

No. 92975-1

No. 46310-5-II

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

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

Reply Brief in Support of Personal Restraint Petition

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The State's response to Ms. Fero's personal restraint petition declined to address the credible and voluminous evidence that Ms. Fero offered concerning the profound shift in the science regarding shaken baby syndrome. Instead of challenging the credibility of Ms. Fero's new experts or questioning the science behind their declarations, the State's response relied on procedural arguments that misstate the timing and substance of Ms. Fero's newly discovered evidence. The new evidence complies with RAP 16.4 and RCW 10.73.100, and Ms. Fero respectfully requests this Court grant the petition or remand to the trial court for a reference hearing.

I. ARGUMENT

A. **The State has conceded the merits of Ms. Fero's petition.**

Ms. Fero's opening brief and supporting declarations set out the voluminous and credible evidence that the medical community has abandoned the two tenants on which Ms. Fero was convicted. First, the medical community now agrees that a child can remain lucid for up to seventy-two hours after a traumatic head injury. This contradicts the State's evidence at trial, which was that because Brynn Ackley lost consciousness while with Ms. Fero, Brynn's injury must have occurred while she was with Ms. Fero. Second, the medical community now accepts that there are causes, including falls from a relatively low height

and a variety of medical conditions, that can lead to head injuries like Brynn's. This contradicts the State's evidence at trial, which was that Brynn's injuries could have only been caused by major trauma (like being ejected from a car in a crash) or severe shaking.

The State accepts that there has been a profound change in the medical paradigm concerning shaken baby syndrome, because its response did not offer a single argument or piece of evidence in support of the old paradigm. Indeed, the State's response did not discuss the merits of Ms. Fero's evidence at all. Presumably, the State could not find any expert, even among the experts the State used at trial, to stand up for the old paradigm regarding shaken baby syndrome.

The State also declined to question the credibility of Dr. Barnes as an expert in the field of pediatric neuroradiology or Dr. Ophoven as an expert in the field of forensic pathology. In light of their considerable expertise, experience, and knowledge, this is not surprising. Dr. Barnes and Dr. Ophoven are nationally recognized experts in their respective fields. Because the State did not offer even a hint of an argument against their credibility or their opinions, it has lost the opportunity to do so.¹

¹ Arguments raised for the first time after briefing are waived. *State v. Nelson*, 18 Wn. App. 161, 164, 588 P.2d 984, 986 (1977) ("In any event, the argument is waived inasmuch as it was raised for the first time during oral argument.").

Critically, the State also declined to rebut Ms. Fero's argument that she could not have been convicted without the medical testimony from the State's experts. The State does not claim, even for argument's sake, that Ms. Fero's allegedly inconsistent statements or her behavior on the night Brynn lost consciousness are sufficient to sustain her conviction. Apparently, the State concedes that Ms. Fero would not have been convicted without the now-refuted medical testimony the State offered at trial.

Instead of contesting the merits of Ms. Fero's petition, the State argues, erroneously, that evidence of the recent shift in the medical paradigm is not "new evidence" under RAP 16.4 and that Ms. Fero did not exercise reasonable diligence in discovering it. Before addressing these arguments, it is worth considering their implications. In the State's view, it is appropriate to uphold a conviction that rests entirely on discredited medical testimony on the grounds either that: (1) evidence regarding shifts in scientific paradigms is inadmissible; or (2) an incarcerated layperson with no medical training should have brought forward complicated evidence regarding pediatric neurology and forensic pathology sooner. As discussed below and in turn, each of these arguments should be rejected.

B. Ms. Fero's newly discovered evidence is, in fact, new, and Ms. Fero exercised reasonable diligence in discovering it.

1. Expert evidence regarding a paradigm shift in the medical community is new and material evidence under RAP 16.4.

Under RAP 16.4, five factors determine if evidence constitutes

“newly discovered evidence” for purposes of post-judgment relief:

(1) The evidence must be such that the results will probably change if a new trial were granted;

(2) The evidence must have been discovered since the trial;

(3) The evidence could not have been discovered before the trial by exercising due diligence;

(4) The evidence must be material and admissible; and

(5) The evidence cannot be merely cumulative or impeaching.

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

The State apparently concedes that the evidence presented in the petition satisfies three of the factors under RAP 16.4. First, as explained above, the State's response does not address Ms. Fero's argument that the new medical evidence would change the result of trial, conceding that Ms. Fero has established the first factor. Second, the State does not argue that Ms. Fero could have discovered the evidence before trial; indeed, it

acknowledges that the paradigm shift, which Dr. Barnes and Dr. Ophoven describe in their declarations, is based on studies published after Ms. Fero's trial. Finally, the State's response does not argue that the evidence is merely cumulative or impeaching, conceding that Ms. Fero has established the fifth factor.

Instead, the State relies on a flawed analysis of this Court's case law to argue that Ms. Fero has not presented new evidence (implying she fails to satisfy the second factor) and that the evidence is not material (the fourth factor). The sections below explain why Ms. Fero's evidence regarding the complete and fundamental change in the medical paradigm regarding shaken baby syndrome is, in fact, new and material evidence.

Unable to dispute that the evidence of Dr. Barnes and Dr. Ophoven regarding the paradigm shift in the medical community would lead to a different result at trial, the State argues instead that there is a categorical bar against offering new medical or scientific evidence in personal restraint petitions. The State is mistaken.

There is no categorical bar against presenting claims based on new scientific developments in a request for post-judgment relief. *See, e.g., State v. Avery*, 345 Wis.2d 407, 826 N.W.2d 60 (2013) (new digital photogrammetry technology able to enhance videotape of robbery satisfies the test for newly discovered evidence, although court found that

defendant did not demonstrate reasonable probability it would change trial result); *Ex Parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012) (holding new developments in science of biomechanics cast doubt on trial evidence that infant died of shaken baby syndrome and require new trial); *Bunch v. State*, 964 N.E.2d 274 (Ind. Ct. App. 2012) (finding advances in field of fire victim toxicology analysis, not recognized as a component of arson analysis until at least 2001, five years after the petitioner's conviction of felony murder, constitutes newly discovered evidence warranting new trial); *State v. Behn*, 868 A.2d 329, 343 (N.J. Super. Ct. App. Div. 2005) (finding new scientific evidence of comparative bullet lead analysis, unavailable at the time of the defendant's trial, constitutes newly discovered evidence). These examples show that courts allow evidence of scientific or medical developments, and expert testimony based on those developments, in post-conviction proceedings when the evidence is based on discoveries made after trial.

The State's arguments to the contrary misconstrue this Court's jurisprudence. The State relies on this Court's decisions in *Harper* and *Evans*; both are inapposite. In those cases, the defendants asked the court to consider new expert opinions based on evidence available at the time of trial. Ms. Fero has presented evidence that is material and truly new—the trial experts could not have formed opinions based on evidence of the

lucid period or mimics of the symptoms of shaken baby syndrome because such evidence did not exist in 2003.

In *State v. Harper*, 64 Wn. App. 283, 823 P.2d 1137 (1992), the defendant argued that an expert's opinion regarding his diminished capacity constituted newly discovered evidence warranting vacation of his conviction for attempted premeditated murder. The post-conviction expert's affidavit stated that the defendant suffered a mental disorder that precluded a premeditative intent to kill. *Id.* at 290-91. The expert formed this opinion by examining the defendant and materials in the defendant's file, which was the same evidence relied upon by the trial expert. *Id.* at 290, 294. The *Harper* court summed up the petitioner's situation: "the retention of new counsel, who retains a new expert, *who reviews the same evidence*, and presents a new opinion." *Id.* (emphasis added). *See also State v. Evans*, 45 Wn. App. 611, 614-15, 726 P.2d 1009 (1986) ("This strikes us as a classic case: the defendant loses, then hires a new lawyer, who hires a new expert, *who examines the same evidence*, and presents a new opinion.") (emphasis added). Under those facts, the new expert's opinion does not constitute newly discovered evidence for purposes of post-judgment relief. *Harper*, 64 Wn. App. at 294.

In *Evans*, the defendant, convicted of arson, petitioned the court for a new trial based on a new expert's testimony that the fire was

accidental. 45 Wn. App. at 612-13. The court found it “plain” that the new expert simply “did a more thorough job of evaluating the physical evidence” examined by the defendant’s trial expert to develop a more definitive opinion that the fire was accidental. *Id.* at 614. The court concluded that the new expert’s stronger opinion did not demonstrate that the result of a trial would probably be different. *Id.*

The *Evans* concurrence demonstrates the important distinction between a new expert relying on evidence available at trial and a new expert relying on new evidence. Judge Reed’s special concurrence, which the State quoted at length in its response to Ms. Fero’s petition, explains that the key inquiry is whether the petitioner alleges that his or her trial experts overlooked something:

Before affirming the grant of a new trial because the defense expert presented at trial *overlooked or thought unimportant a fact or facts now deemed pertinent by an expert who did not testify*, we must ask whether all of those defendants who could now unearth a new expert who finds “new facts”—which if believed by the same jury might cause them to acquit—were denied a fair trial, *i.e.*, failed to receive substantial justice. Surely we have to answer in the negative, or finality goes by the boards and the system fails.

Id. at 617 (Reed, J., concurring specially) (emphasis added). That is, if the only evidence presented in a motion or petition for post-judgment relief is

based on facts available at the time of trial, but overlooked or deemed unimportant, relief is not warranted. *Id.* But where an expert will provide new testimony based on evidence unavailable at trial, justice requires a new trial. *See id.* at 620 (Alexander, J., dissenting) (“The proffered evidence that was to be presented by the new defense witness is not, as the majority indicates, simply a new opinion based on an examination of trial evidence.”). *See also Bunch*, 964 N.E.2d at 288-89 (finding new scientific analysis applied to factual evidence available at the time of trial constitutes newly discovered evidence). Ms. Fero’s evidence falls into the latter category. Her petition does not allege that her medical experts (had she had any) overlooked evidence that a child frequently has a lucid interval after a traumatic head injury or that there are multiple causes of the symptoms typically attributed to shaken baby syndrome. Indeed, the crux of her petition is that such evidence was not available until after her trial. This is the very sort of new and material evidence that justice requires, and RAP 16.4 allows, to be considered in post-conviction proceedings.

Therefore, State’s reliance on *Harper* and *Evans* is misguided. Like the defendants in *Harper* and *Evans*, Ms. Fero has new counsel and new experts, but the similarities end there. The new experts in those cases provided opinions based on physical evidence that was available to the

respective trial experts. *Harper*, 64 Wn. App. at 294; *Evans*, 45 Wn. App. at 614-15. But, the experts in those cases simply applied the same paradigms as had existed at trial and came to a different result. *See Harper*, 64 Wn. App. at 293-94; *Evans*, 45 Wn. App. at 614 (noting the new expert merely performed “a more thorough” evaluation). In contrast, Dr. Barnes and Dr. Ophoven have formed opinions based on evidence that was not available at the time of Ms. Fero’s trial because it did not exist in 2003. As explained in their declarations attached to Ms. Fero’s petition, the medical community’s understanding of the symptoms and causes of pediatric head injuries has evolved since 2003. *See also Del Prete v. Thompson*, 10 F. Supp. 3d 907, 954 (N.D. Ill 2014) (detailing experts’ testimony on the symptoms previously attributed only to intentional shaking and finding “plenty” of new evidence, “a good deal of [which] involves the medical approach to claimed shaken baby cases”).

Ms. Fero’s petition presents new and material evidence that was not available at the time of her trial. This evidence satisfies the elements of RAP 16.4.

2. Ms. Fero exercised reasonable diligence in discovering evidence that has only recently become available.

The State argues that Ms. Fero should be denied justice because she failed to find or present medical articles to the Court before now. The

State's argument fails to acknowledge that Ms. Fero, incarcerated since 2006, had limited, if any, access to technical, scientific research. *See Fero Decl.*, ¶ 4.

The State's argument also fails to acknowledge the slow evolution and gradual acceptance of scientific theories that counter previously-uncontroverted "truths." A federal court recently explained the slow, and sometimes painful, evolution of scientific evidence:

[T]he search for the truth is not always easy, and the path to the truth is not always clear. Sometime we find that truth eludes us. Sometimes, with the benefit of insight gained over time, we learn that what we once regarded as truth is myth, and what was once accepted as science was superstition.

Han Tak Lee v. Tennis, 2014 WL 3894306, at *1 (M.D. Pa. 2014). That case examined the "revolution" that occurred over two decades in the science of fire and arson. *See id.* at *3. From the time the defendant was convicted of arson and murder in 1990, "the analytical paradigm in arson investigations... shifted in profound and dramatic ways" that undermined the validity of the expert trial testimony that supported conviction. *Id.* Though it took twenty years to prove, the court determined that the prosecution's "essentially undisputed proof ... can no longer withstand the

scrutiny of science” and recommended that the defendant’s conviction be vacated. *Id.* at *17, *19.

The medical community only began to question the previously-accepted theories of shaken baby syndrome in the early 2000s. Since Ms. Fero’s trial in 2003, there has been a profound shift in medical thinking about the causes and symptoms of pediatric head trauma. The evidence regarding this shift was incomplete and unavailable to Ms. Fero until recently. *See* Barnes Decl., ¶¶ 8-13; Ophoven Decl., ¶¶ 8-18. As Dr. Barnes and Dr. Ophoven stated in their sworn declarations, the theories that children could remain lucid up to three days after suffering trauma that leads to injuries like Brynn’s, and that there are numerous, non-traumatic and completely innocent causes of injuries like Brynn’s, did not gain general acceptance in the medical community until very recently. Accepting these opinions as true, which we must because the State does not challenge them, the opinions of Dr. Barnes and Dr. Ophoven would not have been admissible under the *Frye* standard until very recently.

The State concedes Ms. Fero could have discovered evidence supporting her innocence as late as 2010. Even that date assumes Ms. Fero, incarcerated since 2006, had access to and reads medical journals of the kind that present or analyze peer-reviewed studies of pediatric head trauma. The State also assumes that complex articles in the fields of

pediatric neurology and forensic pathology are accessible to lay understanding. Without citing any authority that “reasonable diligence” under RCW 10.73.100(1) must be less than four years, the State blithely disregards the practical requirements of developing an argument and petition based on a fundamental change in a scientific paradigm.

From 2010, when Ms. Fero allegedly should have known that the science of shaken baby syndrome was shifting, she needed time to find new counsel willing to challenge a conviction based on evidence that was largely undisputed at trial. She also needed time to find experts in the field of pediatric neurology and forensic pathology to determine whether, on the facts of her case, the evolving scientific understanding would support her claims of innocence. Those experts, then, needed time to study the record, determine the applicability of new science to the case, develop opinions, and prepare reports. In light of the scientifically complex nature of Ms. Fero’s claim, she exercised reasonable diligence in discovering and presenting the new evidence that supports her personal restraint petition.

II. CONCLUSION

The State’s response to Ms. Fero’s personal restraint petition concedes the validity and credibility of the newly discovered scientific evidence regarding pediatric head trauma. The medical community’s

understanding of the causes and symptoms of pediatric head injuries evolved too slowly to save Ms. Fero from eight years in prison, but science has finally caught up and can now provide justice. Ms. Fero requests this court grant her personal restraint petition or remand the matter for a reference hearing.

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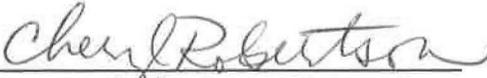
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I, Cheryl Robertson, declare under penalty of perjury under the laws of the State of Washington, that on November 24, 2014, I caused to be served the following documents as indicated below:

1. *Reply Brief in Support of Personal Restraint Petition; and*
2. *Certificate of Service.*

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Dated this 24th day of November, 2014 at Seattle, Washington.


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