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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.

ON DISCRETIOANRY REVIEW FROM
THE COURT OF APPEALS, DIVISION II

Court of Appeals No. 51029-4-II
Superior Court No. 13-1-00466-4

RESPONDENT'S ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS

CHAD M. ENRIGHT
Prosecuting Attorney

RANDALL A. SUTTON
Deputy Prosecuting Attorney

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

SERVICE	<p>John Henry Browne 801 2nd Ave Ste 800 Seattle, WA 98104-1573 Email: johnhenry@jhblawyer.com</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 29, 2020, Port Orchard, WA _____ Original e-filed at the Supreme Court; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us</p>
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I. COUNTERSTATEMENT OF THE ISSUE

Whether the passage in *In re Davis* on which Fowler and Amicus rely is an aberration in this court's jurisprudence and should be disregarded?

II. ARGUMENT

THE PASSAGE IN DAVIS ON WHICH FOWLER AND AMICUS RELY IS AN ABERRATION IN THIS COURT'S JURISPRUDENCE AND SHOULD BE DISREGARDED.

Ironically, Amicus suggests that the State that wants to jettison precedent by suggesting that *Davis* should not control here. However, if *Davis* holds as Fowler and Amicus would suggest, then that case is the one that has swept aside decades of precedent without justification. Amicus argues that "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)." Brief at 9. But in support of this contention, Amicus cites not the opinion in *Davis*, but the brief of the respondent in that case.¹ No doubt this is because the opinion in *Davis* contains no such exegesis. To the contrary its alleged holding is brief and devoid of citation to prior authority authorizing the departure

¹ Amicus has not provided a copy of that brief noting instead that it is available at the state law library in Olympia.

from long-standing precedent for which Amicus and Fowler argue:

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. 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.

In re Davis, 188 Wn.2d 356, 362 n.2, 395 P.3d 998 (2017).

Prior precedent shows that historically, the inherent authority of the Court with regard to the granting of habeas relief was extremely limited. Contrary to Amicus’s claim, Brief at 15, that RCW 10.73.090 is in “in derogation of the common law,” this history shows that the present statute is actually entirely consistent with the common law right to habeas corpus, and indeed, expands it.

A court’s authority to entertain a collateral attack in a criminal case arises from either a statute or the constitution. The constitutional authority, which is contained in article 1, section 13, and article 4, section 6, is very

narrow and does not permit challenges that go beyond the face of a final judgment of a court of competent jurisdiction. *In re Runyan*, 121 Wn.2d 432, 441, 853 P.2d 424 (1993). Any inquiry beyond the face of a final judgment results from legislative authorization, as this Court has noted in the past:

The legislature has long played a role in deciding the scope of collateral relief, and this court has accepted this involvement, so long as the scope of the relief afforded is not constricted beyond the narrow boundaries of our constitution.

Runyan, 121 Wn.2d at 443.

Legislative authorization for review beyond the face of a final judgment can be found in two separate statutes. The first statute, which applies only to superior courts, is RCW 4.72.010. *See State v. Sampson*, 82 Wn.2d 663, 665, 513 P.2d 60 (1973). The second statute, which applies to all courts of record, is RCW 7.36.130.

The habeas corpus statute, RCW 7.36.130, was derived from a statute passed by the first legislature of Washington Territory. As first enacted, the territorial habeas corpus statute was an *absolute* prohibition against collateral review of a facially-valid judgment by a court of competent jurisdiction. Laws of 1854, ¶ 213, § 445. That restriction has been repeatedly upheld by this Court. *In re Lybarger*, 2 Wash. 131, 25 P. 1075 (1891); *In re Grieve*, 22 Wn.2d 902, 158 P.2d 73 (1945).

In 1947, the habeas corpus statute was amended to allow challenges beyond facial invalidity when the challenge was based upon a constitutional violation. Laws of 1947, ch. 256, § 3. “[T]hese statutory changes have never affected, nor could they affect, the core constitutional inquiry protected by our state suspension clause.” *Runyan*, 121 Wn.2d at 443.

In 1989, the Legislature acted to restore some finality to criminal judgments by limiting the authority it had previously granted to courts to look behind the face of a judgment and sentence. *Honore v. Board of Prison Terms & Paroles*, 77 Wn.2d 660, 691, 466 P.2d 485 (1970) (Hale, J., concurring). Specifically, the Legislature restricted the number of petitions for relief a prisoner could file with respect to a single conviction and the length of time a prisoner could wait before bringing a petition. *See* RCW 10.73.090; RCW 10.73.100. The time-bar and the legislatively authorized grounds for waiving the one-year time-bar were incorporated into the jurisdictional statute governing all habeas corpus proceedings. *See* RCW 7.36.130(1).

That this time-bar is jurisdictional has been recognized by this Court in response to requests to consider collateral attacks filed after the expiration of the one-year period. *See, e.g., Shumway v. Payne*, 136 Wn.2d 383, 397-98, 964 P.2d 349 (1998) (“The statute of limitation set

forth in RCW 10.73.090(1) is a mandatory rule that acts as a bar to appellate court consideration of personal restraint petitions filed after the limitation period has passed, unless the petitioner demonstrates that the petition is based solely on one or more of the [grounds contained in RCW 10.73.100]”); *In re Benn*, 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998) (court rules cannot be used to alter or enlarge the time limit contained in RCW 10.73.090).

The foregoing demonstrates that the Court’s authority with regard to entertaining collateral attacks beyond determining the facial validity of the judgment relies on legislative authorization. Thus, since the only legislatively authorized exemptions to the collateral attack of a facially valid judgment are those found in RCW 10.73.100, the alleged holding of *Davis* would be contrary to the long-settled precedent of this Court. *Davis* should be recognized as the aberration that it is and limited to the unique circumstances of that capital case.

The only other similar case Amicus cites was also a capital case and similarly failed to address this Court’s precedent. In *In re Pirtle*, 136 Wn.2d 467, 471 n.1, 965 P.2d 593 (1998), the Court ruled, again in a footnote, without any citation to authority:

The State has filed a motion asserting the one-year statute of limitations, RCW 10.73.090, requires 9 of the 14 issues to be stricken from Pirtle’s amended PRP. The State’s

argument is not well taken. The State is fully aware of the unusual circumstances involved in this case and this court's granting of Pirtle's motion for reconsideration and appointment of new counsel. We will not revisit that decision and the State's motion is denied.

In re Vandervlugt, 120 Wn.2d 427, 842 P.2d 950 (1992), is not on point. In that case, the Court concluded that there were "significant changes in the law that are material to Vandervlugt's sentence." *Vandervlugt*, 120 Wn.2d at 433. The case was thus squarely within RCW 10.73.100(6), and thus sheds no light on whether the Court has the authority to extend the deadline set forth in RCW 10.73.090 without statutory authority.

Amicus further argues that recognizing an inherent authority to waive RCW 10.73.090 "makes good sense." Brief at 11. That however, is a question of policy that was no doubt considered by the Legislature when it enacted the limitation and also enacted its various exceptions. What Amicus fails to present is a basis in the constitution, the common law, or the duly-enacted statutes of this state that would allow such an assertion of authority. This Court has repeatedly recognized in many well-reasoned opinions that the time limit set forth in RCW 10.73.090 is mandatory. The two capital cases cited by Amicus are exceptions to the rule and contain no substantial analysis of the question. They should be recognized as the aberrations that they are and be disavowed.

This Court has recognized the doctrine of equitable tolling to address cases where it would be unjust to prohibit relief. But that doctrine is properly limited to circumstances where the petitioner has not slept on his rights. As discussed in the State's other briefing, Fowler did not diligently pursue the claims he raises now. According to his own declaration, he was aware of the basis of the present claims at the time of trial, which occurred in 2013. He then did nothing for two years while hired counsel apparently did nothing and failed to return his attempts at contact, hiring new counsel only on the eve of the deadline in the Fall of 2017, some four years after he allegedly became aware of the grounds for relief. The Court of Appeals correctly rejected Fowler's claims, and its decision should be upheld.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that the judgment and sentence of the trial court be upheld.

DATED May 29, 2020.

Respectfully submitted,
CHAD M. ENRIGHT
Prosecuting Attorney



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

KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

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