

No. 92975-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal
Restraint Petition of

HEIDI CHARLENE FERRO,

Petitioner.

BRIEF OF AMICUS CURIAE WASHINGTON ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

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A. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Association of Criminal Defense Lawyers (“WACDL”) is a nonprofit association of over 1100 attorneys practicing criminal defense law in Washington State. Because many of its members frequently litigate post-conviction claims in state and federal courts, WACDL often submits amicus curiae briefs in this Court regarding the scope and nature of post-conviction remedies in Washington State. *See, e.g., In re Pers. Restraint of Khan*, 184 Wn.2d 679, 363 P.3d 577 (2015).

B. ISSUE OF CONCERN TO AMICUS CURIAE

In a personal restraint proceeding where the petitioner submitted extensive factual support for the petition and the State filed a response pursuant to RAP 16.9 that did not identify any dispute as to the facts presented by Petitioner, did the Court of Appeals properly conclude that the uncontested declarations by defendant's medical experts presented sufficient new material facts to warrant relief.

C. STATEMENT OF THE CASE PERTINENT TO ISSUE OF CONCERN TO AMICUS CURIAE

In May 2014, Ms. Fero filed a Personal Restraint Petition (“PRP”), contesting her conviction for assault of a child in the first degree. She submitted declarations from various medical experts who challenged the

testimony at the 2003 trial. She asked the Court of Appeals to vacate her conviction or in “the alternative, she ask[ed] that an evidentiary hearing be ordered to resolve any factual disputes about Ms. Fero’s unlawful restraint.” *Personal Restraint Petition* at 3.

On July 16, 2014, the Court of Appeals ordered that the State respond to the PRP. Under RAP 16.9(a), the State’s response “must answer the allegations in the petition. . . . Respondent should also identify in the response all material disputed questions of fact.”¹

The State then made a tactical decision and opted not to challenge the factual allegations of Ms. Fero’s experts. When it filed its 16-page response on October 24, 2014, the State framed the issue as follows:

Should this Court dismiss this Petition because the Petition is untimely and Fero has failed to establish there is “newly discovered evidence” that she exercised “due diligence” in discovering that would warrant vacation of her conviction.

Response to Personal Restraint Petition at 1. Accordingly, the State’s response concentrated on the time bar, the test of newly discovered evidence

¹ Although this Court altered RAP 16.9, effective September 1, 2014 (after the PRP was filed but before the response was filed), the changes did not impact the quoted provisions.

and whether Ms. Fero exercised due diligence. The State never asked for a reference hearing, even as an alternative remedy.

Ms. Fero's reply brief was filed shortly after the State filed its response – on November 24, 2014. In her reply, Ms. Fero repeatedly noted how the State had not contested any of her experts' opinions and how the State had not challenged their expertise, credibility or opinions. *Reply Brief in Support of Personal Restraint Petition* at 1-3, 13. Even so, Ms. Fero again asked that as an alternative remedy, the Court of Appeals should “remand the matter for a reference hearing.” *Id.* at 14.

Oral argument was not held until October 26, 2015, and the Court of Appeals issued its written decision on January 5, 2016, noting that the defense experts' declarations were “uncontested” or were “not contested.” Slip Op. at 1, 16. The State then filed, on January 25, 2016 – over a year and a quarter after filing its response – an extensive motion for reconsideration (which at 37 pages was over double the length of its response to the PRP) in which it finally raised a written challenge to the credibility, expertise, and opinions of Ms. Fero's experts. *Motion to Reconsider Published Opinion.*

When the Court of Appeals denied the motion for reconsideration, the State sought review in this Court and asks the Court to adopt the following new rule of law:

The Court of Appeals was free to dismiss Fero’s petition if it found that any of the five criteria for granting a new trial on the basis of newly discovered evidence were not met. It was not, however, free to find her experts credible (or to find that a jury would credit their testimony at a new trial), and grant her petition without a reference hearing.

Supplemental Brief of Petitioner at 26.

D. ARGUMENT

1. *When the State Responds to a PRP, It Can Tactically Decide Not to Challenge Various Facts*

When a person who is restrained by the State files a post-conviction petition raising a challenge to the lawfulness of that restraint, the State could either admit the person is being illegally restrained or contest the person’s allegations. If the latter course is chosen, the State has a series of strategic and tactical decisions to make when deciding how to respond to a prisoner’s petition.

Here, it is important to give due deference to the particular strategy adopted by a county prosecuting attorney given the “limited grant of power” that is bestowed on county prosecutors “to represent the State of Washington

to enforce the laws of the State within each prosecutor's county." *State v. Bryant*, 146 Wn.2d 90, 102, 42 P.3d 1278 (2002) (Chambers, J., opinion). While it is easy to second-guess a lawyer's strategy decisions in "the harsh light of hindsight" *Harrington v. Richter*, 562 U.S. 86, 89, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting *Bell v. Cone*, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed.2d 914 (2002)), even where there is a Sixth Amendment right to counsel (which the State does not have), such retrospective judgment is not appropriate: "Rare are the situations in which the latitude counsel enjoys will be limited to any one technique or approach. . . . Counsel is entitled to balance limited resources in accord with effective trial tactics and strategies." *Id.*

Thus, when responding to a post-conviction petition, the prosecuting attorney can decide simply to contest the procedural ability of the petitioner to challenge the conviction, raising any of a variety of technical defenses, including a timeliness objection under RCW 10.73.090 or claims of successive petitions under RCW 10.73.140. Conversely, the State can choose not to raise technical procedural objections. *See generally Wood v. Milyard*, 566 U.S. 463, 470-74, 132 S. Ct. 1826, 182 L. Ed. 2d 733 (2012)

(explaining circumstances of how State can waive statute of limitations defenses in habeas).

The State can also challenge the factual allegations made by the petitioner, either by putting in its own facts or even by a general denial, and the State can ask for a reference hearing to contest the petitioner's alleged facts.² Indeed, in another case involving the so-called "Shaken Baby Syndrome," the Snohomish County Prosecuting Attorney's Office specifically contested the petitioner's scientific claims, attaching hundreds of pages of journal articles to its response. *State v. Michael J. Morris*, Snohomish County Superior Court No. 09-1-01071-9, Court of Appeals No.73278-1-I, *State's Motion to Transfer Motion for Relief From Judgment*.³

² In *In re Rice*, 118 Wn.2d 876, 828 P.2d 1086 (1992), the Court described this process:

Once the petitioner makes this threshold showing, the court will then examine the State's response to the petition. The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence. If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.

Rice, 118 Wn.2d at 886-87.

³ The pleading can be found at <https://www.courts.wa.gov/content/Briefs/A01/732781%20Other%20State's%20Motion%20to%20Transfer%20PRP%20.PDF>. Interestingly, it does not appear that the State actually hired an expert to rebut Mr. Morris' claims, simply attaching various articles to its response.

The fact that the State contested the petitioner’s scientific arguments was specifically noted by the Court of Appeals when dismissing the PRP. *In re Pers. Restraint of Morris*, 189 Wn. App. 484, 494, 355 P.3d 355 (2015),⁴ demonstrating that a prosecutor can decide to contest scientific evidence on collateral review if it is so desired, and that a prosecutor need not actually hire an expert in every case involving allegations of new scientific evidence in order to prevail.

Alternatively, the prosecuting attorney can address allegations in the petition by admitting the alleged facts, and then arguing that the petition should still fail legally because of the lack of prejudice, *see In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 597-603, 316 P.3d 1007 (2014), or because it relies on a theory of law that cannot be applied retroactively on collateral review. *See In re Pers. Restraint of Colbert*, 186 Wn.2d 614, 380 P.3d 504 (2016).

⁴ The Court of Appeals noted:

Further, the State now presents a 2011 article listing various international and domestic medical organizations “that have publicly acknowledged the validity of [abusive head trauma] as a medical diagnosis.”

189 Wn. App. at 494.

The State is well equipped to make these tactical decisions and decide whether it should concede facts or seek a reference hearing. For instance, in 2013/14, this Court proposed changes to RAP 16.9 (ultimately adopted in September 2014) that allowed the appellate court to direct the respondent to admit or deny specific allegations. In response to the proposal, the Washington Association of Prosecuting Attorneys (“WAPA”) objected to the proposals, arguing that prosecutors were already making choices about what facts to concede or to contest:

Proposed RAP 16.9(b) is unnecessary because the State is already required by current RAP 16.9/proposed RAP 16.9(a) to respond to the petitioner’s allegations. Proposed RAP 16.9(b) is unnecessary because the *State regularly concedes facts* and claims asserted in personal restraint petitions (PRPs). *See, e.g., In re Personal Restraint of Snively*, 180 Wn.2d 28, 30 (2014) (“The State conceded that the sentence was facially invalid ... “); *In re Personal Restraint of Gentry*, 179 Wn.2d 614, 638 (2014) (“The State concedes its presentation. . . .”); *In re Personal Restraint Petition of Henderson*, 316 P.3d 481 (“The State has correctly conceded that”); *In re Personal Restraint of Heidari*, 174 Wn.2d 288, 291 (2012) (“The State conceded that there was no evidence of [‘]sexual contact.[’]”).

Letter of Pamela Loginsky, Staff Attorney for WAPA to Hon. Ronald Carpenter, April 28, 2014 (emphasis added).⁵

⁵ https://www.courts.wa.gov/court_Rules/proposed/2013Dec/RAP16.9/Pam%20Loginsky%20RAP%2016.9.pdf.

2. *The State's Strategy Was Rational, Although Unsuccessful*

Over the last 30 to 40 years, while recognizing the constitutional underpinnings of trial level post-conviction remedies, *see Toliver v. Olsen*, 109 Wn.2d 607, 746 P.2d 809 (1987), this state has generally pushed post-conviction remedies into the Court of Appeals. The adoption of the Personal Restraint Petition remedy in Title 16 of the Rules of Appellate procedure in 1976 was the first step, but over time, promoted by WAPA, CrR 7.8 was ultimately amended (in 2008) to require the transfer of most post-conviction petitions filed in the superior court to the Court of Appeals to be treated as PRPs.⁶

The result of this channeling of post-conviction petitions to an appellate court is a diminution in the number of evidentiary hearings in post-conviction cases. Indeed, the State of Washington regularly takes the position, in federal court, that evidentiary hearings are not even required for the Court of Appeals to adjudicate a PRP on its merits, even where credibility decisions are made. *See Lambert v. Blodgett*, 393 F.3d 943, 969-70 (9th Cir. 2004) (holding that Washington courts had “adjudicated” prisoner’s claims

⁶ For WAPA’s proposal to change CrR 7.8, *see* https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=89.

on the merits by considering, but rejecting, expert affidavit evidence about effective assistance of counsel, and that an evidentiary hearing was not necessary).

And while WACDL does not agree with this position, the State presumably is aware of it and it is therefore clear why the State might tactically not want to have an evidentiary hearing in many post-conviction cases. The State gains a great tactical advantage by keeping cases in the Court of Appeals, particularly where the quality of procedure for PRPs has not always been at the highest level.⁷

Thus, in the instant case, the State tactically made an initial decision not to contest the facts as alleged by Ms. Fero. The State has noted in its pleadings how Ms. Fero's trial counsel, Mark Muenster, was a highly skilled litigator. *See Motion to Reconsider Published Opinion* at 36. But, here, the deputy prosecutor who wrote the response to the PRP, opting not to contest the affidavit evidence was Rachael Probstfeld, who is also a highly skilled litigator. A LEXIS search of Washington appellate decisions reveal her as counsel of record in 72 cases, including post-conviction matters. *See, e.g.,*

⁷ *See, e.g., In re Pers. Restraint of Ruiz-Sanabria*, 184 Wn.2d 632, 362 P.3d 758 (2015) (PRP improperly dismissed as frivolous where it was not clear if all pertinent documents had been transferred from superior court to Court of Appeals); *In re Pers. Restraint of Khan, supra* (error for Acting Chief Judge to dismiss petition with non-frivolous issues without referral to panel of three judges for hearing on merits).

In re Pers. Restraint of Cruze, 169 Wn.2d 422, 237 P.3d 274 (2010); *State v. Constance*, 185 Wn. App. 1012, 2014 Wash. App. LEXIS 3179 (2014) (unpub.). In ACORDS, Ms. Probstfeld is listed as attorney of record in 158 Court of Appeals cause numbers (of which 33 were PRPs), and 51 Supreme Court cause numbers (of which 18 were PRPs). There is no claim that Ms. Probstfeld made a mistake, and it must be assumed that she made a measured tactical decision about how to best represent the State's interests when she responded to the PRP.

Like other litigants who make strategic decisions, at some later point, after losing and obtaining new counsel (in this case, another deputy prosecutor), the litigant might wish he or she would have made a different tactical decision, but that does not relieve the litigant of the consequences of the initial decisions. Thus, the State, having chosen its strategy of not contesting Ms. Fero's experts' declarations, and having opted not to put in its own evidence or even ask for a reference hearing, cannot later be heard when the particular strategy it adopted ended up not being successful.

3. *Once the Court of Appeals Issued Its Decision, the State Should Not Be Allowed to Adopt a New Litigation Strategy by Means of a Motion for Reconsideration*

Almost a year and a quarter after it filed its response to the PRP, the State filed its lengthy motion for reconsideration, formally seeking a reference hearing to contest the conclusions of the experts proffered by Ms. Fero. This is too late.

Traditionally, motions for reconsideration are not a vehicle for making new arguments.⁸ The RAPs limit the issues raised in motions for reconsideration to the issues raised in the briefs. RAP 12.4(c) provides:

The motion should state with particularity the points of law or fact which the moving party contends the court *has overlooked or misapprehended*, together with a brief argument on the points raised.

Emphasis added. The Court of Appeals could hardly have “overlooked or misapprehended” an issue that was never raised in briefing. Washington courts generally do not consider issues raised for the first time in reply briefs, let alone in motions for reconsideration. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (issue first raised in

⁸ The due process right to effective assistance of counsel on appeal under *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985) may lead to a different result for a criminal defendant.

reply brief too late to warrant consideration); *In re Pers. Restraint of Peterson*, 99 Wn. App. 673, 681, 995 P.2d 83 (2000) (“An appellate court will not consider an issue raised for the first time in a reply brief.”).⁹

The State here was simply too late. The Court of Appeals did not commit error by denying the State’s belated request for an evidentiary hearing.

⁹ This is standard appellate procedure. See *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (motion for reconsideration “may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.”) (emphasis in original); *Gausvik v. Perez*, 239 F. Supp.2d 1108, 1111 (E.D. Wash. 2002) (motions for reconsideration are not a proper vehicle “for offering evidence or theories of law that were available to the party at the time of the initial ruling.”); *Fay Corp. v. Bat Holdings I, Inc.*, 651 F. Supp. 307, 309 (W.D. Wash. 1987) (“‘after thoughts’ or ‘shifting of ground’ are not an appropriate basis for reconsideration.”).

Such procedures are also routinely applied to deny prisoners their day in court when they raise issues late in the appeals’ process. See *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188 n.5, 94 P.3d 952 (2004) (“However, Lord did not raise this particular issue in his PRP that he filed at the Court of Appeals. Thus, we refuse to consider this claim); *In re Pers. Restraint of Ruiz-Sanabria*, 184 Wn.2d at 642 n.9 (striking argument raised for first time in reply to answer to motion for discretionary review); *Castille v. Peoples*, 489 U.S. 346, 351, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989) (holding that it is not fair presentation of a claim, “where the claim has been presented for the first and only time in a procedural context in which its merits will not be considered unless ‘there are special and important reasons therefor.’”); *Williams v. Stewart*, 441 F.3d 1030, 1041 (9th Cir. 2006) (presenting issue in motion for reconsideration not sufficient to exhaust issue); *Greene v. Lambert*, 288 F.3d 1081, 1087 & n.2 (9th Cir. 2002) (issues raised for the first time in purely discretionary motions are not exhausted for federal habeas purposes when the motions are dismissed without comment); *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004) (“to be fairly presented in the state courts, a claim must have been raised throughout the state appeals process, not just at the tail end in a prayer for discretionary review.”). The State wants these procedural rules to be applied to prisoners, but not to itself.

4. *The State's and WAPA's Proposed New Rule of Post-Conviction Procedure Is Not Supported by the RAPs*

The State here wants to circumvent the standard practice and asks this Court to adopt a special rule – a one-sided rule – that requires a reference hearing before granting any PRP based on newly alleged facts, but which allows the Court of Appeals to dismiss a PRP without granting a reference hearing. In its amicus memorandum in support of granting of review, WAPA expands this argument, asking this Court to adopt a “three-step process” for deciding PRPs, including a mandatory third step of a reference hearing: “the court *must* refer the petitioner’s competent, admissible evidence to the superior court for a reference hearing. . . . The purpose of the reference hearing is to resolve genuine factual disputes and to determine whether the produced evidence can withstand the challenges of the courtroom and cross-examination.” *Washington Association of Prosecuting Attorneys’ Amicus Curiae Memorandum* at 3 (emphasis added).

Yet, there is no support for such a rule in the text or language of RAP Title 16. The rules are very specific, requiring, as noted, the State to “identify in the response all material disputed questions of fact.” RAP 16.9(a). If the State does identify what facts are disputed, then

The Chief Judge determines at the initial consideration if the petition will be retained by the appellate court for determination on the merits or transferred to a superior court for determination on the merits or for a reference hearing. . .

.

...

If the petition is not frivolous and can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits. If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing

RAP 16.11. These rules set up a rational procedure that requires there to be some dispute about the facts before a reference hearing is ordered, and requires the State to identify contested facts earlier (rather than later) in the process. The rules certainly do not contain any requirement that relief can only be granted after a reference hearing, even if the State does not contest the facts.

Notably, neither WAPA nor the State cite to any particular language in the RAPs that supports their argument. WAPA's only citation to the RAPs governing PRPs in its entire amicus memorandum is in the "Interest of Amicus Curiae" section explaining how under RAP 16.6 prosecuting attorneys are responsible for responding to collateral attack petitions in state courts. *Washington Association of Prosecuting Attorneys' Amicus Curiae*

Memorandum at 1. The State's pleadings are also similarly bereft of any reasoned discussion of the applicable RAPs.¹⁰

Similarly, none of the cases cited by the State or WAPA in any way support the conclusion that, if the State does not contest affidavit evidence, the Court of Appeals must still refer the matter for a reference hearing. *See Supplemental Brief of Petitioner* at 22-23; *Washington Association of Prosecuting Attorneys' Amicus Curiae Memorandum* at 3-4.¹¹ The cases

¹⁰ See *Petition for Review* [sic] at 6 (citing RAP 16.4(c)(3) regarding standard for granting new trial based on newly discovered evidence; & at 22 (citing RAP 16.12 in a quote from a case in a long string cite)); *Reply to Answer to Petition for Review* (not citing RAP 16 at all); *Supplemental Brief of Petitioner* at 12 (citing Rap 16.4(c)(3) regarding granting new trial for newly discovered evidence).

¹¹ In *Herrera v. Collins*, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), the Court simply stated that affidavits are not favored for new trial motions because of the lack of cross-examination. *Morse v. Antonellis*, 149 Wn.2d 572, 575, 70 P.3d 125 (2003), was a civil case where this Court held that the Court of Appeals had improperly reversed a negligence verdict, incorrectly holding that the defendant was negligent as a matter of law. In *State v. West*, 139 Wn.2d 37, 43-47, 983 P.2d 617 (1999), the Court held that a judge can make credibility determinations during a reference hearing regarding effective assistance of counsel. In *State v. Macon*, 128 Wn.2d 784, 801, 911 P.2d 1004 (1996), the Court upheld a trial court's credibility determination that a recanting witness was not credible. In *State v. Statler*, 160 Wn. App. 622, 632, 248 P.3d 165 (2011), the Court of Appeals affirmed the trial court's rejection of a new trial motion based on a letter and testimony from another trial. In *State v. Scott*, 150 Wn. App. 281, 207 P.3d 495 (2009), the Court of Appeals remanded the case for an evidentiary hearing to assess the credibility of the defendant's new evidence where the trial court had denied the motion without an evidentiary hearing. In *In re Pers. Restraint of Clements*, 125 Wn. App. 634, 642, 106 P.3d 244 (2005), the court cited to *D.T.M.*, *infra*, and upheld the denial of a motion to withdraw a guilty plea where there was other evidence not effected by the recantation, to support the plea. *State v. D.T.M.*, 78 Wn.App. 216, 221, 896 P.2d 108 (1995) involved a defendant's appeal of an order denying a motion to withdraw a guilty plea when he had presented affidavit evidence of a recantation, with the court reversing and remanding for an evidentiary hearing. In *State v. Davis*, 25 Wn.App. 134, 138, 605 P.2d 359 (1980), the court rejected the defense argument that when a PRP was
(continued...)

simply support the general proposition that our system prefers evidentiary hearings as a mechanism of resolving *disputed* facts. Neither the State nor WAPA cite any case to support the proposition that even if the State does not contest a petitioner's alleged facts, the Court of Appeals is precluded from granting relief unless an evidentiary hearing is first held.

In addition to the lack of support for the State's and WAPA's proposed rule in the RAPs or the case law, such a rule will be completely unworkable in practice. The proposed rule will lead to an additional layer of proceedings that must take place before a final decision is rendered.

Under the State's proposal, when someone files a PRP, first the Court of Appeals will screen the petition preliminarily under RAP 16.8.1. If the PRP survives this stage, the Court of Appeals will order the State to respond. RAP 16.8.1(d). Although RAP 16.9(a) requires the State to identify all material disputed questions of fact, the State's proposal is to skip this step, and allow it to rely on some ground other than denying the facts as alleged by the petitioner, be it by arguing a time-bar or lack of prejudice.

¹¹ (...continued)

transferred to the superior court for a reference hearing, the trial judge did not have the authority to make credibility determinations.

None of these cases support the theory that if the State does not contest declarations in a PRP the Court of Appeals *must* still remand for an evidentiary hearing.

After the case is fully briefed and argued, and if the Court of Appeals rejects the State's narrow position in a written decision, the State then wants a second bite at the apple and seeks a procedure by which the Court of Appeals issues only a preliminary decision, but then, instead of making that decision final, the Court of Appeals will then ask the State if it wishes to test the factual allegations at a reference hearing. If the State then states it wants such a hearing,¹² the case will be transferred to the superior court for a reference hearing, and then the case will be returned to the Court of Appeals for a final decision.

This is truly complicated, and unnecessarily will lead to delays, court congestion, and additional work. This proposal will also result in the incarceration of more people in our prisons for a longer period of time, people who should have been released earlier but for the State's decision not to challenge any factual allegations at an early stage of the case. This Court should decline to deviate from the plain language of RAP 16.9(a) ("Respondent should also identify in the response all material disputed questions of fact") to give the State multiple opportunities to present new

¹² Under WAPA's proposal, the State could never even waive an evidentiary hearing, such hearings having to take place in every single PRP before relief can be granted.

theories to prevent the release of someone from restraint. The State is fully capable of challenging a petitioner's facts early on in a case, either by its own affidavits or by otherwise sufficiently challenging the allegations.

Accordingly, the Court should reject the State's invitation to create a new and special rule. In this case, the State made a choice. It may have been the wrong tactical decision, but the harsh light of hindsight cannot justify giving the State a second bite at the apple.

E. CONCLUSION

For these reasons, WACDL urges the Court to affirm the Court of Appeals.

Dated this 20th day of April 2017.

Respectfully submitted,

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