

No. 92975-1

NO. 46310-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

HEIDI CHARLENE FERRO, Petitioner

CLARK COUNTY SUPERIOR COURT CAUSE NO. 02-1-01117-9

RESPONSE TO PERSONAL RESTRAINT PETITION

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A. IDENTITY OF RESPONDENT AND AUTHORITY FOR RESTRAINT

The State of Washington is the Respondent in this matter.

Ms. Heidi Fero (hereafter ‘Fero) is restrained under the authority of the judgment and sentence entered by the Superior Court of Clark County for First Degree Assault of a 15-month old child in cause number 02-1-01117-9. *See Appendix.*

B. ISSUE PRESENTED

Should this Court dismiss this Petition because the Petition is untimely and Fero has failed to establish there is “newly discovered evidence” that she exercised “due diligence” in discovering that would warrant vacation of her conviction.

C. STATEMENT OF THE CASE

Brynn was a 15 month old child who was put in Fero’s case for baby-sitting on January 7, 2002. *State v. Fero*, 125 Wn.App. 84, 90, 104 P.3d 49 (2005). Fero was also baby-sitting Brynn’s 4 year old brother, Kaed. *Id.* At approximately 10:00 pm that evening, paramedics responded to Fero’s residence where Brynn was found unconscious, flaccid and pale,

with bruising on her forehead, around her nose, and on her chin. *Id.* at 87. After first being taken to the local hospital in Vancouver, it was determined Brynn's injuries required she be transferred to Legacy Emmanuel Hospital in Portland, Oregon. There, a neurologist performed emergency surgery on Brynn to remove a blood clot from her brain and to remove a large flap of bone to provide room for her brain to swell. *Id.* Brynn suffered from a subdural hematoma, bilateral hemorrhages, a laceration on the inside of her labia, large bruises on her cheeks, chin, chest, the area above her vagina and on the labia majora and a fracture of her left tibia. *Id.*

At trial for Assault in the First Degree of a Child, Fero advanced a theory that Brynn's 4 year old brother caused her injuries. *Id.* at 88. The State presented several witnesses to refute this theory. *Id.*

The lead paramedic testified that Fero told him some of the bruises on Brynn were from her 4 year old brother attacking her and that she did not indicate that Brynn had trouble walking or a limp. The paramedic indicated that he observed the bruises on Brynn's face to progress rapidly from the time they arrived at the house to the time they reached the hospital. *Id.* Fero told paramedics that Kaed had swung Brynn into the wall "like a baseball bat." *Id.*

Officer Scott Telford of the Vancouver Police Department testified that during his investigation, Fero told him that she was upstairs when Brynn was hurt. *Id.* at 89. After checking once on the children downstairs, she went back upstairs only to come down again five minutes later and saw Kaed jump out of Brynn's play crib. *Id.* Fero told Officer Telford that Brynn then had blood coming out of her mouth and was crying. Telford observed no blood in the play crib. *Id.* Fero said she held Brynn until Brynn stopped crying and then put her on the couch. *Id.* Five minutes later Brynn's eyes were glazed over, she was unresponsive and not breathing. *Id.* This is when Fero called 911. In a written statement, Fero indicated that Kaed hit Brynn with a toy hammer in her face, and that he jumped on her. *Id.*

Fero told police that the play crib had been pushed against the wall and that she had moved it out. Detective Smith of the Vancouver Police Department took photos of the play crib and the wall. *Id.* The marks that police did find on the wall did not correspond with the play crib's height. *Id.*

While police were investigating at Fero's residence, Detective Smith heard Fero tell her mother that she had shaken Brynn, but had only done it to wake her up. *Id.* at 90.

Brynn's father testified that he spoke with Fero twice during the evening of the incident. *Id.* During the first call, at about 7:45 pm, Fero told Brynn's father she was concerned about Kaed hurting Brynn and that Brynn could not walk on a leg. *Id.* Fero did not tell the father about any bruising on Brynn. At 10:30 pm, Brynn's father again spoke to Fero who said that she laid Brynn down after giving her a bath and when she checked on her, Brynn was not breathing. *Id.* Brynn's father testified that though Kaed was sometimes rough with Brynn, Brynn had never sustained any injuries from Kaed. *Id.* Furthermore, prior to arriving at Fero's house on January 7, 2002, Brynn was walking fine, running around and had no bruises to her face. *Id.*

Brynn's mother testified that when she took her 15 month old daughter to Fero's house on January 7, 2002, at 2:00 pm; she was walking fine and had no bruises on her body. *Id.* She also indicated that Kaed had never previously injured Brynn. *Id.*

Detective Steve Norton of the Child Abuse Intervention Center investigated the case and interviewed Fero. *Id.* at 91. Fero told Detective Norton that her daughter told her that Kaed had hurt Brynn so Fero went downstairs to check and saw everything was fine so she went back upstairs. *Id.* After coming back downstairs, she saw Kaed jump out of the play crib. *Id.* Fero said that Brynn was on "all fours facing the wall" and

there was blood coming out of her mouth. *Id.* Fero put Brynn on the couch and believed Brynn went to sleep. *Id.* Fero told Detective Norton that she realized Brynn was unconscious and she tried to revive her by smacking her face and splashing water on her. *Id.* Fero indicated only five minutes had passed from taking Brynn out of her play crib and noticing something was wrong. *Id.* After calling her mother, Fero called 911. *Id.* To Detective Norton, Fero denied giving Brynn a bath or changing her diaper. *Id.*

At trial, the State introduced letters written on Fero's behalf wherein Fero indicated that Brynn had a limp when she arrived at her residence that afternoon and that she had bruises on her chin and abdomen, even though none of this was disclosed to Detective Norton. *Id.* at 92.

Several doctors who treated Brynn testified at trial. *Id.* Dr. Gorecki testified that a CAT scan showed severe brain injury caused by a blood clot on her brain, bleeding in the brain, and brain swelling. *Id.* Dr. Gorecki testified a 4 year old boy could not have caused these injuries, but rather were caused by "repetitive force." *Id.* Dr. Ockner testified that Brynn had suffered from a collection of blood that had clotted between the brain and the skull on the left side of her brain. *Id.* Dr. Ockner testified when the brain is shaken, the veins in the brain break and start to bleed, so a collection of blood can form causing a "subdural hematoma." *Id.*

Dr. Ockner believed Brynn's injury to be quite severe because it caused the brain to swell. *Id.* There was no evidence on Brynn's head of a blunt force trauma; the doctor found no lump or goose egg to the outside of Brynn's head indicating a blow to the area. *Id.* Dr. Ockner testified the injury was non-accidental and was caused by shaking. *Id.*

Dr. Lukschu testified that he was familiar with the medical diagnosis of "shaken baby syndrome" (SBS) and the symptoms associated with it. *Id.* at 93. Dr. Lukschu testified that SBS is an inflicted injury and not accidental. *Id.* He noted that Brynn's head injury was so severe that she would have gone unconscious immediately. *Id.* It was his opinion, based on the multiplicity of bruises and their location, that someone inflicted the bruises. *Id.* Dr. Lukschu further testified that he had only seen bilateral retinal hemorrhages in patients who had suffered SBS. *Id.* The doctor stated that a 4 year old could not cause some of Brynn's injuries because a 4 year old could not inflict the kind of force necessary to cause the hemorrhages. *Id.*

Dr. Goodman testified that Brynn suffered hemorrhages in both eyes over the surface of the retina and within the retina and that these injuries were "consistent with nonaccidental trauma." *Id.* Dr. Bennett testified that Brynn had a fracture through the mid-part of the left tibia and that it was a "recent" injury and was considered a "spiral" fracture. *Id.*

Dr. Goodman indicated that a child with this type of fracture could not walk on it as it would be too painful and that in order to cause this type of fracture to occur, someone would have to “twist the leg violently.” *Id.*

Dr. Goodman believed it would require a lot of force to cause this type of fracture to Brynn’s leg and that a 4 year old child is not capable of causing this injury. *Id.*

Dr. Grewe testified that if a blow to Brynn’s head had caused the brain injury, there would have been a fracture to her skull because of the severity of Brynn’s brain injury. *Id.* at 94. Brynn did not have a skull fracture. *Id.* Dr. Grewe also believed that a boy Kaed’s size could not produce this type of brain injury by hitting her with a green plastic toy hammer or pushing her head into the wall. *Id.* Dr. Grewe also testified that there would not have been a lucid interval between Brynn sustaining the brain injury and the onset of the brain swelling. *Id.*

Fero testified that she gave Brynn a bath and dressed her and put her to bed in the play crib downstairs. *Id.* Fero said she then took her son upstairs to give him a bath. *Id.* While upstairs, Fero’s daughter came upstairs and told Fero that Kaed was hurting Brynn. *Id.* Fero indicated when she came downstairs she saw Kaed getting out of Brynn’s play crib and that Brynn was on her hands and knees with blood in her mouth. *Id.* Fero then comforted Brynn and believed Brynn to have fallen asleep, so

she put her on the couch. Then at 9:45 pm, Fero noticed Brynn was unresponsive and called 911. *Id.*

Fero was convicted by a jury of Assault of a Child in the First Degree. *Id.* The Court found Brynn was particularly vulnerable because of extreme youth and that Fero had acted in breach of her duty to protect Brynn. *Id.* at 94-95. The trial court then sentenced Fero to 180 months.

In her initial appeal, Fero argued insufficient evidence to support her conviction and improper jury instructions. *Id.* at 95-96. Fero also argued that under *Blakely v Washington*, 542 U.S. 296, 124 S. Ct.2531, 159 L.Ed.2d 403 (2004), that the trial court erred in imposing an exceptional sentence without submitting the issue of aggravating factors to the jury. *Id.* at 97-98. After review by the Supreme Court, the Court of Appeals amended its opinion and remanded to the trial court for resentencing in December 2005. *Id.* at 102. The trial court then sentenced Fero to 120 months in prison. The mandate was filed on February 2, 2006.

Fero filed the instant personal restraint petition on May 6, 2014.

D. ARGUMENT

Fero argues that there is newly discovered evidence in her case which allows this Court to hear her Personal Restraint Petition despite the fact that she has filed the instant petition nine years after her judgment was

final. New expert opinion does not and should not constitute “newly discovered evidence” sufficient to grant a defendant a new trial. This Court should dismiss Fero’s petition.

A personal restraint petition is an extraordinary remedy that is designed to address fundamental legal defects that lead to restraints on an individual’s freedom. *See In re Hagler*, 97 Wn.2d 818, 825-26, 650 P.2d 1103 (1982). In order to prevail in a personal restraint petition, the petitioner must be able to demonstrate constitutional error, resulting in “actual prejudice,” or non-constitutional error, resulting in a “fundamental defect that inherently results in a complete miscarriage of justice.” *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298-99, 88 P.3d 390 (2004). The petitioner bears the burden of proving error by a preponderance of the evidence. *In re Cook*, 114 Wn.2d 814, 792 P.2d 506 (1990).

Generally, personal restraint petitions must be brought within one year of the judgment becoming final. RCW 10.73.090(1). However, the time limit will not apply if the petition is based solely on “newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion....” RCW 10.73.100(1). Fero claims newly discovered evidence requires she receive a new trial on the charge of Assault of a Child in the First Degree.

I. NEW MEDICAL OPINIONS ARE NOT “NEWLY DISCOVERED EVIDENCE” UNDER RAP 16.4

In a personal restraint petition, “newly discovered evidence” is subject to the same standards that apply to a motion for a new trial. *State v. Benn*, 134 Wn.2d 868, 886, 952 P.2d 116 (1998) (quoting *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 319, 868 P.2d 835 (1994)). When RAP 16.4(c)(3) was written (previously CrR 7.7(g)(4)), “it was intended to be the post-judgment analogy to the post-trial motion for a new trial under CrR 7.6(a)(3).” *State v. Harper*, 64 Wn.App. 283, 292, 923 P.2d 1137 (1992). Therefore, the same standards apply for determining whether “newly discovered evidence” exists in both post-trial motions and post-judgment petitions for vacations of judgments. *Id.* Fero must show that the “evidence” was discovered after trial and could not have been discovered before trial in the exercise of due diligence. *Id.* (quoting *Lord*, 123 Wn.2d at 319-20).

In *State v. Jeffries*, 114 Wn.2d 485, 789 P.2d 731 (1990), the Washington Supreme Court found that “newly discovered evidence” is only grounds for relief in a personal restraint petition if “[m]aterial facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction [or] sentence.” *Jeffries*, 114 Wn.2d at 493 (citing RAP 16.4(c)(4)). There are several

factors that this Court should consider in determining whether to grant petitions for vacation of convictions based on material facts not previously presented. *Harper*, 64 Wn. App. at 293. In *Harper*, this Court adopted the factors set forth in *State v. Williams*, 96 Wn.2d 215, 634 P.2d 868 (1981). *Id.* In *Williams*, the Supreme Court found five factors must be considered in determining whether evidence constitutes “newly discovered evidence.” *Williams*, 96 Wn.2d at 223. Those factors are:

- (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.

Harper, 64 Wn. App. at 291 (citing *Williams*, 96 Wn.2d at 223).

In *Harper*, this Court addressed a very similar situation to the current case. The defendant in *Harper* was convicted of Attempted Premeditated Murder. *Harper*, 64 Wn.App. at 286. At trial, the defendant presented a diminished capacity defense with the aid of testimony from an expert witness. *Id.* at 287. In his personal restraint petition, the defendant presented an affidavit from a new doctor who examined the defendant and gave a different opinion than the expert witness who testified at trial. *Id.* at 290. From the opinion, it is clear that this new doctor’s testimony could have changed the outcome of the case because the new doctor presented a

much more complete and better defense to the element of premeditation. *See Id.* This Court found that a new expert’s opinion does not amount to “[m]aterial facts ... which have not been previously presented and heard....” *Id.* at 291 (quoting RAP 16.4(c)(3)).

A similar result occurred in *State v. Evans*, 45 Wn.App. 611, 613-14, 726 P.2d 1009 (1986), *rev. denied*, 107 Wn.2d 1029 (1987). In *Evans*, this Court found that a new trial was not warranted when a defendant presented a new opinion from a new expert retained after trial. *Evans*, 45 Wn.App. at 614. In fact, the Court found that case to be

...a classic case: the defendant loses, then hires a new lawyer, who hires a new expert, who examines the same evidence and produces a new opinion. We cannot accept this as a basis for a new trial.

Id. at 614-15.

In a concurring opinion in *Evans*, Judge Reed noted that such experts “rarely agree” and what may be a crucial fact to one expert is not to another. *Id.* at 617-18. Judge Reed further noted that prior to granting new trials for new experts to 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.

Evans, 45 Wn.App. at 617-18.

Judge Reed in his concurrence in *Evans* goes to the heart of the issue: what case involving scientific or medical evidence could ever be final if emerging theories and different opinions by different experts could be considered “material facts...which have not been previously presented and heard....?” RAP 16.4(c)(3). Every murder, serious assault, rape, etc, would be subject to vacation and retrial whenever a defendant found an expert to write an affidavit indicating there were new scientific theories which would explain the evidence in such a way as to possibly exonerate the defendant. This simply cannot be the standard this Court applies in Fero’s situation. A new medical opinion or a new medical theory is not a “material fact.” Furthermore, as cases discussed above have held, that “[a] new expert opinion, based on facts available to the trial experts, does not constitute newly discovered evidence that could not, with due diligence, have been discovered before trial.” *In re Pers. Restraint of Copland*, 176 Wn.App. 432, 451, 309 P.3d 626 (2013) (citing to *State v. Harper*, 64 Wn.App. 283, 293, 823 P.2d 1137 (1992) (citing *State v. Davis*, 25 Wn.App. 134, 138, 605 P.2d 359 (1980))). Fero’s argument that a new expert’s opinion that the medical community would present different evidence in a trial today than it did when Fero received her trial is not “newly discovered evidence.” Fero’s petition should be dismissed.

II. FERO DID NOT EXERCISE DUE DILIGENT IN DISCOVERING THE “NEW EVIDENCE”

Even if this Court were to find that Fero’s newly found expert is “newly discovered evidence,” she did not exercise “reasonable diligence” in finding this evidence or in presenting it to this Court for review. For this reason, Fero’s petition should not be granted.

RCW 10.73.100(1) allows for petitions to be filed after the one-year time limit only if in finding the “newly discovered evidence” the defendant acted “with reasonable diligence” in both finding the new evidence and in filing the petition. Fero spends a significant portion of her brief discussing the opinion of Dr. Barnes as contained in his affidavit. This “new evidence” that Fero argues requires a new trial, comes in the form of many studies on “shaken baby syndrome” and head injuries in babies. According to Dr. Barnes’ affidavit, these studies and publications are from 2002, 2003, 2004, 2005, 2006, 2008 and 2010. Fero offers no explanation for why she did not file her personal restraint petition alleging “newly discovered evidence” prior to 2014.

To have this court hear Fero’s petition, she must demonstrate that she exercised “reasonable diligence” in discovering the evidence and in filing this petition. *See State v. Brand*, 65 Wn.App. 166, 172, 828 P.2d 1 (1992), *reversed on other grounds*, 120 Wn.2d 365, 842 P.2d 470 (1992).

Even though the majority of the studies cited to by Dr. Barnes occurred between 2003 and 2005, giving Fero the benefit of the doubt that the 2010 study was the “newly discovered evidence,” there is absolutely no showing of due diligence as required. Four years cannot be considered “reasonable” within the meaning of RCW 10.73.100. Witnesses’ memories fade, witnesses move and the State, after a conviction is final, generally does not continue to keep in contact with witnesses from trial. In order to effectively pursue justice the State and our Courts must be able to rely on the finality of judgments. Fero was convicted in 2003 and her appeal was denied in 2005. It is unreasonable for her to fail to discover potential new evidence and not bring that evidence before this Court in a diligent manner.

Fero has not complied with the requirements of RCW 10.73.100(1) and therefore this Court should deny her petition.

E. CONCLUSION

New or changing medical opinions are not “material facts” or “newly discovered evidence” upon which this Court should base a decision to grant Fero a new trial. Not only is this evidence, by case law in this State, not considered “material facts” or “newly discovered evidence,” but Fero did not exercise the due diligence required by RCW 10.73.100 in

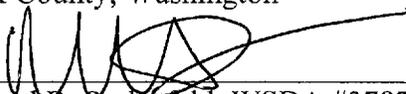
bringing this issue before the Court. Fero has not met her burden and her petition should be denied.

DATED this 24th day of October, 2014.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:



Rachael R. Probstfeld, WSBA #37878
Deputy Prosecuting Attorney

APPENDIX

14

MUENSTER

S1

FILED

MAY 02 2003

JoAnne McBride, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff,
v.
HEIDI CHARLENE FERRO
aka
Defendant.
SID:
DOB: 3/26/1978

No. 02-1-01117-9

JUDGMENT AND SENTENCE (JS)

PRISON - COMMUNITY
PLACEMENT/COMMUNITY CUSTODY

03 9 02673 4

Clerk's action required Paragraph 5.7

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on
by plea jury-verdict bench trial of:

March 18, 2003
(Date)

COUNT	CRIME	RCW	DATE OF CRIME
01	ASSAULT OF A CHILD IN THE FIRST DEGREE	9A.36.120	1/7/2002

as charged in the () Amended) Information.

- A special verdict/finding for use of **firearm** was returned on Count(s) _____
RCW 9.94A.602, 510
- A special verdict/finding for use of **deadly weapon** other than a firearm was returned on
Count(s) _____. RCW 9.94A.602
- A special verdict/finding of **sexual motivation** was returned on Count(s) _____
RCW 9.94A.835

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- A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) _____, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.
- This case involves kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130
- The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- The crimes charged in Count(s) _____ is/are Domestic Violence offense(s) as that term is defined in RCW 10.99.020:
- A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine when a juvenile was present in or upon the premises of manufacture was returned on Count(s) _____. RCW 9.94A, RCW 69.50.401(a), RCW 69.50.440.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are Count(s) _____. RCW 9.94A.589
- Additional misdemeanor crime(s) pertaining to this cause number are contained in a separate Judgment and Sentence.
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____.

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv	TYPE OF CRIME
1	<i>NO known felonies</i>				

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525
- The court finds that the following prior convictions are one offense for purposes of determining the offender score RCW 9.94A.525: _____
- The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520: _____
- The State has moved to dismiss count(s)

2.3 SENTENCING DATA:

COUNT NO	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS*	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
01	0	XII	93 MONTHS to 123 MONTHS			LIFE \$50000

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520

Additional current offense sentencing data is attached in Appendix 2.3.

2.4 EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence above within below the standard range for Count(s) 2. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.750/753

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are attached as follows:

_____. If no formal written plea agreement exists, the agreement is as set forth in the Defendant's Statement on Plea of Guilty.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 The Court DISMISSES Counts .

The defendant is found NOT GUILTY of Counts .

3.3 There do do not exist substantial and compelling reasons justifying an exceptional sentence outside the presumptive sentencing range.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

\$ 115 634,523.06	Restitution to be paid to <u>Insurance Brea Frank</u> <input checked="" type="checkbox"/> Victim(s) and amounts to be set by separate court order <u>to be set by sep. order</u>	RCW 9.94A.750/753
\$110.00	Criminal filing fee	RCW 9.94A.505
\$500.00	Victim assessment	RCW 7.68.035
\$100.00	Collection of biological sample (for crimes committed on or after July 1, 2002)	Chapter 289, Laws of 2002
\$ _____	Fees for court appointed attorney	RCW 9.94A.505/760/030
\$500.00	Fine	RCW 9A.20.021

\$ _____	Drug fund contribution to be paid within two (2) years Fund # <input type="checkbox"/> 1015 <input type="checkbox"/> 1017 (TF)	RCW 9.94A.760
\$ _____	Crime lab fee	RCW 43.43.690
\$ _____	Witness costs	RCW 10.01.160 and RCW 2.40.010
Court costs, including:		RCW 9.94A.030, 9.94A.505, 9.94A.760, 10.01.160, 10.46.190
\$ _____	Sheriff service fees	RCW 10.01.160 and RCW 36.18.040
\$ _____	Jury demand fee	RCW 10.01.160 and RCW 10.46.190
\$ _____	Court appointed defense expert and other defense costs	RCW 9.94A.505, 760, RCW 9.94A.030
\$ _____	Extradition costs	RCW 9.94A.505
\$ _____	Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum) To: _____ (List Law Enforcement Agency)	RCW 38.52.430
\$ _____	Other Costs for: _____	RCW 9.94A.760

- The above financial obligations do not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.750/753. A restitution hearing:
- shall be set by the prosecutor
- is scheduled for _____
- The Department of Corrections may immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602
- All payments shall be made in accordance with the policies of the clerk and on a schedule established by the Department of Corrections, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____, RCW 9.94A.760
- In addition to the other costs imposed herein, the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate of \$ _____, RCW 9.94A.760
- The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190
- The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160

4.2 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or Department of Corrections, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754

HIV TESTING. The defendant shall be tested and counseled for HIV as soon as possible and the defendant shall fully cooperate in the testing and counseling. RCW 70.24.340

4.3 The defendant shall not have contact with B.M.A. (female, DOB: 9-30-00) including, but not limited to, personal, verbal, telephonic, electronic, written or contact through a third party for use years (not to exceed the maximum statutory sentence).

Supplemental Domestic Violence Protection Order or Antiharassment Order attached as Form 4.3.

4.4 OTHER: _____

4.5 **CONFINEMENT OVER ONE YEAR.** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.589. Defendant is sentenced to the following term of confinement in the custody of the Department of Corrections:

180 ~~days~~ / months on Count 01

Actual number of months of total confinement ordered is: 18 months
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The term(s) of confinement (sentence) imposed herein shall be served consecutively to any other term of confinement (sentence) which the defendant may be sentenced to under any other cause in either District Court or Superior Court unless otherwise specified herein:

Confinement shall commence immediately unless otherwise set forth here: _____

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505.

Credit for 0 days time served prior to this date is given, said confinement being solely related to the crimes for which the defendant is being sentenced.

4.6 **COMMUNITY PLACEMENT** is ordered on Counts _____ for _____ months

COMMUNITY CUSTODY is ordered on Counts I for a range from 24 to 48 months or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700/705(9) for community placement offenses which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Community custody follows a term for a sex

offense --RCW 9.94A.505. Use paragraph 4.7 to impose community custody following work ethic camp. Community placement/custody shall be for 12 months or for the period of earned early release, whichever is longer, for sex offenses or serious violent offenses committed between 7/1/88 and 7/1/90, Assault 2, Assault of a Child 2, deadly weapon enhancements and drug offenses under RCW 69.50 or 69.52; 24 months or for the period of early earned release, whichever is longer, for sex offenses occurring between 7/1/90 and 6/6/96, serious violent offenses, and vehicular homicides or vehicular assaults; 36 months or for the period of earned early release, whichever is longer, for sex offenses committed after 6/6/96.]

The defendant shall be on community supervision/community custody under the charge of the Department of Corrections and shall follow and comply with the instructions, rules and regulations promulgated by said Department for the conduct of the defendant during the period of community supervision/community custody and any other conditions stated in this Judgment and Sentence.

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at Department of Corrections-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by the Department of Corrections; (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by the Department of Corrections. The residence location and living arrangements are subject to the prior approval of the Department of Corrections while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement. The defendant's conditions of Community Placement/Community Custody include the following:

- The defendant shall not consume any alcohol.
- Defendant shall have no contact with _____
- Defendant shall remain within outside of a specified geographical boundary, to wit: _____
- Other conditions may be imposed by the court or Department during community custody, or are set forth here: _____
- The conditions of community supervision/community custody shall begin immediately or upon the defendant's release from confinement unless otherwise set forth here: _____
- Defendant shall not violate any federal, state or local criminal laws, and shall not be in the company of any person known by him/her to be violating such laws.
- Defendant shall not commit any like offenses.
- Defendant shall notify his/her community corrections officer within forty-eight (48) hours of any arrest or citation.
- Defendant shall not initiate or permit communication or contact with persons known to him/her to be convicted felons, or presently on probation, community supervision/community custody or parole for any offense, juvenile or adult, except immediate family. Additionally, the defendant shall not initiate or permit communication or contact with the following persons: _____

- Defendant shall not have any contact with other participants in the crime, either directly or indirectly.
- Defendant shall not initiate or permit communication or contact with persons known to him/her to be substance abusers.
- Defendant shall not possess, use or deliver drugs prohibited by the Uniform Controlled Substances Act, or any legend drugs, except by lawful prescription. The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.
- Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling and data storage devices.
- Defendant shall not frequent known drug activity areas or residences.
- Defendant shall not use or possess alcoholic beverages at all to excess.
The defendant will will not be required to take monitored antabuse per his/her community corrections officer's direction, at his/her own expense, as prescribed by a physician.
- Defendant shall not be in any place where alcoholic beverages are sold by the drink for consumption or are the primary sale item.
- Defendant shall undergo an evaluation for treatment for substance abuse mental health anger management treatment and fully comply with all recommended treatment.
- Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a substance abuse mental health anger management treatment program as established by the community corrections officer and/or the treatment facility.
- Based upon the Pre-Sentence Report, the court finds reasonable grounds to exist to believe the defendant is a mentally ill person, and this condition was likely to have influenced the offense. Accordingly, the court orders the defendant to undergo a mental status evaluation and participate in outpatient mental health treatment. Further, the court may order additional evaluations at a later date, if deemed appropriate.
- Treatment shall be at the defendant's expense and he/she shall keep his/her account current if it is determined that the defendant is financially able to afford it.
- Defendant shall submit to urine, breath or other screening whenever requested to do so by the treatment program staff and/or the community corrections officer.
- Defendant shall not associate with any persons known by him/her to be gang members or associated with gangs.
- Defendant shall not wear or display any clothing, apparel, insignia or emblems that he/she knows are associated with or represent gang affiliation or membership as determined by the community corrections officer.
- Defendant shall not possess any gang paraphernalia as determined by the community corrections officer.
- Defendant shall not use or display any names, nicknames or monikers that are associated with gangs.
- Defendant shall comply with a curfew, the hours of which are established by the community corrections officer.

- Defendant shall attend and successfully complete a shoplifting awareness educational program as directed by the community corrections officer.
- Defendant shall attend and successfully complete the Victim Awareness Educational Program as directed by the community corrections officer.
- Defendant shall not accept employment in the following field(s):

- Defendant shall not possess burglary tools.
- Defendant's privilege to operate a motor vehicle is suspended/revoked for a period of one year; two years if the defendant is being sentenced for a vehicular homicide.
- Defendant shall not operate a motor vehicle without a valid driver's license and proof of liability insurance in his/her possession.
- Defendant shall not possess a checkbook or checking account.
- Defendant shall not possess any type of access device or P.I.N. used to withdraw funds from an automated teller machine.
- Defendant shall submit to affirmative acts necessary to monitor compliance with the orders of the court as required by the Department of Corrections.
- Defendant shall not be eligible for a Certificate of Discharge until all financial obligations are paid in full and all conditions/requirements of sentence have been completed including no contact provisions.
- Defendant shall not enter into or frequent business establishments or areas that cater to minor children without being accompanied by a responsible adult. Such establishments may include but are not limited to video game parlors, parks, pools, skating rinks, school grounds, malls or any areas routinely used by minors as areas of play/recreation.
- Defendant shall not have any unsupervised contact with minors. Minors mean persons under the age of 18 years.
- Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a sexual deviancy treatment program as established by the community corrections officer and/or the treatment facility. "Cooperate with" means the offender shall follow all treatment directives, accurately report all sexual thoughts, feelings and behaviors in a timely manner and cease all deviant sexual activity.
- Defendant shall submit to periodic polygraph examinations at the direction of his/her community corrections officer to ensure compliance with the conditions of community placement/custody.
- Defendant shall submit to periodic plethysmograph examinations at the direction of his/her community corrections officer to ensure compliance with the conditions of community placement/custody.
- Defendant shall not possess or use any pornographic material or equipment of any kind and shall not frequent establishments that provide such materials for view or sale.
- Defendant shall sign necessary release of information documents as required by the Department of Corrections.

- Defendant shall adhere to the following additional crime-related prohibitions or conditions of community placement/community custody:

- 4.7 The Bail or release conditions previously imposed are hereby exonerated and the clerk shall disburse it to the appropriate person(s).
- 4.8 This case shall not be placed on inactive or mail-in status until all financial obligations are paid in full.
- 4.9 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the Department of Corrections:

4.10 Other:

V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090
- 5.2 **LENGTH OF SUPERVISION** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten (10) years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A505(5).
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7606
- 5.4 **RESTITUTION HEARING.**
 Defendant waives any right to be present at any restitution hearing (sign initials): _____
- 5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634
- 5.6 **FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047
- 5.7 The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The court clerk is directed to immediately forward an Abstract of Court Record to the Department of Licensing, who must revoke the defendant's driver's licenses. RCW 46.20.285.

Cross off if not applicable:

N/A

5.8 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in Chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington state, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington state.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 48 hours excluding weekends and holidays after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The county sheriff's office may require you to list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550

If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing a residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State

If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within 5 days of the entry of the order. RCW 9A.44.130(7).

5.9 Persistent Offense

The crime(s) in count(s) I is/are "most serious offense(s)." Upon a third conviction of a "most serious offense", the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.030 (28 & 32(a)), 9.94A.505

The crime(s) in count(s) _____ is/are one of the listed offenses in RCW 9.94A.030 (32)(b). Upon a second conviction of one of these listed offenses, the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody.

5.10 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: 5/2/03

[Signature]
JUDGE OF THE SUPERIOR COURT

Print Name: ROGER BENNETT

[Signature]
Kathleen A. Hart, WSBA #24207
Deputy Prosecuting Attorney

[Signature]
Mark W. Muenster, WSBA #11228
Attorney for Defendant

[Signature]
HEIDI CHARLENE FERRO
Defendant

SUPERIOR COURT OF WASHINGTON - COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff

NO. 02-1-01117-9

v.

**WARRANT OF COMMITMENT TO STATE
OF WASHINGTON DEPARTMENT OF
CORRECTIONS**

HEIDI CHARLENE FERRO,

aka

Defendant.

SID:

DOB: 3/26/1978

THE STATE OF WASHINGTON, to the Sheriff of Clark County, Washington, and the State of Washington, Department of Corrections, Officers in charge of correctional facilities of the State of Washington:

GREETING:

WHEREAS, the above-named defendant has been duly convicted in the Superior Court of the State of Washington of the County of Clark of the crime(s) of:

COUNT	CRIME	RCW	DATE OF CRIME
01	ASSAULT OF A CHILD IN THE FIRST DEGREE	9A.36.120	1/7/2002

and Judgment has been pronounced and the defendant has been sentenced to a term of imprisonment in such correctional institution under the supervision of the State of Washington, Department of Corrections, as shall be designated by the State of Washington, Department of Corrections pursuant to RCW 72.13, all of which appears of record; a certified copy of said judgment being endorsed hereon and made a part hereof,

NOW, THIS IS TO COMMAND YOU, said Sheriff, to detain the defendant until called for by the transportation officers of the State of Washington, Department of Corrections, authorized to conduct defendant to the appropriate facility, and this is to command you, said Superintendent of the appropriate facility to receive defendant from said officers for confinement, classification and placement in such correctional facilities under the supervision of the State of Washington, Department of Corrections, for a term of confinement of :

COUNT	CRIME	TERM
01	ASSAULT OF A CHILD IN THE FIRST DEGREE	<i>180 months</i>

These terms shall be served concurrently to each other unless specified herein:

The defendant has credit for 0 days served.

And these presents shall be authority for the same.

HEREIN FAIL NOT.

WITNESS, Honorable

Ray C. Smith

JUDGE OF THE SUPERIOR COURT AND THE SEAL THEREOF THIS DATE:

5/2/03

JOANNE McBRIDE, Clerk of the
Clark County Superior Court

By:

[Signature]

Deputy

Patricia



CAUSE NUMBER of this case: 02-1-01117-9

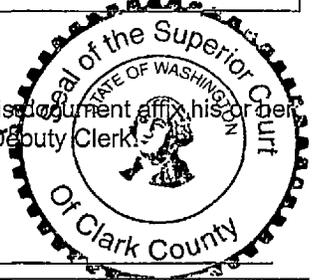
I, JOANNE McBRIDE, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of said County and State, by: _____, Deputy Clerk

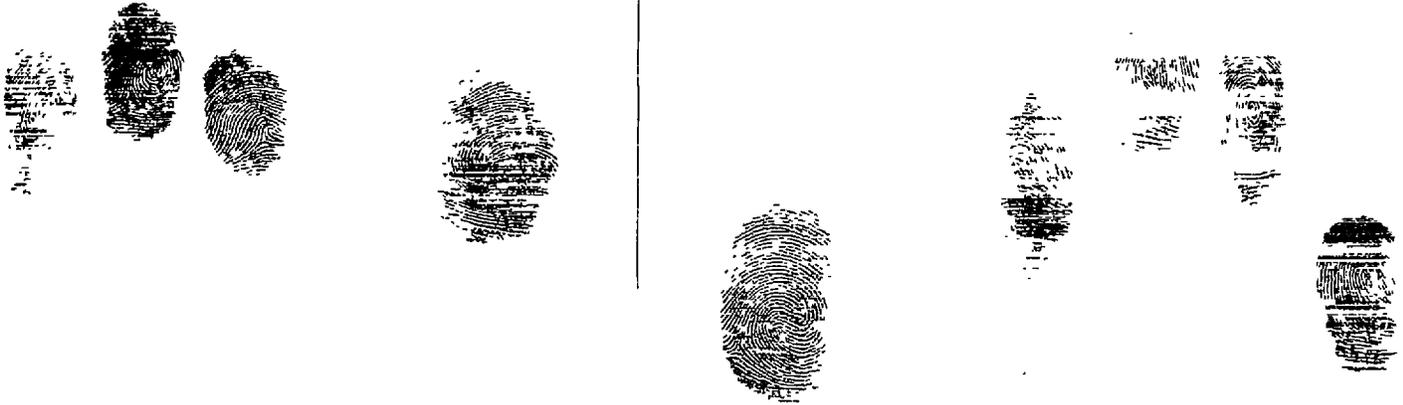
IDENTIFICATION OF DEFENDANT HEIDI CHARLENE FERRO		
SID No. (If no SID take fingerprint card for State Patrol)	Date of Birth 3/26/1978	
Driver License No. FER0*HC225D6	Driver License State: WA	
FBI No.	Local ID No. (CFN):	
SSN: 541-98-5246	Corrections No.	
PCN No. _____	Other _____	
Alias name, SSN, DOB:		
Race: W	Ethnicity:	Sex: F

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto. Clerk of the Court: _____ Deputy Clerk: _____
 Dated: 5/02/03



DEFENDANT'S SIGNATURE: Heidi Charlene Ferro

Left four fingers taken simultaneously Left Thumb Right Thumb Right four fingers taken simultaneously



CLARK COUNTY PROSECUTOR

October 24, 2014 - 4:38 PM

Transmittal Letter

Document Uploaded: prp2-463105-Response.pdf

Case Name: State v. Heidi Fero

Court of Appeals Case Number: 46310-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion:

Answer/Reply to Motion:

Brief:

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes:

Hearing Date(s):

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other:

Comments:

No Comments were entered.

Sender Name: Abby Rowland - Email: abby.rowland@clark.wa.gov