

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 Amicus Curiae Memoranda  
from the Washington Association of Prosecuting Attorneys

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## **I. IDENTITY OF RESPONDENT**

Heidi Charlene Fero, petitioner below, requests that this Court deny the State's untimely Motion for Discretionary Review ("Motion") and ignore the Amicus Curiae Memorandum ("Memorandum") filed by the Washington Association of Prosecuting Attorneys ("WAPA").

## **II. INTRODUCTION**

WAPA takes the extreme position that a reference hearing should be required in all cases involving newly discovered evidence even if, as here, the State did nothing to contest that evidence in its response to a personal restraint petition. It also argues, contrary to this Court's precedent, that petitions based on new expert evidence should be subject to higher scrutiny than claims based on other new evidence. Because neither of these positions is the law, the Court of Appeals correctly held that the medical community's understanding of the timing and causes of the symptoms once exclusively attributed to Shaken Baby Syndrome ("SBS"), commonly called the "triad" of symptoms, has changed since Ms. Fero's trial in 2003, and it granted her petition.

WAPA does not dispute that the science regarding the timing or causes of the triad has changed, and it virtually ignores the RAP 13.4(b) factors that govern when this Court accepts review. Instead, it asks this Court to accept review to announce a new rule regarding when new expert

evidence constitutes newly discovered evidence under RAP 16.4 and to “clarify” that a reference hearing is required before a court may grant relief under RAP 16.4. Memorandum at 1-2. WAPA’s arguments have nothing to do with the RAP 13.4 factors and are wrong on the merits.<sup>1</sup> The State’s Motion should be denied.

### III. BACKGROUND

Ms. Fero, who has been released from prison after serving her sentence, incorporates by reference the facts presented in her Personal Restraint Petition and in her Answer to the State’s Motion. This section describes the procedural posture as it relates to WAPA’s arguments.

Ms. Fero’s petition argued that numerous cases establish that there is a new scientific consensus regarding the timing and causes of the triad of symptoms once associated exclusively with SBS. Two supporting expert declarations attached to Ms. Fero’s petition explained how the new consensus applied to the facts of her case. This new consensus, Ms. Fero argued, is “newly discovered evidence” under RAP 16.4.

Ms. Fero’s petition did not challenge the validity of SBS as a diagnosis. Instead, her petition argued, and the cases and declarations

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<sup>1</sup> WAPA does not say whether the State’s Motion was timely. Perhaps that is because RAP 13.5A, which sets the 30-day deadline for filing motions for discretionary review of decisions deciding personal restraint petitions, was based on a proposal from WAPA. See 3 Karl B. Tegland, Wash. Prac., *Rules Practice* RAP 13.5A (8th ed. 2014); see also *In re Bonds*, 165 Wn.2d 135, 144 n.5, 196 P.3d 672 (2008) (recognizing that motions for discretionary review are due 30 days after the decision of the Court of Appeals).

establish, that two key lines of expert testimony that the State presented at Ms. Fero's trial are no longer valid. First, and contrary to the State's medical evidence at trial, the medical community now acknowledges multiple innocent causes of the triad. Op. Br. in Support of PRP at 30-31. Second, the medical community now recognizes that a child who presents with the triad can remain lucid for up to 72 hours after the event that caused the symptoms. *Id.* at 28-29. At the time of Ms. Fero's trial, the medical community thought children could remain lucid for no more than a few minutes. *Id.* See also *In re Fero*, 192 Wn. App. 138, 155, 367 P.3d 588 (2016).

On July 16, 2014, the Clerk for Division II directed the State, under RAP 16.9, to file a response to Ms. Fero's petition within 60 days. See Attachment A. RAP 16.9 states, in relevant part:

The response must answer the allegations in the petition. . . . Respondent should also identify in the response all material disputed questions of fact.

The State's response to Ms. Fero's petition, filed October 24, 2014, did not identify any material disputed questions of fact. See generally State Resp. to Fero PRP. Nor did it discuss the numerous cases Ms. Fero cited in support of her argument that the science had changed so fundamentally that she was entitled to a new trial under RAP 16.4.

Rather than arguing that Ms. Fero's experts were wrong or distinguishing the cases holding that the science had changed, the State argued that Ms. Fero's petition should be dismissed for two reasons. First, it argued that expert opinions can never be "newly discovered evidence" within the meaning of RAP 16.4. State Response at 13. Second, it argued that Ms. Fero waited too long after the science changed to bring her petition. *Id.* at 14-15.<sup>2</sup> The Court of Appeals addressed and rejected both of these arguments. *Fero*, 192 Wn. App. 160-61, 163-65.

#### IV. ARGUMENT

Just as the State's Motion failed to identify a legitimate issue under RAP 13.4(b), WAPA's Memorandum does not demonstrate that this Court should accept review.

**A. If the State believed Ms. Fero's experts were wrong, it should have said so in response to her petition.**

The State's response to Ms. Fero's petition did not identify any disagreement with the supporting experts or distinguish the numerous cases holding that the science regarding the timing and causes of the triad has fundamentally changed. Therefore, the Court of Appeals correctly recognized that Ms. Fero's "newly discovered evidence" was uncontested and granted her petition. *See Fero*, 192 Wn. App. at 162.

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<sup>2</sup> The State's Motion continues to advance these two arguments, at least as they relate to the new evidence regarding lucid intervals. WAPA's Memorandum, however, does not endorse either of them.

WAPA does not claim that the State met its obligation under RAP 16.9 to identify material disputed issues of fact in response to Ms. Fero's petition. In fact, WAPA ignores RAP 16.9 altogether. Instead, WAPA argues that the Court of Appeals should have ordered a reference hearing as a matter of course, but does not cite any decision mandating a reference hearing when newly discovered evidence is uncontested. *See* Memorandum at 9. WAPA's arguments rely on an inaccurate description of the process that governs review of personal restraint petitions. *See id.* at 2-3.

Petitioners have the initial burden of production under RAP 16.7, which requires petitioners to state the grounds for relief, including "the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations." RAP 16.7(a)(2). Ms. Fero met that burden of production when she stated the facts entitling her to relief (the changed scientific paradigm) and the evidence supporting those facts (the expert declarations and case law).

Next, the appellate court conducts a preliminary review under RAP 16.8.1, dismissing the petition if it is frivolous or requesting a response if not. RAP 16.8.1(b), (d). Here, the Clerk determined that Ms. Fero had perfected her petition and directed the State to respond under RAP 16.9. *See* Attachment A.

RAP 16.9(a) establishes the State's burden of production, requiring the State to "answer the allegations in the petition" and to "identify in the response all material disputed questions of fact." The State answered Ms. Fero's allegations by arguing that she waited too long to file and that expert evidence can never be "newly discovered evidence" under RAP 16.4. It did not, however, identify any material disputed questions of fact. *See generally* State Resp. to Fero PRP.

After reviewing Ms. Fero's petition, response, and reply, the Chief Judge referred the petition to a panel of judges, as required by RAP 16.11(b) when the petition "can be determined solely on the record." The panel held that Ms. Fero's expert evidence was uncontested and that the State's arguments lacked merit. *Fero*, 192 Wn. App. at 162.

None of the cases cited in WAPA's Memorandum hold that a reference hearing is required when the State fails to identify material disputed questions of fact. To the contrary, no reference hearing is necessary where the record is clear. *See 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."); *cf. State v. Scott*, 150 Wn. App. 281, 298, 207 P.3d 495 (2009) (remanding for a reference hearing when the State contested the reliability of a witness).

And, if the record allows the Court of Appeals to determine that the new evidence would probably change the result of trial, remand is not necessary. *See 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.”).

Here, the State’s response to Ms. Fero’s petition did not dispute any of the evidence that Ms. Fero proffered. Nor did the State offer any argument on whether the proffered evidence would probably change the result of trial. *See In re Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001) (establishing five factors to determine if new evidence warrants a new trial, including whether the evidence would probably change the result of the trial). Because the now-debunked medical expert evidence was the only evidence connecting Ms. Fero to the alleged assault, it was not necessary for the Court of Appeals to remand for a reference hearing to weigh Ms. Fero’s new evidence against the trial record. *Cf. State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995) (remanding because Court of Appeals could not determine, based on the existing record, whether a supporting affidavit would impact result of trial).

WAPA does not discuss the State’s RAP 16.9 obligation to identify material disputed questions of fact. Instead, it argues that the

State should not be required to submit expert declarations to rebut a petitioner's experts. Memorandum at 9. Submitting competing declarations is not the only way to identify material disputed questions of fact, and the Court of Appeals did not hold otherwise. *Fero*, 192 Wn. App. at 142, 162 (merely noting that the State did not contest Ms. Fero's declarations). At the very least, RAP 16.9 requires the State to give some hint in its response that it disagrees with the petitioner's alleged facts. Here, the State did not do even that. *See id.* at 162 ("The State does not question Dr. Barnes or Dr. Ophoven as experts or question the opinions they present.").

Whether it agreed with Ms. Fero's expert evidence at the time or it made a strategic decision to focus on other issues, the State's response to Ms. Fero's petition did not dispute the credibility or admissibility of the evidence Ms. Fero proffered or the effect the evidence would have on her trial. Therefore, the State did not meet its burden of production, and it was not error for the Court of Appeals to grant Ms. Fero's petition.

**B. This Court should decline WAPA's invitation to accept review to announce a new rule regarding expert evidence.**

WAPA asks this Court to accept review "to announce the rule" that expert evidence meets the RAP 16.4 "newly discovered evidence" standard only if it would render expert testimony offered at trial inadmissible. Because this new rule is not relevant to any of the

RAP 13.4(b) factors, is contrary to this Court's prior decisions, and would not apply here in any event, this Court should deny the State's Motion.

WAPA does not explain how the proposed new rule relates to this Court's acceptance of review under RAP 13.4(b). Moreover, the proposed rule is unnecessary because newly discovered expert evidence is already subject to scrutiny under RAP 16.4(c)(3). *See Brown*, 143 Wn.2d at 453 (establishing factors to determine if new evidence warrants a new trial); *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 applied this standard to the evidence supporting Ms. Fero's petition. *See Fero*, 192 Wn. App. at 153-63.

Even if this Court were to adopt WAPA's new rule, Ms. Fero's new evidence meets WAPA's proposed standard. Ms. Fero's new expert evidence established that the opinions the State's experts offered at trial—that children cannot remain lucid after an event that causes the triad and that the triad is caused only by violent shaking or major trauma—are no longer generally accepted in the scientific community. Thus, those opinions would be inadmissible. *See State v. Copeland*, 130 Wn.2d 244, 260-61, 920 P.2d 1304 (1996) (applying general acceptance standard provided in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), to scientific evidence). Instead, it is now generally accepted that children

can remain lucid for up to 72 hours after an event that causes the triad and that many things, including falls from a short height, can cause the triad.

The issue in this case is not whether a diagnosis of SBS is controversial, although it is and always has been. The issue is whether the medical testimony at Ms. Fero's trial regarding the timing and causes of a specific set of symptoms is still valid. The uncontested declarations supporting Ms. Fero's petition and numerous cases from other jurisdictions establish that it is not.

#### **V. CONCLUSION**

Ms. Fero followed the rules. She presented competent, admissible evidence that directly contradicted the only evidence the State offered at trial to connect Ms. Fero to the alleged crime. If the State disagreed with Ms. Fero's new evidence, it had an obligation to say so in response to her petition. Because it did not, the decision to grant relief without ordering a reference hearing does not conflict with any decisions of this Court or the Court of Appeals. Additionally, WAPA's request that this Court create a new rule regarding the consideration of expert evidence is not relevant to any of the RAP 13.4(b) factors. Therefore, the State's Motion should be denied.

DATED: July 1, 2016

**PERKINS COIE LLP**

By: 

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# **Attachment A**



# Washington State Court of Appeals

## Division Two

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David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

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July 16, 2014

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**CASE #: 46310-5-II**  
**Personal Restraint Petition of Heidi Charlene Fero**

Dear Counsel:

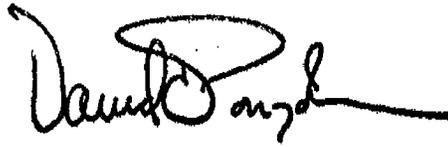
We have received the Personal Restraint Petition for post-conviction relief noted above. Since this petition is in proper form, we have filed it. RAP 16.3 et seq.

As RAP 16.9 requires, the respondent must, within 60 days of receiving this letter and the attached copy of the petition, file and serve a response to the petition on petitioner or petitioner's counsel and this court. If referring to the record of another proceeding answers the petition, include a copy of the relevant parts of that record. If a brief supports the petition, we have attached a copy, and the respondent's answering brief is likewise due within 60 days. RAP 16.10. If the respondent determines that the relief sought is appropriate, he should so stipulate. Petitioner may file a reply brief if done so within 30 days of receiving service of the respondent's brief. *See* RAP 16.10(a)(2).

This court has initially waived petitioner's filing fee based on his affidavit stating that he is indigent. Please include in the response any information you possess with regard to indigency and state whether you will contest petitioner's indigency claim.

When the time for filing briefs has expired, the Chief Judge will consider the petition and enter appropriate orders. **The court will defer any decisions on motions for appointment of counsel and/or motions for production of the record at public expense, if any, until we submit your petition to the Chief Judge for consideration. RAP 16.11(a). Any request limited solely to the status of the petition will be placed in the file without further action.** You will be notified if the court decides to call for additional briefs or portions of the record other than what the parties filed or decides that oral argument will be scheduled. Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Ponzoha". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David C. Ponzoha,  
Court Clerk

DCP: rgh.

Jul 01, 2016, 3:13 pm

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No. 92975-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Petitioner

v.

HEIDI CHARLENE FERRO, Respondent

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FROM THE COURT OF APPEALS, DIVISION II  
PERSONAL RESTRAINT PETITION NO. 46310-5-II

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**CERTIFICATE OF SERVICE**

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I, Teresa McLain, declare under penalty of perjury under the laws of the State of Washington, that on July 1, 2016, I caused to be served the following documents as indicated below:

- 1. Respondent Heidi Charlene Ferro's Answer to Amicus Curiae Memoranda from the Washington Association of Prosecuting Attorneys; and**
- 2. Certificate of Service**

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Dated this 1st day of July, 2016 at Seattle, Washington.

  
Teresa McLain

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Dear Clerk of the Court:

Attached to this email please find a PDF of Respondent Heidi Charlene Fero's Answer to Amicus Curiae Memoranda from the Washington Association of Prosecuting Attorneys for filing today, in the above captioned matter: No. 92975-1, State of Washington v. Heidi Charlene Fero. A Certificate of Service is also attached.

Thank you for your assistance.

**Teresa McLain | Perkins Coie LLP**

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