

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
May 22, 2014, 1:49 pm
BY RONALD R. CARPENTER
CLERK

NO. 90229-1

E CDF
RECEIVED BY E-MAIL

Court of Appeals No. 68633-0-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEE FREEMAN,

Petitioner.

ANSWER TO PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

AMY MECKLING
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

 ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF RESPONDENT</u>	1
B. <u>FACTS AND COURT OF APPEALS OPINION</u>	1
C. <u>ARGUMENT</u>	1
THE COURT SHOULD DENY THE PETITION FOR REVIEW.....	2
D. <u>CONCLUSION</u>	5

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Coleman v. Thompson, 501 U.S. 722,
111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)..... 3

O'Sullivan v. Boerckel, 526 U.S. 838
119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999)..... 3

Washington State:

In re Pers. Restraint of Haghghi, 178 Wn.2d 435,
309 P.3d 459 (2013) 3

State v. Freeman, No. 68633-0-1
(Div. I, Dec. 23, 2013) 1

State v. Smith, 144 Wn. App. 860,
184 P.3d 666 (2008) 4, 5

Statutes

Washington State:

RCW 10.73.090..... 2, 4

RCW 10.73.140..... 5

Rules and Regulations

Washington State:

CrR 7.81, 4, 5

RAP 13.45

A. IDENTITY OF RESPONDENT

Respondent, the State of Washington, respectfully asks this Court to deny the petition for review.

B. FACTS AND COURT OF APPEALS OPINION

Freeman filed an untimely CrR 7.8 motion in the King County Superior Court. Although the State asserted that the motion should be transferred to the Court of Appeals because it was untimely, the trial court concluded that timeliness was a matter for the Court of Appeals to determine, denied the State's motion to transfer, and denied Freeman's CrR 7.8 motion. Freeman appealed, and in an unpublished opinion, Division I of the Court of Appeals vacated the denial of Freeman's motion, converted the appeal to a personal restraint petition, and dismissed it as untimely. State v. Freeman, No. 68633-0-1 (Div. I, Dec. 23, 2013) (attached to Petition for Review).

C. ARGUMENT

THE COURT SHOULD DENY THE PETITION FOR REVIEW.

Freeman's petition for review is based on two assertions: (1) that his CrR 7.8 motion was timely filed, and (2) that the Court of Appeals, on its own motion, erroneously converted his appeal to a personal restraint petition and dismissed it as untimely. Neither of these contentions is correct.

Freeman repeatedly claims that his CrR 7.8 motion was "timely," but in so doing, he ignores the plain language of RCW 10.73.090. A "collateral attack" is any form of post-conviction relief other than a direct appeal, including, but not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion for a new trial, and a motion to arrest judgment. RCW 10.73.090(2). With a number of exceptions inapplicable to Freeman, a collateral attack must be brought within one year from the date the judgment becomes final, which occurs on the last of the following dates:

- (a) The date it is filed with the clerk of the trial court;
- (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction;
- or (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal.

RCW 10.73.090(1), (3).

Freeman filed his CrR 7.8 motion more than six years after the mandate issued in his direct appeal. CP 1; 160-61. He did not petition the Supreme Court for a writ of certiorari to review the decision affirming his conviction on direct appeal. Rather, the petition for certiorari that his argument relies on sought review of a federal district court's dismissal of a habeas petition. CP 107, 129, 131.

Federal habeas review is a collateral civil proceeding in which the court is not asked to review the state court's criminal judgment on direct appeal; rather the federal court asks only whether the petitioner's custody is lawful. See Coleman v. Thompson, 501 U.S. 722, 730, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) ("When a federal district court reviews a state prisoner's habeas corpus petition . . . it must decide whether the petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States.' . . . The court does not review a judgment, but the lawfulness of the petitioner's custody *simpliciter*." (internal citations omitted) (emphasis in original)).

Moreover, before a defendant may seek federal habeas relief, he is required to exhaust his remedies in state court. 28 U.S.C.A. § 2254(b)(1)(A); see also O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) ("[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition."). Principles of comity require "that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." Boerckel, 526 U.S. at 842.

Freeman's judgment and sentence unquestionably became final on January 27, 2006, when the mandate issued affirming his

conviction and sentence. CP 160-67; RCW 10.73.090(3); see also In re Pers. Restraint of Haghghi, 178 Wn.2d 435, 448, 309 P.3d 459 (2013) (“RCW 10.73.090’s time bar promotes finality of judgments, a principle especially important in this context because a petitioner cannot obtain federal habeas corpus relief until his or her judgment is final.” (emphasis added)). Freeman’s CrR 7.8 motion was filed almost six years later. CP 1. Therefore, the Court of Appeals properly found that the motion was untimely pursuant to RCW 10.73.090.

Freeman also maintains that the Court of Appeals denied him unspecified rights when it acted on its own motion, “and outside of either parties’ [*sic*] requests [*sic*],” by converting his appeal to a personal restraint petition and dismissing it as untimely. Pet. for Rev. at 11. It is not clear why Freeman characterizes the court’s decision as *sua sponte* when the State specifically asked for the relief granted. See Brf. of Respondent at 11 (“It would be a waste of judicial resources to remand the case to the superior court simply for the purpose of having the superior court transfer the motion back to this Court. This Court should convert this appeal to a personal restraint petition, and dismiss it as untimely and successive.”).

Moreover, contrary to Freeman’s argument, State v. Smith, 144 Wn. App. 860, 184 P.3d 666 (2008) does not preclude the outcome at issue. Unlike the defendant in Smith, Freeman had previously filed a

personal restraint petition, and was therefore subject to the successive petition rule of RCW 10.73.140 prior to filing the instant CrR 7.8 motion. Although Freeman argues that Smith does not expressly restrict its holding to second or subsequent personal restraint petitioners, the integrity of its analysis necessarily depends on such a limitation.

Pursuant to CrR 7.8(c)(2), Freeman's untimely motion should have been transferred to the Court of Appeals for consideration as a personal restraint petition. As such, the Court of Appeals properly converted the direct appeal to a personal restraint petition, and dismissed it as untimely. Freeman has failed to establish that review under RAP 13.4(b) is appropriate.

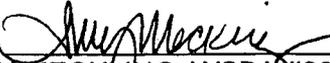
D. CONCLUSION

For above-stated reasons, the State respectfully asks that the petition for review be denied.

DATED this 22nd day of May, 2014.

Respectfully submitted,

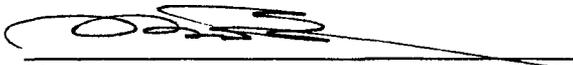
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
AMY MECKLING, WSBA #28274
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lance Hester, the attorney for the appellant, at Hester Law Group, Inc., P.S., 1008 S. Yakima Ave, Suite 302, Tacoma, WA 98405, containing a copy of the Answer to Petition for Review, in STATE V. ROBERT LEE FREEMAN, Cause No. 90229-1, in the Supreme Court for the State of Washington.

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



Name
Done in Seattle, Washington

Date

05/22/14

OFFICE RECEPTIONIST, CLERK

To: Ly, Bora
Cc: Meckling, Amy; 'lance@hesterlawgroup.com'
Subject: RE: State of Washington v. Robert Lee Freeman

Received 5-22-2014

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Ly, Bora [mailto:Bora.Ly@kingcounty.gov]
Sent: Thursday, May 22, 2014 1:44 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Meckling, Amy; 'lance@hesterlawgroup.com'
Subject: State of Washington v. Robert Lee Freeman

Dear Supreme Court Clerk,

Attached please find the State's Answer to Petition for Review to be E-filed in the above-referenced case.

Please let me know if you should have problems opening the attachment.

Thank you,

Bora Ly
Paralegal
Criminal Division, Appellate Unit
King County Prosecutor's Office
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Phone: 206-296-9489
Fax: 206-205-0924
E-Mail: bora.ly@kingcounty.gov

For

Amy Meckling
Senior Deputy Prosecuting Attorney
Attorney for Respondent