

No. 92975-1

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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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

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**Respondent Heidi Charlene Fero's  
Answer to Amended Brief of Amicus Curiae  
Washington Association of Prosecuting Attorneys**

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**TABLE OF CONTENTS**

	<b>Page</b>
I. IDENTITY OF RESPONDENT .....	1
II. INTRODUCTION .....	1
III. BACKGROUND .....	2
IV. ARGUMENT .....	3
A. Ms. Fero’s petition satisfied the standard for relief under RAP 16.4(c)(3).....	4
1. Courts may grant petitions without a reference hearing when the State does not contest the facts, as required by RAP 16.9. ....	6
2. Ms. Fero’s newly discovered evidence would change the result of her trial.....	7
B. RAP 13.5(a) does not toll the time for filing a motion for discretionary review.....	12
1. None of the cases WAPA cites support reading a tolling period into RAP 13.5. ....	14
2. WAPA proposed the rule that applies to the State’s untimely Motion for Discretionary Review. ....	16
3. WAPA’s counsel has argued the same rule to the State’s advantage. ....	18
V. CONCLUSION.....	19

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Ex parte Henderson</i> , 384 S.W.3d 833 (Tex. Crim. App. 2012).....	11
<i>Frye v. United States</i> , 293 F. 1013 (1923).....	5
<i>Hews v. Evans</i> , 99 Wn.2d 80, 660 P.2d 263 (1983).....	6
<i>In re Brown</i> , 143 Wn.2d 431, 21 P.3d 687 (2001).....	7, 8, 12
<i>In re Copland</i> , 176 Wn. App. 432, 309 P.3d 626 (2013).....	12
<i>In re Fero</i> , 192 Wn. App. 138, 367 P.3d 588 (2016), <i>review</i> <i>granted</i> , 187 Wn.2d 1024, 390 P.3d 356 (2017).....	passim
<i>In re Yates</i> , 177 Wn.2d 1, 296 P.3d 872 (2013).....	6
<i>People v. Bailey</i> , 144 A.D.3d 1562, 41 N.Y.S.3d 625 (N.Y. App. Div. 2016).....	12
<i>State ex rel. Payson v. Chapman</i> , 35 Wash. 64, 76 P. 525 (1904).....	14
<i>State v. Edmunds</i> , 308 Wis. 2d 374, 746 N.W.2d 590 (Wis. Ct. App. 2008).....	10, 11
<i>State v. Savaria</i> , 82 Wn. App. 832, 919 P.2d 1263 (1996).....	8
<i>State v. Williams</i> , 96 Wn.2d 215, 634 P.2d 868 (1981).....	7, 8, 10

**RULES**

RAP 7.1.....15

RAP 7.3.....15

RAP 13.4..... passim

RAP 13.5..... passim

RAP 13.5A..... passim

RAP 16.3(c) .....14

RAP 16.4.....3, 4

RAP 16.4(c)(3)..... passim

RAP 16.9.....5, 6, 7

RAP 16.11(b) .....6

RAP 16.14(c) .....12

## **I. IDENTITY OF RESPONDENT**

Respondent Heidi Fero, Petitioner below, has served her entire sentence. She requests that this Court affirm the Court of Appeals decision and disregard the amicus curiae brief filed by the Washington Association of Prosecuting Attorneys (“WAPA”).

## **II. INTRODUCTION**

WAPA asks this Court to announce a rule that post-trial new scientific evidence is merely impeaching unless it renders trial testimony inadmissible. There is no support for this position in the Rules of Appellate Procedure or case law. WAPA’s proposed new rule would fundamentally change the well-established standard that governs when newly discovered evidence merits a new trial.

WAPA also argues that the State’s Motion for Discretionary Review is timely despite being filed more than thirty days after the Court of Appeals issued its decision granting Ms. Fero’s personal restraint petition. RAP 13.5(a) states that a party seeking review of a decision on the merits of a personal restraint petition “must file . . . within 30 days after the decision is filed.” RAP 13.5(a). The rule is not ambiguous. Nonetheless, WAPA asks this Court to read into RAP 13.5(a) a tolling provision that does not exist. WAPA proposed the very rule it now claims is confusing, and its position contradicts a position taken in an earlier case

by the deputy prosecuting attorney who signed its brief in the present case. The State's motion for discretionary review was late and should be dismissed.

### **III. BACKGROUND**

Ms. Fero incorporates by reference the facts presented in her Personal Restraint Petition, her Answer to the State's Motion for Discretionary Review, and her Answer to WAPA's Amicus Curiae Brief in Support of the State's Motion for Discretionary Review. This section repeats only those facts relevant to WAPA's current arguments.

Supported by expert declarations and cases from other jurisdictions, Ms. Fero's petition argued that there is new scientific consensus regarding the timing and causes of the triad of symptoms once associated exclusively with shaken baby syndrome. Ms. Fero's petition did not introduce new evidence about the validity of shaken baby syndrome, which is also known as abusive head trauma, as a diagnosis. Instead, Ms. Fero argued that the new scientific consensus regarding the prevalence of lucid intervals and discovery of alternate causes of the triad is "newly discovered evidence" warranting relief under RAP 16.4(c)(3).

The Court of Appeals held that Ms. Fero's petition satisfied the requirements for relief under RAP 16.4(c)(3). *See In re Fero*, 192 Wn. App. 138, 367 P.3d 588 (2016), *review granted*, 187 Wn.2d 1024, 390

P.3d 356 (2017). In particular, the Court of Appeals held that Ms. Fero's new evidence would probably change the result of her trial because the medical community's current understanding of the timing and causes of the triad "refutes the medical testimony that was presented" at Ms. Fero's trial. *Id.* at 156. The court noted that the expert declarations supporting Ms. Fero's petition "are not contested by the State" and that they "contradict[] the certainty of the doctors at trial" who testified that Ms. Fero must have inflicted Brynn's head injuries. *Id.* at 156, 157. The Court of Appeals also compared the medical evidence presented at Ms. Fero's trial and the new evidence presented in her petition and held that the new evidence was not merely impeaching. *Id.* at 162-63.

The Court of Appeals issued its opinion granting Ms. Fero's petition on January 5, 2016. The State filed its Motion for Discretionary Review with this Court on April 1, 2016.

#### **IV. ARGUMENT**

Even assuming the State's Motion for Discretionary Review was timely, WAPA's amicus brief supports neither of the arguments that the State preserved for Supreme Court review. In response to Ms. Fero's personal restraint petition, the State argued that new scientific evidence can never be "newly discovered evidence" under RAP 16.4 and that Ms.

Fero waited too long to file her petition. WAPA does not present support for either argument in its brief.

Instead of supporting the State's preserved arguments on the merits, WAPA argues that the Court of Appeals erred by not ordering a reference hearing. WAPA also proposes a new, albeit unsupported and unnecessary, rule regarding how courts reviewing personal restraint petitions should consider scientific evidence. WAPA Amicus Br., at 13. WAPA also argues, contrary to the plain text of RAP 13.5(a), that the State's motion for discretionary review was timely. This Court should reject WAPA's arguments.

**A. Ms. Fero's petition satisfied the standard for relief under RAP 16.4(c)(3).**

Ms. Fero's petition satisfied the standard for relief based on newly discovered evidence. Under RAP 16.4, a petitioner is entitled to relief based on newly discovered evidence 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." RAP 16.4(c)(3). To satisfy this standard, Ms. Fero's petition offered uncontested evidence that children with the triad can remain lucid for up to three days before exhibiting symptoms. This evidence directly contradicts the testimony of the State's trial experts, who testified that Brynn would have lost consciousness within minutes of whatever event caused her symptoms. Ms. Fero also

offered uncontested evidence that doctors have discovered many causes of the triad since Ms. Fero's trial, including falls from a short height and other accidental events. This directly contradicts the testimony of the State's trial experts, who testified that Brynn must have either been shaken or suffered major trauma. The Court of Appeals held that this uncontested evidence entitled Ms. Fero to relief under RAP 16.4(c)(3).

WAPA argues that the Court of Appeals erred by not ordering a reference hearing. However, this argument ignores the State's failure to contest Ms. Fero's new evidence. Because the State did not alert the Court of Appeals to any "material disputed questions of fact," as RAP 16.9(a) obligated it to do, the Court of Appeals correctly accepted Ms. Fero's evidence as uncontested and decided Ms. Fero's petition on the merits. WAPA also proposes a new rule, arguing that Ms. Fero's new evidence is "merely impeaching" because "it does not demonstrate that the State's medical expert's [*sic*] testimony would be excluded under *Frye* [*v. United States*, 293 F. 1013 (1923)]." WAPA Amicus Br., at 13. There is no support in the Rules of Appellate Procedure or case law for this new rule. It also ignores cases from courts across the country holding that evidence similar to Ms. Fero's would change the result of trials and is not merely impeaching.

**1. Courts may grant petitions without a reference hearing when the State does not contest the facts, as required by RAP 16.9.**

WAPA argues that the Court of Appeals should not have granted Ms. Fero's petition without first ordering a reference hearing. WAPA Amicus Br., at 19-20. However, as the Court of Appeals noted, the State did not contest the credibility of the experts supporting Ms. Fero's petition or contest the veracity of the newly discovered evidence. *Fero*, 192 Wn. App. at 162 ("The State does not question Dr. Barnes or Dr. Ophoven as experts or question the opinions they present."). Moreover, the State did not answer the allegations in Ms. Fero's petition or identify any "material disputed questions of fact," as required by RAP 16.9.

The Court of Appeals may grant a petition without a hearing when the petition "can be determined solely on the record." RAP 16.11(b); *In re Yates*, 177 Wn.2d 1, 18, 296 P.3d 872 (2013) ("Granting the petition is appropriate if the petitioner has proved actual prejudice or a fundamental defect resulting in a complete miscarriage of justice."); *Hews v. Evans*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983) ("If the court is convinced a petitioner has proven actual prejudicial error, the court should grant the Personal Restraint Petition without remanding the cause for further hearing."). Whether the State agreed with Ms. Fero's expert evidence at the time of its response to her petition or made a strategic decision to focus on other

issues, WAPA cannot now ask this Court to change the rules. Because the State did not identify, as required by RAP 16.9, any material disputed questions of fact, there were no issues to be resolved in a reference hearing.

**2. Ms. Fero's newly discovered evidence would change the result of her trial.**

As the Court of Appeals correctly held, Ms. Fero presented newly discovered evidence that would change the result of her trial:

[Ms.] Fero has presented sufficient new material facts to warrant relief because the uncontested declarations of the medical experts she provided establish that the result of her trial would probably be different if the current generally accepted medical evidence was available at the time of her trial in 2003.

*Fero*, 192 Wn. App. at 142. In reaching this result, the Court of Appeals applied the five *Williams*<sup>1</sup> factors, which set the standard for granting relief under RAP 16.4(c)(3):

that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; *and* (5) is not merely cumulative or impeaching.

*Id.* at 153 (quoting *In re Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001)).

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<sup>1</sup> *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981).

WAPA does not cite or discuss the *Williams* factors. However, WAPA does argue that Ms. Fero's new scientific evidence is "merely impeaching," the final *Williams* factor. To the extent that WAPA's brief can be read to challenge the Court of Appeals' holding on the other factors, Ms. Fero relies on her Supplemental Brief to this Court, her Opening Brief in Support of her Personal Restraint Petition, and the Court of Appeals decision.

The Court of Appeals held that Ms. Fero's new evidence is not merely impeaching because it refutes the State's only evidence of the timing or cause of Brynn's injuries. *Id.* at 162-63; *see also State v. Savaria*, 82 Wn. App. 832, 838, 919 P.2d 1263 (1996) ("[I]mpeaching evidence can warrant a new trial if it devastates a witness's uncorroborated testimony establishing an element of the offense. In such cases the new evidence is not merely impeaching, but critical.") (footnote omitted). In response, WAPA argues that Ms. Fero's new evidence is "merely impeaching" because it does not render testimony about shaken baby syndrome inadmissible under *Frye*.

WAPA cites no authority, from Washington or elsewhere, for this proposed new rule. The standard for post-trial relief based on newly discovered evidence assesses the impact of the new evidence on the evidence presented at trial. *See Brown*, 143 Wn.2d at 453. New evidence

need not render trial evidence wholly inadmissible. If the new evidence is itself admissible, is material, and would change the result of trial, then relief is warranted.

Even if such a rule were to apply, which it should not, WAPA's brief applies it too broadly. Ms. Fero offered new medical evidence on two specific paradigm shifts regarding pediatric head trauma: lucid intervals and the alternate causes of the triad. Ms. Fero need not prove—and this Court need not decide—whether the original trial testimony regarding shaking would be wholly or partially inadmissible under *Frye*. Rather, under the established standard for post-trial relief based on newly discovered evidence, Ms. Fero is entitled to a new trial in order to present the new medical evidence because that evidence would probably change the result of her trial.

WAPA's proposed rule is not just unreasonably broad as applied to Ms. Fero's evidence; it also would preclude other petitions based on newly discovered scientific evidence. The prototypical actual innocence or newly discovered evidence case involves DNA evidence. However, that evidence rarely, if ever, renders inadmissible trial evidence such as eyewitness testimony, confessions, or ballistic evidence. Instead, it establishes that a new trial is warranted because the DNA evidence provides scientific proof to overcome the state's trial evidence that the convicted individual

committed the crime. WAPA's rule would entirely preclude relief on such petitions.

WAPA's proposed rule would also prohibit a petitioner from presenting evidence of a debate within the scientific community. But the fact that a debate exists can be the newly discovered evidence that would change the result of a trial:

[I]t is the emergence of a legitimate and significant dispute within the medical community as to the cause of those injuries that constitutes newly discovered evidence. At trial . . . there was no such fierce debate. Thus, the State was able to easily overcome [the petitioner's] argument that she did not cause [the child's] injuries by pointing out that the jury would have to disbelieve the medical experts in order to have a reasonable doubt as to [the petitioner's] guilt. Now, a jury would be faced with *competing credible medical opinions* in determining whether there is a reasonable doubt as to [the petitioner's] guilt.

*State v. Edmunds*, 308 Wis. 2d 374, 392, 746 N.W.2d 590 (Wis. Ct. App. 2008) (emphasis added). WAPA's requested rule would silence one side of legitimate scientific debates and prohibit petitioners from presenting credible, admissible evidence challenging the State's trial theory.

New scientific or medical evidence that meets the five-part *Williams* test requires courts to grant petitioners a new trial. No case law or rule directs courts to treat newly discovered medical evidence differently than any other newly discovered evidence, even when that

newly discovered medical evidence is presented in the form of new expert testimony.

Finally, WAPA does not address cases from across the country where courts have granted post-trial relief based on newly discovered evidence like the evidence presented in Ms. Fero's petition. These courts have held that new evidence of the causes and timing of the triad would change the result of trials where defendants were convicted based on the theory of shaken baby syndrome. In *Edmunds*, the Wisconsin Court of Appeals evaluated new evidence regarding "an alternate theory" of the cause of the child's injuries, holding that the evidence was "not merely cumulative" because it differed from the "substance and quality of the defense evidence at trial." *Id.* at 386. The court 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." *Id.* at 392. In *Ex parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012), the defendant claimed that a child in her care died after falling from her arms, not as a result of abuse. After considering new medical evidence of the multiple causes of pediatric head trauma, including short falls, the court held that "no reasonable juror would have convicted her of capital murder in light of her new evidence." *Id.* at 834.

Cases from other jurisdictions have also specifically addressed whether evidence like Ms. Fero's is merely impeaching. In *People v. Bailey*, the court applied a standard requiring the petitioner to show that the new evidence "does not merely impeach or contradict the record evidence." 144 A.D.3d 1562, 1563, 41 N.Y.S.3d 625 (N.Y. App. Div. 2016) (citations omitted). The trial record included medical testimony that the child's head injuries could not have been caused by a short fall. *Id.* The court held that the recent discovery of additional causes of the triad, including short falls, was not merely impeaching. *See id.*

Newly discovered expert evidence is already subject to scrutiny under RAP 16.4(c)(3). *See Brown*, 143 Wn.2d at 453-54; *In re Copland*, 176 Wn. App. 432, 450-51, 309 P.3d 626 (2013) (applying five-factor standard to proffered new expert testimony). The Court of Appeals correctly held that Ms. Fero's newly discovered evidence meets the standard for relief under RAP 16.4(c)(3).

**B. RAP 13.5(a) does not toll the time for filing a motion for discretionary review.**

The rules governing the timing of the State's Motion for Discretionary Review are unambiguous. The Court of Appeals decision on the merits of a personal restraint petition is "subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in rule 13.5A." RAP 16.14(c). *See also* RAP

13.5A(a)(1). For the terms of review, RAP 13.5A references RAP 13.4: “In ruling on motions for discretionary review pursuant to this rule, the Supreme Court will apply the considerations set out in rule 13.4(b).” RAP 13.5A(b). For the manner of review, RAP 13.5A references RAP 13.5: “The procedure for motions pursuant to this rule shall be the same as specified in rule 13.5(a) and (c).” RAP 13.5A(c). RAP 13.5(a), in turn, states that a party seeking review by motion “must file a motion for discretionary review in the Supreme Court . . . within 30 days” after the Court of Appeals files its decision. RAP 13.5(a) does not toll the thirty-day deadline for any reason.

As WAPA concedes, RAP 13.5(a) does not expressly toll the deadline for filing a motion for discretionary review while a motion for reconsideration is pending. WAPA Amicus Br., at 8. However, WAPA argues that this clear progression of rules is a “quirk” that should not be read literally. *See id.*, at 3. Instead, WAPA argues for an implied tolling period, but none of the cases it cites support reading a tolling period into RAP 13.5(a). Additionally, WAPA ignores its own role in drafting RAP 13.5A—it proposed the rule that it now claims produced a procedural quirk, and its members have used the rule to the State’s advantage in other cases. *See infra* Section IV(B)(2)-(3).

**1. None of the cases WAPA cites support reading a tolling period into RAP 13.5.**

WAPA argues that a “century old rule” supports reading a tolling provision into RAP 13.5, but no such blanket rule exists. Even if it did, the Supreme Court was free to abandon that rule when it declined to include a tolling provision in RAP 13.5, despite the explicit inclusion of a tolling provision in RAP 13.4.

None of the cases that WAPA cites support reading a tolling provision into RAP 13.5(a). In fact, none of the cited cases deal with motions for discretionary review, let alone review of personal restraint petitions. *See* WAPA Amicus Br., at 3-7. Instead, all of the cases WAPA cites involve the handoff of jurisdiction from one court to another. *See, e.g., State ex rel. Payson v. Chapman*, 35 Wash. 64, 68, 76 P. 525 (1904) (holding that “the time for taking an appeal begins to run from the date of the order denying a motion for a new trial”). In those cases, if the time for filing a notice of appeal were not tolled pending a motion for reconsideration, there would be a risk that the lower court would issue an order after losing jurisdiction over the case.

There is no such risk when a party requests reconsideration of a decision on a personal restraint petition because the Supreme Court and the Court of Appeals have concurrent jurisdiction. RAP 16.3(c) (“The Supreme Court and the Court of Appeals have original concurrent

jurisdiction in personal restraint petition proceedings in which the death penalty has not been decreed.”). *See Fero Supp. Br.*, at 16-17. Therefore, the Court of Appeals has jurisdiction to issue an order deciding a motion for reconsideration even after a party files a motion for discretionary review in the Supreme Court. *See RAP 7.3* (“The Court of Appeals retains authority to act in a case pending before it until review is accepted by the Supreme Court, unless the Supreme Court directs otherwise.”). In fact, there is no reason to treat decisions deciding personal restraint petitions differently than any other interlocutory decision. *See RAP 7.1* (“The trial court retains full authority to act in a case before review is accepted by the appellate court[.]”).<sup>2</sup>

RAP 13.5A unambiguously states that RAP 13.5 controls the procedure for the review of decisions on personal restraint petitions. RAP 13.5A. As WAPA concedes, RAP 13.5(a) does not expressly toll any deadlines. WAPA provides no authority to suggest that the Supreme Court’s decision to forgo a tolling provision in RAP 13.5(a) was anything other than intentional.

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<sup>2</sup> WAPA argues that decisions on personal restraint petitions are more akin to decisions terminating review than interlocutory decisions. WAPA Amicus Br., at 3. Ms. Fero respectfully disagrees. *See Fero Supp. Br.*, at 16-17. Regardless, the rule is clear: RAP 13.5A does not contain a tolling provision.

**2. WAPA proposed the rule that applies to the State's untimely Motion for Discretionary Review.**

The Supreme Court adopted RAP 13.5A in 2006 “based on a recommendation originally submitted by [WAPA].” 3 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 13.5A, at 230-31 (8th ed. 2014). RAP 13.5A specifically changed the standard for accepting review of decisions on personal restraint petitions. *Id.* at 231; *see also* RAP 13.5A(a)(1). Before RAP 13.5A, those decisions were subject to the standards in RAP 13.5(b). 3 TEGLAND RAP 13.5A, at 231. WAPA proposed RAP 13.5A to adopt the RAP 13.4(b) standard for accepting review of decisions on the merits of a personal restraint petition. *Id.*; *see also* RAP 13.5A(b). WAPA’s proposal did not suggest adopting the RAP 13.4(a) procedures for seeking review. *See* RAP 13.5A(c).

By the time RAP 13.5A was adopted in 2006, RAP 13.4(a) had been amended at least six times. 3 TEGLAND RAP 13.4, at 219-223 (describing amendments to RAP 13.4(a) in 1983, 1990, 1992, 1994, 1998, and 2002). The 1983 and 1990 amendments clarified the deadline for filing a petition for review when a motion for reconsideration is pending. *Id.* at 219-20. The 1992 amendment to RAP 13.4(a) added that the deadline for filing a petition for review would be tolled pending a motion to publish. *Id.* at 220-21. RAP 13.4(a) explicitly tolls the deadline for

filing a petition for review pending a motion for reconsideration or a motion to publish.

When WAPA proposed and this Court adopted RAP 13.5A in 2006, the tolling provision in RAP 13.4(a) was well established. But WAPA did not propose to adopt the procedures in RAP 13.4(a) to govern review of Court of Appeals decisions on the merits of a personal restraint petition. Instead, the new rule proposed by WAPA and adopted by this Court unambiguously incorporates the procedures in RAP 13.5(a) for seeking review of such decisions. RAP 13.5A(c). The drafters' comment for RAP 13.5A makes a clear distinction:

The suggested rule would change the standard for accepting review, but not the procedure. The governing standard would be the standard governing petitions for review, as set out in RAP 13.4(b). The procedure, however, would continue to be the motion procedure, as set out in RAP 13.5(a) and (c).

3 TEGLAND RAP 13.5A, at 231. RAP 13.5A reflects a deliberate choice—*proposed by WAPA*—to change the standard for accepting review of decisions on the merits of personal restraint petition but to maintain the procedures for review set forth in RAP 13.5(a).

In contrast to RAP 13.4(a), RAP 13.5(a) does not toll the deadline for filing for review pending a motion for reconsideration or a motion to publish. If WAPA wanted tolling, it could have proposed incorporating

both the standards and the procedures from RAP 13.4. Instead, it proposed to apply the RAP 13.4(b) standards governing review, but the RAP 13.5(a) and (c) procedures, to review of decisions on personal restraint petitions. Because RAP 13.5(a) does not toll the deadline for filing a motion for discretionary review of a decision on the merits of a personal restraint petition for any reason, the State's motion was untimely.

**3. WAPA's counsel has argued the same rule to the State's advantage.**

As explained in Ms. Fero's Supplemental Brief to this Court, the Supreme Court Commissioner has applied RAP 13.5(a) to deny review of a decision deciding a personal restraint petition when the motion for review was filed more than thirty days after the Court of Appeals decision. *See Fero Supp. Br.*, at 18. In that case, the State, represented by Kathleen Webber of the Snohomish County Prosecutor's Office, argued that the motion for discretionary review of the Court of Appeals decision denying the personal restraint petition was late under RAP 13.5(a). The State argued that RAP 13.5(a) set a deadline thirty days after the Court of Appeals filed the decision on the petition's merits and that this time was not tolled pending motions to publish or reconsider. The Supreme Court Commissioner agreed and denied the motion for discretionary review. *Id.*, Ex. A, at 2-3.

Ms. Webber coauthored WAPA's brief in the present case and now argues for a less-than-literal reading of RAP 13.5(a). If RAP 13.5(a) strictly applies to motions for discretionary review filed by personal restraint petitioners, then it should apply equally to motions filed by the State. It would be inherently unfair to permit the State's late filing due to a misunderstanding of the rules while strictly applying the same rules to personal restraint petitioners who suffer similar misunderstandings.

#### **V. CONCLUSION**

This Court should disregard WAPA's arguments and affirm the Court of Appeals decision granting Ms. Fero's petition. Under the unambiguous language of RAP 13.5(a), the State's Motion for Discretionary Review is untimely. Moreover, WAPA cannot excuse or compensate for the State's failure to identify material disputed facts in its response to Ms. Fero's petition. Ms. Fero's petition presented newly discovered evidence that satisfies the standard for relief under RAP 16.4(c)(3), and the Court of Appeals correctly granted her petition. Ms. Fero urges this Court to affirm.

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