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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF

HEIDI CHARLENE FERRO,

Respondent.

AMENDED BRIEF OF AMICUS CURIAE
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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys (“WAPA”) represents the elected prosecuting attorneys of Washington State who are responsible by law for the prosecution of all felonies, gross misdemeanors and misdemeanors charged under state statutes and are also responsible by law for responding to collateral attacks upon criminal convictions that are filed in state courts. *See* RAP 16.6(b).

WAPA is interested in cases, such as this, that have wide-ranging impact on the criminal justice system. A collateral attack on a final judgment that is based on allegedly new scientific evidence cannot be decided in a war of affidavits, and the State cannot be expected to expend precious resources on expert witness fees before an appellate court has determined that a reference hearing is needed. Moreover, a final judgment should be overturned only if purported new “evidence” has been subject to the test of cross examination in a public hearing. The decision of the Court of Appeals in this case has important ramifications for the handling of all collateral attacks on a judgment.

II. ISSUES PRESENTED

1. For over a century, Washington courts followed the rule that the period for filing a notice of appeal does not begin to run until an order denying a timely legally authorized motion for reconsideration is entered.

Heidi Fero has not demonstrated why this rule should not apply in this case.

Should this Court hold that the State's motion for discretionary review¹ was timely filed when the motion was filed 29 days after the Court of Appeals issued its March 3, 2016,² order that denied the State's timely-filed RAP 12.4(a)(2)³ motion for reconsideration?

2. There are few scientific propositions that are universally accepted. There are few areas of science that will not evolve as studies test both old and new principles.

Should this Court hold that new dissenting views regarding the scientific evidence that was presented at trial will satisfy the "newly discovered evidence" test only when the original scientific evidence or theory would now be inadmissible at a new trial?

III. STATEMENT OF THE CASE

WAPA adopts the statement of the case provided by the State in its numerous appellate court pleadings.

¹Although the State labeled its document a "Petition for Review," WAPA will refer to the document throughout this brief as a "motion for discretionary review." See RAP 13.3(d).

²The State timely filed and served its motion with the court of appeals on April 1, 2016. See Docket, *State v. Fero*, Court of Appeals No. 46310-5-II. See also RAP 18.23.

³The court of appeals filed its opinion on January 5, 2016. The State filed its motion for reconsideration on January 25, 2016. See Docket, *State v. Fero*, Court of Appeals No. 46310-5-II.

IV. ARGUMENT

A. A SEASONABLY FILED MOTION TO RECONSIDER SUSPENDS THE TIME FOR FILING A MOTION FOR DISCRETIONARY REVIEW.

There is only one method of seeking review of a decision by the court of appeals in this Court. RAP 13.1(a). This one method is “discretionary review.” *Id.* Discretionary review is obtained by filing a petition for review or a motion for discretionary review. RAP 13.3. The correct procedure is dependent upon whether the decision being reviewed is an “interlocutory decision” or a “decision terminating review.” *Id.*

The decision at issue here is more akin to a “decision terminating review,” than an “interlocutory decision.” *Compare* RAP 12.3(a) *with* RAP 12.3(b). The decision on the merits was issued by a panel of the court, rather than by the Chief Judge. *See* RAP 16.8(b) (identifying two ways by which an appellate court can resolve a PRP). The panel’s decision, unlike a decision by the Chief Judge is subject to reconsideration. *See* RAP 12.4(a)(2). The panel’s decision became “final” once the court of appeals issued its order denying the motion for reconsideration.

Yet, in order to argue that the State’s motion for discretionary review is untimely, Ms. Fero ignores the clear distinctions between a panel’s decision on a PRP and an order issued by the Chief Judge. Ms. Fero essentially relies on a quirk in the rules that, if interpreted literally, would

conflict with other rules, with this Court's prior decisions in similar circumstances, and which has caused confusion for experienced appellate practitioners⁴ and even for the appellate courts.

Common sense counsels that a party seeking review in this Court of an appellate court's decision must await that court's "final decision." When a party has been granted a right to file a motion for reconsideration, the lower court's decision is not final until that court issues its ruling on the motion to reconsider. This Court has followed this common sense principle for over a century.

The question of whether the time to comply with procedural deadlines for an appeal commences to run on the date a judgment is entered or from the date the denial of a timely filed motion for new trial is filed was considered

⁴The *Washington Appellate Practice Deskbook*, in the context of explaining how to obtain review of appellate court decisions, states that:

Motions for reconsideration of interlocutory decisions of the Court of Appeals by the Supreme Court are not authorized. RAP 12.4. As a result, the filing of a motion for reconsideration of an interlocutory decision will not extend the time within which a motion for discretionary review under RAP 13.5 must be filed in the Supreme Court.

² Washington State Bar Association, *Washington Appellate Practice Deskbook*, § 18.3 at p. 18-13 (4th ed. 2016). The authors note no such restriction as to decisions terminating review. Thus, most practitioners familiar with this Court's long-standing practices would conclude that a panel's decision on a PRP, which is subject to a motion for reconsideration, is a "decision terminating review." Consequently, a party may wait to file a motion for discretionary review of such a decision until a timely filed motion to reconsider has been decided. The Washington Practice Series commentary would lead to a similar conclusion. See 3 Karl B. Tegland, Washington Practice, *Rules Practice*, RAP 13.5A, at 228-29 (7th ed. 2011) (describing a change in the standard for granting review of decisions terminating review but no intended change to the procedure).

by this Court in 1904 in *State ex rel. Payson v. Chapman*, 35 Wash. 64, 76 P. 525 (1904). In *Chapman*, this Court held that where a litigant is clearly given the right to move for a new trial, “the time for taking an appeal begins to run from the date of the order denying a motion for a new trial, when such motion is seasonably filed.” 35 Wash. at 68. This rule exists, in part, because the judgement is not final until the order is entered that denies the timely filed motion for new trial. *Id.*, at 67-68.

Against a backdrop of court rules and statutes⁵ that were silent on the effect a timely filed motion for new trial has on the time for taking an appeal, this Court consistently held that a timely filed motion for a new trial will suspend the time for taking an appeal until the entry of an order denying the motion. *See, e.g., Dunseath v. Hallauer*, 40 Wn.2d 708, 711-12, 716-17, 246 P.2d 496 (1952) (noting that in numerous cases the Court held “that time for filing notice of appeal did not commence to run until the trial court denied the motion [for new trial]”); *Tungsten Prods. v. Kimmel*, 5 Wn.2d 572, 574-75, 105 P.2d 822 (1940) (“This court has at all times been committed to the rule that, where a motion for new trial is made subsequent to the entry of the decree, the time for giving notice of appeal begins to run from the time of

⁵*See Dunseath v. Hallauer*, 40 Wn.2d 708, 711-12, 246 P.2d 496 (1952) (“our statutes have always required that notice of appeal be given within a designated period after date of entry of final judgment. Code 1881, § 543; Hill's Code, § 1403; Bal. Code, § 6502; Rem. & Bal. Code, § 1718; Rem. 1915 Code, § 1718; Rem. Comp. Stat., § 1718; Rem. Rev. Stat., § 308-10 [P.P.C. § 93-19]; Rule on Appeal 33, 34A Wn. (2d) 33”).

entry of an order denying a new trial.”); *Sitko v. Rowe*, 195 Wash. 81, 83, 79 P.2d 688 (1938) (“When a motion for a new trial is seasonably made after the final judgment is entered, the time within which notice of appeal must be given, begins to run from the date of entry of the order denying such motion.”); *Bezich v. Columbia Ins. Co.*, 168 Wash. 379, 12 P.2d 413 (1932) (appellant, who had the right under the statute to file a motion for new trial when he did, had thirty days from the date his motion for new trial was overruled to file the appeal); *Woody v. Seattle Electric Co.*, 65 Wash. 539, 540, 118 P. 633 (1911) (“Necessarily there must be a limited time within which an appeal may be taken. That time begins to run when an appealable order has been made and entered. The only procedure that will suspend its running is the filing of a motion for a new trial. When such a motion is interposed, the time for appeal will run from the date on which it is determined.”).

When the statutes and court rules at issue in the earlier cases were replaced by new statutes and rules of court that were also silent on the impact of a motion for new trial, this Court reaffirmed the rule that when a motion for new trial is timely served, the due dates for filing a notice of appeal and other documents run from the date of the order denying the motion. See *Dunseath v. Hallauer, supra* (discussing the Rule on Appeal). The Court of Appeals followed suit in addressing a similar omission in the Rules of

Appellate Procedure, stating that:

The Rules of Appellate Procedure do not deal with the effect of a motion for reconsideration on the time for appeal. In federal court the general rule is that “if a motion or petition for a rehearing is properly and seasonably made or presented and entertained by the court, the period limited for instituting appellate proceedings does not begin to run until the motion or petition is disposed of . . .” Annot., *Motion or Petition for Rehearing in Court Below as Affecting Time Within Which Appellate Proceedings Must Be Taken or Instituted*, 10 A.L.R.2d 1075, 1079 (1950). The reasoning behind the rule is that a timely petition for rehearing suspends the finality of the judgment pending that court's further determination on whether the judgment should be modified, Annot., at 1080; *Communist Party v. Whitcomb*, 414 U.S. 441, 38 L. Ed. 2d 635, 94 S. Ct. 656 (1973). A similar analysis was used in *Sitko v. Rowe*, 195 Wash. 81, 79 P.2d 688 (1938), where the court held that the time for a notice of appeal does not begin to run until the entry of an order denying the motion for a new trial. It would serve no purpose to require appellants to file a notice of appeal while a motion for reconsideration or new trial was pending in the court below. The notice of appeal was filed within 30 days of the denial of the motion for reconsideration and properly brings the judgment before us for review.

Simonson v. Veit, 37 Wn. App. 761, 765, 683 P.2d 611, review denied, 102 Wn.2d 1013 (1984).

This Court further extended its rule – that the time period for filing a notice of appeal does not begin to run until the entry of an order denying a timely filed motion for reconsideration – to statutes governing administrative decisions and land use petitions. See, e.g., *Mellish v. Frog Mountain Pet Care*, 172 Wn.2d 208, 257 P.3d 641 (2011) (the time limit for filing a LUPA decision runs from the entry of the order denying a timely filed motion for

reconsideration); *Skinner v. Civil Service Commission*, 168 Wn.2d 845, 232 P.3d 558 (2010) (local rule allowing a party to move for reconsideration will extend the statutory deadline for taking an appeal until the entry of an order denying the motion). These cases recognize that the decision on the motion for reconsideration may alter the outcome of the case, preventing the original decision from being a “final” decision. *Mellish*, 172 Wn.2d at 217; *Skinner*, 168 Wn.2d at 852. These cases also recognize that a contrary rule would undermine judicial efficiency by promoting unnecessary filings in the reviewing court. *Mellish*, 172 Wn.2d at 216-17; *Skinner*, 168 Wn.2d at 852.

The instant case deals with RAP 13.5A(c), which incorporates RAP 13.5(a). RAP 13.5(a) provides that:

A party seeking review by the Supreme Court of an interlocutory decision of the Court of Appeals must file a motion for discretionary review in the Supreme Court and a copy in the Court of Appeals within 30 days after the decision is filed.

RAP 13.5(a), like the court rules and statutes at issue in the cases cited *supra*, is silent with respect to the impact a timely filed and authorized motion for reconsideration has upon the deadline for seeking review. This silence is easily explained by the fact that a motion to reconsider interlocutory decisions was not authorized when the Rules of Appellate Procedure were

first adopted.⁶

In 1990, however, RAP 12.4(a) was amended to specifically authorize a motion for reconsideration “of a decision by the judges ...granting or denying a personal restraint petition on the merits.” 115 Wn.2d 1133 (1990) (codified as RAP 12.4(a)(2)). This amendment was made at the recommendation of the Supreme Court Commissioner’s Office. The drafter’s comments in support of the amendment evince no intent to deprive those parties who chose to file the motion for reconsideration of the chance for review by the Supreme Court. *See* 3 K. Tegland, *Washington Practice: Rules Practice*, at 159-160 (6th ed. 2004).

The 1990 amendment to RAP 12.4(a) was not accompanied by an amendment to RAP 13.5(a). No change was required to RAP 13.5(a) to allow a party to exercise the right to file a motion for reconsideration as the pre-existing case law dealing with notices of appeal firmly established that the time for filing such a notice does not begin to run until the entry of an order denying a timely filed authorized motion for reconsideration. This case

⁶The Rules of Appellate Procedure, as adopted, required a motion for reconsideration to be filed in all cases before a party could file a petition for review of a decision that terminated review. *See* Former Rule 12.4, 86 Wn.2d 1209 (1976). A 1983 amendment to RAP 12.4(a) eliminated the requirement of a motion for reconsideration in the court of appeals as a condition precedent to seeking review by the supreme court. Former RAP 12.4(a), 99 Wn.2d 1103 (1983). *See also* 3 K. Tegland, *Washington Practice: Rules Practice*, at 159 (6th ed. 2004). Language was added to RAP 13.4(a) to reflect that a motion for reconsideration was optional, rather than mandatory. Former RAP 13.4(a), 99 Wn.2d 1103 (1983) (“If no motion for reconsideration is made, a petition for review must be filed within 30 days after the decision is filed.”).

law, *supra*, closed any gap that might otherwise exist. The official comment to the rule indicates an intent that the time limit in RAP 13.5(a) be interpreted the same as the time period for filing a notice of appeal. *See* RAP 13.5 Comment, 86 Wn.2d 1222 (1976) (“The time within which to seek review is the same as that in which a notice of appeal must be filed.”).

Applying this Court’s century old rule to RAP 13.5 motions for discretionary review of a panel’s decision on a PRP, that was subject to an authorized RAP 12.4(a)(2) motion for discretionary review, is consistent with the preference for deciding cases on their merits rather than on procedural technicalities. *Vaughn v. Chung*, 119 Wn.2d 273, 280, 830 P.2d 668 (1992); RAP 1.2(a). Adhering to this Court’s long-standing precedent also avoids absurd results, while being faithful to the language and policy of both RAP 13.5(a) and RAP 12.4(a)(2). *See generally Seattle v. Crockett*, 87 Wn.2d 253, 551 P.2d 740 (1976) (court rules are “designed to operate in conjunction with one another and not to require meaningless and useless duplication”); *State v. Kelly*, 60 Wn. App. 921, 927, 808 Wn. App. 921 (1991) (“Like statutes, court rules are construed to avoid absurd results.”).

Ms. Fero asks, in effect, that this Court abandon its century old rule that the time for seeking review does not begin to run until after entry of an order denying a timely filed motion for reconsideration. Ms. Fero, however, does not acknowledge this Court’s long-standing rule. Ms. Fero’s failure to

explain why the rule – that a decision is not “final” until the entry of the order on a timely filed motion for reconsideration is filed⁷ – does not apply to this case, requires this Court to hold that the State’s motion for discretionary review was timely filed in this case.

B. FERO FAILED TO MAKE A PRIMA FACIE CASE THAT SHE WAS ENTITLED TO RELIEF. AT BEST FERO WAS ENTITLED TO A REFERENCE HEARING.

A personal restraint petitioner bears the burden of proving that she was actually prejudiced by constitutional error, or that nonconstitutional errors “constitute a fundamental defect which inherently results in a complete miscarriage of justice.” *In re Rice*, 118 Wn.2d 876, 884, 828 P.2d 1086 (1992). If she fails to meet the threshold burden of proving prejudice the petition must be dismissed. If she makes a prima facie showing of actual prejudice but the merits of the contentions cannot be determined solely on the

⁷*Cf. State ex rel Cross v. Superior Court for Okanogan County*, 158 Wash. 46, 49, 290 P. 430 (1930) (“We have uniformly held that the superior court has no jurisdiction to vacate and modify its judgments after an appeal has been taken.”); *see also* RAP 7.2(e) (once a notice of appeal has been filed, the trial court may not enter an order on a post-judgment motion that will change a decision then being reviewed by the appellate court without the permission of the appellate court).

Absent a statute or court rule providing otherwise, a party that files a notice of appeal before the lower court rules on the motion for reconsideration is generally deemed to have abandoned the motion for reconsideration. *Cf. Fairview Lumber Co. v. Makos*, 44 Wn.2d 131, 134, 265 P.2d 837 (1954) (a party abandons consideration of a motion for new trial by filing a notice of appeal). While RAP 13.4(a) states that a petition for review that is filed prior to resolution of a motion for reconsideration will not be forwarded to the supreme court until the court of appeals files an order on the motion, RAP 13.5(a)-(c) contains no similar language.

record the court should conduct a hearing on the merits. *Id.* at 885. To sustain her evidentiary burden to be entitled to a reference hearing the petitioner must demonstrate that she has competent admissible evidence to establish facts that entitle her to relief. *Id.* at 886.

Here Ms. Fero's PRP was based on a claim that newly discovered evidence entitled her to a new trial. To grant a new trial on that basis the new evidence must probably change the result of the trial, and must not be merely cumulative or impeaching. *In re Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001). A new expert opinion that merely contradicts the State's expert testimony will not satisfy this test as it is merely impeaching.⁸ *See generally State v. Mesaros*, 62 Wn.2d 579, 589-90, 384 P.2d 372 (1963) (new expert's alternative theory was merely impeaching.). Impeachment evidence is designed to aid the jury in evaluating the credibility of a witnesses. *State v. Alexis*, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980). A post-trial debate regarding forensic or scientific evidence should be considered "not merely impeaching" in only one situation: when the evidence tendered at trial has been so completely discredited that it would be excluded in a new trial. *Cf. State v. Savaria*, 82 Wn. App. 832, 838, 929 P.2d 1263 (1996) (evidence which

⁸ A party may impeach expert testimony by (1) introducing its own expert testimony in rebuttal; or (2) discrediting the opposing party's expert testimony on cross-examination; or (3) relying upon evidence from which the jury may infer that the opposing party's expert testimony depends on an incorrect view of the facts. *United States v. Bodey*, 607 F.2d 265, 269 (9th Cir. 1979).

devastates the prior testimony is not merely impeaching).

Ms. Fero's PRP was based on a claim that advancements in the science of child head injury have developed to the point that the basis for the testimony of the medical experts at trial were no longer valid. That claim is supported by declarations from Dr. Patrick Barnes and Dr. Janice Ophoven. Each witness stated that developments in various scientific fields have refuted the basis for the State's medical expert's testimony. On the basis of these two witness's affidavits the Court of Appeals held that the results of the trial would be different given "the current medical understanding of the trauma [B.A.] suffered." *In re Fero*, 192 Wn. App. 138, 163, 367 P.3d 588 (2016), *review granted*, 187 Wn.2d 1024 (2017). It additionally found the new scientific evidence was not "merely impeaching." These holdings are incorrect.

Ms. Fero's PRP fails to demonstrate a prima facie case of prejudice because it does not demonstrate that the State's medical expert's testimony would be excluded under *Frye*.⁹ Expert testimony is admissible when there is a general acceptance in the scientific community of the reliability of the underlying principles on which the testimony is based. *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996). Unanimity among scientists is not required to meet the general acceptance standard. *Id.* at 270. A court

⁹*Frye v. United States*, 293 F. 1013, 34 A.L.R. 145 (1923).

considering general acceptance must conduct “a searching review which may extend beyond the record and involve consideration of scientific literature as well as secondary legal authority.” *Id.* at 255-256.

In a recent case expert medical testimony similar to that presented in Ms. Fero’s PRP was admitted in evidence. *See In re Morris*, 189 Wn. App. 484, 355 P.3d 355 (2015). In *Morris*, Dr. Barnes testified at trial, putting forth a number of alternative causes of the child’s injuries. *Id.* at 490. After the jury rejected Dr. Barnes’ theories, the defendant sought a new trial, claiming that his trial counsel was deficient due to her failure to challenge the State’s expert’s acceleration/deceleration causation testimony under *Frye*. *Morris*, at 492. *Morris*’s claim was rejected by the appellate court because the State’s expert’s testimony was still generally accepted in the scientific community, as established by position papers from the American Academy of Pediatrics and Academy of Ophthalmology,¹⁰ a publication from the Centers for Disease control recognizing abusive head trauma and accepting shaking as a mechanism of injury, and a 2011 article that named 15 national and international medical organizations which publicly recognize abusive

¹⁰A 2010 Information Statement from the American Academy of Ophthalmology stated, “Currently, there is abundant evidence from multiple sources (perpetrator confessions, clinical studies, postmortem studies, mechanical models, animal models and finite element analysis) that repetitive acceleration-deceleration with or without head impact is injurious...” *Morris*, 189 Wn. App. at 497, quoting Am. Acad. of Ophthalmology, *Information Statement: Abusive Head Trauma/Shaken Baby Syndrome* (May 2010).

head trauma as a valid medical diagnosis.¹¹ *Morris* at 493-494.

Other materials not considered by the Court of Appeals in this case also demonstrate the State's expert trial testimony continues to be generally accepted in the scientific community.¹² An article reviewing current studies stated infants and children with abusive head trauma have a wide range of symptoms. Certain symptoms including retinal hemorrhages do hold high specificity and positive predictive value for abusive injury.¹³ Studies reviewing perpetrator confessions likewise link those injuries to nonaccidental trauma.¹⁴ A study looking at the onset of symptoms after injury reported that children seen by independent observers were described

¹¹Sandeep Narang, *A Daubert Analysis of Abusive Head Trauma/Shaken Baby Syndrome*, 11 Hous. J. Health & Pol'y 505, 574-76 (2011). Abusive head trauma is defined as "those constellations of injuries that are caused by the directed application of force to an infant or young child, resulting in physical injury to the head and/or its contents." *Id.* at 570. Dr. Narang stated "there is a clear, strong and highly statistically significant association of [subdural hematomas] and [retinal hemorrhages] with trauma." *Id.* at 571. Those injuries include the kinds of injuries observed on B.A. used to diagnose non-accidental trauma with shaking as a mechanism of injury.

¹²The authors of a recent biomechanical study concluded that using a model that was more life-like than those used in earlier biomechanical studies showed that more significant injuries may be caused by shaking alone than previously reported. Jenny, Bertocci, Fukada, Rangarajan, Shams, *Biomechanical Response of the Infant Head to Shaking- An Experimental Investigation* (April 2017) (available at <http://online.liebertpub.com/doi/abs/10.1089/neu.2016.4687> (last visited Apr. 18, 2017)). This article has been peer reviewed and accepted for publication in the *Journal of Neurotrauma*.

¹³Narang, and Clarke, *Abusive Head Trauma: Past, Present, and Future*, *Journal of Child Neurology* (2014).

¹⁴Catherine Adamsbaum et al., *Abusive Head Trauma: Judicial Admissions Highlight Violent and Repetitive Shaking*, 126 *Pediatrics* 546 (2010); Matthieu Vinchon et al., *Confessed Abuse Versus Witnesses Accidents in Infants; Comparison of Clinical, Radiological, and Ophthalmological Data in Corroborated Cases*, 26 *Child's Nervous Sys.* 637 (2009).

as lethargic and otherwise abnormal in the interval between injury and presentation of severe symptoms.¹⁵ Finally, a 2016 study surveying over 600 physicians from 10 leading children's hospitals who were frequently involved in evaluating injured children determined that a diagnosis of shaken baby syndrome/abusive head trauma is still generally accepted in that relevant scientific community. Furthermore the study showed that shaking with or without impact is generally accepted to be capable of producing subdural hematomas, retinal hemorrhages, coma, or death.¹⁶

A reviewing court properly considers decisions from other jurisdictions to assess whether evidence is generally accepted in the relevant scientific community. *State v. Cauthron*, 120 Wn.2d 879, 888, 846 P.2d 502 (1992). At least two other courts have recently recognized that the medical basis for an abusive head trauma diagnosis is generally accepted. *Wolfe v. State*, 509 S.W.3d 325, 337 (Texas 2017); *Day v. State*, 303 P.3d 291, 296 (Okla. Crim. App. 2013). Another court has noted that the new literature regarding shaken baby syndrome reveals “not so much a repudiation of triad-only SBS, but a vigorous debate about its validity in the scientific community.” *Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir.), cert.

¹⁵M.G.F. Gilliland, *Interval Duration Between Injury and Severe Symptoms in Nonaccidental Head Trauma in Infants and Young Children*, 43 J. Forensic Sci. 723 (1998).

¹⁶Sandeep K. Narang et. al., *Acceptance of Shaken Baby Syndrome and Abusive Head Trauma as Medical Diagnoses*, 177 Journal of Pediatrics 273 (2016) (available at [http://www.jpeds.com/article/S0022-3476\(16\)30402-4/pdf](http://www.jpeds.com/article/S0022-3476(16)30402-4/pdf) (last visited May 3, 2017)).

denied, 137 S. Ct. 503 (2016).

Ms. Fero's current experts agree that at the time of trial it was generally accepted in the scientific community that the kinds of injuries sustained by B.A. were indicative of non-accidental trauma caused by shaking or shaking with impact, and that it was not likely B.A. had a lucid interval. Decl. Ophoven, 12-14, Decl. Barnes, 9. As the foregoing demonstrates that remains the case today. At best Ms. Fero might present the studies referenced by Dr. Barnes to the jury. Dr. Barnes's alternative theories testimony was not sufficient to sway the jury in *Morris*. Thus the new studies Ms. Fero's witnesses relied on would not probably change the outcome of Ms. Fero's trial. The new studies and alternative causation theories would not seriously undercut the State's experts' testimony; it is merely impeaching. The new studies and alternative causation theories as to B.A.'s head injuries does not explain the broken leg or the significant facial and vaginal bruising. The new studies and alternative causation theories, moreover, do not render Ms. Fero's claim that B.A.'s injuries were inflicted by a 4-year-old child who was also present in the home any more credible or persuasive. Thus, Ms. Fero has not made a prima facie case that she was entitled to relief.

Even if Ms. Fero had made a prima facie case, the Court of Appeals erred in relying on the scant record before it to conclude that she was entitled to a new trial. At best Ms. Fero demonstrated that she was entitled to a

reference hearing to determine if the new evidence actually demonstrated a shift in thinking by the relevant medical community so extraordinary that evidence presented was no longer scientifically valid. The Court of Appeals characterized petitioner's witnesses's declarations as "not contested." *Fero*, 192 Wn. App. at 156. That characterization suggests that the Court believed the State had some obligation to rebut Ms. Fero's claims with declarations from opposing experts. This Court should find that no such requirement exists in this kind of case.

The nature of the new evidence presented in this case is far different than evidence found to justify a new trial in other cases. There was no disagreement among experts that a State Crime Lab employee had committed malfeasance which destroyed his credibility in *State v. Roche*, 114 Wn. App. 424, 438, 59 P.3d 682 (2002). Nor was there any disagreement that phone records existed that could be used to impeach the victim in harassment case. *Savaria*, 82 Wn. App. at 837-838.

Unlike the evidence at issue in those two cases, the significance of B.A.'s injuries and whether those injuries would have manifested symptoms shortly after receiving them has been the subject of decades of study and consideration by experts in a variety of fields. At best declarations from two of those experts contradicting the testimony of six other experts presented at trial demonstrate that there may be a change in the science. That cannot be

determined absent a hearing to fully vet whether in fact there has been such a shift in the medical community's thinking that the testimony from the experts who did testify would no longer be admissible.

The lower court's handling of this issue ignores Ms. Fero's burden of proof and puts the State in a precarious position when it comes to the question of complex scientific evidence challenged in a collateral attack. Should the State spend precious resources defending cases after they are final before knowing whether evidence relied on by the petitioner is sufficient to make a prima facie case for relief? The answer should be no. A paper war of declarations would not adequately answer the question whether the evidence presented by the petitioner is credible or sufficient to sustain her burden of proof. Credibility determinations are left to the trier of fact, a function performed by trial courts and not appellate courts.¹⁷ *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Where evidence such as that which is at issue here forms the basis of a petition, at best the appellate court should remand to the trial court to make those factual determinations. A court should not vacate a conviction "without giving the State an opportunity to test, in an adversarial hearing, whatever evidence" the petitioner produced.

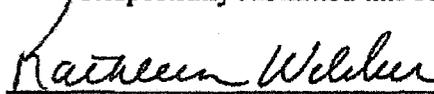
¹⁷At least one court found that Dr. Ophoven's opinion in a case was not supported by the evidence. *See State v. Lucy S.*, 873 N.W.2d 1, 6 (Neb. App. 2015). Another court found Dr. Barnes's opinions to be unsupported by the evidence and internally inconsistent. *See People v. Schuit*, 67 N.E.3d 890, 920 (Il. App. 2016).

In re Gentry, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999). *Accord Herrera v. Collins*, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) (new trial “motions based solely upon affidavits are disfavored because the affiants’ statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations.”). *See also State v. West*, 139 Wn.2d 37, 43-47, 983 P.2d 617 (1999) (explaining the gatekeeping function of the evidentiary hearing and that the trial court must assess the credibility of the newly discovered evidence prior to granting a new trial).

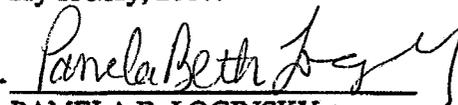
V. CONCLUSION

WAPA respectfully requests that this Court reinstate Ms. Fero’s conviction.

Respectfully submitted this 3rd day of May, 2017.



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PROOF OF SERVICE

On the 3rd day of May, 2017, pursuant to the agreement of the parties and amicus curiae, I e-mailed a copy of the document on which this proof of service appears to:

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Signed under the penalty of perjury under the laws of the state of

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