

No. _____

**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

**In re the Personal Restraint of Heidi Charlene Fero,
Petitioner.**

Personal Restraint Petition

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I. STATUS OF PETITIONER

Petitioner Heidi Charlene Fero is currently serving a 120-month sentence at the Washington Corrections Center for Women in Gig Harbor, Washington upon conviction of a crime. She is now in custody because of the following type of court order: Judgment and Sentence entered in *State v. Fero*, Clark County Cause No. 02-1-01117-9, entered on May 2, 2003.

1. The Court in which she was sentenced is the Clark County Superior Court.
2. She was convicted of First Degree Assault of a Child.
3. She was sentenced after trial on May 2, 2003. Judge Roger A. Bennett imposed the 180-month sentence.
4. Ms. Fero timely appealed from the decision of the trial court. She appealed to the Court of Appeals, Division II, which issued a published decision. *State v. Fero*, 125 Wn. App. 84 (2005). The Court of Appeals remanded for resentencing in light of *Blakely v. Washington*, 542 U.S. 296 (2004).
5. On remand to the trial court for resentencing, Judge Bennett imposed a sentence of 120 months on February 17, 2006.
6. This is the first time that Ms. Fero has filed a personal restraint petition. Since her conviction, Ms. Fero has not asked a court for relief from her sentence, other than described above.

II. INADEQUACY OF OTHER REMEDIES

No remedies are available to Ms. Fero to challenge her restraint other than this Personal Restraint Petition or an equivalent habeas corpus petition in Superior Court.

III. GROUNDS FOR RELIEF

Ms. Fero has the following grounds for relief from her sentence. The relevant factual background and the evidence upon which this personal restraint petition is based are set forth in Petitioner's Opening Brief (Brief) and Declarations filed herewith pursuant to RAP 16.7(a)(2) and RAP 16.10(a)(1). Ms. Fero incorporates by reference the facts and evidence contained within the Brief and Declarations.

Ms. Fero should be given a new trial or released from confinement pursuant to RAP 16.4(c)(3). Newly-discovered medical evidence, which was unavailable at the time of Ms. Fero's trial in 2003, refutes key trial testimony of the State's medical experts. Without that trial testimony, a jury could not have found Ms. Fero guilty.

IV. STATEMENT OF FINANCES

Ms. Fero is unable to pay the filing fees, fees of counsel, or fees of the medical experts that have offered declarations in support of her personal restraint petition. She remains indigent. Ms. Fero respectfully requests this Court to waive any fees levied by the Court as a result of this

petition. She has a spendable balance of \$100 in her institution account. She is employed by Correctional Industries, but earns less than \$100 per month. She has no other employment. During the past 12 months, she did not get any money from a business, profession, other form of self-employment, or any other source. She has no assets. Her liabilities include an over \$1 million restitution order stemming from her Judgment and Sentence entered in *State v. Fero*, Clark County Cause No. 02-1-01117-9. She is married. Her husband is Dustin Goodwin, and he lives at 321 NW 19th Avenue, Camas, WA 98607.

V. REQUEST FOR RELIEF

Ms. Fero requests that this Court vacate her conviction. In the alternative, she asks that an evidentiary hearing be ordered to resolve any factual disputes about Ms. Fero's unlawful restraint.

VI. OATH

I, J. Christopher Baird, after being first duly sworn, on oath, depose and say:

That I am Ms. Heidi Charlene Fero's attorney. I have read the petition, know its contents, and I believe the petition is true.

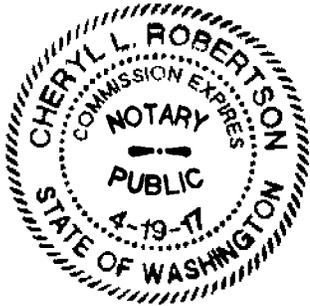
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Dated this 5th day of May, 2014.



J. Christopher Baird
WSBA # 38944

Subscribed and sworn to before me this 5th day of May,
2014.



Name: Cheryl Robertson

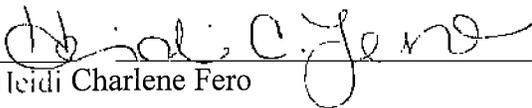
NOTARY PUBLIC in and For the State of

Washington, residing at Seattle

VII. VERIFICATION

I declare that I have received a copy of the petition prepared by my attorney and that I consent to the petition being filed on my behalf.

Dated this 5th day of May, 2014.



Heidi Charlene Fero

No. _____

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OF THE STATE OF WASHINGTON**

**In re the Personal Restraint of Heidi Charlene Fero,
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CERTIFICATE OF SERVICE

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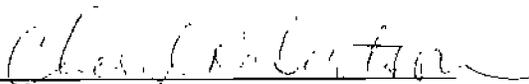
I, Cheryl Robertson, declare under penalty of perjury under the laws of the State of Washington, that on May 6, 2014, I caused to be served the following documents as indicated below:

1. *Personal Restraint Petition;*
2. *Opening Brief in Support of Personal Restraint Petition*
3. *Declaration of Heidi Charlene Fero;*
4. *Declaration of Dr. Janice Ophoven;*
5. *Declaration of Dr. Patrick Barnes; and*
5. *Certificate of Service.*

Tony Golik
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Via Hand Delivery

Dated this 6th day of May, 2014 at Seattle, Washington.


Cheryl Robertson

No. _____

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OF THE STATE OF WASHINGTON**

**In re the Personal Restraint of Heidi Charlene Fero,
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Opening Brief in Support of Personal Restraint Petition

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I. ISSUE PRESENTED

Whether Heidi Fero is entitled to a new trial under RAP 16.4 because new expert testimony, based on new medical research about the timing and causes of shaken baby syndrome, is “newly discovered evidence” that undermines Ms. Fero’s conviction?

II. INTRODUCTION

Recent court decisions have recognized a new, significant, and legitimate debate about the causes and timing of what was once known as “shaken baby syndrome.”¹ As one court described it,

a significant and legitimate debate in the medical community has developed in the past ten years over whether infants can be fatally injured through shaking alone, whether an infant may suffer head trauma and yet experience a significant lucid interval prior to death, and whether other causes may mimic the symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome.²

This debate arose because of significant advances in medical research regarding infant head trauma. As explained in the accompanying declarations from renowned experts Dr. Patrick Barnes and Dr. Janice

¹See, e.g., *State v. Edmunds*, 308 Wis. 2d 374, 746 N.W.2d 590, 596 (Wis. Ct. App. 2008).

²*Edmunds*, 746 N.W.2d at 596.

Ophoven, this research supports Heidi Fero's personal restraint petition on the basis of newly discovered evidence.

In 2003, a jury found that Ms. Fero assaulted 15-month-old Brynn Ackley. Nobody saw Ms. Fero abuse Brynn, and Ms. Fero has consistently maintained her innocence. Without eye witness testimony, a confession, or direct evidence of any kind, the State relied on the testimony of several doctors to prove its case against Ms. Fero. In fact, the conviction rested almost exclusively on now-refuted medical evidence regarding shaken baby syndrome.

The State's experts offered two primary opinions at trial, both of which were based on theories that the medical community has since abandoned. First, they opined that Brynn would have lost consciousness almost immediately after being shaken. Because Ms. Fero was the only adult present when Brynn lost consciousness, the State argued that Ms. Fero was the perpetrator. Second, they opined that injuries like Brynn's are only caused by either a major trauma, such as a car crash or a fall from a multistory building, or child abuse by violent shaking. Because Brynn had not been in a car crash or fallen from a building, the doctors reasoned that an adult must have violently shook Brynn.

New evidence completely undermines both of these conclusions. First, new medical research shows that infants that have injuries like Brynn's can, and often do, remain lucid for up to 72 hours after sustaining trauma. This research refutes the State's theory that Brynn must have been shaken while she was with Ms. Fero. Second, new medical research shows that it is not possible to cause injuries like Brynn's by shaking, and that many conditions mimic the symptoms that were once thought to indicate of shaken baby syndrome. These so-called "mimics" include low-impact events, such as short falls, as well as several medical conditions. This new evidence refutes the State's theory that Ms. Fero must have shaken Brynn.

Ms. Fero is innocent. She has served almost all of her prison sentence, waiting for the medical community's understanding of shaken baby syndrome to evolve. The medical profession has now abandoned the two theories that supported Ms. Fero's conviction. New medical evidence raises substantial doubt about whether a crime occurred at all, let alone whether Ms. Fero committed it. Because this new evidence, which was unavailable at the time of trial and only recently discovered, would change the result of the trial, she is entitled to a new trial under RAP 16.4.

III. STATEMENT OF THE CASE

A. New Medical Evidence

On January 7, 2002, Brynn arrived at the hospital with cerebral edema (brain swelling), subdural hemorrhages (brain bruising or bleeding) and retinal hemorrhages (bruising or bleeding in the retina), as well as other injuries. At the time of Ms. Fero's trial, many doctors believed that infants with these three symptoms—known as the “triad”—would have lost consciousness almost immediately after sustaining the trauma that lead to these injuries. They also believed that these symptoms only appeared in two situations: (1) after being violently shaken; or (2) after major trauma, such as a car crash. If an infant had not been in a car crash or fallen from a great height, many doctors assumed that infants with the triad of symptoms had been violently shaken. Relying on then-current medical beliefs, the State's experts testified that an adult must have violently shaken Brynn shortly before she arrived at the hospital.

New medical research shows that these beliefs were wrong. Dr. Patrick Barnes and Dr. Janice Ophoven have provided sworn declarations, and are prepared to testify, about how new research creates reasonable doubt about Ms. Fero's guilt. Doctors now know that infants suffering from the triad, like Brynn, can be lucid for up to three days after the event that causes the triad. This newly discovered and now well-

documented prevalence of so-called “lucid intervals” leads Dr. Barnes and Dr. Ophoven to conclude that it is impossible to determine that Brynn’s injuries occurred while in Ms. Fero’s care. Doctors also now know that a fall from a couch or a chair can lead to the exact same symptoms that were once thought diagnostic of shaken baby syndrome. That light trauma and other medical conditions can mimic the symptoms of shaken baby syndrome leads Dr. Barnes and Dr. Ophoven to conclude that it is impossible to tell what caused Brynn’s injuries. The declarations of Dr. Barnes and Dr. Ophoven are summarized below.

1. Evidence of Dr. Patrick Barnes.

Dr. Barnes is a Professor of Radiology at Stanford Medical Center and the Chief of Pediatric Neuroradiology and Medical Director of the MRI/CT Center at Lucile Salter Packard Children’s Hospital.³ Dr. Barnes is intimately familiar with the medical research regarding traumatic head injuries in general, and lucid intervals and mimics of shaken baby syndrome in particular.⁴ He describes research conducted after Ms. Fero’s trial that shows children can experience a lucid interval for up to 72 hours, and perhaps longer, after suffering trauma.⁵ In light of this new medical

³Declaration of Dr. Patrick Barnes (hereinafter “Barnes Decl.”) ¶ 1.

⁴*Id.* ¶¶ 4-7.

⁵*Id.* ¶¶ 6, 46-48.

research, the testimony of the State's experts that Brynn would have lost consciousness "immediately" is not scientifically valid.⁶ It is impossible to tell from the medical record when Brynn suffered her injuries.⁷

Dr. Barnes also explains how research conducted after Ms. Fero's trial identified several conditions that could have caused the triad.⁸ These so-called "mimics" of shaken baby syndrome include: (1) hypoxia-ischemia, or lack of oxygen to the brain; (2) bleeding or clotting disorders; (3) infection; (4) metabolic or tissue diseases; (5) light trauma, such as a fall from a chair; and (6) major trauma, such as a car crash.⁹ Recent research has also cast significant doubt on whether it is possible to cause the triad by shaking a child.¹⁰ Although shaking accompanied by one or more blows to the head may produce the triad in some situations, recent research shows that shaking alone does not.¹¹

Dr. Barnes describes how the recent research and his considerable experience interpreting Computed Tomography ("CT") images make it

⁶*Id.* ¶¶ 49-61.

⁷*Id.*

⁸*Id.* ¶¶ 35-45.

⁹*Id.* ¶ 43.

¹⁰*Id.* ¶¶ 14-34.

¹¹*Id.*

impossible to determine the cause of Brynn’s head injuries.¹² It is not possible to distinguish among shaken baby syndrome mimics using CT scans.¹³ Although it is possible, using newer imaging techniques like Magnetic Resonance Imaging (“MRI”), to distinguish among shaken baby syndrome mimics in some situations, MRI scans of Brynn’s injuries are not available.¹⁴

Dr. Barnes concludes that, in light of the new research, the opinions of the State’s experts that Brynn’s injuries could only have been caused by either major trauma or child abuse are not scientifically valid.¹⁵

2. Evidence of Dr. Janice Ophoven.

Dr. Janice Ophoven is a renowned pediatric forensic pathologist with nearly 40 years of clinical experience.¹⁶ Her declaration explains that new medical research has identified several potential causes of the triad, including minor falls.¹⁷ In light of this new research, the testimony of the

¹²*Id.* ¶¶ 49-57.

¹³*Id.* ¶¶ 31-33.

¹⁴*Id.* ¶¶ 49-57.

¹⁵*Id.* ¶¶ 58-62.

¹⁶Declaration of Dr. Janice Ophoven (hereinafter “Ophoven Decl.”) ¶ 1.

¹⁷*Id.* ¶¶ 6-17.

State's experts that Brynn's injuries could only have been caused by either major trauma or child abuse is not scientifically valid.¹⁸

Dr. Ophoven explains that the exact cause of Brynn's injuries cannot be determined based on the medical record because many of the potential causes of the triad were unknown in 2002, and the doctors who treated Brynn did not conduct a differential diagnosis.¹⁹ Although it is unlikely that Brynn suffered from a metabolic or tissue disorder, minor trauma, major trauma, and hypoxia cannot be ruled out as causes for her head injuries.²⁰

Dr. Ophoven also explains that, due to the advanced state of Brynn's brain swelling when she arrived at the hospital, it is extremely unlikely that Brynn was injured just before Ms. Fero called 911.²¹ Based on the new evidence regarding lucid intervals and the mechanisms and timing of the development of cerebral edema (brain swelling), Dr. Ophoven concludes that Brynn was injured at least 12 hours before the

¹⁸ *Id.* ¶ 24.

¹⁹ *Id.* ¶¶ 31-33.

²⁰ *Id.* ¶¶ 31-33.

²¹ *Id.* ¶¶ 22-27.

911 call, which would have been before Brynn arrived at Ms. Fero's house.²²

B. Ms. Fero's Trial

There is little doubt that something extremely serious happened to Brynn sometime before she arrived at the hospital. At trial, both sides believed, based on then-current medical knowledge, that Brynn was injured a short time before Ms. Fero called 911 at approximately 10 p.m. on January 7, 2002. Ms. Fero and the State, however, fundamentally disagreed about who, or what, caused Brynn's injuries. Ms. Fero testified that Kaed, Brynn's older brother, jumped onto Brynn and slammed her head into a wall several hours before the 911 call.²³ The State argued that Ms. Fero shook Brynn shortly before Ms. Fero called 911.²⁴

1. Sequence of Events

In the evening on January 7, Ms. Fero babysat two children: 15-month-old Brynn Ackley and Brynn's four-and-a-half-year-old half-brother, Kaed Franck.²⁵ Ms. Fero's children, one-year-old Deric and five-

²² *Id.* ¶ 27.

²³ V-A Report of Proceedings (RP) at 80-84 (Mar. 17, 2003).

²⁴ V-B RP at 148 (Mar. 17, 2003) (State's closing argument) ("And we know from the medical testimony that when you're shaken that hard, you're going to immediately go unconscious. And that's exactly what happened.").

²⁵ 1 RP at 117-18; 148-49 (Mar. 11, 2003).

year-old Rachel, were also at home.²⁶ Ms. Fero knew Brynn's parents, Brea Franck and Jason Ackley, through her now-husband, Dustin Goodwin.²⁷ Mr. Goodwin and Mr. Ackley worked together, and Ms. Fero occasionally watched Brynn and Kaed while Ms. Franck and Mr. Ackley were at work, though Ms. Fero had not watched Brynn or Kaed for about two weeks.²⁸

At about 2 p.m., Ms. Franck dropped Brynn and Kaed off at Ms. Fero's home.²⁹ Ms. Fero was still at work, but Mr. Goodwin was home.³⁰ He testified that Ms. Franck carried Brynn into the house in her car seat, which was unusual.³¹ Mr. Goodwin took Brynn out of the car seat and sat her in a rocking chair.³² Deric tried to play with Brynn, but she cried whenever Deric touched Brynn's legs.³³ Ms. Fero returned home about an hour later, and Mr. Goodwin left for work.³⁴

²⁶V-A RP at 74 (Mar. 17, 2003).

²⁷1 RP at 116 (Mar. 11, 2003).

²⁸V-A RP at 69-70 (Mar. 17, 2003).

²⁹1 RP at 152 (Mar. 11, 2003).

³⁰1 RP at 154 (Mar. 12, 2003).

³¹1 RP at 154-55 (Mar. 12, 2003).

³²1 RP at 156 (Mar. 12, 2003).

³³1 RP at 156-157 (Mar. 12, 2003).

³⁴1 RP at 157-59 (Mar. 12, 2003).

Ms. Fero described Brynn as being quiet and distant, which was not normal, and that Brynn did not walk around like she normally did.³⁵ Instead, she sat wherever Ms. Fero put her.³⁶ Ms. Fero gave Brynn a bath after dinner and saw several bruises on Brynn's body, including a large one on her lower abdomen.³⁷

After the bath, Ms. Fero put Brynn in a playpen downstairs while she bathed Deric upstairs.³⁸ While Ms. Fero was upstairs, Kaed jumped into Brynn's playpen and banged Brynn's head into the wall.³⁹ Ms. Fero did not see the incident, but Rachel did.⁴⁰ Rachel ran upstairs and told Ms. Fero that Kaed was hurting Brynn.⁴¹ Ms. Fero took Deric out of the bathtub and rushed downstairs.⁴² By then, Kaed was outside of Brynn's playpen and Brynn appeared to be fine.⁴³

³⁵V-A RP at 75 (Mar. 17, 2003).

³⁶V-A RP at 75 (Mar. 17, 2003).

³⁷V-A RP at 76 (Mar. 17, 2003).

³⁸V-A RP at 77 (Mar. 17, 2003).

³⁹V-A RP at 80-82 (Mar. 17, 2003); 1 RP at 40-41 (Mar. 10, 2003).

⁴⁰V-A RP at 80-81 (Mar. 17, 2003).

⁴¹V-A RP at 80 (Mar. 17, 2003).

⁴²V-A RP at 80 (Mar. 17, 2003).

⁴³V-A RP at 81 (Mar. 17, 2003).

Ms. Fero went back upstairs to finish Deric's bath.⁴⁴ A few minutes later, Rachel came back upstairs and told Ms. Fero that Kaed was hurting Brynn again.⁴⁵ When Ms. Fero went back downstairs, she saw Kaed jumping out of Brynn's playpen.⁴⁶ Ms. Fero saw that Brynn was on her knees and "shaking" or "trembling" and that she had a little blood coming out of her mouth.⁴⁷ Brynn was crying, but in a strange, almost silent way.⁴⁸ She "was shaking and gripping at [Ms. Fero], clenching and just--and [Ms. Fero] was holding [Brynn] to [Ms. Fero], because [Brynn] was just shaking so bad."⁴⁹

Ms. Fero took Brynn to the rocking chair and comforted her.⁵⁰ After Brynn fell asleep, Ms. Fero laid Brynn on the couch and called Mr. Ackley.⁵¹ Mr. Ackley testified that he spoke with Ms. Fero at around 7:45 that evening.⁵² During that call, Ms. Fero said Kaed had been hurting Brynn and that Brynn "couldn't walk on a leg" and that Brynn's "left leg

⁴⁴V-A RP at 81 (Mar. 17, 2003).

⁴⁵V-A RP at 81-82 (Mar. 17, 2003).

⁴⁶V-A RP at 82 (Mar. 17, 2003).

⁴⁷V-A RP at 82 (Mar. 17, 2003).

⁴⁸V-A RP at 83 (Mar. 17, 2003).

⁴⁹V-A RP at 83 (Mar. 17, 2003).

⁵⁰V-A RP at 84 (Mar. 17, 2003).

⁵¹V-A RP at 84-85 (Mar. 17, 2003); 1 RP at 118-19 (Mar. 11, 2003).

⁵²1 RP at 118 (Mar. 11, 2003).

was like she could not walk on it.”⁵³ Ms. Fero wanted to know how she should discipline Kaed.⁵⁴

Mr. Ackley testified that Kaed frequently hurt his half-sister, bruising her legs and her side.⁵⁵ Mr. Ackley had also seen Kaed knock Brynn down and pinch her on multiple occasions.⁵⁶ Mr. Ackley believed that Kaed’s aggression was getting worse.⁵⁷ In fact, Ms. Franck and Mr. Ackley sometimes argued about where Brynn’s bruises came from.⁵⁸

Mr. Ackley told Ms. Fero to lock Kaed in a separate room as discipline, but Ms. Fero eventually allowed Kaed to watch a video with Rachel.⁵⁹ While Kaed and Rachel watched the video, Brynn slept on the couch and Ms. Fero cleaned the house, occasionally checking on the children.⁶⁰ Just before 10 p.m., Ms. Fero noticed that Brynn’s eyes were open but that she was not moving.⁶¹ Brynn was unresponsive.⁶² Ms. Fero

⁵³ 1 RP at 118-19, 133-34 (Mar. 11, 2003).

⁵⁴ 1 RP at 119 (Mar. 11, 2003).

⁵⁵ 1 RP at 127-30 (Mar. 11, 2003).

⁵⁶ 1 RP at 127-30 (Mar. 11, 2003).

⁵⁷ 1 RP at 130 (Mar. 11, 2003).

⁵⁸ 1 RP at 163 (Mar. 11, 2003).

⁵⁹ 1 RP at 134 (Mar. 11, 2003); V-A RP at 86-88 (Mar. 17, 2003).

⁶⁰ V-A RP at 88 (Mar. 17, 2003).

⁶¹ V-A RP at 88-89 (Mar. 17, 2003).

⁶² V-A RP at 89 (Mar. 17, 2003).

attempted to revive Brynn by patting her face, gently jostling her, and splashing water on her face.⁶³ Ms. Fero called her mother, who had medical training, to ask what to do.⁶⁴ Her mother told Ms. Fero to call 911, and Ms. Fero immediately did so.⁶⁵

Paramedics arrived within minutes.⁶⁶ They found Brynn unconscious and saw bruises on several parts of her body.⁶⁷ At 10:10 p.m., they transported Brynn to Southwest Medical Center in Vancouver.⁶⁸

At Southwest, a CT scan showed that Brynn had subdural hemorrhaging and cerebral edema.⁶⁹ Brynn was transferred to the trauma center at Legacy Emanuel Medical Center in Portland, Oregon.⁷⁰ After arriving at Legacy Emanuel, Dr. Goodman observed hemorrhages in both Brynn's eyes, a condition known as bilateral retinal hemorrhages.⁷¹ The

⁶³V-A RP at 89 (Mar. 17, 2003).

⁶⁴V-A RP at 90 (Mar. 17, 2003).

⁶⁵V-A RP at 90 (Mar. 17, 2003).

⁶⁶1 RP at 37-38 (Mar. 10, 2003).

⁶⁷1 RP at 39-41 (Mar. 10, 2003); 1 RP at 40-41 (Mar. 11, 2003).

⁶⁸1 RP at 21 (Mar. 11, 2003).

⁶⁹2 RP at 59-60 (Mar. 12, 2003).

⁷⁰2 RP at 61 (Mar. 12, 2003).

⁷¹1 RP at 58-62 (Mar. 13, 2003).

doctors at Legacy Emanuel also noted that Brynn's left leg was fractured, a condition that the paramedics and the doctors at Southwest had missed.⁷²

2. The State's Theories About Brynn's Injuries.

The State did not offer any eyewitness testimony to counter the defense testimony that Kaed hurt Brynn. Instead, the State laid out several unsubstantiated ideas about how and why Ms. Fero could have injured Brynn. In one version, the State said that Ms. Fero swung Brynn into a wall.⁷³ The State argued that Brynn then cried for hours, leading Ms. Fero to break down and violently shake Brynn to stop the crying.⁷⁴

In another version, the State argued that Ms. Fero must have "lost it" while giving Brynn a bath, causing the bruising that Ms. Fero had reported to Mr. Ackley.⁷⁵ The State argued that "Bryn[n]'s maybe not paying attention to [Ms. Fero], not cooperating" during the bath, leading Ms. Fero to injure Brynn.⁷⁶

⁷²1 RP at 20-21 (Mar. 11, 2003).

⁷³V-B RP at 154 (Mar. 17, 2003).

⁷⁴V-B RP at 160, 162-63 (Mar. 17, 2003).

⁷⁵V-B RP at 158 (Mar. 17, 2003).

⁷⁶V-B RP at 158 (Mar. 17, 2003).

In a third version, the State argued that Brynn may have cried for hours, and that Ms. Fero may have shaken Brynn by the face to stop her.⁷⁷ Beyond conjecture that Ms. Fero “lost it,” the State never offered any explanation for why Ms. Fero, who had no history of violence—let alone violence against young children—assaulted Brynn.

However, when police interviewed Rachel and Kaed, neither reported that Brynn cried for hours or that Ms. Fero violently shook Brynn, broke Brynn’s leg, or grabbed Brynn’s face.⁷⁸ In fact, during Kaed’s first interview with Detective Steve Norton, Kaed told Detective Norton that he had hurt Brynn “when Brynn was not breathing.”⁷⁹

3. Medical Evidence Offered in Support of State’s Theories.

Because there was no direct evidence that Ms. Fero abused Brynn, the State supported its arguments with medical testimony. During trial, the State called six doctors who collectively testified that (1) Brynn must have been shaken and (2) the shaking must have occurred a short time

⁷⁷Compare V-B RP at 160 (Mar. 17, 2003), with 2 RP at 233-34 (Mar. 11, 2003) (Dr. Lukschu testifying that the bruises could have been caused by separate blows to the face or by someone grabbing Brynn’s face).

⁷⁸2 RP at 211-17 (Mar. 12, 2003); V-A RP at 57-61 (Mar. 17, 2003).

⁷⁹2 RP at 212 (Mar. 12, 2003).

before Ms. Fero called 911.⁸⁰ The testimony of these doctors is summarized below.

Dr. Daniel Gorecki, an emergency room physician at Southwest Washington Medical Center, testified that a CT scan of Brynn's brain showed that Brynn had a subdural hemorrhage and cerebral edema.⁸¹ Dr. Gorecki opined that Brynn's subdural hemorrhage was caused by a repetitive motion, such as shaking.⁸² Moreover, he opined that Kaed could not have caused Brynn's repetitive injuries because children "don't continue their behavior unabated."⁸³ Finally, he testified that Brynn could have immediately lost consciousness after suffering her head injuries, or that she may have remained conscious for 5 to 10 minutes.⁸⁴

Dr. James Ockner, a radiologist at Southwest Washington Medical Center, testified that a CT scan showed that Brynn had a subdural hemorrhage.⁸⁵ He opined that this hemorrhage was caused by ruptured

⁸⁰See also *State v. Fero*, 125 Wn. App. 84, 95-96, 104 P.3d 49 (2005).

⁸¹1 RP at 59, 64 (Mar. 12, 2003).

⁸²1 RP at 60, 64 (Mar. 12, 2003).

⁸³1 RP at 64 (Mar. 12, 2003).

⁸⁴1 RP at 74 (Mar. 12, 2003) ("[W]ell, it could take 5 or 10 minutes, okay, before something would appear. So there would be maybe a 10-minute period, roughly, of the child may be okay, crying, the swelling progresses, so it's -- it's hard to nail down the time. In my -- for me, I can't give you a scientific time based on, you know, what was found. I can just tell you that it is possible that there was some episode where the child was not unconscious.").

⁸⁵1 RP at 83-84 (Mar. 12, 2003).

bridging veins between Brynn’s brain and her dura, the outermost membrane of the covering of the brain.⁸⁶ Dr. Ockner testified that Brynn’s head injuries, including the subdural hemorrhage, were the result of non-accidental shaking because there was no evidence of impact to Brynn’s skull, such as a skull fracture or “goose eggs.”⁸⁷ Dr. Ockner also opined that Brynn’s injuries could not have occurred from something like “falling out of bed.”⁸⁸ In fact, in response to questions about the force required to cause Brynn’s injuries, Dr. Ockner responded as follows:

All I can say is that it’s a severe type of injury, something that you would expect to see out of a car accident, a severe blow to the head with an implement or – or a fall from a great height or something like that. This would be a fall of something more than a counter top or something like that.⁸⁹

Finally, Dr. Ockner testified that a severe shaking injury causes an immediate loss of consciousness.⁹⁰

Dr. Michael Lukshu, a pediatrician at Legacy Emanuel Hospital, testified that shaken baby syndrome is an “inflicted injury,” and that

⁸⁶1 RP at 84 (Mar. 12, 2003).

⁸⁷1 RP at 90-92 (Mar. 12, 2003).

⁸⁸1 RP at 97 (Mar. 12, 2003).

⁸⁹1 RP at 96 (Mar. 12, 2003).

⁹⁰1 RP at 97 (Mar. 12, 2003) (“With – if the blow is severe enough that cause [*sic*] diffuse axonal injury typically – or a shaking injury, typically a patient loses consciousness right away.”).

Brynn's injuries were "the result of severe shaking."⁹¹ He opined that Brynn's injuries were so severe that she would have "immediately" lost consciousness.⁹² He testified that "shaking alone can cause the severe injuries" characteristic of shaken baby syndrome.⁹³ Moreover, he testified that bilateral retinal hemorrhages are only present in infants who have suffered shaken baby syndrome.⁹⁴ He testified that Kaed could not have generated the force required to cause Brynn's injuries.⁹⁵

Dr. William Bennett, a pediatric radiologist at Legacy Emanuel Hospital, testified about Brynn's fractured leg and her head injuries. He testified that Brynn's leg fracture was between one hour and four days old and that Brynn would not have been able to walk with the fracture.⁹⁶ He also opined that a young child like Kaed would not be able to generate enough force to cause that injury.⁹⁷ On cross-examination, he conceded

⁹¹2 RP at 180-81, 191 (Mar. 11, 2003).

⁹²2 RP at 195 (Mar. 11, 2003) ("With this severe injury, I doubt if she had cried at all. She would have been almost immediately unconscious and not doing anything [*sic*] initially.").

⁹³2 RP at 180 (Mar. 11, 2003).

⁹⁴2 RP at 184, 197 (Mar. 11, 2003).

⁹⁵2 RP at 190, 196, 198-99 (Mar. 11, 2003).

⁹⁶RP at 15-16 (Mar. 13, 2003).

⁹⁷RP at 16-17 (Mar. 13, 2003).

that the fracture was consistent with “toddler fractures,” accidental injuries that sometimes occur when toddlers fall and twist their legs.⁹⁸

Dr. Bennett testified that, based on CT scans of Brynn’s brain, Brynn sustained these injuries between 7 p.m. and 9 p.m. on the night of January 7, 2002.⁹⁹ He opined that the force required to cause Brynn’s head injuries was “equivalent to being ejected from a motor vehicle and smashing her face into a bank.”¹⁰⁰ Moreover, he testified that, if the injury had been caused by repeated blows to the face (such as by Kaed hitting Brynn with a toy cane or hammer), the blows would have destroyed all of Brynn’s facial bones.¹⁰¹ Lastly, he testified that a four-and-a-half-year-old could not have caused Brynn’s head injuries.¹⁰²

Dr. Kent Grewe, a neurosurgeon at Legacy Emanuel who practiced mainly on adults, testified that Brynn would not have been lucid after she suffered her head injuries.¹⁰³ He also testified that if the injury had been

⁹⁸RP at 26 (Mar. 13, 2003).

⁹⁹RP at 28 (Mar. 13, 2003).

¹⁰⁰RP at 30 (Mar. 13, 2003).

¹⁰¹RP at 34 (Mar. 13, 2003) (“The amount of force necessary to produce a brain injury of this magnitude by repeated blows to the face would destroy the face, there wouldn’t be just bruises and swelling, there would be destruction of all the bones of the face and everything else.”).

¹⁰²RP at 35 (Mar. 13, 2003).

¹⁰³RP at 36, 43 (Mar. 13, 2003).

caused by a blow to the head, there would have been a skull fracture.¹⁰⁴

Finally, he testified that Kaed could not have caused Brynn's head injuries by hitting her in the head with a toy or by pushing her head into a wall.¹⁰⁵

Lastly, Dr. Shawn Goodman, a pediatric ophthalmologist, testified that he observed hemorrhages in both of Brynn's eyes and that the hemorrhages were consistent with non-accidental trauma.¹⁰⁶ However, he conceded that similar hemorrhages had been observed in other situations, including accidental trauma.¹⁰⁷

Based on this medical evidence, the State argued that Ms. Fero shook Brynn nearly to death.¹⁰⁸ Ms. Fero did not call any medical experts to testify on her behalf. Instead, her attorney challenged the State's experts with medical evidence that shaking alone cannot, without an accompanying head impact, cause injuries like Brynn's.¹⁰⁹ Ms. Fero did not offer medical evidence on the prevalence of lucid intervals or the low

¹⁰⁴RP at 46 (Mar. 13, 2003).

¹⁰⁵RP at 50 (Mar. 13, 2003).

¹⁰⁶RP at 58, 61-63 (Mar. 13, 2003).

¹⁰⁷RP at 67-71 (Mar. 13, 2003).

¹⁰⁸RP at 176 (Mar. 17, 2003) ("And [Dr. Lukschu] says there's only one explanation. That [Brynn's injury] was inflicted trauma by an adult or person larger than four and a half years old.").

¹⁰⁹*See, e.g.*, 2 RP at 215-16 (Mar. 11 2003).

force required to cause head injuries like Brynn's. Such evidence did not exist at the time of trial.¹¹⁰

4. Non-Medical Evidence Offered in Support of State's Hypotheses

The State offered two types of non-medical evidence against Ms. Fero: (1) testimony regarding arguably inconsistent statements by Ms. Fero; and (2) testimony that Ms. Fero acted in a manner inconsistent with innocence.

One inconsistent statement concerned whether Ms. Fero gave Brynn a bath.¹¹¹ Detective Steve Norton recalled that Ms. Fero told him that she had not given Brynn a bath.¹¹² At trial, however, Ms. Fero testified that she gave Brynn a bath around 6:30 p.m. and, at that time, Ms. Fero discovered a bruise on Brynn's abdomen.¹¹³ Another inconsistency was the amount of time that elapsed between when Ms. Fero laid Brynn on the couch and when she noticed that Brynn was unresponsive. Detective Nelson recalled that Ms. Fero told him that she noticed something was wrong with Brynn about five minutes after

¹¹⁰*See infra* at IV.B.

¹¹¹V-B RP at 158 (Mar. 17, 2003).

¹¹²2 RP at 193 (Mar. 12, 2003).

¹¹³V-A RP at 76-77 (Mar. 12, 2003).

Ms. Fero put Brynn on the couch.¹¹⁴ Ms. Fero provided a written statement to Officer Telford confirming that timeline.¹¹⁵ However, Blaine Dohman, one of the paramedics that responded, testified that Ms. Fero told him that Brynn was injured and put on the couch around 7 p.m.¹¹⁶ Ms. Fero recounted a similar timeline at trial.¹¹⁷

The State also argued that some of Ms. Fero's actions on the night in question were contrary to how an innocent person would act. For example, the State argued that any person in Ms. Fero's position would have immediately given Mr. Ackley's phone number to the 911 operator or to the paramedics, but Ms. Fero did not do so.¹¹⁸ However, Detective Norton testified that the paramedics told him that Ms. Fero acted appropriately, given the situation.¹¹⁹

C. Ms. Fero's Record Since Incarceration

Ms. Fero's focus while she has been in prison has been on maintaining a close bond with her family, her three children in particular, helping other inmates maintain connections with their children and, over

¹¹⁴2 RP at 192 (Mar. 12, 2003).

¹¹⁵V-A RP at 102 (Mar. 17, 2003).

¹¹⁶1 RP at 41 (Mar. 10, 2003).

¹¹⁷V-A RP at 84-86 (Mar. 17, 2003).

¹¹⁸See, e.g., V-B RP at 151 (Mar. 17, 2003).

¹¹⁹2 RP at 203 (Mar. 12, 2003).

the last year, battling breast cancer.¹²⁰ Ms. Fero does everything she can to stay involved in the daily lives of her children. She reads stories to them over the phone at bedtime and participates in their parent-teacher conferences.¹²¹

To support other inmates, Ms. Fero co-founded The Women's Village, an organization that supports inmates as they try to change their communities for the better.¹²² She is particularly involved in the family support sub-council of The Women's Village, which facilitates parenting support groups and workshops.¹²³ She has also participated in other organizations to help her fellow inmates and has an exemplary disciplinary record.¹²⁴

D. Procedural History

On March 18, 2003, a jury found Ms. Fero guilty of first degree assault of a child.¹²⁵ Ms. Fero appealed, challenging the sufficiency of the evidence, the constitutionality of the jury instructions, and her 180-month

¹²⁰Declaration of Heidi Charlene Fero (hereinafter Fero Decl.) ¶¶ 12-21.

¹²¹*Id.* ¶¶ 13-14.

¹²²*Id.* ¶ 15.

¹²³*Id.* ¶ 16.

¹²⁴*Id.* ¶¶ 12-20, 22.

¹²⁵Trial Tr. 212 (Mar. 18, 2003).

exceptional sentence.¹²⁶ This Court held that this evidence was sufficient and that the jury instructions were constitutional.¹²⁷ The Washington State Supreme Court granted Ms. Fero's petition for review of the sentencing issue, and remanded the case to the Court of Appeals for further consideration in light of *State v. Hughes*, 154 Wn.2d 118 (2005).¹²⁸ The Court of Appeals amended its opinion and remanded to the trial court for resentencing under *Hughes* and *Blakely v. Washington*, 542 U.S. 296 (2004).¹²⁹ On remand, Ms. Fero was resentenced to 120 months in prison.

This is her first personal restraint petition.

IV. ARGUMENT

Ms. Fero is innocent, and she likely would not have been charged with a crime, let alone convicted, if doctors knew in 2003 what they know now. Specifically, the new medical consensus is that a child can, and often will, be lucid for up to 72 hours after suffering trauma that causes symptoms like Brynn's.¹³⁰ This evidence refutes the State's position that Brynn must have been injured while in Ms. Fero's care, because Brynn could not have remained conscious for more than a few minutes after

¹²⁶*Fero*, 125 Wn. App. at 87.

¹²⁷*Id.*

¹²⁸*State v. Fero*, 154 Wn.2d 1032, 119 P.3d 852 (2005) (Table, No. 76573-1).

¹²⁹*Fero*, 125 Wn. App. at 102.

¹³⁰*See Barnes Decl.* ¶¶ 6, 46-48.

being injured. New medical evidence also shows that a host of things can cause symptoms like Brynn's, from low-impact traumatic events like accidental falls from a bed to infection, metabolic disorders, and congenital disorders. This evidence refutes the State's position that an adult must have shaken Brynn. Either of these lines of evidence raise a reasonable doubt about Ms. Fero's guilt.

Under RAP 16.4, a petitioner is entitled to a new trial if new “[m]aterial facts exist [that] have not been previously presented and heard, which in the interest of justice require vacation of the conviction.”¹³¹ To satisfy this standard, the new evidence (1) must probably change the result of the trial; (2) must have been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) must be material; and (5) must be not merely cumulative or impeaching.¹³²

The following three sections analyze how the new medical research satisfies the RAP 16.4 standard for a new trial. The new, material medical evidence contradicts the medical evidence upon which Ms. Fero's conviction rests and would change the result of her trial.

¹³¹RAP 16.4(c)(3).

¹³²*In re Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001) (citations omitted).

A. The New Medical Evidence Would Change the Result of Ms. Fero's Trial

The following sections explain, in detail, why Ms. Fero's new medical evidence would "probably change the result of the trial."¹³³ First, the new medical evidence directly contradicts the most critical evidence that the State offered to prove its case against Ms. Fero. Second, Ms. Fero could not have been convicted without the State's now-refuted medical testimony.

1. New Medical Evidence Refutes the State's Medical Evidence.

Ms. Fero's newly discovered medical evidence directly contradicts the State's case against her. At trial, Dr. Gorecki,¹³⁴ Dr. Ockner,¹³⁵ and Dr. Lukshu¹³⁶ all testified that Brynn could not have remained conscious for more than a few minutes after suffering her injuries. In fact, the State

¹³³See *State v. Roche*, 114 Wn. App. 424, 435-39, 59 P.3d 682 (2002).

¹³⁴1 RP at 74 (Mar. 12, 2003) (stating that "it could take 5 or 10 minutes" for a child to lose consciousness).

¹³⁵1 RP at 97 (Mar. 12, 2003) ("[I]f the blow is severe enough that cause [*sic*] diffuse axonal injury typically – or a shaking injury, typically a patient loses consciousness right away.").

¹³⁶2 RP at 195 (Mar. 11, 2003) ("With this severe injury, I doubt if she had cried at all. She would have been almost immediately unconscious and not doing anything [*sic*] initially.")

argued that “we know from the medical testimony that when you’re shaken that hard, you’re going to immediately go unconscious.”¹³⁷

Since Ms. Fero’s trial in 2003, doctors have all but abandoned the view that children necessarily lose consciousness immediately after sustaining severe brain injuries. Instead, doctors now generally accept that children can remain lucid for up to 72 hours after suffering trauma. For example, one 2003 report in the literature describes a nine-month-old child who fell 30 inches from a bed onto a concrete floor.¹³⁸ During an investigation by police, three adults independently corroborated that the child acted normally after the fall.¹³⁹ However, 72 hours after the fall, he was found dead.¹⁴⁰ An autopsy revealed subdural hemorrhage, cerebral edema, skull fracture, and other injuries similar to Brynn’s.¹⁴¹

Recent literature suggests that extended periods of lucidity, even with severe injuries like those of the child described above, are not anomalies. For example, a peer-reviewed 2005 article by Dr. K.B. Arbogast, Director of the Pediatric Injury Prevention Program at the

¹³⁷V-B RP at 148 (Mar. 17, 2003).

¹³⁸Scott Denton & Darinka Mileusnic, *Delayed Sudden Death in an Infant Following an Accidental Fall: A Case Report with Review of the Literature*, 24 AM. J. FORENSIC MED. & PATHOLOGY 371 (2003).

¹³⁹*Id.*

¹⁴⁰*Id.*

¹⁴¹*Id.*

Children's Hospital of Philadelphia, documented a study of 314 children (including 191 children under the age of two) that had suffered fatal brain injuries.¹⁴² It concluded that 10.6% of the children under two years old had a Glasgow Coma Scale ("GSC") score of 8 or above (where a score of 3 describes a completely non-responsive child and a score of 15 describes one with no impaired functions) when they arrived at the hospital.¹⁴³ High GSC scores were even more common in cases of inflicted injury.¹⁴⁴ This study confirmed that a significant percentage of infants, perhaps more than 10%, will remain lucid for hours, or even days, after suffering traumatic head injuries.¹⁴⁵

This new evidence regarding lucid intervals refutes the State's experts' testimony at trial. Contrary to what those experts told the jury, it is not possible to determine that Brynn was injured while in Ms. Fero's care.¹⁴⁶ In fact, the new evidence shows that Brynn may have been injured days before arriving at Ms. Fero's home.¹⁴⁷ Although this new

¹⁴²Kristy B. Arbogast *et al.*, *Initial Neurologic Presentation in Young Children Sustaining Inflicted and Unintentional Fatal Head Injuries*, 116 PEDIATRICS 180 (2005).

¹⁴³*Id.* at 183.

¹⁴⁴*Id.*

¹⁴⁵*Id.*

¹⁴⁶Ophoven Decl. ¶¶ 22, 25, 27, 33.

¹⁴⁷*Id.* ¶¶ 22-27.

evidence does not establish when exactly Brynn was injured, it raises a reasonable doubt about whether she was injured while with Ms. Fero.¹⁴⁸

Additionally, since Ms. Fero's trial, doctors have discovered numerous other conditions that mimic the symptoms of shaken baby syndrome. At Ms. Fero's trial, the State's medical experts testified that Brynn's injuries could only have been caused by one of two possible events: (1) major accidental trauma, such as a car crash or a fall from a multistory building; or (2) child abuse by severe shaking. However, as Dr. Barnes explains in his declaration, there are now at least 12 medically acknowledged causes of the triad.¹⁴⁹ Even considering injuries caused by trauma only, there is no way to tell whether those injuries were accidentally suffered or intentionally inflicted.

Perhaps most important, it is now known that low-impact trauma can cause the triad. One example from the literature documents the case of a four-month-old boy who arrived at the hospital with a skull fracture, subdural and intraventricular hemorrhage, brain herniation, and retinal hemorrhages.¹⁵⁰ These injuries, and the retinal hemorrhages in particular,

¹⁴⁸*Id.*

¹⁴⁹Barnes Decl. ¶ 43.

¹⁵⁰Gregg T. Lueder *et al.*, *Perimacular Retinal Folds Simulating Nonaccidental Injury in an Infant*, 124 ARCHIVES OF OPHTHALMOLOGY 1782 (2006).

were once considered diagnostic of nonaccidental trauma. However, based on the statements from two adult eyewitnesses describing how a twelve-year-old fell on the boy, forensic investigators concluded that the death was an accident.¹⁵¹ As Dr. Ophoven notes, a small child is more than capable of generating sufficient force to cause the triad in an infant or toddler.¹⁵² This evidence directly contradicts the testimony of Dr. Ockner, Dr. Lukshu, Dr. Bennett and Dr. Grewe, the State's medical experts who testified that it was not possible for minor accidental trauma to cause Brynn's injuries.

Based on the record available at trial, it is impossible to tell exactly what caused Brynn's injuries. The record contains evidence that Brynn could have suffered from hypoxia-ischemia or trauma. Ms. Fero testified that she saw blood coming out of Brynn's mouth after Kaed jumped out of Brynn's playpen. This blood could have clogged Brynn's airway enough to have reduced the flow of oxygen to her brain, causing the triad. Kaed also hit Brynn with one or more toys, hit her head into the wall, or landed on top of her when he jumped into the playpen. Medical evidence unavailable at the time of trial shows that seemingly low-impact events like these can cause the triad in some situations.

¹⁵¹*Id.*

¹⁵² Ophoven Decl. ¶¶ 11, 34.

We may never know what happened to Brynn, but that is not what the State's experts told the jury. They said that the only potential cause of Brynn's injuries was child abuse. Their opinions were based on outdated medical knowledge. The new medical evidence discussed above refutes their opinions and, if available in 2003, would have changed the result of Ms. Fero's trial.

Decisions from other jurisdictions demonstrate that the medical consensus about lucid intervals and causes of the triad has significantly changed since Ms. Fero's trial in 2003. In *State v. Edmunds*, 308 Wis. 2d 374, 746 N.W.2d 590 (Wis. Ct. App. 2008), the Wisconsin Court of Appeals evaluated new medical evidence, similar to Ms. Fero's, presented by a woman convicted of first-degree reckless homicide for allegedly shaking a seven-month-old infant. The Wisconsin Court of Appeals held that "there is a reasonable probability that a jury, looking at both the new medical testimony and the old medical testimony, would have a reasonable doubt as to Edmunds's guilt."¹⁵³

The Wisconsin court granted Edmunds's petition for a new trial based on evidence from qualified experts who testified

¹⁵³*Id.* at 599.

that a significant and legitimate debate in the medical community has developed in the past ten years over whether infants can be fatally injured through shaking alone, whether an infant may suffer head trauma and yet experience a significant lucid interval prior to death, and whether other causes may mimic the symptoms traditionally viewed as indicating shaken-baby or shaken impact syndrome.¹⁵⁴

The Wisconsin Court of Appeals held that Ms. Edmunds was entitled to a new trial for two reasons. First, new evidence showed that there was a fierce debate about the causes of the triad and whether a child could be lucid after suffering injuries that lead to the triad.¹⁵⁵ Second, Ms. Edmunds could not have presented evidence of this debate at her first trial.¹⁵⁶ The “emergence of a legitimate and significant dispute within the medical community” raised “a reasonable probability” that a jury would have reasonable doubt.¹⁵⁷ The similar facts, the similar new evidence, and a persuasive analysis of the *Edmunds* court support Ms. Fero’s argument that she is entitled to a new trial under RAP 16.4.

Another recent case, from the Seventh Circuit Court of Appeals, discusses the new medical literature regarding lucid intervals in the

¹⁵⁴*Id.* at 596.

¹⁵⁵*Id.* at 599.

¹⁵⁶*Id.*

¹⁵⁷*Id.*

context of a malicious prosecution claim.¹⁵⁸ In that case, police suspected a child's day care provider of causing brain injuries by shaking the eleven-month-old.¹⁵⁹ The defendant was not tried, however, because medical professionals determined that it was highly unlikely that the child's collapse was caused by injuries sustained while in the defendant's care.¹⁶⁰ The Seventh Circuit noted that

[a]lthough the medical profession once thought that there is no interim between trauma and collapse in shaken-baby syndrome, the medical profession now believes . . . that there can be an interim in which the child would be conscious, but probably lethargic or fussy or feverish or have difficulty sleeping or eating.¹⁶¹

In reaching this conclusion, the court relied on the *Edmunds* case from Wisconsin, a *New York Times Magazine* article discussing multiple successful domestic and international challenges to shaken baby syndrome

¹⁵⁸ *Aleman v. Vill. of Hanover Park*, 662 F.3d 897 (7th Cir. 2011).

¹⁵⁹ *Id.* at 902.

¹⁶⁰ *Id.* at 903.

¹⁶¹ *Id.* at 902-03 (noting also that some child abuse experts believed lucid intervals were possible as early as 2005).

convictions based on new evidence,¹⁶² and the scholarly literature describing the prevalence of lucid intervals.¹⁶³

In a case with particularly striking facts, the Texas Court of Criminal Appeals recently granted a new trial to Cathy Lynn Henderson, who was on death row for the murder of an infant, Brandon Baugh.¹⁶⁴ After Brandon's parents left him with Ms. Henderson, his regular babysitter, Ms. Henderson and Brandon disappeared.¹⁶⁵ When Ms. Henderson was captured (she had fled the state), she admitted that Brandon was dead and that she had buried his body.¹⁶⁶ At her 1995 trial, the sole contested issue was whether Ms. Henderson had intentionally killed Brandon.¹⁶⁷ Ms. Henderson claimed that Brandon slipped from her arms onto a linoleum-covered concrete floor.¹⁶⁸ The state's experts argued that the only way to explain Brandon's injuries, which included a depressed skull fracture, was child abuse.¹⁶⁹

¹⁶²Emily Bazelon, "Shaken-Baby Syndrome Faces New Questions in Court," *N.Y. Times Magazine*, Feb. 6, 2011, at MM30.

¹⁶³Arbogast *et al.*, 116 PEDIATRICS at 180.

¹⁶⁴*Ex parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012).

¹⁶⁵*Id.* at 837 (Cochran, J. concurring).

¹⁶⁶*Id.* at 837-38.

¹⁶⁷*Id.* at 838.

¹⁶⁸*Id.*

¹⁶⁹*Id.* at 839-41.

In a state habeas petition, Ms. Henderson argued that she was entitled to a new trial because of new medical evidence regarding “advances in the science of pediatric head trauma.”¹⁷⁰ On remand for an evidentiary hearing, the trial court concluded that Ms. Henderson “has proven by clear and convincing evidence that no reasonable juror would have convicted her of capital murder in light of her new evidence.”¹⁷¹ The court of appeals held that the trial court’s findings were supported by the record and remanded the case for a new trial.¹⁷²

In a very recent case, the United States District Court for the Northern District of Illinois found that new evidence, presented at a nine-day evidentiary hearing, supported Jennifer Del Prete’s actual innocence claim.¹⁷³ Ms. Del Prete, an employee at a home-based daycare, was the only adult present when a three-month-old in her care became unresponsive; the baby died ten months later. Ms. Del Prete was convicted of first-degree murder after medical professionals testified that the baby’s subdural hematomas could only be caused by shaking and that

¹⁷⁰*Id.* at 837.

¹⁷¹*Id.* at 834 (per curiam).

¹⁷²*Id.*

¹⁷³ *Del Prete v. Thompson*, No. 1:10-cv-05070, 2014 WL 269094 (N.D. Ill. Jan. 27, 2014).

the onset of symptoms must have occurred immediately following the abuse.¹⁷⁴

Ms. Del Prete filed a habeas corpus petition in federal court claiming, in part, that new evidence demonstrated her actual innocence.¹⁷⁵ At an extensive evidentiary hearing in late 2012 and early 2013, both sides presented expert medical testimony. Evaluating the evidence presented at trial and the new medical testimony presented at the evidentiary hearing, the court determined that no reasonable juror would find Ms. Del Prete guilty beyond a reasonable doubt.¹⁷⁶ The court considered particularly persuasive the testimony from both sides' experts that at least some of the baby's injuries existed before the day of her collapse and that a child could have a lucid interval after suffering abusive head trauma.¹⁷⁷

These cases all recognize that there has been a profound shift in medical thinking about pediatric head trauma. This shift is supported by conclusions in scholarly literature discussing the unraveling of the old consensus about the impossibility of lucid intervals and the level of force required to cause the triad. For example, Professor Deborah Tuerkheimer

¹⁷⁴ *Id.* at*6, *39.

¹⁷⁵ *Id.* at *1.

¹⁷⁶ *Id.* at *45.

¹⁷⁷ *Id.* at *42-43.

has noted that although the debate about shaken baby syndrome is remarkably polarized, both sides have essentially agreed that (1) the triad is not necessarily caused by shaking, (2) in the absence of external signs of head trauma, doctors cannot clinically determine whether the triad is caused by accidental forces or non-accidental forces, and (3) a “period of time can exist where a child is impaired but functioning, making the lucid interval ‘a distinct discomfoting but real possibility.’”¹⁷⁸

In sum, the declarations from Dr. Barnes and Dr. Ophoven, the new medical literature, recent scholarly articles, and recent case law demonstrate a massive shift in medical thinking about shaken baby syndrome.¹⁷⁹ Doctors have abandoned the once-consensus view that children would not remain lucid for any significant period of time after suffering injuries that lead to the triad. Medical science since 2003 has proven that view false, and even supporters of the theory that the triad can be caused by shaking alone agree that lucid intervals of up to 72 hours are possible. This new medical evidence creates a reasonable doubt of

¹⁷⁸Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash. U. L. Rev. 1, 16-21 (2009).

¹⁷⁹See *Cavazos v. Smith*, ___ U.S. ___, 132 S. Ct. 2, 10 (2011) (Ginsburg, J., dissenting) (“Doubt has increased in the medical community over whether infants can be fatally injured through shaking alone.”) (internal quotations and citation omitted).

Ms. Fero's guilt, because Ms. Fero can now show that Brynn's injuries could have occurred well before Brynn arrived at Ms. Fero's house.

Doctors have also abandoned the once-consensus view that only child abuse or major trauma, such as a car crash or a fall from a multi-story building, can cause the triad. But, new evidence shows that a variety of causes, including accidental, low-impact events like a fall from a chair, can cause the triad. This new medical evidence creates a reasonable doubt about Ms. Fero's guilt because Ms. Fero can now show, using new medical evidence, that Brynn's injuries could have been caused by an accidental fall, an undiagnosed medical condition, or even by Brynn's brother, Kaed.

2. Ms. Fero Could Not Have Been Convicted Without the State's Now-Refuted Medical Evidence.

The State's medical evidence regarding the impossibility of lucid intervals and the level of force necessary to cause Brynn's brain injuries was crucial to the State's case. Ms. Fero could not have been convicted without those lines of evidence.

At trial, the State alleged that Ms. Fero had intentionally assaulted Brynn, recklessly inflicting great bodily harm.¹⁸⁰ Great bodily harm is

¹⁸⁰1 RP at 108-09 (Mar. 11, 2003).

statutorily defined as “bodily injury which creates a probability of death . . . or which causes a significant permanent loss or impairment of the function of any bodily part or organ.”¹⁸¹ Ms. Fero disputed that she had intentionally assaulted Brynn and that she had recklessly inflicted great bodily harm.

To establish the “intentional assault” element, the State argued that the medical testimony established both that Ms. Fero assaulted Brynn and that the assault was intentional. Specifically, the State argued that only violent shaking could have caused Brynn’s head injuries and that an adult must have caused the injuries. The State implicitly argued that the level of force required to cause Brynn’s injuries necessarily meant that the assault was intentional. Without the State’s now-outdated medical evidence, the State could not have established intent.

Only Brynn’s brain injuries constitute “great bodily harm” under the statutory definition. Brynn’s other injuries, including her retinal hemorrhages, several bruises, and a toddler’s fracture, do not constitute “great bodily harm” under the statute, and the State never contested otherwise. The State’s experts acknowledged that Brynn’s retinal hemorrhages were temporary and that they would not permanently impair

¹⁸¹RCW 9A.04.110(4)(c).

Brynn's vision. None of the State's experts argued that the bruises on Brynn's face and body would lead to, or were evidence of, great bodily harm. Moreover, the State's experts acknowledged that a child could have caused the bruising, and they did not offer any opinions on precisely how or when the bruises occurred. Finally, the State's experts did not argue, nor could they, that Brynn's broken leg constituted "great bodily harm."

Without the State's medical evidence regarding lucid intervals and the force required to cause the triad, there would not have been enough evidence to convict Ms. Fero. The evidence of Ms. Fero's allegedly inconsistent statements neither proves nor disproves that Ms. Fero assaulted Brynn. The statements show that Ms. Fero was under extreme stress and potentially confused, nothing more. But, even examining the statements in a light most favorable to the State, they have no bearing on the elements of first-degree assault of a child that the State was required to prove. The evidence regarding Brynn's other injuries and Ms. Fero's allegedly inconsistent statements is not sufficient to support Ms. Fero's conviction. Without the State's now-outdated and unreliable medical evidence, Ms. Fero's conviction cannot stand.

* * *

The State's case against Ms. Fero rested on two key lines of expert testimony that the medical profession has since abandoned. In light of current medical knowledge, it is no longer possible for medical experts to credibly argue that Brynn would have lost consciousness immediately after sustaining her injuries. Additionally, it is no longer possible for medical experts to credibly argue that only an adult could have caused Brynn's injuries, as opposed to an accidental trauma or other innocent causes. Without these lines of evidence, Ms. Fero could not have been convicted. Because the new medical consensus contradicts the only evidence the State offered to prove the elements of first degree assault of a child, the new medical evidence would change the result of trial.¹⁸²

B. The New Evidence Was Not, and Could Not Have Been, Discovered Before Trial Because It Was Not Published Until After Trial

The new medical evidence regarding the prevalence of lucid intervals and levels of force necessary to cause the triad was discovered by Ms. Fero after her trial in 2003. Ms. Fero could not have discovered it earlier because the medical evidence was not available.

¹⁸² See *Edmunds*, 746 N.W.2d at 599 (holding that the "emergence of a legitimate and significant dispute within the medical community" regarding the cause of a child's brain injuries established a "reasonable probability" that a jury would have reasonable doubt).

Most of the studies cited by Dr. Barnes and Dr. Ophoven were published after Ms. Fero's trial. Although there were anecdotal reports before 2003 of children with head injuries having significant lucid intervals, there were no systematic studies of the issue until 2005.¹⁸³ Even if these obscure anecdotal reports had been uncovered before trial, they were not generally accepted. However, later research confirmed these anecdotal reports in a systemic way, and the medical community now generally accepts that significant lucid intervals are possible.

Similarly, the medical community started questioning, before 2003, whether other conditions mimicked the symptoms of shaken baby syndrome.¹⁸⁴ However, until after Ms. Fero's trial, this research was considered outside the mainstream. It did not gain general acceptance until after Ms. Fero's trial.

The research regarding the prevalence of lucid intervals and the variety of potential causes of the triad was not available to Ms. Fero at her trial, and it would have been impossible for her to discover it regardless of her diligence.

¹⁸³ Barnes Decl. ¶ 47; Ophoven Decl. ¶ 12.

¹⁸⁴ Barnes Decl. at ¶ 21.

C. The New Evidence Is Material and Not Merely Cumulative or Impeaching

The new medical evidence regarding lucid intervals and the causes of Brynn’s brain injuries is material and not merely cumulative or impeaching. Evidence is material when it tends to disprove the validity of scientific evidence used to convict a petitioner.¹⁸⁵ The newly discovered medical evidence is material because it directly contradicts the only evidence that the State offered at trial to prove the elements of first-degree assault of a child.

The Washington Supreme Court has defined cumulative evidence as ““additional evidence of the same kind to the same point.””¹⁸⁶ Evidence is not merely cumulative or impeaching when it refutes the validity of scientific evidence used to convict a petitioner, such as by rendering the scientific evidence inadmissible.¹⁸⁷ The new medical evidence is not cumulative or offered to impeach. Ms. Fero did not, and could not, present similar evidence at trial because it was not known. Moreover, the evidence is not offered to impeach because it refutes the opinions offered

¹⁸⁵See *In re Delmarter*, 124 Wn. App. 154, 167, 101 P.3d 111 (2004) (holding that new evidence is material, in a drug possession conviction, when the evidence casts doubt on the accuracy of drug tests performed on substances found on the accused).

¹⁸⁶ *State v. Williams*, 96 Wn.2d 215, 223-24, 624 P.2d 868 (1981) (quoting *Roe v. Snyder*, 100 Wash. 311, 314, 170 P. 1027 (1918)).

¹⁸⁷See *Roche*, 114 Wn. App. at 438 (“Moreover, the evidence of [a lab chemist’s] malfeasance is more than ‘merely’ impeaching; it is critical with respect to . . . the validity of his testing . . .”).

by the State's experts rather than merely attacking their credibility. The new evidence of the possibility of a lucid interval, the mimics of shaken baby syndrome, and the shortcomings of the shaken baby syndrome theory is not "additional evidence of the same kind." It raises new points that have not been presented to a jury.

Ms. Fero is not alone in believing that the new medical evidence is material and casts significant doubt on the basis for shaken baby syndrome convictions. In Maricopa County, Arizona, two convictions have been overturned since 2011 after the defendants presented new medical evidence.¹⁸⁸ And in California, Governor Jerry Brown commuted the sentence of a woman, the grandmother of the deceased child, whose case became the subject of a contested procedural battle between the Ninth Circuit Court of Appeals and the United States Supreme Court.¹⁸⁹ The governor cited "significant doubts" regarding her guilt.¹⁹⁰ The new medical evidence is material and corroborates Ms. Fero's persistent claim that she is innocent.

¹⁸⁸ Emily Bazelon, "The Exoneration of Drayton Witt," *Slate.com*, Oct. 31, 2012, available at http://www.slate.com/articles/news_and_politics/jurisprudence/2012/10/what_the_exoneration_of_arizona_father_drayton_witt_means_for_shaken_baby.html.

¹⁸⁹ See *Cavazos*, 132 S. Ct. 2.

¹⁹⁰ L.A. Now, "Jerry Brown commutes grandmother's murder sentence," *L.A. Times*, Apr. 6, 2012, available at <http://latimesblogs.latimes.com/lanow/2012/04/shaken-baby-clemency.html>.

* * *

The evidence satisfies the RAP 16.4 standard for a new trial because it was unavailable during the 2003 trial, is material and not merely impeaching, and would have changed the result of the trial by casting reasonable doubt that Brynn was abused while in Ms. Fero's care. Even examining the new evidence in the light most favorable to the State, the new medical literature, studies, and expert opinions demonstrate the existence of a "significant and legitimate debate" within the medical community.

In light of the new consensus regarding lucid intervals and the myriad causes of the trial, the testimony the State offered in 2003 would likely not be admissible today because it is no longer generally accepted.¹⁹¹ Even if it were admissible, Ms. Fero can now offer opposing experts that could rely on generally accepted scientific studies, which was not possible for her in 2003. A jury evaluating the competing experts, and the old and new medical evidence, would have reasonable doubt about Ms. Fero's guilt.¹⁹² Therefore, Ms. Fero is entitled to a new trial under RAP 16.4.

¹⁹¹See *State v. Cauthron*, 120 Wn.2d 879, 888, 846 P.2d 502 (1993).

¹⁹²*Edmunds*, 746 N.W.2d at 596.

V. CONCLUSION

Ms. Fero knows that she did not abuse Brynn. She has waited in prison for nearly 10 years for medical research to catch up to the truth. In that time, she has focused on staying involved with her family and supporting fellow inmates. With her exemplary disciplinary record, Ms. Fero may soon be eligible for work release. Although she is looking forward to her release, she is pursuing this personal restraint petition with the hopes of enjoying her full legal rights and ameliorating the other consequences of her wrongful conviction.

At her trial, Ms. Fero could not dispute the State's medical testimony about shaken baby syndrome. Today, she can show that the State's medical testimony is wrong on two critical points. First, Brynn may have been injured well before she arrived at Ms. Fero's house, evidenced by the new, widely accepted medical scholarship documenting the prevalence of a lucid interval in children suffering brain trauma. Second, Brynn's injury may have been caused by an accident or undiagnosed medical condition, supported by evidence that even minor falls or other small children can cause severe head injuries in infants and toddlers. These parallel, but related, lines of medical evidence directly refute the only evidence of Ms. Fero's guilt. Because the new evidence would change the result of Ms. Fero's trial, is material, and could not have

been discovered before her trial, Ms. Fero is entitled to a new trial under
RAP 16.4.

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