA No. 15277

LAW OFFICE OF NEIL FOX PLLC

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