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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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IN RE PERSONAL RESTRAINT OF

LEON L. REYES,

*Petitioner.*

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**OPENING BRIEF IN SUPPORT OF  
PERSONAL RESTRAINT PETITION**

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## TABLE OF CONTENTS

	<b>Page</b>
ISSUES PRESENTED.....	1
INTRODUCTION .....	1
STATEMENT OF THE CASE.....	4
I. Factual Background .....	4
A. The Reyes Family .....	4
B. Headaches and Vomiting Leading Up to Haydon’s Collapse.....	7
C. The Night of Haydon’s Collapse .....	8
D. Treatment at the Hospital and Haydon’s Passing .....	9
E. The Investigation and Charges.....	11
F. Mr. Reyes’s Trial .....	13
1. Opening Statements .....	14
2. The State’s Case.....	15
a. Testimony of Dr. Paschall.....	15
b. Testimony of Dr. Duralde .....	16
c. Testimony of Dr. Ramoso.....	17
3. Closing Arguments and Jury Verdict.....	18
4. Sentencing.....	20
II. Procedural History .....	20
NEW MEDICAL EVIDENCE .....	21
ARGUMENT .....	25

III.	MR. REYES IS ENTITLED TO A NEW TRIAL.....	26
A.	New Medical Evidence Would Probably Change the Result of Mr. Reyes’s Trial.....	26
1.	New Evidence Raises Profound Questions About the Diagnostic Reliability of the SBS Hypothesis.....	27
2.	New Evidence Demonstrates that Key Statements Made by the State and the State’s Witnesses Were False .....	31
a.	Retinal Hemorrhages Not Pathognomonic .....	32
b.	Subdural Hematomas Not Pathognomonic .....	34
c.	Short Falls Can Cause Catastrophic Head Injuries.....	35
d.	Statements About Amount of Force Applied to Haydon Were False.....	37
3.	New Medical Evidence Shows that Shaking Was Not the Necessary or Even Likely Cause of Death.....	39
4.	Mr. Reyes Could Not Have Been Convicted Without the Now-Refuted Medical Evidence.....	43
B.	New Evidence Was Discovered After Trial and Could Not Have Been Discovered Before Trial .....	46
1.	Mr. Reyes Did Not Discover the Evidence Prior to Trial.....	46
2.	Mr. Reyes Could Not Have Discovered the Evidence Prior to Trial.....	46
3.	Mr. Reyes Used Reasonable Diligence in Discovering the Evidence .....	48

C.	New Evidence is Not Cumulative or Merely Impeaching.....	48
D.	Mr. Reyes’s New Evidence Claim Is Not Successive.....	49
IV.	MR. REYES IS ENTITLED TO NEW SENTENCING .....	49
	CONCLUSION.....	50

TABLE OF AUTHORITIES

Page(s)

CASES

*Ake v. Oklahoma*,  
470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53  
(1985).....32

*Commonwealth v. Doe*,  
90 Mass. App. Ct. 793, 68 N.E.3d 654 (2016) .....31

*Commonwealth v. Epps*,  
474 Mass. 743, 53 N.E.3d 1247 (Mass. 2016).....26, 36

*Commonwealth v. Millien*,  
474 Mass. 417, 50 N.E.3d 808 (Mass. 2016).....34

*Del Prete v. Thompson*,  
10 F. Supp. 3d 907 (N.D. Ill. 2014) .....31, 34, 36

*In re Pers. Restraint of Brown*,  
143 Wn.2d 431, 21 P.3d 687 (2001).....26

*In re Pers. Restraint of Fero*,  
192 Wn. App. 138, 367 P.3d 588 (2016)..... *passim*

*In re Pers. Restraint of Fero*,  
190 Wn.2d 1, 409 P.3d 214 (2018) .....26

*In re Pers. Restraint of Stoudmire*,  
141 Wn.2d 342, 5 P.3d 1240 (2000).....25

*In re Pers. Restraint of Weber*,  
175 Wn.2d 247, 284 P.3d 734 (2012).....25

*Johnson v. Oklahoma*,  
484 U.S. 878, 108 S. Ct. 35, 98 L. Ed. 2d 167  
(1987).....32

<i>Matter of Rihana J.H. (Quiana J.),</i> 54 Misc.3d 1223, 54 N.Y.S.3d 612 (N.Y. Fam. Ct. 2017) .....	31, 34
<i>People v. Ackley,</i> 497 Mich. 381, 870 N.W. 2d 858 (Mich. 2015) .....	32
<i>People v. Bailey,</i> 47 Misc.3d 355, 999 N.Y.S.2d 713 (N.Y. Sup. Ct. 2014) .....	31, 35, 36, 37
<i>People v. Bailey,</i> 144 A.D.3d 1562, 41 N.Y.S.3d 625 (N.Y. App. Div. 2016) .....	31
<i>People v. Roberts,</i> 2017 Mich. App. LEXIS 901 (June 6, 2017) .....	38
<i>State v. Brand,</i> 120 Wn.2d 365, 842 P.2d 470 (1992) .....	49
<i>State v. Reyes,</i> 165 Wn.2d 1039, 2015 P.3d 131 (2009) .....	20
<i>State v. Reyes,</i> No. 06-1-00890-3 (Sup. Ct. Pierce Cty.) .....	5
<i>State v. Reyes,</i> No. 36136-1-II, 2008 Wn. App. LEXIS 2302 (Oct. 21, 2008) .....	20, 39

## STATUTES

RCW § 10.73.100(1) .....	26
RCW § 9A.32.050(1) .....	13
RCW § 9A.32.050(1)(a) .....	13
RCW § 10.73.140 .....	49

## RULES

RAP 16.4.....	49, 50
RAP 16.4(c)(3) .....	<i>passim</i>

## PATTERN JURY INSTRUCTIONS

WPIC 27.02, Murder—Second Degree—Intentional—Elements .....	13
WPIC 29.04, Homicide by Abuse—Elements.....	13

## NEWS ARTICLES

Debbie Cenziper et al., <i>Doctors Doubt Shaken Baby Syndrome Science, Fear Bad Convictions</i> , WASH. POST, Mar. 23, 2015, <a href="http://www.dailyherald.com/article/20150323/news/150329644/">http://www.dailyherald.com /article/20150323/news/150329644/</a> .....	30
C. Haberman, <i>Shaken Baby Syndrome: A Diagnosis That Divides the Medical World</i> , N.Y. TIMES, Sept. 13, 2015, <a href="https://www.nytimes.com/2015/09/14/us/shaken-baby-syndrome-a-diagnosis-that-divides-the-medical-world.htm">https://www.nytimes.com/2015/09/14/us/shaken- baby-syndrome-a-diagnosis-that-divides-the- medical-world.htm</a> .....	30

## **ISSUES PRESENTED**

1. Whether Petitioner Leon L. Reyes is entitled to a new trial under Rule of Appellate Procedure (“RAP”) 16.4(c)(3) because new medical evidence regarding Shaken Baby Syndrome (“SBS”) would probably change the result of his trial.

2. Whether, in the alternative, Mr. Reyes is entitled to new sentencing under RAP 16.4(c)(3) because new evidence regarding SBS would probably change the result of his sentencing.

## **INTRODUCTION**

Mr. Reyes’s account of what happened on the night his stepson Haydon, age 2½, collapsed in their home has never changed. As he did every night his wife worked the evening shift, Mr. Reyes cooked dinner for the boys and got them ready for bed. He was cleaning up in the kitchen when he heard screaming and ran toward the bedroom to find Haydon crying and pointing to his head. When Haydon collapsed in a seizure, the other two boys in the home, ages 4 and 7, told Mr. Reyes that Haydon had fallen off the bunk bed. Resuscitation attempts were complicated by an obstructed airway and clenched teeth. Haydon was taken to the hospital but tragically passed away. Mr. Reyes was charged with murder.

The Reyes family had a tight-knit network of friends and family, and no one ever suspected Mr. Reyes of abusing Haydon. Haydon did not have any bruises on his face or buttocks. His neck, chest and arms did not show the kind of injuries that one would expect if he had been violently shaken. Neither of the older boys contradicted Mr. Reyes's account of the night of Haydon's collapse. Haydon had a bruise on the top of his head, and family members confirmed that they had been concerned about the boys and their dangerous play around the bunk bed, including an incident within a month of his death in which Haydon had been injured.

Despite all of this, Mr. Reyes was convicted of homicide by abuse. His conviction was based on unchallenged testimony from three medical doctors that violent shaking could be inferred solely from the presence of three *neurological symptoms*—bleeding beneath the outer layer of membranes surrounding the brain (subdural hematoma), bleeding in the retina (retinal hemorrhaging) and brain swelling (cerebral edema) (collectively, the “triad”). The State's witnesses testified that the only explanation for Haydon's injuries was that Mr. Reyes had shaken him, and that the shaking was violent enough to suggest that Mr. Reyes did not care whether Haydon lived or died. The SBS testimony established both the actus reus and mens rea of the crime. It was a diagnosis of murder.

Not only did the defense allow this “expert” testimony to go unchallenged, but it also accepted the State’s theory as a medical fact. Without Mr. Reyes’s foreknowledge or consent, the defense told the jury at closing that there was “*no doubt*” that Haydon died a “*violent death*” at the hands of Mr. Reyes, that it was “*from shaking*,” and that the bunk bed fall was just an “*excuse*.” Not surprisingly, Mr. Reyes was convicted and sentenced to an astonishing forty years in prison.

New medical evidence shows that the State’s testimony regarding the SBS hypothesis has been proven to be false in almost every key respect. It is now understood that subdural hematomas and retinal hemorrhages are not “pathognomonic” of shaking—*i.e.*, they do not indicate shaking to the exclusion of all other causes. It is now acknowledged that short falls can cause catastrophic head injuries, particularly where a child has a preexisting head injury, as Haydon had here. Indeed, both the evidentiary base for the SBS hypothesis and its diagnostic reliability have been called into serious question. Even *the originator of the SBS hypothesis* recently stated that he was “utterly shocked” and “desperately disappointed” that prosecutors were using his science to convict caregivers.<sup>1</sup>

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<sup>1</sup> Mr. Reyes is *not* arguing that violent shaking could never injure a child. He is arguing that one cannot necessarily infer from the presence of the triad that a child was violently shaken and that shaking was the necessary or even likely diagnosis in this case.

The jury never heard any of this evidence—indeed, they were *never given any reason* to doubt the State’s medical testimony. Here the interests of justice require that Mr. Reyes be granted a new trial or new sentencing under RAP 16.4(c)(3) so that the evidence can be heard.

### **STATEMENT OF THE CASE**

#### **I. FACTUAL BACKGROUND**

##### **A. The Reyes Family**

Leon Reyes was born in 1978 and grew up in Texas. He moved to Spanaway, Washington in August 1996 to care for his aunt, Chris Roberts, and her young daughter, Jasmine, after Chris was injured in a car accident. He graduated from Bethel High School in 1997. Reyes Decl. ¶ 2.<sup>2</sup>

Leon married Charlene Birnel after high school and they had two children together: Tristan (1998) and Pacey (2001). Leon and Charlene separated in 2003, and in 2004, Charlene dropped the boys off with Leon and told him that she needed him to take care of them. Leon took sole custody of the boys, found a full-time job in Puyallup, and moved into a house in Parkland with the boys. Reyes Decl. ¶¶ 3–4.

In October 2004, Leon met Laura Kostelecky, who had a one-year-old son named Haydon from a previous relationship, born in September

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<sup>2</sup> References to “Reyes Decl.” are to the Declaration of Leon L. Reyes, submitted concurrently herewith.

2003. The two hit it off, and Laura and Haydon moved in December 2004. Reyes Decl. ¶ 5. In August 2005, Keira was born. Tr. 592:5–6.<sup>3</sup>

Laura and Leon married in November 2005. Shortly thereafter, the family moved into a larger house in Tacoma. Tristan had his own bedroom and slept on the bottom bunk of a five-foot-tall bunkbed; Haydon and Pacey slept in another room. Tr. 497:14–498:12. Leon generally worked from 6:00 a.m. to 3:00 p.m., and Laura generally worked from 4:30 p.m. to 9:00 p.m. Tr. 457:9–23. Because of their schedules, Leon was often responsible for helping the boys with their homework, making dinner, making sure they bathed, and getting them to bed. Tr. 458:9–19.

The Reyes family had a significant support network. Mary Jane Gutierrez, Leon’s aunt, used to babysit the kids at the Parkland house and visited the family “on a regular basis” after the move to Tacoma. Tr. 863:12–21, 866:7–10. Patty Richards, longtime girlfriend and partner to Laura’s father, Boyd Kostelecky, saw Haydon “[p]retty much every weekend.” Tr. 386:15–20. Chris and Jasmine would visit the Reyes family about two weekends a month, and Chris often helped drive Tristan, Pacey and Haydon to daycare. Tr. 777:18–778:22. All of the boys

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<sup>3</sup> References to “Tr.” are to the trial transcripts in *State v. Reyes*, No. 06-1-00890-3 (Sup. Ct. Pierce Cty.), excerpts of which are attached as Exhibit A to the Declaration of John C. Roberts Jr., submitted concurrently herewith. References to “Opening Tr.” are to the transcript of the opening statements, attached as Exhibit B to the Roberts Declaration, and references to “Sentencing Tr.” are to the sentencing transcript, attached as Exhibit C. References to “Ex. \_” are to other exhibits to the Roberts Declaration.

attended daycare or school, and the boys were consistently taken to the same medical practice, Union Avenue Pediatrics. Tr. 586:10–597:20. None of Haydon’s family members ever saw Leon be violent with any of the children or suspected him of abuse. Tr. 570:25–571:13 (Laura), 426:1–4 (Patty), 431:10–12 (Boyd), 869:24–25 (Mary Jane), 825:23–25 (Jasmine); 796:15–17, 806:21–807:5 (Chris).

Several family members, however, recalled the boys’ dangerous play around the bunk bed. Mary Jane saw Tristan and Pacey jump from the top of the bed and land on a floor mat, even while Haydon was sitting on it. Tr. 881:3–9, 883:8–16. Chris also recalled Tristan and Pacey jumping off the bunk bed and couch in a dangerous way. Tr. 780:21–782:10; 804:4–11. Patty recalled being concerned that Haydon, the youngest of the three boys, would soon follow suit:

I know that they [Tristan (age 7) and Pacey (age 4)] jumped off the . . . beds, but I just thought okay, that’s not a safe thing to do. I know they did it in the old house, because they, they would put down these little cushion thingies, and they would jump onto the floor. Because they were doin’ [it] with the door closed one day and I thought, what is that? So, and Laura’s, “Oh yeah, they jump off the bed.” [And I thought] “Oh that’s good. *I hope Hayden isn’t watching that.*”

Ex. D (Richards Interview) at 26:21–27:3 (emphasis added). Laura instructed the boys not to go on the top bunk, Tr. 527:5, and she disciplined Haydon “more than once” for trying to climb it. Tr. 529:8–9,

602:11–17. Mary Jane remembered “a time that she saw Haydon climb up the ladder” and had to stop him. Ex. E (Gutierrez Interview) at 1–2. So did Tristan. Tr. 527:24–528:2. On one occasion within a month of Haydon’s collapse, Laura heard “screaming” and caught the boys jumping off the bunk bed onto Haydon. Tr. 476:2–8, 477:1–478:19.

**B. Headaches and Vomiting Leading Up to Haydon’s Collapse**

In December 2005, Haydon began to suffer from headaches and vomiting, symptoms associated with head injuries. Leon and Laura took him to Union Avenue Pediatrics, where Dr. Thomas Charbonnel concluded it was a virus. Tr. 896:2–902:17. Haydon continued to complain of headaches and threw up repeatedly. Tr. 207:12–14, 574:14–575:7; 424:13–17. In the weeks before his collapse, his head hurt “[a]lmost daily.” Tr. 702:23–703:6, 782:11–15. Haydon was taken to the doctor again on February 17, 2006, three days before his collapse, but no further examination of the head was conducted. Ex. F (Feb. 17, 2016 UAP Notes) at 1.

On the night before his collapse, Haydon spent the night at Patty’s house. Patty noticed that he was lethargic, “slow,” and ate little. Tr. 406:1–408:13, 411:5. Patty thought his behavior “[v]ery unusual.” Tr. 407:9, 407:22. While he normally liked to play at bath, that night he

drained the tub and sat in it, shivering. Tr. 408:18–409:13. Patty was frightened and called her daughter “upstairs to see what he was doing.” *Id.*

### **C. The Night of Haydon’s Collapse**

The next morning, on February 20, 2006, Patty dropped Haydon off with Laura at approximately 1:00 p.m. Tr. 413:5–415:10, 459:18–20. Laura noted that Haydon was “clingy” and “hadn’t been feeling good.” Tr. 460:8–10. Before she went to work, Laura dropped the boys off with Mary Jane around 2:00 p.m. and told her to “be careful with [Haydon]” because he was not well. Tr. 459:21–23, 870:16–871:19. Shortly thereafter, Mary Jane took the three boys to meet Leon as he was getting off work. Tr. 872:22–874:7. As Leon drove them home, he stopped at a mini-mart to purchase nachos for the boys, where he encountered a former coworker, James Baldwin. Tr. 446:5–18. Leon invited him to visit the new house. Tr. 446:9–13. James remained at the house for about an hour and a half with Leon; he did not see Leon acting inappropriately to any of the children. Tr. 446:23–449:12, 452:23–453:9.

Leon cooked dinner for the boys and they ate together; after dinner, Leon sent them off to get ready for bed. Tr. 114:15–115:3. Rather than go quietly, the boys were “fighting and carrying on,” with Tristan and Pacey “beating up on Haydon.” Tr. 202:11–203:9. Leon was in the kitchen when he heard Haydon crying and went to see what was wrong.

Haydon walked out of Tristan’s bedroom pointing at his head and saying “head, head.” Tr. 115:9–15, 202:19–24. When Leon asked what happened, Tristan and Pacey said Haydon fell off the bunk bed. Tr. 203:2–9. Leon went to pick Haydon up and he “spazzed out,” “went stiff,” and bent “completely backwards.” Tr. 203:19–204:3, 212:6–12. Leon tried to revive Haydon but got no response; Haydon vomited and Leon carried him to the living room to try CPR, a task made difficult by an obstructed airway and clenched teeth. Tr. 204:8–205:6, 361:8–12. Leon called 911 and, following the dispatcher’s instructions, cleared the vomit from Haydon’s airway until Haydon began to breathe again. Tr. 205:4–206:9.

The Tacoma Police Department was the first to arrive on the scene. Leon was “screaming on the ground over the top of the kid,” who was unconscious. Tr. 42:23–43:1, 144:22–145:3, 363:5–364:3, 665:9–11. Two paramedics and three medical emergency technicians from the Tacoma Fire Department arrived shortly thereafter and took over the treatment of Haydon, who was breathing very slowly. Tr. 359:13–361:12. They worked on Haydon for about twenty minutes before having him transferred to the hospital. Tr. 146:7–12.

#### **D. Treatment at the Hospital and Haydon’s Passing**

Haydon arrived at Mary Bridge Hospital (“Mary Bridge”) at approximately 9:48 pm. Tr. 366:18–367:2; Ex. G (Emergency Services

Report) at 1. Upon arrival, he was transferred to an emergency room where Dr. Steven Bin conducted a survey. Ex. G at 3 [REDACTED]

[REDACTED]

Dr. Bin consulted with Dr. Peter Brown, a Mary Bridge neurosurgeon, who examined Haydon around 11:00 p.m. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Further surgery was unlikely to improve Haydon's outcome, so he was taken to the ICU. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Haydon's condition did not improve and, on February 22, 2006, he passed away.

**E. The Investigation and Charges**

On February 23, 2006, the State filed an information charging Leon with one count of second-degree murder. Ex. K (Information) .

On February 28, 2006, the medical examiner, Dr. Roberto Ramoso, filed an initial Postmortem Examination Report. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Around March 8, 2006, Leon's assigned counsel, Mr. John Chin, visited him in jail and showed him a plea agreement for ten years in prison.

Mr. Chin advised Leon to take it but he refused, a decision that annoyed Mr. Chin, who snatched the paper away from Leon. Reyes Decl. ¶ 7.

On March 16, 2006, Dr. Yolanda Duralde, the medical director at the child abuse intervention department at Mary Bridge, drafted a letter stating that Haydon's injuries were consistent with "[REDACTED]" Ex. M (Duralde Letter) at 2. On May 9, 2006, Detective Graham forwarded the letter to Dr. Ramoso, who released a revised *Postmortem Examination Report* on May 26, 2009 with the manner of death changed to homicide. Ex. N (Second Postmortem) at 3. On June 14, 2006, the State filed an amended information charging homicide by abuse. Ex. O (Amended Information) at 1.

In early July 2006, the defense team retained Emmanuel Lacsina, MD, a former medical examiner for Pierce County, to assist in establishing that Haydon's injuries were consistent with blunt force trauma. Dr. Lacsina did not offer any opinion on the State's SBS theory or the Duralde Letter. Roberts Decl. ¶ 3. In late July 2006, the defense team received an email about a neurosurgeon, Dr. John Plunkett, who testified for the defense in SBS cases; the email stated that there was "[a] LOT of info online regarding Shaken Baby," that it was "not the brick wall the state makes it out to be and in fact, the whole theory is disregarded in Japan." *Id.* at 4. According to the email, the expert's fee

was \$10,000 per day at the time. *Id.* There is no indication that anyone on the defense team ever followed up on the email. *Id.*

By September 2006, more than six months after charges were filed, the defense had still not interviewed the medical examiner, Dr. Ramoso, or any of the State’s other medical experts. Roberts Decl. ¶ 2. On September 18, 2006, the defense finally interviewed the medical examiner, but they did not interview Dr. Bin until December 2006. *Id.* The defense did not interview Dr. Duralde until January 22, 2017, *the day voir dire began*, and never interviewed Dr. Brown, Dr. Paschall, or Dr. Khan. *Id.*

Before trial, the Prosecutor approached Leon and Mr. Chin at counsel’s table with another offer, this time for twenty years. Reyes Decl. ¶ 8. When Leon told her he would not accept, she told him, “I’m going to rip you a new one.” *Id.* Mr. Chin leaned back in his seat and smirked. *Id.*

#### **F. Mr. Reyes’s Trial**

Mr. Reyes was tried on charges of homicide by abuse and second-degree murder.<sup>4</sup> The trial lasted from January 18 to February 9, 2007. The State attempted to prove that Leon violently shook Haydon through

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<sup>4</sup> For homicide by abuse, the State must prove that the defendant (1) acted in a manner that caused the death of a victim under sixteen years of age, (2) “acted under circumstances manifesting an extreme indifference to human life,” (3) and “previously engaged in a pattern or practice of assault or torture” of the victim. RCW § 9A.32.050(1); *see* WPIC 29.04, Homicide by Abuse—Elements. As to second-degree murder, the State must prove that the defendant (1) acted in a manner that caused the death of a victim, and carried out those acts (2) “[w]ith intent to cause the death of” the victim. RCW § 9A.32.050(1)(a); *see* WPIC 27.02, Murder—Second Degree—Intentional—Elements.

the testimony of three doctors: Dr. Paschall, Dr. Duralde, and Dr. Ramoso. The defense did not put forth Dr. Lacsina or any other medical expert, instead calling a series of family members and pediatricians who testified that they had never seen Leon harm Haydon or suspected him of doing so.

### **1. Opening Statements**

In its opening statement, the State told the jury it was impossible for Haydon to have sustained his injuries in a fall from the bunk bed:

You will hear from the medical people, the people who treated him, tried to save his life. You will hear that this type of devastating trauma to the brain does not and cannot occur, no way, no how, from a fall from a bunk bed.

Opening Tr. 5:12–16. The State told the jury unequivocally that the injuries must have resulted from shaking:

[T]his type of trauma to the head occurs when an adult of greater strength and weight takes the child by the ribs and shakes the child so violently and so ferociously, that the head whips back and forth.

*Id.* 5:22–6:5. In an opening that took up only three pages of transcript, Mr. Chin made no attempt to deny the State’s claim that Leon had violently shaken Haydon. Opening Tr. 14:15–16:5. He did not mention the fall from the bunk bed or Leon’s innocence at all—he simply asked for a “just verdict.” *Id.* 15:24–25.

## **2. The State's Case**

### **a. Testimony of Dr. Paschall**

The State called Dr. Paschall, a Mary Bridge ICU physician who was in the ER the night that Haydon arrived and who accompanied him into the surgery performed by Dr. Brown. Tr. 162:7–195:18. Despite his lack of experience with neuropathology or forensic pathology,<sup>5</sup> Dr. Paschall offered his opinion, with “reasonable medical certainty,” that Haydon’s injuries were not consistent with a fall from a bunk bed but were “probably related to acceleration/deceleration injury or shaking-type injury.” Tr. 177:117–17, 191:2–23. Dr. Paschall specifically stated that bilateral retinal hemorrhages are thought to be “pathognomonic or diagnostic” of abuse. Tr. 165:9–166:2. He also provided gruesome details about Haydon’s craniectomy and the inability of the doctors to close his scalp after it had been opened. Tr. 181:8–185:10.

Defense counsel, who had not interviewed Dr. Paschall prior to trial, asked him only eighteen questions and made no attempt to undermine any of his statements about non-accidental injury or acceleration/deceleration forces. Tr. 192:4–194:25.

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<sup>5</sup> Dr. Paschall’s primary responsibility was to “assist[] with respiratory support on a ventilator” and “plac[e] breathing tubes” and take care of children with poor heart function or inadequate circulation. Tr. 168:4–19. He was only in the operating room “on rare occasion” and could not “speak in neurosurgical terms.” Tr. 167:20–22; 181:6–7.

### **b. Testimony of Dr. Duralde**

The second Mary Bridge physician called by the State was Dr. Duralde. Although she did not appear to have any expertise in neuropathology or forensic pathology, Tr. 221:13–224:10, the State proceeded to ask her opinion of the cause of death. The State asked her if she had “heard” of subdural hematomas. Tr. 224:23–25. She was then asked to narrate over a 1999 video created by Dan Davis called *The Mechanism of Injury in the Shaken Baby Syndrome* (“Davis Video”), which purported to show “the mechanism that creates [subdural hematoma].” Tr. 225:4–227:4. The video was admitted for “illustrative purposes” without objection.<sup>6</sup> Tr. 225:4–226:1.

In her testimony, Dr. Duralde essentially equated subdural hematomas with shaking injuries: a subdural hematoma is simply “a symptom of shaking,” she said, it “implies that’s what occurred.” Tr. 228:22–25. She also stated that “bilateral retinal hemorrhage is really important [because] you really don’t see that outside of shaking forces.” Tr. 235:1–6. “[T]he only other times you really see those particularly bilateral injuries” are “occasionally . . . in a motor vehicle accident.” Tr.

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<sup>6</sup> The video shows an adult shaking a doll representing a two-to-three-month-old infant. Roberts Decl. ¶ 6. Dr. Duralde never attempted to explain the physiological differences between a three-month-old infant and a two-and-a-half-year-old toddler.

235:10–16; 258:18–259:12. She testified with “pretty high medical certainty” that Haydon had been violently shaken. Tr. 233:16–234:25.

Defense counsel, who interviewed Dr. Duralde for the first time during voir dire, did not attempt to undermine any of her testimony about SBS. Tr. 255:6–263:21, 264:19–265:20. Instead, Mr. Chin made it perfectly clear that he was not challenging her: “I don’t pretend to be an expert, and I’m certainly not going to try to take you on here . . . .” Tr. 256:23–25.

**c. Testimony of Dr. Ramoso**

The State’s third medical witness was Dr. Ramoso, the medical examiner who performed the autopsy on Haydon. Dr. Ramoso further testified that he believed the cause of death was “blunt head trauma” and that blunt head trauma was the sole factor in Haydon’s death. Tr. 291:6–10, 302:1–6. Dr. Ramoso testified that “the most common cause” of retinal hemorrhages was “shaken impact baby syndrome.” Tr. 302:19–23. He testified that subdural hematomas are “almost always traumatic,” Tr. 280:22–281:4, although he conceded that it could have been the result of “a physical blow” to the head. Tr. 298:13–23. The State then asked Dr. Ramoso to walk through a series of gory post-autopsy pictures, Tr. 291:18–298:2, some of which were shown to the jury for no apparent reason. *See, e.g.*, Tr. 295:3–7 (showing the jury a photograph of a

disembodied eyeball even though Dr. Ramoso conceded that the retinal hemorrhages could not be seen in the photo).

### 3. Closing Arguments and Jury Verdict

The State’s closing argument cut right to the chase: “[O]n the 20th of February, when there was no one around to protect Haydon, . . . the defendant shook Haydon violently, with force and with rage, and he killed Haydon Kostelecky.” Tr. 929:9–14. Repeatedly invoking the “doctors” and “experts,” the State told the jury unequivocally that Haydon could not have fallen off a bunk bed: “[A] fall from this height cannot cause the brain injury that Haydon sustained.” Tr. 931:12–933:24. The State was unequivocal: “[Y]ou never have bilateral retinal hemorrhaging as a result of an accident.” Tr. 932:4–6. Mr. Reyes’s “story,” the State claimed, was “not consistent with the medical evidence.” Tr. 931:17–18.

The State then proceeded with a shock-and-awe approach. Embellishing the testimony of its witnesses, the State told the jury that Haydon had been shaken with “rage” and “fury” and “violence,” Tr. 929:12–14; 933:25–934:1; 941:25–942:1; 949:24–25, and that he had been shaken with forces “equivalent to a fall from a two-story building or a high-speed car crash”<sup>7</sup> until his brain “gushed out [of] his skull.”<sup>8</sup> The

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<sup>7</sup> Tr. 932:23–25; *see also* Tr. 933:13–15 (“[H]ead trauma of this type is caused by a fall from a two-story building or a high-speed car crash.”); 944:7–14 (“The force is . . .

State then asked the jury to infer from the catastrophic nature of Haydon’s injuries that catastrophic force had been applied to him:

Why do we need to talk about all of this? The brain injury, the amount of force? Because the extent of the brain damage tells you the amount of force that was used to shake the child, and the amount of force that was used to shake this child shows you definitely, without a doubt, conclusively, absolutely, the amount of rage, the amount of violence, the extreme indifference that Defendant showed to the well-being of this child.

Tr. 945:4–946:7. During its closing, the defense conceded, without Mr. Reyes’s foreknowledge or consent, that the bunk bed was an “excuse,” Tr. 956:22–24, and there was “no question” that Leon had shaken Haydon:

There is no question in my mind, Haydon died a violent death. There shouldn’t be any question in your mind that it was a violent death. It was from shaking.

Tr. 964:17–23. The defense said it was “just frustration, you know” but “no more than Manslaughter.” Tr. 965:3, 965:21–22. The Prosecutor immediately seized on the concession: “Counsel’s words, no question that Haydon died a violent death. No question that he died from being shaken. His words.” Tr. 966:9–11. Leon was found guilty of both homicide by abuse and second-degree murder. Tr. 998:12–1001:9.

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equivalent to the amount of force from a car crash at a high speed. It’s equivalent to the amount of force when a child falls off a two-story building.”).

<sup>8</sup> See Tr. 928:22–25 (shaken “until his brain swelled so much inside his skull, that it gushed out when his skull was opened”); 944:19–22 (“There was so much damage that it gushed out of his skull. . . . [T]hey had to cut his brain so that they could close him back up.”); 967:6–7 (shaking “caused his brain to gush out of his skull when they opened him up”).

#### 4. Sentencing

The trial court asked the jury to determine by special verdict whether certain aggravating factors existed. Tr. 1047:7–18. The jury specifically found that *Leon had not acted with deliberate cruelty*, although it did find that Haydon had been particularly vulnerable due to extreme youth. Tr. 1071:3–1072:1. Although the standard sentencing range for the crime of homicide by abuse is 271 to 361 months, Sentencing Tr. 4:11–12, the trial judge sentenced Leon to an exceptional sentence of 480 months, *id.* 19:1–6.

## II. PROCEDURAL HISTORY

Mr. Reyes filed a notice of appeal in April 2007 and filed an appellate brief in October 2007 asserting four errors: (i) insufficient evidence of homicide by abuse; (ii) ineffective assistance of counsel, but only with respect to counsel’s decision to concede guilt without his consent; (iii) double jeopardy; and (iv) excessive sentence. Ex. P (Reyes Appellate Brief) at 22–43. The Court of Appeals agreed as to the double jeopardy argument, and remanded with instructions to vacate the second-degree murder conviction. *State v. Reyes*, 2008 Wn. App. LEXIS 2302, at \*26–27 (Oct. 21, 2008). It affirmed in all other respects, *id.* at \*32, and the Supreme Court denied discretionary review, *State v. Reyes*, 165 Wn.2d 1039, 2015 P.3d 131 (2009).

Mr. Reyes filed a pro se personal restraint petition on March 10, 2010. The petition raised six grounds for relief, none of which challenged the diagnostic reliability or applicability of the SBS hypothesis. Ex. Q (First Reyes PRP) at 4–25. The Court of Appeals denied Mr. Reyes’s petition on October 5, 2010.

### **NEW MEDICAL EVIDENCE**

*Evidence of Dr. Janice Ophoven.* Dr. Janice Ophoven, M.D., is a medical doctor who is board-certified in anatomic pathology and forensic pathology, with special training and over 30 years of experience in the evaluation, investigation and interpretation of injuries in childhood, including experience as Assistant Medical Examiner for south St. Louis County, Minnesota. Ophoven Decl. ¶¶ 1–6.<sup>9</sup> Dr. Ophoven reviewed the testimony and argument presented at Mr. Reyes’s trial, as well as the underlying medical record, and she concluded that much of the medical testimony presented during Mr. Reyes’s trial is not scientifically valid in light of recent advances in the medical community’s understanding of the accidental and non-accidental causes of cerebral edema, subdural hematoma and retinal hemorrhages. ¶¶ 7–8, 12–14, 55–68.

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<sup>9</sup> References to “Ophoven Decl.” are to the Declaration of Dr. Janice J. Ophoven, submitted concurrently herewith.

Dr. Ophoven noted that the State’s witnesses placed considerable weight on the presence of retinal hemorrhages, but there is no reliable literature that satisfactorily links retinal hemorrhages to a confirmatory diagnosis of abuse. Ophoven Decl. ¶¶ 35–40, 60–61. The testimony of the State’s experts in this case that bilateral retinal hemorrhages alone are diagnostic of abuse or that short falls could “never” cause the triad would be totally unsupported today. *Id.* Dr. Ophoven also noted that the trial testimony was based on the outdated belief that a fall from a bunk bed would be insufficient to cause a fatal outcome, which is now recognized to be untrue. ¶¶ 12–14, 41–45, 65–68.

Moreover, Dr. Ophoven noted that the State’s witnesses failed to account for the presence of a preexisting head injury that placed the child at risk for further intracranial injury and bleeding. Ophoven Decl. ¶¶ 13–14, 44, 49–51, 57–58. Indeed, the State’s key witness based her opinion on the erroneous notion that Haydon had been “[REDACTED]” in the weeks leading up to his collapse. *Id.* ¶ 56. But during that period Haydon had symptoms of intracranial injury such as vomiting, headaches, and lethargy, and the medical record shows evidence of a chronic subdural hematoma. *Id.* ¶ 57. Dr. Ophoven believes that it is clear that his brain’s regulatory system was seriously taxed prior to the night of his collapse. *Id.* ¶¶ 50, 57. This undiagnosed chronic subdural put him at significant risk

for serious complications including irreversible brain damage especially if he suffered subsequent impacts, and for new bleeding associated with minor or even innocuous impacts. *Id.* ¶¶ 13–14, 44, 49–51, 57–58.

It is Dr. Ophoven’s opinion “that Haydon suffered complications of a preexisting head injury compounded by an acute fall” from a five-foot bunk bed and subsequent oxygen deprivation. Ophoven Decl. ¶¶ 12–14, 55–68. “Haydon’s chronic and acute subdural hematomas would have caused cerebral edema and increased intracranial pressure, meaning that the retinal hemorrhages were a byproduct of Haydon’s cerebral edema, not an independent injury diagnostic of child abuse.” *Id.* ¶ 60. In light of the recent medical literature, Dr. Ophoven’s opinion is that “there is no scientific basis to conclude, to a reasonable degree of medical certainty, that Haydon was violently shaken.” *Id.* ¶ 55. “Shaking is not the necessary or even likely cause of death in Haydon’s case.” *Id.* ¶ 14.

***Evidence of Dr. Chris Van Ee.*** Chris A. Van Ee, PhD, is Principal Engineer of Biomedical and Mechanical Engineering at Design Research Engineering, as well as an Adjunct Assistant Professor of Biomedical Engineering at Wayne State University. Van Ee Ltr. 6–7.<sup>10</sup> Dr. Van Ee specializes in biomechanical engineering, or the application of physics and

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<sup>10</sup> Reference to “Van Ee Ltr.” are to the Letter of Dr. Chris Van Ee, which is attached as Exhibit R to the Roberts Declaration, submitted concurrently herewith.

mechanical engineering to determine how particular forces will affect the human body. *Id.* at 1–2.

Dr. Van Ee examined this case and concluded to “a reasonable degree of biomedical certainty,” based on “the current state of scientific knowledge,” that “[s]evere and fatal head injuries can occur from short falls such as a fall of a bunk bed onto a floor.” Van Ee Ltr. at 9. Dr. Van Ee stated that “[a]ny testimony or video that was shown to the jury that indicated head accelerations from shaking are large and much greater than falls of a few feet and further indicated that shaking produces head accelerations or shear forces that are similar to multi-story falls or high speed motor vehicle accidents is scientifically unfounded, highly misleading, and in error.” *Id.* at 12. Dr. Van Ee explained that research measuring the force produced by shaking and comparing it to the amount of force that a human infant can tolerate consistently fails to support the SBS hypothesis that shaking can cause the traditional triad of injuries. *Id.* at 3–9. Indeed, Dr. Carole Jenny, a proponent of SBS who is involved in biomechanical research, now concedes that the causal mechanism is “not consistent with the biomechanical data.” *Id.* at 7–8.

Dr. Van Ee also explains that the current scientific understanding of biomechanics and pediatric anatomy suggests that violent shaking is not a mechanism of brain and eye injury in the absence of “significant torso

and neck injuries,” which Haydon did not have. Van Ee Ltr. at 8. In fact, he observes that the bruise at the apex of Haydon’s head is consistent with a fall onto the crown of the head and inconsistent with laboratory studies of shaking-slamming, where impacts are typically seen “to the back of the head.” *Id.* at 10.

### **ARGUMENT**

Mr. Reyes was wrongly convicted of homicide by abuse and sentenced to forty years in prison based on “expert” medical testimony about SBS. While it was deemed unassailable at the time of trial, the testimony has since been shown to be false, unproven and unreliable. Under RAP 16.4(c)(3), Mr. Reyes is entitled to a new trial if “[m]aterial facts exist [that] have not been previously presented and heard, which in the interest of justice require vacation of [his] conviction [or] sentence.” As explained below, compelling new medical evidence regarding changes in the understanding of SBS satisfies that standard.<sup>11</sup> *See In re Fero*, 192

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<sup>11</sup> The instant Petition presents only a claim of newly discovered evidence and therefore is not a “mixed” petition. *See In re Stoudmire*, 141 Wn.2d 342, 348–49, 5 P.3d 1240 (2000). Mr. Reyes notes, however, that the mixed-petition rule prevents him from including what might be a strong claim of ineffective assistance of counsel, depending on how one views the shifting science, and he reserves the right to assert such a claim in a subsequent petition under the actual-innocence procedural gateway, which is governed by a probability standard very similar to the one articulated in *Fero*. *Compare In re Weber*, 175 Wn.2d 247, 260, 284 P.3d 734 (2012) (actual-innocence procedural gateway standard: “more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt”); *with Fero*, 192 Wn. App. at 142 (new evidence standard: must be “probabl[e]” that the “result of [the] trial,” *i.e.*, a jury determination that the defendant was guilty beyond a reasonable doubt, would be “different”). In the

Wn. App. 138, 151–52, 367 P.3d 588 (2016) (“the paradigm shift in the medical community’s understanding of [SBS] . . . constitute[s] new ‘material facts’ satisfying the standard . . . under RAP 16.4(c)(3)”), *aff’d*, 190 Wn.2d 1, 409 P.3d 214 (2018).

### **III. MR. REYES IS ENTITLED TO A NEW TRIAL**

Washington courts have interpreted RAP 16.4(c)(3) to contain five basic elements: a petitioner is entitled to a new trial or new sentencing if evidence (1) probably changes the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *In re Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001); *see also* RCW § 10.73.100(1) (requiring “reasonable diligence”). The new evidence here satisfies all of these elements.

#### **A. New Medical Evidence Would Probably Change the Result of Mr. Reyes’s Trial**

Because Haydon did not show external signs that he had been violently shaken and none of Mr. Reyes’s friends or family had ever suspected him of abusing any of the children, the State was forced to rely on expert medical testimony about SBS to prove that Mr. Reyes had

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end, “[the] touchstone must be to do justice . . . , regardless whether the source of the deprivation is counsel’s performance alone, or the inability to make use of relevant new research findings alone, or the confluence of the two.” *Commonwealth v. Epps*, 474 Mass. 743, 767, 53 N.E.3d 1247 (Mass. 2016).

violently shaken Haydon. Recent scientific developments call the diagnostic reliability of the SBS hypothesis into question, many of the State’s assertions regarding shaking and short falls are now known to be false, and it now appears that shaking is not the necessary, or even likely, cause of death in this case. Were Mr. Reyes’s trial held today, the results “would probably be different because the medical community’s now generally accepted understanding of brain trauma in children directly contradicts the medical theories that were relied upon to convict [him], and [he] could not have been convicted without the now-refuted medical testimony presented against [him].” *Fero*, 192 Wn. App. at 142.

**1. New Evidence Raises Profound Questions About the Diagnostic Reliability of the SBS Hypothesis**

Of course, the fundamental premise of the State’s case was that SBS was an inconvertible diagnosis that could determine with reasonable medical certainty what happened to Haydon. Indeed, it was presented to the jury as medical fact. No one questioned its reliability, not even the defense. And the State emphasized its medical authority to the jury. “The doctors,” the State implored, “You’ve all heard the doctors.” Tr. 932:17–21; *see also* Tr. 933:21–24 (“[Y]ou’ve heard . . . the experts[.]”). But there has recently developed a significant new debate over the reliability

of SBS as a diagnosis and an increased understanding that the claims made in support of SBS have been overstated. Ophoven Decl. ¶¶ 15–34.

It has now been acknowledged at the highest levels of the medical establishment that the SBS hypothesis is not supported by sufficient scientific evidence to constitute a reliable medical diagnosis. In October 2016, the Swedish Agency for Health Technology Assessment and Assessment of Social Services, one of the oldest medical assessment organizations in the world, published its findings regarding the most comprehensive review of the SBS literature ever conducted. *See* SWEDISH AGENCY FOR HEALTH TECHNOLOGY ASSESSMENT & ASSESSMENT OF SOCIAL SERVICES, TRAUMATIC SHAKING: THE ROLE OF THE TRIAD IN MEDICAL INVESTIGATIONS OF SUSPECTED TRAUMATIC SHAKING—A SYSTEMATIC REVIEW (REPORT 255E 2016) (Oct. 26, 2016) (“Swedish Report”) (attached as Exhibit S to the Roberts Declaration). The agency appointed a panel of six experts—representing the fields of pediatrics, forensic medicine, radiology, technology assessment, biomechanics, and family medicine—to answer the following question: “With what certainty can it be claimed that the triad, subdural hematoma, retinal hemorrhages and encephalopathy, is attributable to isolated traumatic shaking[?]” *Id.* at 17. Four of the experts came from the Karolinska Institute, which has awarded the Nobel Prize in Physiology or Medicine since 1901.

The results were stunning. The panel found the evidence base that supposedly validated the SBS hypothesis was insufficient for diagnostic purposes. Ex. S at 22. The panel reviewed 1065 published studies regarding the SBS hypothesis, only thirty of which met its criteria for minimum study size and quality of evidence. *Id.* at 18, 21. The report found studies touting SBS to be of “very low quality” and plagued by methodological flaws such as circular reasoning. *Id.* at 22, 29–30. The Swedish Report found that “there is limited scientific evidence that the triad and therefore its components can be associated with traumatic shaking” and “insufficient scientific evidence on which to assess the diagnostic accuracy of the triad in identifying traumatic shaking.” *Id.* at 5. A related ethics committee also opined that medical professionals should not assert that “certain specific injuries in infants are automatically evidence that they were caused by shaking.” *Id.* at 67.

Moreover, just one month earlier, a groundbreaking report from the Executive Office of the President on the scientific flaws in numerous areas of forensic science stated that SBS was a matter that required “urgent attention.” President’s Council of Advisors on Science and Technology, REPORT TO THE PRESIDENT: FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 23 n.15 (Sept. 2016), Ex. T. This came after Valerie Maholmes,

chief of the Pediatric Trauma and Critical Illness Branch of the National Institutes of Health, admitted: “The jury is still out [on SBS] and we need to do much more basic science . . . . We want good, strong science that has been confirmed and verified.” Debbie Cenziper et al., *Doctors Doubt Shaken Baby Syndrome Science, Fear Bad Convictions*, WASH. POST, Mar. 23, 2015, <http://www.dailyherald.com/article/20150323/news/150329644/>.

Indeed, Dr. Carole Jenny, a prominent SBS proponent, conceded in April 2017 that a “controversy” existed with regard to SBS and that the causal mechanism asserted by SBS proponents was “not consistent with the biomechanical data.” Van Ee Ltr. at 7–8. Even Dr. Norman Guthkelch, *the originator of the SBS hypothesis*, recently stated that he was “desperately disappointed” that prosecutors were using his science to convict individuals and that he “was against defining this thing as a syndrome in the first instance.”<sup>12</sup> C. Haberman, *Shaken Baby Syndrome: A Diagnosis That Divides the Medical World*, N.Y. TIMES, Sept. 13, 2015, <https://www.nytimes.com/2015/09/14/us/shaken-baby-syndrome-a-diagnosis-that-divides-the-medical-world.html> (embedded video).

SBS has always been—and remains—a hypothesis. Here, where witnesses fielded by the State testified that the triad of injuries alone

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<sup>12</sup> A recent survey by a staunch SBS proponent found that only 40% of pathologists believe SBS is a reliable diagnosis. Ophoven Decl. ¶ 16–17 & n.24 (citing Narang 2016).

showed with utmost certitude that Haydon had been violently shaken, evidence showing that the SBS hypothesis lacks support in “basic science” and that its diagnostic reliability has been called into serious question would profoundly affect a reasonable juror. This alone is grounds for a new trial. *See, e.g., Commonwealth v. Doe*, 90 Mass. App. Ct. 793, 794 & n.3, 68 N.E.3d 654 (2016) (“As noted in two recent opinions of the Supreme Judicial Court, shaken baby syndrome has been the subject of heated debate in the medical community.”); *Del Prete v. Thompson*, 10 F. Supp. 3d 907, 957 (N.D. Ill. 2014) (“shaken baby syndrome” arguably “more an article of faith than a proposition of science”).<sup>13</sup>

## **2. New Evidence Demonstrates that Key Statements Made by the State and the State’s Witnesses Were False**

At Mr. Reyes’s trial, the State’s witnesses stated categorically and emphatically that it was medically impossible for Haydon to have sustained his injuries by any cause other than shaking. With extreme confidence, the State told the jury that bilateral retinal hemorrhages “*never*” occur in an accident and that a fall from a bunk bed “*cannot*” have caused Haydon’s injuries. Tr. 931:17–932:15 (emphasis added). According to

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<sup>13</sup> *See also Matter of Rihana J.H. (Quiana J.)*, 54 Misc.3d 1223, at \*2, 54 N.Y.S.3d 612 (N.Y. Fam. Ct. 2017) (“There is now significant scholarly debate and some consensus that these injuries were over-diagnosed as resulting from abuse.”); *People v. Bailey*, 47 Misc.3d 355, 372, 999 N.Y.S.2d 713 (N.Y. Sup. Ct. 2014) (The “key medical propositions relied upon by the prosecution at trial . . . are now subject to new debate.”), *aff’d*, 144 A.D.3d 1562, 41 N.Y.S.3d 625 (N.Y. App. Div. 2016).

the State, it was a medical *res ipsa loquitur*. Such categorical pronouncements from the “experts” in the room are incredibly powerful and difficult to combat without medical experts of one’s own.<sup>14</sup> Moreover, new medical evidence shows these categorical pronouncements were false.

**a. Retinal Hemorrhages Not Pathognomonic**

Drs. Duralde and Paschall testified that Haydon must have been violently shaken because an eye examination revealed “[REDACTED]” Ex. G (Emergency Services Report) at 1. Dr. Duralde told the jury that bilateral retinal hemorrhages were “really important” because they have “never” been “seen” or “reported” in connection with accidental trauma: ***“[O]f the hundreds to thousands of cases that have been reviewed of head trauma in children, there have never been bilateral retinal hemorrhages in any kind of accidental blunt force trauma.”*** Tr. 235:1–21; 258:14–259:12 (emphasis added).<sup>15</sup> Dr.

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<sup>14</sup> See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 81 n.7, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985) (noting that “[t]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury”) (citations and internal quotations omitted); see also *Johnson v. Oklahoma*, 484 U.S. 878, 880, 108 S. Ct. 35, 98 L. Ed. 2d 167 (1987) (Marshall, J., dissenting from denial of writ of certiorari) (“Without expert assistance, a defendant will usually be powerless to create doubts in the jury’s mind about [the expert] testimony’s strength or correctness.”); *People v. Ackley*, 497 Mich. 381, 394, 870 N.W.2d 858 (2015) (“The defendant’s own testimony and that of his lay character witnesses were extremely unlikely to counter this formidable expert testimony. Therefore, the absence of expert assistance in the defendant’s favor was critical. It prevented counsel from testing the soundness of the prosecution’s experts’ conclusions with his own expert testimony and with effective cross-examination.”).

<sup>15</sup> See also Tr. 258:18–19 (“ha[ve] not been seen” in accidental trauma); 258:23–24 (“[T]here haven’t been any reported cases . . .”).

Paschall also stated categorically that bilateral retinal hemorrhages, however minor, were “pathognomonic or diagnostic for the finding of non-accidental trauma,” and more specifically, “a shaking-type injury.” Tr. 165:9–166:19; 191:11–23. And while it was not clear that they had seen the hemorrhages first-hand, Tr. 257:21–24, the State told the jury unequivocally that “you never have bilateral retinal hemorrhaging as a result of an accident.” Tr. 932:4–6. These are powerful words to a jury.

But the notion that retinal hemorrhages are pathognomonic of abuse is now known to be false. Ophoven Decl. ¶¶ 35–40. It is now acknowledged that retinal hemorrhages are observed in natural deaths as well as deaths resulting from accidental and non-accidental trauma. *Id.* The new consensus is that retinal hemorrhaging is most likely caused by increased intracranial pressure.<sup>16</sup> ¶ 38 & n.28 (citing Scheller 2018 and Shuman 2017). Retinal hemorrhages are thus nonspecific and of little diagnostic value. *Id.* ¶ 36 (citing Lynoe 2017 and de Leeuw 2015). Given the State’s heavy reliance on the pathognomony of retinal hemorrhages to convict Mr. Reyes, this is grounds for a new trial. *See Fero*, 192 Wn. App. at 153 (new understanding of SBS hypothesis justified new trial under

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<sup>16</sup> Dr. Duralde testified that retinal hemorrhages occurred when the eyes were “jiggling” during shaking. Tr. 235:1–21; 258:14–259:1. If by “jiggling” Dr. Duralde was referring to the vitreous traction hypothesis, this has “never been proven in animal models.” Ophoven Decl. ¶ 39 & n.30 (quoting Gabaeff 2016). Indeed, a 2017 study in which animals were shaken for both short and extended periods reported no ocular injury. ¶ 39 & n.31 (citing Coats 2017).

RAP 16.4(c)(3)); *Del Prete*, 10 F. Supp. 3d at 955 n.8 (deficiencies in testimony regarding retinal hemorrhages); *Rihana*, 54 Misc.3d 1223, at \*2 (“[T]he experts agree that . . . retinal hemorrhages ‘are not caused exclusively or almost exclusively by shaking or inflicted trauma’ . . .”).

**b. Subdural Hematomas Not Pathognomonic**

The State’s witnesses also suggested that only shaking can cause a subdural hematoma: “[T]he subdural is actually a symptom of the shaking,” Dr. Duralde told the jury, “It implies that’s what occurred.” Tr. 228:22–23; *see also* Tr. 227:3–4 (stating that video showed “the mechanism of injury that occurs with shaking”). But, just like retinal hemorrhages, subdural hematomas are now understood to have a wide variety of causes. Ophoven Decl. ¶¶ 35–40. Indeed, the most common cause of acute subdural hematoma is impact head trauma, a fact that is apparent from statistics collected by the Centers for Disease Control and Prevention. *Id.* ¶ 42 & n.36. The idea that subdural hematomas rule out all but a shaking injury, a car crash, or a fall from a multistory building is no longer defensible. Ophoven Decl. ¶ 53; Van Ee Ltr. at 9. This is also grounds for a new trial. *See Commonwealth v. Millien*, 474 Mass. 417, 426–27, 436–38, 442, 50 N.E.3d 808 (Mass. 2016) (new trial granted where evidence suggested subdural hematoma could have had alternate cause);

*Bailey*, 47 Misc.3d at 372 (“key medical propositions” were “demonstrably wrong”).

**c. Short Falls Can Cause Catastrophic Head Injuries**

One of the State’s central objectives was to show that a fall from the bunk bed could not have caused Haydon’s injuries. “You will hear from the medical people,” the Prosecutor promised, “that this type of devastating trauma to the brain does not and cannot occur, *no way, no how*, from a fall from a bunk bed.” Opening Tr. at 5:12–16 (emphasis added); *see also* Tr. 191:17–23, 234:22–25. And the State drove it home in closing: “What does this all mean? What do the pieces of evidence that you’ve heard from the experts, what do they all mean? Haydon did not die from falling off that bunk bed . . . .” Tr. 933:21–24.

The new understanding of short falls is that they can cause serious and even fatal injury at distances far less than five feet. Ophoven Decl. ¶¶ 41–45; Van Ee Ltr. at 4–9. Indeed, biomechanical analysis now confirms that short falls, unlike shaking, can generate forces exceeding established thresholds for serious brain injury. Van Ee Ltr. at 4–9. As Dr. Van Ee notes, “falls of only 12 inches resulting in head impact” impart more force to the brain than the most vigorous shaking. *Id.* at 9. Reports

of fatal short falls and play-related accidents resulting in the triad are now widely acknowledged. *Id.* at 4–9.

It is now also widely acknowledged that a chronic subdural hematoma can and often does rupture due to minor trauma, or even on its own, causing re-bleeding. Ophoven Decl. ¶ 44 & n.39. Re-bleeding can cause seizures, increased intracranial pressure and, potentially, neurologic collapse in small children. *Id.* Also well understood is the potential for low-impact events and minor trauma to disrupt the brain’s ability to compensate for increased fluid inside the skull—*i.e.*, its ability to maintain “intracranial equilibrium.” ¶¶ 48–51. This is particularly true where a preexisting injury has compromised the brain’s regulatory system to some degree. *Id.*

Had the jury learned that Haydon’s injuries were consistent with such a fall, the jury would have been unlikely to conclude that Haydon’s injuries were caused by shaking and shaking alone. *See, e.g., Fero*, 192 Wn. App. at 157 (granting PRP based on new evidence that “short falls and other low-impact accidents” can cause serious head trauma); *Del Prete*, 10 F. Supp. 3d at 955, 957 (potential for chronic subdural hematoma to re-bleed “give[s] rise to reasonable doubt regarding [the caregiver’s] guilt.”); *Epps*, 474 Mass. at 763–768 (granting motion for new trial in part on new evidence regarding short falls); *Bailey*, 47

Misc.3d at 370 (“mainstream belief in 2001–2002 . . . that children did not die from short falls[] has been proven to be false.”).

**d. Statements About Amount of Force Applied to Haydon Were False**

To establish that Mr. Reyes acted with “extreme indifference” to human life, the State invited the jury to equate the severity of Haydon’s injuries with the severity of the force: “[*T*]he extent of the brain damage tells you the amount of force that was used to shake this child, and the amount of force that was used to shake this child shows you *definitively, without a doubt, conclusively, absolutely*, the amount of rage, the amount of violence, the extreme indifference that Defendant showed to the well-being of this child.” Tr. 945:5–12 (emphasis added). The State coupled this medical testimony with a shock-and-awe approach that included gory post-autopsy photographs and lurid testimony about “high-speed car crash[es]” and brains “gush[ing] out of [the] skull.” *See supra* nn. 7 & 8.

But statements that shaking produces the same forces as a multistory fall or a major motor vehicle accident are now known to be without scientific foundation. Ophoven Decl. ¶ 61; Van Ee Ltr. at 9. They are also acknowledged to be highly prejudicial, as “[j]uries are understandably horrified and inflamed by post-mortem and operative photos of infants and children and ‘talking points’ that exaggerate the

forces required to produce a subdural hematoma and retinal hemorrhage.” Richard M. Hirshberg, *Reflections on the Syndrome of the ‘Shaken Baby,’* 29 MED. & LAW 103, 104 (Mar. 2010). New medical evidence demonstrating that such analogies are false can be grounds for a new trial. *See People v. Roberts*, 2017 Mich. App. LEXIS 901, at \*25 (June 6, 2017) (defendants prejudiced by testimony that force was “akin to a car accident” because it suggested that defendant must have done something “forceful and violent—and presumably intentional—to cause his son’s injuries”).

The new medical understanding of the dangers of preexisting cranial injuries further undermines the State’s insidious and simplistic suggestion that one could equate the severity of the injury with the severity of the supposed shaking. Ophoven Decl. ¶¶ 53–54. Subdural hematomas cause increased intracranial pressure; the human brain has regulatory mechanisms that compensate for that pressure, but there comes a point when the compensatory mechanisms are overwhelmed and the brain falls into catastrophic disequilibrium. ¶¶ 49–51. Just before disequilibrium, when “compensatory mechanisms are close to being overwhelmed,” there is a “border zone” where one sees “symptoms such as lethargy, vomiting, irritability, [and] poor feeding.” ¶ 50 (quoting Leestma 2014). In this situation, “even an *incremental increase [in] volume* will result in a *dramatic increase in pressure* (disequilibrium) and

the rapid evolution of symptoms leading to respiratory failure and death.”  
*Id.* Thus it cannot be said, where preexisting injuries have already pushed the brain’s regulatory system to the brink, that the extent of brain damage is proportional to the amount of trauma experienced by the victim.

### **3. New Medical Evidence Shows that Shaking Was Not the Necessary or Even Likely Cause of Death**

When viewed objectively, the evidence that Mr. Reyes actually assaulted Haydon has always been far from overwhelming.<sup>17</sup> When the new medical evidence is considered in the context of the record and what could have easily been in the entire record, it is clear that shaking was not the necessary, or even likely, cause of Haydon’s death.

It is more likely than not that a reasonable jury would find, on this record, reasonable doubt as to whether Leon had violently shaken Haydon on the night he collapsed. No one ever suspected Leon of abusing the children. *See supra* 6. There were no bruises found on his face or buttocks. *See supra* 11. Haydon’s mother testified that Leon never physically disciplined Haydon. Tr. 570:25–571:5; 572:7–11; 591:9–13. A

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<sup>17</sup> In affirming Mr. Reyes’s conviction on direct appeal, this Court held that there was overwhelming evidence of guilt. *See State v. Reyes*, No. 36136-1-II, 2008 Wash. App. LEXIS 2302 (Oct. 21, 2008). The Court, however, relied on the very medical evidence called into question in this Petition. *See, e.g., id.* at 25 (“Each medical expert testified that Haydon’s brain injury was consistent with shaking, and Dr. Duralde testified that she did not believe that a fall from a bunk bed . . . could have caused Haydon’s injuries.”).

friend at the house just hours before the incident had noticed nothing unusual—just the boys eating nachos and watching a movie. *See supra* 8.

Current biomechanical studies and tolerance data indicate that the most serious injuries directly resulting from shaking a child would be more likely to the neck and chest than to the brain. Van Ee Ltr. at 8. But the State presented no evidence that Haydon suffered any neck or spinal cord injuries, and the record indicates that there were none. Tr. 284:8–12; Ex. N (Second Postmortem Report) at 5, 6, 8. Haydon’s chest did not show grip marks, chest-to-chin marks, or such other bruising as one might expect if an adult were to grip a child and violently shake him. Van Ee Ltr. at 8. Instead, it showed only “small redness of the skin, small bruising” above the left breast that was “very faint,” Tr. 284:8–12, and a bruise around a “[REDACTED]” fracture of the ninth posterior rib, Ex. N (Second Postmortem Report) at 5, all of which were detected only at autopsy.<sup>18</sup> It is far more plausible that the almost imperceptible rib

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<sup>18</sup> The bruises to the chest and back must have been “very faint” or must have occurred at the hospital because first responders did not notice any bruises on Haydon. Tr. 150:10–16. Dr. Bin did not notice any bruises on Haydon’s chest or back when he arrived at the hospital, nor did Dr. Paschall on his initial examination. Tr. 193:11–20. The same goes for the fractured rib. CT scans of Haydon’s chest taken shortly after he arrived at the hospital specifically noted “[REDACTED]” Ex. U (Schmit CT Scan) at 1, and an infant bone survey conducted the next day specifically noted that “[REDACTED]” Ex. J (Infant Bone Survey) at 1. Haydon did show some faint “high-velocity marks” on his thighs, Tr. 251:4–7, but those marks are consistent with the boys “fighting” and “beating up on Haydon” the night of his collapse, Tr. 202:11–203:9.

fracture was related to chest compressions and other intensive medical treatment received by Haydon.

It is also critical to remember that Haydon was not a “baby,” and certainly not the very young infant portrayed in the Davis Video. Haydon was almost 2½ years old and weighed nearly 30 pounds. Ex. N (Second Postmortem Report) at 4. Even assuming an adult like Mr. Reyes could shake a months-old infant with enough force to cause subdural hematomas, to do so with a 2½-year old child would be exponentially more difficult. Van Ee Ltr. at 5–6. Not only was Haydon bigger and heavier than the infant depicted in the Davis Video and the classic SBS literature, he also lacked the features that undergird the entire SBS hypothesis. Though infants have disproportionately large heads and underdeveloped neck muscles, as a child ages, the body increases in size relative to the head and the neck muscles strengthen. *Id.*

Here, everything points to a fall from the bunk bed on the night Haydon collapsed. Multiple family members said they were concerned about the boys engaging in dangerous play on and around the bunk bed. *See supra* 6–7. There had been an incident just a week before he collapsed. Tr. 476:2–8, 477:1–478:19. And a bruise was found at the apex of his skull, whereas a bruise from a shaking-slamming incident would be on the back of the skull. Van Ee Ltr. at 10.

It is also clear that Haydon had an undiagnosed chronic subdural hematoma at the time of his death—the State conceded this fact at halftime.<sup>19</sup> Tr. 750:12–19 (“We had testimony that there was an older bleed, a chronic bleed . . .”). Haydon was already showing symptoms of brain swelling as he exhibited headaches, vomiting, lethargy, and poor appetite prior to his collapse. Tr. 406:1–408:13, 411:5, 574:14–575:22. The State itself emphasized that Haydon was acting strangely *the night before he collapsed*. Tr. 406:1–408:13. But not only did the State’s experts fail to discuss the impact of the prior head injuries, the State’s key expert witness erroneously believed that Haydon was “██████████” in the days leading up to his collapse, Ex. M (Duralde Letter) at 1, when in fact Haydon suffered from headaches and vomiting, likely from the chronic subdural hematoma discovered after his collapse. At this point, even a relatively minor injury to the head from falling off a bunk bed could have caused regulatory failure and catastrophic disequilibrium. Ophoven Decl. ¶¶ 49–51. The resulting increase in intracranial pressure would also explain Haydon’s retinal hemorrhages.<sup>20</sup>

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<sup>19</sup> Further complicating matters was the fact that Haydon had macrocephaly at the time of his death. Ophoven Decl. ¶¶ 38 n.28, 56.

<sup>20</sup> Haydon had only “██████████” and no one testified to anything distinctive about them. Today, even the most dogmatic SBS proponents acknowledge that “small numbers” of retinal hemorrhages are consistent with accidental injury. Ophoven Decl. ¶ 40 & n.32.

Viewed as a whole, the new medical evidence is such that a reasonable juror would probably have reasonable doubt as to whether Haydon was shaken. *See Fero*, 192 Wn. App. at 157 (new evidence contradicted “certainty of the doctors at trial” even if it was “impossible to determine” exactly what happened).

#### **4. Mr. Reyes Could Not Have Been Convicted Without the Now-Refuted Medical Evidence**

As explained above, this case turned on the testimony of the State’s three medical experts. Because there was no eyewitness, no corroborative physical evidence, and no apparent motive, the experts *were* the State’s case. Outside of their testimony, the State presented no evidence that Mr. Reyes either committed an act that caused Haydon’s death or exhibited extreme indifference to his life. The State directed the rest of its case to injuries Haydon sustained before the night of his collapse in an attempt to prove the “pattern or practice” element of homicide by abuse. As the State conceded, however, evidence of prior injuries bore only on “pattern or practice” and was irrelevant both to the actus reus and mens rea of homicide by abuse.<sup>21</sup> Accordingly, Mr. Reyes’s new

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<sup>21</sup> *See* Tr. 732:10–733:3 (“[W]hen we’re talking about the State having to prove the element of pattern o[r] practice, we have to show prior injuries, not just how the child died as a result of the blunt force trauma to the head. Any injuries that shows [sic] that the injuries had occurred prior to the 20th is all very relevant and pertinent to the pattern and practice element. If the Court rules—I mean, if the State no longer has homicide by abuse, then none of those prior injuries even become relevant.”).

scientific evidence would probably change the result irrespective of any of this supposed evidence. But the State’s suggestion that Leon had inflicted earlier injuries on Haydon is also extremely misguided. No reasonable jury would have credited these claims had the State not primed it to imagine Mr. Reyes as an abuser.

***Prior Injury to Ankle.*** The State suggested that a twisted ankle that Haydon had sustained in the parking lot of a K-Mart a year earlier was the product of abuse. But there is no basis for this in the record. Laura testified that she was there when the injury occurred: Leon was holding Haydon while bending down to get a pair of keys that he had dropped when he accidentally put pressure on Haydon’s ankle. Tr. 565:14–25, 588:14–18. Laura testified that the ankle had just been “twisted” and she did not think it was done intentionally. Tr. 565:20–21; 588:17–18. The State never put forward any testimony that Haydon was not taken immediately to a doctor, or that any of the doctors who treated Haydon for the ankle injury suspected abuse.

***Prior Injury to Elbow.*** The State also attempted to blame a prior elbow injury on Mr. Reyes, but numerous family members believed that the elbow had been injured while Haydon was at daycare.<sup>22</sup> Tr. 550:15–24;

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<sup>22</sup> The State called various daycare workers who testified they did not cause the injury and tried to pin the blame on Leon and Laura, but even the trial judge recognized that they “ha[d] a potential reason to deflect liability from themselves.” Tr. 620:10–13.

778:23–780:5. Haydon was taken to his regular doctors, who referred the family to an orthopedic specialist, Dr. Victoria Silas, who testified that there was a very “small” fracture with no dislocation and nothing “out of place.” Tr. 271:7–9, 268:17–269:1. She did not express any concern about the injury, noting that it was in “the olecranon, the bone that makes the point of the elbow,” and that it was “likely to be caused from a fall.” Tr. 268:16–269:7, 372:11–373:16, 380:1–5.

***Prior Injury to Stomach.*** The State repeatedly and recklessly claimed that Mr. Reyes “stomped” on Haydon’s stomach a few weeks before his collapse, Tr. 943:20–24, 946:14–22, 950:4–6, 952:7–9, 970:9–12, but there is no basis for this highly prejudicial claim. Laura testified that, a few weeks before his collapse, she saw a “bruise-type mark” on Haydon’s stomach that was about the size of a coin: Laura said that “the only thing that came to mind” at the time was that the pattern of the bruise “[looked] like a shoe print.” Tr. 577:7–10; 578:15–16; 596:22–24. But Laura specifically stated that “it didn’t even look big enough to be an adult shoe,” Ex. V (Laura Reyes Interview) at 18:1–2, and it “never crossed [her] mind” that Leon had caused the mark, Tr. 597:14. Six months later, the Prosecutor asked Laura to make a drawing of the mark, Tr. 579:25–580:13, and then showed the jury the drawing as well as a picture of Mr. Reyes’s shoe, Tr. 937:18–938:2. The two patterns did not match. Tellingly, the

State never asked Laura if her crude sketch matched Leon’s shoe, nor did it ask any of its experts to explain how an adult male could “stomp” on the abdomen of a toddler and only leave a mark the size of a coin.

**B. New Evidence Was Discovered After Trial and Could Not Have Been Discovered Before Trial**

**1. Mr. Reyes Did Not Discover the Evidence Prior to Trial**

The new medical evidence presented by Mr. Reyes was not discovered prior to his trial in 2007. Roberts Decl. ¶ 5. The shift in scientific consensus against the SBS hypothesis happened only after his trial. Ophoven Decl. ¶¶ 15–34. Trial counsel does not specifically recall any scientific evidence or expert opinion critical of SBS, and nothing in the defense file suggests that the trial team sought out or discovered any scientific evidence or expert opinion critical of SBS. Roberts Decl. ¶¶ 3–5.

**2. Mr. Reyes Could Not Have Discovered the Evidence Prior to Trial**

Mr. Reyes could not have discovered the evidence presented in this Petition prior to his trial. Again, the shift in scientific consensus against the SBS hypothesis has only taken place recently. Ophoven Decl. ¶¶ 15–34. For example, it was not until *October 2016* that one of the world’s most esteemed medical organizations conducted the most thorough examination of the pro-SBS literature to date and found the research to be of poor quality. *Id.* ¶¶ 28–33. It was not until *September 2016* when the

Executive Office of the President reported that the forensic science and criminal justice issues surrounding SBS required “urgent attention.” *Id.* And it was not until **March 2015** that a high-ranking official at the National Institutes of Health publicly announced that SBS lacked support in “good, strong science that has been confirmed and verified.” *Id.* ¶ 27. Indeed, in **April 2017**, a prominent SBS proponent admitted that there was “controversy” surrounding SBS and that the causal mechanism put forward by SBS proponents was “not consistent with the biomechanical data.” Van Ee Ltr. at 7–8. Mr. Reyes could not have discovered this change in medical consensus before trial no matter how diligently he pursued it, because it did not yet exist. Further, though important papers published prior to 2007 laid the groundwork for the present understanding of the SBS hypothesis,<sup>23</sup> these papers did not get traction at the highest levels of the medical establishment until recently. Ophoven Decl. ¶¶ 15–34. Thus RAP 16.4(c)(3) is satisfied. *See Fero*, 192 Wn. App. at 161 (“paradigm shift” was “recent development” and “not in place when [defendant] was tried”).

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<sup>23</sup> *See, e.g.*, Ann-Christine Duhaime et al., *The Shaken Baby Syndrome: A Clinical, Pathological, and Biomechanical Study*, 66 J. NEUROSURG. 409 (1987) (forces generated by violent shaking insufficient to cross injury thresholds); John Plunkett, *Fatal Pediatric Head Injuries Caused by Short Distance Falls*, 22 AM. J. FORENS. MED. PATHOL. 1 (March 2001) (multiple witnessed short falls resulting in symptoms associated with SBS, including a videotape of a 23-month old toddler’s fatal fall from 28 inches); Jennian F. Geddes et al., *Neuropathy of Inflicted Head Injury in Children: II. Microscopic Brain Drain Injury in Infants*, 124 BRAIN 1299 (2001) (SBS symptoms might be related to hypoxia-ischemia).

### **3. Mr. Reyes Used Reasonable Diligence in Discovering the Evidence**

Once again, the shift in consensus against the SBS hypothesis took place recently, Ophoven Decl. ¶¶ 15–34; Van Ee Ltr. at 7–8, and much of the new evidence presented in the Petition was published in the last few years. The reasonable-diligence requirement is satisfied where the new evidence only “recently” became available. *Fero*, 192 Wn. App. at 161. Moreover, Mr. Reyes is a layman with no college education and no medical training and he has been incarcerated continuously since his arrest; obviously, his access to medical professionals in the field of pediatric head trauma is extremely limited, and he needed to find pro bono legal counsel. *Id.*; Reyes Decl. ¶¶ 9–10. Counsel needed to conduct a full investigation of the facts, which included reconstructing the defense file, tracking down potential new witnesses, and attempting to locate and gain access to critical CT scans that appear to have gone missing. Roberts Decl. ¶ 7. Counsel then needed to find medical experts, dig into the complex science, research the legal precedent, and formulate a legal strategy against a shifting scientific and legal status quo. *Id.* Reasonable diligence has been satisfied. *Fero*, 192 Wn. App. at 161.

#### **C. New Evidence is Not Cumulative or Merely Impeaching**

The new evidence is not cumulative or “merely” impeaching because it presents “the opposite point” of view compared to “the other

doctors presented at [his] trial,” *Fero*, 192 Wn. App. at 162–63, and no medical experts were put forth at trial on Mr. Reyes’s behalf.

**D. Mr. Reyes’s New Evidence Claim Is Not Successive**

Mr. Reyes filed a pro se personal restraint petition on March 10, 2010, but this Petition does not rest on “similar grounds,” RCW § 10.73.140, because “the current evidence is significantly different in [both] quantum [and] quality from the evidence presented” earlier. *State v. Brand*, 120 Wn.2d 365, 370, 842 P.2d 470 (1992). For his first petition, Mr. Reyes presented new evidence showing that his children had been mistreated by Laura’s boyfriend subsequent to Mr. Reyes’s arrest, Ex. Q (First Reyes PRP) at 6–7. In the instant Petition, he presents expert opinion on a recent shift in the understanding of the SBS hypothesis.

**IV. MR. REYES IS ENTITLED TO NEW SENTENCING**

Mr. Reyes is entitled to new sentencing under RAP 16.4. The trial judge sentenced him to *forty years in prison*, an astonishing sentence ten years above the recommended range, Sent. Tr. 4:11–12, 19:4–6, despite the fact that the jury found that *Mr. Reyes had not acted with deliberate cruelty*, Tr. 1071:11–13. There can be little doubt that the trial judge was affected by the State’s misleading equation of catastrophic injury with catastrophic force, its exaggerated claims about the force being equivalent to a high-speed car crash or a fall from a multistory building, and its

sensational descriptions of Haydon's brains "gush[ing] out of his skull." *See supra* n.8. The trial judge did not have the benefit of knowing that Haydon's chronic subdural hematoma was already taxing his regulatory function and that, in that condition, he was extremely vulnerable to minor trauma or an incremental increase in intracranial pressure. *See supra* 42–43. It is difficult to believe that Mr. Reyes's sentence would be the same if the trial judge had this information before her.

### CONCLUSION

For these reasons, Mr. Reyes respectfully requests that the Court vacate his conviction and/or sentence under RAP 16.4 and remand his case to the trial court for a new trial or new sentencing.

Dated: September 28, 2018

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**CERTIFICATE OF SERVICE**

I certify that on the 28th day of September, 2018, I caused a true and correct copy of Petitioner's Opening Brief in Support of Personal Restraint Petition [Public Version] to be served on the following by placing it in the U.S. mail:

Mark Lindquist  
Prosecuting Attorney  
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on September 28, 2018 at Seattle, Washington.

By: 

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**Filing Personal Restraint Petition**

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