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NO. 92975-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

HEIDI CHARLENE FERO, Respondent

FROM THE COURT OF APPEALS, DIVISION II
In the Matter of the Personal Restraint Petition of Heidi Fero
NO. 46310-5

RESPONSE TO BRIEF OF AMICUS CURIAE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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TABLE OF CONTENTS

IDENTITY OF PETITIONER AND AMICUS CURIAE 1

ARGUMENT IN RESPONSE TO WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (WACDL) AS AMICUS CURIAE 1

I. The State complied with RAP 16.9(a) in its response to Fero's Personal Restraint Petition. 1

II. The State has not adopted a "new litigation strategy" in faulting the Court of Appeals for reversing without first holding a reference hearing. 17

III. The State is not asking this court to adopt a "new rule" of post-conviction procedure when it simply asks the court to follow the rules already in place. 19

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Dalton v. State, 130 Wn.App. 653, 124 P.3d 305 (2005) 20
Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 753 P.2d 517 (1988) 3
Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed. 1047 (1968) 16
In re A.V.D., 62 Wn.App. 562, 815 P.2d 277 (1991) 20
Leschi Improvement Council v. Highway Comm'n, 84 Wn.2d 271, 525 P.2d 774 (1974) 3
State v. Bennett, 180 Wn.App. 484, 322 P.3d 815 (2014) 20
State v. Fero, 125 Wn.App. 84, 104 P.3d 49 (2005) 9
State v. Macon, 128 Wn.2d 784, 911 P.2d 1004 (2005) 4, 19
State v. West, 139 Wn.2d 37, 983 P.2d 617 (1999) 4, 19
State v. Williams, 96 Wn.2d 215, 634 P.3d 868 (1981) 2, 3, 5, 18, 19

Other Authorities

Webster's Third New Int'l Dictionary 813 (1976) 2

Rules

CR 56(e) 3
RAP 12.1 18
RAP 16.11 ..... 17, 19
RAP 16.7 12
RAP 16.9(a) 1, 6, 16

IDENTITY OF PETITIONER AND AMICUS CURIAE

The State of Washington is the petitioner in the matter before the Court, captioned *In the Matter of the Personal Restraint Petition of Heidi Fero*, No. 92975-1. The Washington Association of Criminal Defense Lawyers appears in this case as amicus curiae.

ARGUMENT IN RESPONSE TO WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (WACDL) AS AMICUS CURIAE

I. The State complied with RAP 16.9(a) in its response to Fero's Personal Restraint Petition.

WACDL repeats the claim that the State failed to contest the "facts" set forth by Fero in her personal restraint petition. The argument, at its root, is that the State failed to comply with RAP 16.9(a) in identifying "material disputed questions of fact" by failing to hire its own experts (beyond the six experts it already called at *the trial*) and procuring new declarations re-affirming the soundness of the evidence presented to the jury. Thus, the argument goes, the Court of Appeals was free to make credibility determinations it was not otherwise empowered to make and find the un-cross-examined opinions of Fero's newly retained witnesses *valid* without the benefit of adversarial testing at a reference hearing. Stated another way, WACDL argues the State procedurally defaulted in its defense of this personal restraint petition by arguing that Fero was not entitled to a new trial *even if* her new witness opinions were valid because

she still had not made the showing required for a new trial predicated on newly discovered evidence under *State v. Williams*, 96 Wn.2d 215, 634 P.3d 868 (1981). WACDL characterizes the State as having chosen to defend this case solely on the "time-bar," ignoring that the State did, in fact, argue the merits of the petition by arguing that Fero had not met the *Williams* factors and thus was not entitled to a new trial. The fact that failure to meet the *Williams* factors *also* rendered Fero's petition time-barred does not mean the State did not defend this case on the merits. WACDL's position is a mischaracterization of the rules and conventions governing personal restraint petitions.

First, the State is not required to hire new experts—at a cost of tens of thousands of dollars to the taxpayers of Clark County—*before* a reference hearing has been ordered. Such a rule would effectively require the State to retry its case via warring declarations in response to any petition challenging its scientific evidence and would render the institutional cost of prosecuting cases involving medical or scientific evidence too high.

Second, Fero did not set forth facts in her petition. She set forth opinions. Opinions are not facts. "A fact is an event, an occurrence, or something that exists in reality. *Webster's Third New Int'l Dictionary* 813 (1976). It is what took place, an act, an incident, a reality as distinguished

from supposition or opinion. 35 C.J.S. Fact 489 (1960)." *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). " ' "A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its *legal effect*." ' " *Williams*, *supra*, at 221, quoting *Leschi Improvement Council v. Highway Comm'n*, 84 Wn.2d 271, 283, 525 P.2d 774 (1974). (Emphasis added). In the summary judgment context, "the 'facts' required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts and conclusions are insufficient." *Grimwood, supra,* at 359.

Some personal restraint petitions are based on factual claims, and some are based solely on legal claims. An example of the latter would be a petition claiming that an instruction given at trial was an incorrect statement of the law. Neither the petitioner nor the State sets forth any "facts" in litigating such a petition. Rather, they set forth legal argument. An example of the former would be a petition claiming that a witness lied during his/her testimony at trial, accompanied by a declaration from the witness. For example, an eyewitness to a crime who executes a declaration recanting his trial testimony and declaring that he never witnessed the crime. A petition such as this sets forth a factual claim which, just as in Fero's case, the State is in *no position* to either admit or deny without

adversarial testing through discovery and cross-examination.[1] And if the State fails to deny something it is simply in no position to deny, the reviewing court should not find the State "failed to contest" the petition. The reviewing court is, however, free to deny the petition without need for adversarial testing if the new claim, *even if true*, would not change the result of the trial or is not material.

Third, to the extent it can be said that Fero actually set forth "facts" in her petition, the State did, in fact, identify all material disputed questions of fact. It is true that the State did not recount each of the opinions offered by Fero's witnesses and say that it either "admitted" or "denied" the *validity* of those opinions. The lawyer for the State was in absolutely no position to do such a thing. There had been no discovery or reference hearing. The deputy prosecutor is not a scientist or doctor. The only way the State could have offered that sort of response would have been to hire an expert.[2] Both WACDL and the Court of Appeals seem to

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[1] This is why a witness recantation, if it is material and would probably change the result at trial, must be subjected to adversarial testing at a reference hearing. See *State v. West*, 139 Wn.2d 37, 983 P.2d 617 (1999); *State v. Macon*, 128 Wn.2d 784, 911 P.2d 1004 (2005).

[2]WACDL attempts to deny that it is arguing for an incredibly onerous rule that would require the State to hire new experts, and construct a new record, in response to any petition which challenges the validity of the scientific evidence offered at trial. But that is the only reasonable outcome of WACDL's argument. WACDL's suggestion that the State could have merely attached articles to its initial response confirming the continued validity of abusive head trauma as a diagnosis ignores that had the State done that, the Court of Appeals still would not have been free to weigh those articles against Fero's

labor under the assumption that the State was required to respond to this petition in much the same way that a civil litigant would be required to respond to a civil complaint. But level of formality is not required by the rules. To examine the tired assertion that the State failed to contest those things that Fero characterizes as "facts," it is necessary to set forth exactly what Fero's retained witnesses said in their declarations and what the State said and relied upon in response.

The settled facts in the matter of the *State of Washington v. Heidi Fero* are found in the trial record which was transferred from the direct appeal to the personal restraint petition by the Court of Appeals on its own motion on July 18, 2014. The full record includes the testimony admitted at trial and the evidence admitted at trial, which includes the photographs of Brynn that are attached to the State's Supplemental Brief of Petitioner filed in this Court. In the personal restraint context, a trial has already occurred and a conviction obtained. Unless specifically disavowed by the State, it is obvious that any facts contained within the trial record which contradict the "facts" (or opinions) set forth by a personal restraint petitioner should be considered a material dispute of the facts. It should be unnecessary for the State to go through each fact contained within the settled record one by one and reaffirm its belief in those facts in order to

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declarations and grant the petition. The Court would still have been required to order a reference hearing—assuming all five of the *Williams* factors were satisfied.

be deemed to have "contested" the claims set forth by the petitioner. It is enough that the State set forth settled facts from the record in its response to the petition that necessarily undercut both the validity and relevance of the opinions of Fero's witnesses. Because the State did not disavow any fact from the trial record, and because those facts, as set forth in the State's response, thoroughly contradict the opinions set forth by Fero's newly retained witnesses, the State did, in fact, identify all material disputed questions of fact as required by RAP 16.9(a).

The settled facts from the record are set forth in the State's original Response to Personal Restraint Petition. They include, but are not limited to, the following: 1) Brynn Ackley was beaten, and the beating took place at Heidi Fero's apartment. (This is according to Fero herself, both in her statements to the police and in her trial testimony, as well as all of the evidence admitted at trial); 2) Heidi Fero was the only adult at the apartment when the beating occurred; 3) The beating was not committed by Brynn's four year-old brother, by Fero's five year-old daughter, or by Fero's one year-old son; 4) There were no intruders in the apartment who could have committed the beating; and 5) Heidi Fero repeatedly lied to the police about what occurred at the apartment. Following the presentation of these facts to the jury, the jury concluded that Heidi Fero,

not Brynn's four year-old brother, Kaed, committed the grave beating of Brynn Ackley that occurred on January 7, 2002 in Heidi Fero's home.

The State demonstrated the aforementioned facts first, by putting them into the record at trial, and, second, by outlining them in the Response to Personal Restraint Petition. In its Response the State noted that Brynn arrived at Heidi Fero's apartment that day with no bruising and normally functioning legs. She left the apartment bloodied and unconscious in an ambulance, seizing during the ride, with bruising that was rapidly darkening before the eyes of the paramedics on the ride to the hospital and with a significantly displaced spiral fracture of her tibia. March 11, 2003 VRP, pgs. 22-23, 29, 39, 72, 78, 87. She did not have this fracture before arriving at Fero's and the fracture was recently inflicted. The fracture would have made Brynn's leg too painful to walk on and the mechanism of infliction was a violent twisting force. A four year-old child could not have inflicted this injury. March 13, 2003 VRP at pgs. 6-17. Fero reported both to the police and to the 911 dispatcher that Brynn was beaten by her four year-old brother, Kaed, while they were at her home and in her care that day. March 11, 2003 VRP at 40-102, March 17, 2003 VRP at 98. Specifically, Fero reported to paramedic Jeff Tone that Kaed had picked Brynn up and swung her against the wall like a baseball bat. March 11, 2003 VRP at pgs. 40, 42. Kaed, however, could not lift Brynn.

March 12, 2003 VRP at 43. In the Response to Personal Restraint Petition the State outlined the testimony of five of the State's expert witnesses establishing that Brynn's beating caused her brain injury, and outlined some of the many false statements Fero made throughout the pre-trial proceedings and the trial itself. See Response to Personal Restraint Petition.

Some examples in the record of Fero's contradictory statements include her denial to Detective Norton that she had given Brynn a bath or changed her diaper, or even taken her upstairs at all that night, despite both admitting to Brynn's father and testifying at trial that she had given Brynn a bath.[3] March 11, 2003 VRP at 135, March 12, 2003 VRP at 193, March 17, 2003 VRP at 76-77. (At trial Fero claimed she saw bruises on Brynn's abdomen when she gave her a bath—something she never told Brynn's father when she called him that night. March 11, 2003 VRP at 120, March 17, 2003 VRP at 76.) She claimed in a letter sent by her lawyer to the prosecutor that Brynn was limping when she arrived at her

[3] The State's theory of the case, which it maintains, is that the exhausted, overwrought Fero became frustrated with Brynn during the bath and assaulted her, fracturing Brynn's leg. Brynn was likely in such distress after Fero violently twisted her leg and fractured it that Brynn's ensuing crying provoked Fero to further violently assault Brynn, resulting in the abusive head trauma as well as the extreme bruising depicted in the photographs of Brynn in the hospital. The bruise on Brynn's vagina, coupled with the vaginal laceration, suggest that Brynn was kicked—hard—in her vaginal area without her diaper on. Because this incident revolved around the bath, this is why Fero lied to Detective Norton, telling him she had not given Brynn a bath, taken her upstairs, or even changed her diaper that night.

house, despite telling the 911 dispatcher that Brynn had been running around while being chased by her brother earlier in the evening and then testifying at trial that Brynn didn't walk *at all* during the approximately seven hours she was in Fero's care. March 12, 2003 VRP at 200, March 17, 2003 VRP at 75, 98. Fero was obviously trying to tailor her statements and testimony to the evidence as she was learning about it through discovery.

The State showed that this case is not a stereotypical "shaken baby" case in which a pre-verbal infant presents with a constellation of symptoms but there is no outward evidence of assault so the doctors have to work their way backward to determine what happened to the child. This was no medical mystery. Brynn had been severely beaten and that was plain for anyone to see. Moreover, Brynn's babysitter, Heidi Fero, told the police, paramedics, and 911 that Brynn had been beaten—albeit by someone else. See citations to record, *Supra.* See also Response to Personal Restraint Petition at pages 1-8, and *State v. Fero*, 125 Wn.App. 84, 86-94. 104 P.3d 49 (2005).

Fero attached two declarations to her personal restraint petition. These declarations contain opinions offered by retained witnesses who claim to be experts. These opinions can be summed up as follows: The declarants are a radiologist (Barnes) and a pathologist and former medical

examiner (Ophoven). Each declarant has a personally held opinion that brain injuries in children can be caused by natural causes (such as infections), accidental causes (such as a fall), and non-accidental causes (like assault and abuse). Each declarant states that in addition to holding this opinion personally, some other people hold this opinion as well. Each declarant calls the alleged natural causes of brain trauma "mimics" of shaken baby syndrome. Yet they acknowledge assault as a possible cause of brain trauma. In the opinion of these declarants, any testimony which would state that a child cannot experience a lucid interval following a brain injury is an invalid opinion that is not generally accepted within the scientific community. Considering that Brynn's doctors made no such claim, this opinion—even if valid—has no relevance to the State's case against Heidi Fero. The State's doctors opined that *Brynn Ackley* did not experience a lucid interval, not that lucid intervals can never occur or are not a recognized phenomenon.

Patrick Barnes offered case-specific speculation that Brynn Ackley may have incurred her grave injuries naturally (a claim belied by the medical evidence, by the photographic evidence, by the circumstantial evidence, and by Fero's own statements and testimony). He opined that Brynn may have experienced a lucid interval that would back-date the event that caused her injuries—which would serve to expand the universe

of suspects and/or exclude Fero as the perpetrator. This theory, however, is belied by Fero's own pre-trial statements and testimony that Brynn was beaten in the apartment that night as well as all of the other circumstantial evidence in the case. He opined that she may have received her numerous other injuries, such as the bruising, from CPR, which the doctors who treated Brynn specifically ruled out and which would not explain the spiral tibia fracture. To support his case-specific speculation, Barnes criticized the medical examinations of Brynn that were done by her treating physicians and declares he would have done things differently. He further states had he been the treating physician he would have drawn different conclusion from the CT scans—*at that time*—than those drawn by Brynn's treating physicians. Thus, his opinion merely impeaches the conduct and opinions of the treating physicians and does not set forth "newly discovered evidence."

Barnes also opines that bruises and fractures cannot be dated, but does not state this opinion is *newly discovered* within the medical community, or that this opinion is shared by others or generally accepted within the scientific community. Barnes offers the unremarkable opinion that edema (swelling) can be secondary to other causes such as infection or lack of oxygen, but does not state that this opinion is newly discovered. Barnes opines that a child of Brynn's size could not have been shaken

with enough force to cause her injuries, and that if she had been shaken there would have been "grip marks" to show it. Barnes doesn't say that this argument is *newly discovered* or that this (wholly obvious) argument was unavailable to Fero at the time of her trial. Indeed, Fero retained a biomechanical expert whom she ultimately did not call at trial (presumably because his opinion would have contradicted the very argument now made by Barnes). Most importantly, this slipshod opinion contradicts the position Fero took at trial, which was that Brynn *was* violently beaten and shaken—by her four year-old brother, Kaed. Barnes opines that Janice Ophoven "has been active in the shaken baby field," and is therefore credible and her opinion should be given "considerable weight." Barnes Declaration, p. 31. But this opinion is totally inadmissible and cannot be considered under RAP 16.7. Barnes acknowledges that there was "earlier evidence" pertaining to lucid interval, but states that the "first systemic" evaluation of lucid intervals, of which he is aware, occurred in 2005—some nine years before Fero filed this petition and one year before Fero went into custody in this case (and during which time Fero was represented by counsel (John Hays of Longview)).

Finally, nowhere does Barnes specifically state what material he reviewed in preparation of his declaration. He merely states he reviewed the "materials provided" to him by Fero's attorneys but does not state

what those materials included. As such, his opinions are somewhat useless to the reader. What we certainly do know is that he did *not* review the photographs of Brynn taken in the hospital, because if he had he could not have speculated that those bruises were "normal toddler bruises resulting from normal play" and still expect to be taken seriously as a witness. We also know he did not review Fero's trial testimony, because his claim that the bruises depicted on Brynn when she was taken to the hospital could have been sustained over "a period of days or weeks" is contradicted by Fero's testimony that she noticed nothing unusual about Brynn's appearance when she began babysitting her on the day of the assault. See Barnes Declaration, page 31, March 17, 2003 RP Vol. at p. 75.

The facts set forth in the Response to Personal Restraint Petition, as well as the facts that were placed into the trial record via testimony and exhibits, contradict any opinion offered by Barnes to the effect that Brynn's injuries were the result of natural or accidental causes, or that her injuries were inflicted on some date or time *before* she arrived at Heidi Fero's apartment on January 7, 2002. Thus, if the opinions of Barnes can even be characterized as "facts," a proposition with which the State does not agree, the State identified the material disputed questions of fact.

Janice Ophoven similarly based her case-specific opinions on assumptions that are contradicted by the physical, circumstantial, medical,

and testimonial evidence of the case. Ophoven's declaration focuses mostly on lucid interval and Fero's attempt to back-date this assault so that she can change her theory of the case from "four year-old Kaed did it" to "Brynn's mom or dad did it."(See e.g. paragraph 24 of Ophoven's declaration.) Ophoven opines that Brynn suffered a "traumatic injury of uncertain origin" and that it is "impossible to tell when that injury occurred," completely ignoring the fact that Heidi Fero both testified and told the police, paramedics, and 911 that Brynn had been recently beaten at the Fero apartment by her four year-old brother. Ophoven opines that Brynn could have sustained her injuries 48 to 72 hours before 911 was called, and was likely injured at least twelve hours before 911 was called. This *opinion* is contradicted by the evidence that Brynn arrived at Fero's house with two intact legs, by Fero's testimony that there was nothing unusual about Brynn's appearance when she began babysitting Brynn that day, by Fero's statements and testimony that Brynn was assaulted by her own brother sometime during that evening, by the photographs that depicted Brynn's injuries, and by the testimony of the paramedics that Brynn's bruises were darkening during the ambulance ride to the hospital—all facts which were set forth in the Response to Personal Restraint Petition and which are contained within the record.

Ophoven, like Barnes, opines that Brynn could not have been shaken because there would be grip marks—but this argument is not newly discovered and was available at the time of trial. At paragraph 32 of her declaration Ophoven criticizes the care given to Brynn by the physicians who actually treated her, and, like Barnes, says she would have done things differently (to include ignoring the history given by the care provider—Fero—who said Brynn was recently assaulted). But this is merely an impeaching opinion and is not *newly discovered* evidence. At paragraph 33, Ophoven purports to outline "findings" in the case that are relevant to her forensic analysis, but the facts she sets forth as "findings" are not findings at all—they are the self-serving statements of Heidi Fero that were presented to and rejected by the jury. These non-existent "findings" include Fero's claim that Brynn had trouble walking when she arrived at Fero's apartment on January 7, 2002, that several bruises "were noted at bath time," and that Kaed may have injured Brynn while Fero left them unsupervised. These facts come only from Heidi Fero and were necessarily rejected by the jury by their verdict. They are not settled facts from the record. They are, in fact, flatly contradicted by the record. Moreover, they are contradicted by the factual recitation put forth by the State in the Response to Personal Restraint Petition. Thus, they were identified as disputed facts. With respect to Ophoven's assertion that

Brynn could have been assaulted by Kaed, that claim was made at trial and roundly rejected by the jury. It cannot form the basis of a claim of newly discovered evidence. Finally, after criticizing the treating physicians for not ferreting out natural and accidental causes of Brynn's injuries in spite of the care-giver reporting that Brynn had been beaten, Ophoven opines that Brynn suffered "accidental" trauma. (See Declaration at paragraphs 34 and 35). This "opinion," which is nothing more than speculation, is, again, not a *fact.*

Even if the opinions offered by Barnes and Ophoven, which are nothing more than speculation, could be considered "facts" for purposes of RAP 16.9(a), the State did, in fact, dispute them when it set forth actual facts from the record which necessarily contradict every alternative explanation for what happened to Brynn Ackley on January 7, 2002. Assertions that the State "failed to contest" Fero's declarations misunderstand the State's burden in responding to personal restraint petitions. Moreover, in granting a new trial the Court of Appeals overlooked the general rule that "a defendant's testimony at a former trial is admissible in evidence against him in later proceedings." *Harrison v. United States*, 392 U.S. 219, 222, 88 S.Ct. 2008, 20 L.Ed. 1047 (1968). It is Fero, not the State, who has adopted a new litigation strategy in this case. Fero locked in her theory of the case at her trial: Brynn was beaten

by her four year-old brother while she was at Fero's home and in Fero's care. Indeed, it would be unsurprising if Fero has no intention of raising this claim of scientific "paradigm shift" at a new trial, arguing that Brynn's injuries were sustained accidentally, as the result of natural causes, or as the result of a beating that took place up to three days before Brynn arrived at her apartment. Rather, this petition may be merely a gateway for Fero to again argue that Kaed did it. Except Kaed isn't four years old anymore. He is a grown man who will appear to the jury as someone more than capable of nearly killing a fifteen month-old baby, because the jury will inescapably view him as he is now, not as he was then. This is incredibly unfair to the people of the State of Washington who are the plaintiffs in this matter.

II. The State has not adopted a "new litigation strategy" in faulting the Court of Appeals for reversing without first holding a reference hearing.

The State is not required to ask the court to order a reference hearing in the face of a time-barred petition in which the petitioner has not satisfied the requirements for obtaining a new trial based on newly discovered evidence. The court of appeals is both empowered and *required* to hold a reference hearing, whether a party has asked for one or not, if the petition cannot be determined solely on the record. RAP 16.11. Because the State adhered to the facts in the record and did not disavow

any fact necessarily relied upon by the jury in reaching its verdict, and because those facts fully contradict the opinions proffered by Fero's retained witnesses, the court was required to hold a reference hearing to determine the *validity* of the new opinions if it determined that the opinions, if valid, satisfied the *Williams* factors—a point with which the State disagrees.

Further, WACDL either misconstrues or misrepresents the record when it claims the State did not ask for a reference hearing before this case had been decided by the Court of Appeals. The State did, in fact, ask the Court of Appeals to order a reference hearing if the Court found that a new trial might be warranted if the newly obtained opinions were valid. The State did this at the oral argument that was held on October 26, 2015 at 9:00 a.m. at Division II of the Court of Appeals. At four points during the State's argument (10:22, 12:01, 17:11 and 24:27) the State suggested to the Court that if it was disinclined to simply deny the personal restraint petition based on Fero's failure to show prejudice, it should, at a minimum, remand the matter for a reference hearing to determine whether the new opinions offered by Fero are credible. (See Appendix, recording of oral argument). Further, the State cannot be said to have raised a new issue for the first time at oral argument, which is prohibited by RAP 12.1,

because alerting the Court to its duty to hold a reference hearing under RAP 16.11 is not raising a "new issue."

The duty to hold a reference hearing to determine disputed facts is well-settled. Cases involving witness recantation saliently demonstrate this principle. See *State v. West*, 139 Wn.2d 37, 983 P.2d 617 (1999); *State v. Macon*, 128 Wn.2d 784, 911 P.2d 1004 (2005). The State did not fail to timely request a reference hearing as an alternative in this case.

III. The State is not asking this court to adopt a "new rule" of post-conviction procedure when it simply asks the court to follow the rules already in place.

WACDL argues that the State is asking for a "new rule" when it argues that whereas an appellate court is free to deny a personal restraint petition based on newly discovered evidence if it finds that any one of the *Williams* factors is not satisfied, it is not free to grant a personal restraint petition based on newly discovered evidence (in this case, new medical opinions applied to facts known at the time of trial) where doing so would require the appellate court to weigh evidence or find the new scientific opinions *valid.* WACDL's argument fails.

It is well-settled that an appellate court is not permitted to weigh evidence (in this case weighing Fero's newly obtained medical opinions against the opinions of the six experts who testified at her trial) or make credibility determinations. *Dalton v. State,* 130 Wn.App. 653, 656, 124

P.3d 305 (2005); *State v. Bennett,* 180 Wn.App. 484, 489, 322 P.3d 815 (2014); *In re A.V.D.*, 62 Wn.App. 562, 568, 815 P.2d 277 (1991). Those functions lie exclusively with the fact finder. In the personal restraint context, the fact finder would be a judge of the Superior Court at a reference hearing. The need for a reference hearing before granting Fero a new trial is particularly important where the opinions of Fero's newly retained witnesses are entirely speculative and were clearly made without a complete review of the record.

The State is not asking for a "new rule." Rather, the State is asking to Court to employ a logical application of the existing rules that govern how evidence is weighed and credibility is determined.

CONCLUSION

WACDL's arguments are unpersuasive and this Court should reverse the decision of the Court of Appeals.

DATED this 23rd day of May, 2017.

Respectfully submitted:

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