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NO. 892975-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE PERSONAL RESTRAINT PETITION OF

HEIDI CHARLENE FERRO,

Respondent.

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WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS'  
AMICUS CURIAE MEMORANDUM

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## I. INTEREST OF AMICUS CURIAE

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

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

## II. ISSUES PRESENTED

1. Whether this Court should grant the State’s petition to announce the rule that new dissenting views regarding the scientific evidence that was presented at trial will satisfy the “newly discovered evidence” test when the

original scientific evidence or theory would be inadmissible at a new trial?

2. Whether this Court should grant the State's petition for review in order to clarify that a reference hearing is required before a court may determine whether a petitioner's new "evidence" would probably change the result of the trial?

### III. STATEMENT OF THE CASE

WAPA adopts the statements provided by the State in its response to the personal restraint petition (PRP), in its motion for reconsideration, and in its petition for review.

### IV. ARGUMENT

#### A. Resolution of a PRP that Presents New Evidence is a Three Step Procedure.

In a PRP asserting a claim of newly discovered evidence, resolution of the petitioner's claims involves a three-step process. First, the court must determine whether the petitioner has made a prima facie showing of a fundamental defect resulting in a complete miscarriage of justice. To establish a prima facie showing, the petitioner must demonstrate that she has competent, admissible evidence to establish the facts that entitle her to relief. *See generally In re Pers. Restraint of Yates*, 177 Wn.2d 1, 18, 296 P.3d 872 (2013). If the petitioner does not produce the necessary competent, admissible evidence, her petition will be dismissed. *See, e.g. In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988).

Second, the court must determine whether the petitioner has made a prima facie showing that she is entitled to relief. If the petitioner's affidavits, taken as true, reveal a possibility that the petitioner can satisfy all prongs of the newly discovered evidence test, the petitioner is entitled to an evidentiary hearing to determine whether her new evidence is credible. *See, e.g., State v. Scott*, 150 Wn. App. 281, 207 P.3d 495 (2009); *State v. Davis*, 25 Wn. App. 134, 605 P.2d 359 (1980).

Third, the court must refer the petitioner's competent, admissible evidence to the superior court for a reference hearing. This step is required because new trial "motions based solely upon affidavits are disfavored because the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations." *Herrera v. Collins*, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). *See also State v. West*, 139 Wn.2d 37, 43-47, 983 P.2d 617 (1999) (explaining the gatekeeping function of the evidentiary hearing).

The purpose of the reference hearing is to resolve genuine factual disputes and to determine whether the produced evidence can withstand the challenges of the courtroom and cross-examination. *See, e.g., In re Pers. Restraint of Clements*, 125 Wn. App. 634, 642, 106 P.3d 244, *review denied*, 154 Wn.2d 1020, *cert. denied*, 126 S. Ct. 745 (2005). If the demeanor of the witness or other evidence establishes that the new testimony is not credible

or reliable, the conviction will remain undisturbed. *See State v. Macon*, 128 Wn.2d 784, 801, 911 P.2d 1004 (1996). If the new evidence is unlikely to influence the verdict because it is of doubtful or insignificant value, the conviction will remain undisturbed. *Id.*

In the instant case, the Court of Appeals's published opinion contains errors at both steps two and three. If these errors are allowed to stand uncorrected, finality of judgments will be eroded.

**B. The Newly Discovered Evidence Test is Not Satisfied By Demonstrating that there is a Debate Regarding the Scientific Evidence that was Presented at Trial.**

The petitioner in this case, Heidi Fero, was convicted of first degree abuse of a child for injuries inflicted upon a four-and-a-half-year-old child. Those injuries included a twisting tibial fracture, bruising to the genital area, bruising to the face, and a head injury. Ms. Fero's conviction was final in 2005.

In 2014, Ms. Fero filed a collateral attack claiming that she was entitled to a new trial due to the discovery of new evidence. The new evidence Ms. Fero offers consists of declarations from two experts that summarize some of the post-trial literature regarding pediatric head injuries. These declarations do not apply the literature to the actual facts presented to Ms. Fero's jury and do not explain how the recent debate regarding "shaken baby syndrome" provides an alternative explanation for the child's broken leg

or for the speed with which bruises developed on the victim's body.

For Ms. Fero's PRP to fall within the newly discovered evidence exception, she must establish

"that the evidence (1) will probably change the result of the [proceeding]; (2) was discovered since the [proceeding]; (3) could not have been discovered before [the proceeding] by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. The absence of any one of the five factors is grounds for the denial of a new" proceeding.

*In re Pers. Restraint of Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001).

A presentation of new expert opinions based upon the evidence that was available at trial is insufficient to justify a new trial under Washington's five-prong test. *See generally State v. Harris*, 106 Wn.2d 784, 796, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940 (1987) (new expert opinion based upon a review of evidence that was available prior to trial will not support a motion for new trial); *State v. Mesaros*, 62 Wn.2d 579, 589-90, 384 P.2d 372 (1963) (same); *State v. Harper*, 64 Wn. App. 283, 923 P.2d 1137 (1992) (same); *State v. Evans*, 45 Wn. App. 611, 726 P.2d 1009 (1986), *review denied*, 107 Wn.2d 1029 (1987) (same).

Such new expert opinions do not satisfy factor 5 of the newly discovered evidence test as they are merely "impeaching." Impeachment evidence is the discrediting of a witness's veracity, such "as by catching the witness in a lie or by demonstrating that the witness has been convicted of a criminal offense." Black's Law Dictionary 768 (8th ed. 2004) (defining

impeachment), Impeachment can be accomplished in a number of ways. A party may impeach expert testimony introduced by (1) introducing its own expert testimony in rebuttal; or (2) discrediting the opposing party's expert testimony on cross-examination; or (3) relying upon evidence from which the jury may infer that the opposing party's expert testimony depends on an incorrect view of the facts. *United States v. Bodey*, 607 F.2d 265, 269 (9th Cir. 1979); *see also United States v. Dube*, 520 F.2d 250, 252 (1st Cir. 1975) ("Expert testimony is not conclusive even where uncontradicted . . . and it may be rebutted in various ways apart from the introduction of countervailing expert opinion."); 5B K. Tegland, *Washington Practice: Evidence Law and Practice* § 702.50, 705.7, and 705.8, at 182-85 and 296-303 (5th ed. 2007).<sup>1</sup>

Ms. Fero's PRP should have been denied under these cases. She presented no new evidence. All Ms. Fero presented was a newly discovered theory that she wished to use to impeach the medical practitioners who testified at trial. Ms. Fero's evidence that the medical and scientific communities' ability to distinguish traumatic from non-traumatic head injuries may be questioned to a greater degree than at the time of her trial is, standing alone, insufficient to vacate her conviction. Merely because Ms.

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<sup>1</sup>Juries in Washington are informed that an expert's opinion is not binding upon them. *See generally* WPIC 6.51. Even an unrebutted expert's opinion is not binding upon the trier of fact. *See, e.g., State v. Toomey*, 38 Wn. App. 831, 837, 690 P.2d 1175 (1984) ("Expert opinions are not binding. The court [or jury], not the particular expert testifying, makes the decision.").

Fero's experts' opinion of the mechanism or timing of the victim's injuries differs from that presented at trial does not mean that the original trial testimony is incompetent. *Cf. In re Rice*, 118 Wn.2d 876, 894, 828 P.2d 1086 (1992) (differing opinions regarding the mental health of an individual does not mean that one of the opinions is incompetent).

Science is an ever evolving field and criminal defendants should not be afforded a new trial every time the scientific testing methods or diagnostic standards change. Other jurisdictions have only advanced a collateral attack based upon post-trial debates regarding forensic or scientific evidence to an evidentiary hearing when forensic or scientific evidence tendered at trial has been discredited to the point where it would be excluded at trial. *See, e.g., Gimenez v. Ochoa*, \_\_\_ F.3d \_\_\_, 2016 U.S. App. Lexis 8511 (9th Cir. May 9, 2016) (surveying the case law as to when a change in the science may justify a new trial and stating that a vigorous debate over shaken baby syndrome is insufficient to justify a new trial); *More v. State*, \_\_\_ N.W.2d \_\_\_ (Iowa May 20, 2016) (surveying how states have dealt with claims of newly discovered evidence related to comparative bullet lead analysis); *Rhodes v. State*, 875 N.W.2d 779 (Minn. 2016) (new scientific literature addressing drowning forensics insufficient to justify a new trial as it does not prove that the original trial testimony was incorrect); *Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014) (new trial appropriate where testifying

pathologist reevaluated her testimony and opinion and could no longer stand by her trial testimony that the child's death was a homicide).

Here, the medical testimony that was presented at Ms. Fero's original trial is still generally accepted by medical authorities worldwide. *See generally In re Pers. Restraint of Morris*, 189 Wn. App. 484, 355 P.3d 355 (2015) (surveying the literature and holding that abusive head trauma evidence satisfies both *Frye* and ER 702). Ms. Fero, therefore, has failed to satisfy her burden of proof. This Court should grant the State's petition for review to clarify that new expert opinions will justify a reference hearing only when the science is discredited. A reference hearing would then be required to determine if the application of new scientific evidence would change the result of the case.

**C. A Reference Hearing is Required to Test the Credibility and Reliability of a Petitioner's New "Evidence" Before a Final Conviction May Be Set Aside.**

Even if Ms. Fero's new studies regarding the medical and scientific communities' ability to distinguish traumatic from non-traumatic head injuries might satisfy all five factors of the newly discovered evidence test, the Court of Appeals erred by ordering a new trial rather than remanding the matter to the superior court for a reference hearing. This action by the Court of Appeals conflicts with the well-established framework for resolving claims of newly discovered evidence that is embodied in cases issued by this

Court and by other divisions of the Court of Appeals. As such, the State's petition for review should be granted. *See* RAP 13.4(b)(1) and (2).

Review should also be accepted because the Court of Appeals' announced a new rule in this PRP that requires the State to hire experts to rebut declarations submitted by a petitioner in support of his PRP at a stage of the proceedings where no judicial authority can assess the party's declarations with live testimony and cross-examination. *See In re Pers. Restraint of Fero*, 192 Wn. App. 138, 142 and 156, 367 P.3d 588 (2016) (stating relief is proper because the State did not contest the declarations of the medical experts submitted by the petitioner). This new rule shifts the burden of proof from the petitioner to the State and will ultimately weaken the factual basis upon which PRPs are considered. This new rule forces the State to expend limited funds defending presumptively valid convictions, rather than devoting its resources to current cases,<sup>2</sup> and results in process that weakens finality rather than protects it.

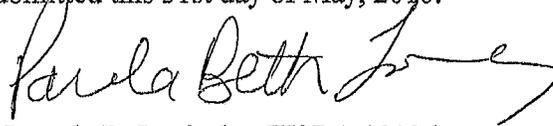
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<sup>2</sup>In the 2015/2016 budget, the Clark County Commissioners provided the Clark County Prosecuting Attorney's Office with \$155,678.00 for "professional services." Clark County 2015/2016 Adopted Expenditure Budget Line Item Detail, at 50 (available at <https://www.clark.wa.gov/sites/default/files/2015-2016AdoptedExpenditureBudgetLineItemDetail.pdf> (last visited May 27, 2016)). Retention of expert witnesses for all criminal matters must come from this fund. The number of cases that this budget item must be stretched to accommodate is significant. *See* Caseloads of the Courts of Washington, 2015 Annual Report (in 2015, 2,583 felony matters, including 16 homicides, 171 sex crimes and 396 assaults were filed in the Clark County Superior Court, approximately 700 juvenile offender matters were filed in Clark County in 2015, including 2 homicides, 23 sex crimes, and 47 assault matters, and the Clark County District Court opened 4, 764 misdemeanor matters in 2015). The Caseload reports may be found at <http://www.courts.wa.gov/caseload/> (last visited May 31, 2016).

## V. CONCLUSION

WAPA has a strong interest in the finality of judgments. There are few scientific propositions that are universally accepted. If the existence of a dissenting view is sufficient reason for overturning a final judgment, finality would have little meaning. The danger is particularly great if such dissenting views are accepted by appellate courts, with no opportunity for cross-examination. Moreover, this would require prosecutors to expend scarce resources in hiring experts to rebut the "new" opinions. WAPA respectfully requests that the Court grant review to determine the circumstances under which new expert opinions can be used to overturn final judgments.

Respectfully submitted this 31st day of May, 2016.



Pamela B. Loginsky, WSBA 18096  
Staff Attorney

## OFFICE RECEPTIONIST, CLERK

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**From:** OFFICE RECEPTIONIST, CLERK  
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**To:** 'Pam Loginsky'; Anne Cruser; JCBaird@perkinscoie.com; MHupp@perkinscoie.com; ftorres@uw.edu  
**Subject:** RE: In re the PRP of Heidi Charlene Fero, No. 92975-1

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**To:** Anne Cruser <Anne.Cruser@clark.wa.gov>; OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; JCBaird@perkinscoie.com; MHupp@perkinscoie.com; ftorres@uw.edu  
**Subject:** In re the PRP of Heidi Charlene Fero, No. 92975-1

Dear Clerk and Counsel:

Enclosed for filing is WAPA's motion for leave to file an amicus curiae memorandum, the proposed amicus curiae memorandum and a proof of service.

It is not entirely clear which court rules apply to WAPA's motion as there is a dispute between the parties as to whether the State's motion for discretionary review is governed by RAP 13.4 or RAP 13.5. It is also not entirely clear when this motion is due, as the State's reply in support of its motion for discretionary review is not due until June 1, 2016. This motion is being filed within 60 days of April 7, 2016, the date the Court has identified on its docket as the date when the State's Motion for Discretionary Review was filed. See [http://dw.courts.wa.gov/index.cfm?fa=home.casesummary&casenumber=929751&searchtype=aNumber&crt\\_itl\\_nu=A08&filingDate=2016-04-07](http://dw.courts.wa.gov/index.cfm?fa=home.casesummary&casenumber=929751&searchtype=aNumber&crt_itl_nu=A08&filingDate=2016-04-07)

Please do not hesitate to contact me if any of you should experience any difficulty in opening any of the attachments.

Sincerely,

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