

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
CLERK'S OFFICE  
May 02, 2016, 3:20 pm  
RECEIVED ELECTRONICALLY

No. 92975-1

---

SUPREME COURT  
OF THE STATE OF WASHINGTON

---

In re the Personal Restraint of Heidi Charlene Fero.

---

Respondent Heidi Charlene Fero's  
Answer to Motion for Discretionary Review

---

J. Christopher Baird  
WSBA No. 38944  
JCBaird@perkinscoie.com  
Margaret C. Hupp  
WSBA No. 43295  
MHupp@perkinscoie.com

PERKINS COIE LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000

M. Fernanda Torres  
WSBA No. 34587  
ftorres@uw.edu

Innocence Project Northwest  
University of Washington School of Law  
PO Box 85110  
Seattle, WA 98145-1110  
Telephone: 206.543.5780

Attorneys for Respondent (Petitioner below) Heidi Charlene Fero



ORIGINAL

FILED AS  
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

	<b>Page</b>
I. IDENTITY OF RESPONDENT.....	1
II. INTRODUCTION .....	1
III. STATEMENT OF THE CASE.....	1
IV. ARGUMENT .....	5
A. The State’s Motion is late and must be dismissed. ....	6
B. The Court of Appeals decision comports with <i>Evans, Harper, and Copland</i> . ....	7
C. Ms. Fero exercised reasonable diligence. ....	12
D. The State waived its other meritless arguments.....	13
1. Brynn’s other injuries do not prove Ms. Fero’s guilt. ....	14
2. The State is not entitled to a reference hearing.....	17
E. The State’s Motion does not challenge an independent basis of the Court of Appeals decision.....	19
V. CONCLUSION.....	20

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>In re Copland</i> , 176 Wn. App. 432, 309 P.3d 626 (2013), <i>review denied</i> , 182 Wn.2d 1009 (2015) .....	7, 8, 9, 12
<i>Del Prete v. Thompson</i> , 10 F. Supp. 3d 907 (N.D. Ill. 2014) .....	11
<i>In re Fero</i> , 192 Wn. App. 138, 367 P.3d 588 (2016) .....	<i>passim</i>
<i>Ex parte Henderson</i> , 384 S.W.3d 833 (Tex. Crim. App. 2012).....	11, 19
<i>Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett</i> , 146 Wn.2d 29, 42 P.3d 1265 (2002).....	6, 14
<i>People v. Bailey</i> , 999 N.Y.S.2d 713 (N.Y. Cty. Ct. 2014).....	11
<i>In re Reise</i> , 146 Wn. App. 772, 192 P.3d 949 (2008) .....	17
<i>Shumway v. Payne</i> , 136 Wn.2d 383, 964 P.2d 349 (1998).....	7
<i>State v. Edmunds</i> , 308 Wis. 2d 374, 746 N.W.2d 590 (Wis. Ct. App. 2008).....	10, 11
<i>State v. Evans</i> , 45 Wn. App. 611, 726 P.2d 1009 (1986) .....	7, 8, 9, 12
<i>State v. Harper</i> , 64 Wn. App. 283, 823 P.2d 1137 (1992) .....	7, 8, 9, 12
<i>State v. Nelson</i> , 18 Wn. App. 161, 588 P.2d 984 (1977) .....	17

*State v. Williams*,  
96 Wn.2d 215, 634 P.2d 868 (1981).....4, 17

**Other Authorities**

RAP 13.4..... *passim*  
RAP 13.5(a) .....6  
RAP 16.4..... *passim*  
RAP 16.9.....18  
RAP 18.8(b) .....6  
RAP 18.9(c) .....6

### **I. IDENTITY OF RESPONDENT**

Heidi Fero, petitioner below, urges this Court to deny the State's tardy and meritless Motion for Discretionary Review ("Motion").

### **II. INTRODUCTION**

Like many courts across the country, the Court of Appeals correctly held that the medical community's understanding of the timing and causes of symptoms once exclusively associated with shaken baby syndrome has radically changed since Ms. Fero's trial in 2003. Because Ms. Fero's conviction rests almost entirely on opinions that the medical community has since abandoned, the Court of Appeals rightly granted Ms. Fero's personal restraint petition ("PRP").

The State does not dispute that the medical paradigm has changed in fundamental ways, as the Court of Appeals recognized. Instead, the State's Motion offers a laundry list of reasons, including many that it never timely presented to the Court of Appeals, why it believes that this Court should grant review. The State's arguments lack merit. But the State's Motion suffers an even more fundamental defect: it was filed nearly two months late. Because the State filed its motion 58 days late, without justifying its tardiness, the Motion should be denied.

### **III. STATEMENT OF THE CASE**

Two independent, but now medically invalid, lines of expert testimony linked Ms. Fero to the alleged assault of 15-month-old Brynn

Ackley.<sup>1</sup> First, the State's experts, consistent with the then-prevailing medical consensus, testified that Brynn's cerebral edema, subdural hematomas, and retinal hemorrhage (collectively known as the "triad") could have been caused only by violent shaking or by major trauma, such as being ejected from a moving car. PRP Br., at 16-21. Because Brynn had not suffered major trauma, the experts testified that she must have been shaken. *Id.* Second, the State's experts, also consistent with the medical consensus at the time, testified that a child with the triad would lose consciousness almost immediately after being shaken. *Id.* Because Ms. Fero was the only adult with Brynn when she lost consciousness, the medical testimony identified Ms. Fero as the culprit. *Id.*

Since Ms. Fero's trial, the medical community has abandoned these two positions. First, the medical community has reached consensus that a child may remain lucid for as long as three days after an event causing the triad. *Id.* at 28-30. Second, the medical community has reached consensus that the triad of symptoms can be caused by accidental and low-impact traumatic events or other medical conditions, such as an infection or hypoxia-ischemia. *Id.* at 30-31.

---

<sup>1</sup> Ms. Fero's brief in support of her PRP explains why the other evidence adduced at trial does not, by itself, establish Ms. Fero's guilt. Opening Br. in Supp. of Personal Restraint Pet. (hereinafter, "PRP Br."), at 39-41. The State does not argue otherwise.

Two renowned medical experts, working pro bono, submitted declarations explaining the paradigm shift and supporting Ms. Fero's petition. Barnes Decl. in Supp. of Fero PRP; Ophoven Decl. in Supp. of Fero PRP. Dr. Patrick Barnes, Professor of Radiology at Stanford Medical Center and Chief of Pediatric Neuroradiology and Medical Director of the MRI/CT Center at the Lucile Packard Children's Hospital, concluded that the testimony of the State's experts at trial that Brynn would have lost consciousness "immediately" is no longer scientifically valid. Barnes Decl., ¶¶ 1, 46-48. He also described research conducted since 2003 identifying multiple causes or mimics of the triad, concluding that it is impossible to determine the cause of Brynn's head injuries from the medical record. *Id.* ¶¶ 24-32, 36-42, 45.

Dr. Janice Ophoven, a pediatric forensic pathologist with nearly 40 years of clinical experience, explained the new evidence concerning lucid intervals and the mechanisms and timing of the development of brain swelling after an injury. Ophoven Decl., ¶¶ 1, 8-18. She also explained the new medical research proving that minor falls can cause the triad. *Id.* ¶¶ 8-10. This new research directly contradicts the testimony from the State's trial experts. PRP Br., at 30-31.

Dr. Barnes and Dr. Ophoven relied on recently published research to support their conclusions. For example, Dr. Ophoven's declaration

discusses two position papers from the American Academy of Pediatrics. Ophoven Decl., ¶¶ 13, 15. In 2001, the Academy issued a position paper categorically stating that the triad could not be the result of short falls or seizures and were the result of violent shaking. *Id.* ¶ 13. In 2009, the Academy issued a new paper, acknowledging that the injuries resulting from accidental and abusive head trauma overlap and that there are mimics of the symptoms previously believed to be caused exclusively by violent shaking. *Id.* ¶ 15.

The State does not now contest, and never has contested, that the medical paradigms have changed. Instead, it responded to Ms. Fero's PRP with just two arguments. First, it argued that new expert testimony can never be "newly discovered evidence" within the meaning of RAP 16.4. State's Resp. Br., at 13. Second, it argued that Ms. Fero did not exercise reasonable diligence in pursuing her claim. *Id.* at 14. The State's response did not challenge the credibility of Ms. Fero's experts, attack the veracity of their conclusions, or distinguish the numerous cases holding that the medical paradigm has changed in the ways that Ms. Fero's experts described. *See generally* State's Resp. Br.

Because the State did not dispute the veracity of Ms. Fero's new evidence in any way, the issues for the Court of Appeals were whether that new evidence satisfied the requirements of *State v. Williams*, 96 Wn.2d

215, 634 P.2d 868 (1981), and whether Ms. Fero exercised reasonable diligence. It resolved both issues in Ms. Fero's favor. *In re Fero*, 192 Wn. App. 138, 153-63, 367 P.3d 588 (2016). The State moved for reconsideration, raising new arguments. The Court of Appeals denied that motion on March 3, 2016.

#### IV. ARGUMENT

The State filed its Motion 58 days late, without moving for an extension of time or explaining its delay. That should end the matter, and the State's Motion should be denied.

To the extent that this Court examines the merits, a motion for discretionary review should be granted only if at least one criteria under RAP 13.4(b) is met. The State argues that the decision below conflicts with other Court of Appeals decisions and that the Court of Appeals' decision to grant relief without ordering a reference hearing is an issue of substantial public interest. The State is wrong on both counts.

The Court of Appeals properly rejected all the arguments that the State made in response to Ms. Fero's PRP. First, consistent with precedent, it dismissed the State's novel and sweeping argument that expert testimony based on new medical knowledge can never be "newly discovered evidence" within the meaning of RAP 16.4. *Id.* at 163. The

Court of Appeals also correctly held that Ms. Fero acted with reasonable diligence in bringing her PRP. *Id.* at 160-61.

The State's Motion also raises a host of new arguments. Because the State never timely presented those arguments to the Court of Appeals, this Court should decline to consider them now. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 37, 42 P.3d 1265 (2002). Moreover, the State's new arguments are wrong.

**A. The State's Motion is late and must be dismissed.**

The State filed its Motion nearly two months late. The State's Motion must be dismissed. RAP 18.9(c).

Under RAP 13.5(a), a party seeking review of a decision on a PRP "must file a motion for discretionary review in the Supreme Court and a copy in the Court of Appeals *within 30 days after the decision is filed.*" RAP 13.5(a) (emphasis added). In contrast to RAP 13.4, which tolls the filing deadline for filing a petition for review while a motion for reconsideration is pending, RAP 13.5(a) does not toll the deadline for filing a motion for discretionary review.

The Court of Appeals filed its decision on January 5, 2016. Under RAP 13.5(a), the State's Motion was due 30 days later, on February 4, 2016. The State did not file its Motion until April 1, 2016, 88 days after the Court of Appeals filed its decision. Although RAP 18.8(b) provides a

narrow exception to the timeliness requirement if it is justified by “extraordinary circumstances” and will “prevent a gross miscarriage of justice,” the State never explained why it filed its Motion late. Therefore, this Court should dismiss the Motion. *Shumway v. Payne*, 136 Wn.2d 383, 394-96, 964 P.2d 349 (1998).

**B. The Court of Appeals decision comports with *Evans, Harper, and Copland*.**

The State’s Motion incorrectly argues that *State v. Evans*, 45 Wn. App. 611, 726 P.2d 1009 (1986), *State v. Harper*, 64 Wn. App. 283, 823 P.2d 1137 (1992), and *In re Copland*, 176 Wn. App. 432, 309 P.3d 626 (2013), *review denied*, 182 Wn.2d 1009 (2015), categorically bar new expert testimony from being “newly discovered evidence” under RAP 16.4. Those cases do not stand for such a sweeping proposition. Instead, they merely prohibit new expert testimony based solely on facts available at trial.

The foundation of Ms. Fero’s PRP is that since her trial, new medical evidence regarding the prevalence of lucid intervals and the alternate causes of the triad has been discovered. Because the Court of Appeals recognized that this new evidence was not available at trial, it correctly, and consistent with *Evans, Harper, and Copland*, granted Ms. Fero’s PRP. *See Fero*, 192 Wn. App. at 164-65.

The facts of each case are instructive. In *Evans*, the defendant, convicted of arson, engaged new counsel and hired a new expert who would have testified that the fire was caused by electrical defects. 45 Wn. App. at 612-13. Because the new expert, at most, “did a more thorough job of evaluating the physical evidence,” the Court of Appeals held that the “new evidence” did not warrant a new trial. *Id.* at 614. There was no suggestion in *Evans* that arson science changed between the time of trial and the filing of the petition.

Similarly, in *Harper*, the Court of Appeals dismissed the petition of a defendant convicted of attempted premeditated murder. 64 Wn. App. at 285. The defendant submitted an affidavit from a new expert who opined that the defendant could not have formed premeditative intent. *Id.* at 290-91. Relying on *Evans*, the court determined that no relief was warranted because the new expert “reviewed the same evidence” from the defendant’s medical file that the defense trial expert reviewed. *Id.* at 293-94. There was no suggestion in *Harper* that the science of mental health changed between trial and the filing of the petition.

Finally, in *Copland*, the Court of Appeals denied relief to a defendant, convicted of manslaughter, who claimed that testimony from new experts would show that the victim shot himself. 176 Wn. App. at 450. Those experts examined the defendant’s clothing using a microscope

“and decided that no trace of blood or gun residue was present.” *Id.* at 451. The court determined that the defendant could have developed the expert testimony before trial. *Id.* at 451. There was no suggestion that the methods for examining clothing or analyzing blood or gunpowder residue changed between trial and the filing of the petition.

Unlike the petitioners in *Evans*, *Harper*, and *Copland*, Ms. Fero’s PRP argued that her new experts had new tools—the new medical paradigms regarding the prevalence of lucid intervals and the alternate causes of the triad—to evaluate the medical evidence. The only issue, then, is whether those tools were, in fact, discovered after Ms. Fero’s trial. The State’s Motion disputes whether the paradigm shift regarding lucid intervals is truly new. However, it apparently concedes, because it does not discuss at all, that medical experts now agree that many conditions and events, including short falls, can cause the triad. Regardless, the declarations from Dr. Barnes and Dr. Ophoven establish that the medical consensus regarding lucid intervals and alternate causes of the triad developed only recently. PRP Br., at 29-31.

Every court that has examined evidence similar to that presented by Dr. Ophoven and by Dr. Barnes has recognized that the medical paradigm changed only recently. The first such court was the Wisconsin Court of Appeals, which determined in 2008 that

a significant and legitimate debate in the medical community has developed in the past ten years over whether infants can be fatally injured through shaking alone, whether an infant may suffer head trauma and yet experience a significant lucid interval prior to death, and whether other causes may mimic the symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome.

*State v. Edmunds*, 308 Wis. 2d 374, 385-86, 746 N.W.2d 590 (Wis. Ct. App. 2008). There, the defendant, Audrey Edmunds, presented a medical expert at trial who testified that the child had a lucid interval after suffering a traumatic head injury. *Id.* at 378. After her conviction, Ms. Edmunds unsuccessfully sought post-conviction relief in 1997, arguing that the child was possibly not shaken at all and again arguing that the child may have remained lucid after whatever event caused her injury. *Id.* at 379-80.

In 2006, Ms. Edmunds filed a new motion for relief, arguing that there had been a significant shift in the medical community's understanding of "shaken baby syndrome" since her trial. *Id.* at 380-81. In granting her motion, the court compared the evidence in her second motion to the evidence relied on in her first motion in 1997. The court held that the testimony proffered in 1997 would have been a "minority opinion" that was "disavowed by the mainstream." *Id.* at 384. Ms. Edmunds's new evidence was very different:

In contrast, the defense experts who testified for the 2006 postconviction motion explained that in the past ten years, a shift has occurred in the medical community around shaken baby syndrome, so that now the fringe views posited in 1997 are recognized as legitimate and part of a significant debate.

*Id.* In light of the significant shift, the defendant “could not have been negligent” in seeking the new evidence because “the bulk of the medical research and literature supporting the defense position, and the emergence of the defense theory as a legitimate position in the medical community, only emerged in the ten years following her trial.” *Id.* at 386.

Other courts agree that the medical paradigm regarding the symptoms and causes of the triad has evolved only recently. *See People v. Bailey*, 999 N.Y.S.2d 713, 724-26 (N.Y. Cty. Ct. 2014); *Del Prete v. Thompson*, 10 F. Supp. 3d 907, 954 (N.D. Ill. 2014); *Ex parte Henderson*, 384 S.W.3d 833, 837-38 (Tex. Crim. App. 2012) (Cochran, J., concurring).

The Court of Appeals determined that Ms. Fero presented truly new evidence—the paradigm shifts in the medical community’s understanding of pediatric head trauma—that did not exist before her trial. *Fero*, 192 Wn. App. at 165. Just as new scientific techniques like DNA testing can give new meaning to evidence that has been available all along, the new paradigms regarding lucid intervals and alternate causes of

the triad give Dr. Barnes and Dr. Ophoven a new way to evaluate the medical evidence in Ms. Fero's case. Because the new medical paradigms were established after Ms. Fero's trial, the Court of Appeals opinion is consistent with *Evans*, *Harper*, and *Copland*, and there is no basis for review under RAP 13.4(b)(2).

**C. Ms. Fero exercised reasonable diligence.**

Ms. Fero exercised the reasonable diligence required to secure relief under RAP 16.4. The State's Motion argues otherwise but does not explain how Ms. Fero's diligence is relevant to any of the RAP 13.4(b) criteria. It identifies no case law on the subject, and Ms. Fero's alleged lack of diligence is not relevant to a significant question of public interest. In any event, the Court of Appeals correctly held that she acted with reasonable diligence. *Fero*, 192 Wn. App. at 160-61.

Neither RAP 16.4 nor Washington case law defines reasonable diligence by a time limit or required effort. The Court of Appeals determined that Ms. Fero exercised reasonable diligence for two reasons. First, the paradigm shifts in the medical community's understanding of pediatric head trauma occurred only recently. *Id.* at 161. Second, Ms. Fero was incarcerated during the majority of the years that the medical community debated and evolved its understanding of pediatric head trauma through articles and published research. *Id.* The Court of Appeals

reasonably held that Ms. Fero needed time to learn of the paradigm shifts, engage new attorneys to review her case, and find experts to review the medical record. *See id.*

The State argues Ms. Fero failed to exercise reasonable diligence by claiming she should have filed a PRP immediately after the articles that Dr. Barnes and Dr. Ophoven cite were published. But even assuming that Ms. Fero learned of the articles the moment they were published, her understanding of the shifting science should not be expected to outpace that of the American Academy of Pediatrics. Not until 2009 did that group publish a paper accepting that the science had changed and disavowing its earlier position that the triad of symptoms could be caused only by violent shaking. *See Ophoven Decl.*, ¶ 15.

Because Ms. Fero acted with reasonable diligence, and because the State failed to explain how Ms. Fero's diligence was related to any of the RAP 13.4 criteria, the State's Motion should be denied.

**D. The State waived its other meritless arguments.**

The Motion raises two arguments that the State never raised in response to Ms. Fero's PRP. First, the State now argues that Brynn's bruising and leg injury prove that Ms. Fero assaulted Brynn. Second, it argues that the Court of Appeals did not have the power to grant the PRP without ordering a reference hearing. As discussed below, the State's new

arguments are wrong on the merits. And, because the State neglected to raise them in response to the PRP, this Court should decline to consider them now. *Int'l Ass'n of Fire Fighters*, 146 Wn.2d 29 at 37 (“This court will generally decline to decide issues that were not raised below.”).

**1. Brynn’s other injuries do not prove Ms. Fero’s guilt.**

The State’s Motion argues that the new medical evidence regarding lucid intervals is irrelevant because Brynn had a broken leg and bruises. Setting aside that this argument does not go to any of the RAP 13.4(b) criteria governing acceptance of review, the State is incorrect. The State introduced no evidence at trial that these other injuries were related to Brynn’s head injuries, that they occurred while Brynn was in Ms. Fero’s home, or that Ms. Fero caused them.<sup>2</sup>

At trial, one of the State’s experts conceded that Brynn could have broken her leg over three days before she arrived at Ms. Fero’s home. RP at 15-16 (Mar. 13, 2003) (testimony of Dr. Bennett). He also conceded that the fracture was consistent with “toddler fractures,” accidental injuries that can occur when toddlers fall and twist their legs. RP at 26 (Mar. 13, 2003). Moreover, none of the State’s experts testified that Brynn’s broken leg was related to or established the cause or timing of her head injuries.

---

<sup>2</sup> The leg injury or bruises do not establish the “great bodily harm” element of First Degree Assault of a Child. PRP Br., at 40-41. The State does not argue otherwise.

The same is true of Brynn's bruises. Preliminarily, the State has included photographs of Brynn without including exhibit numbers or explaining how they relate to particular testimony. Regardless, none of the State's experts could say at trial when Brynn received the bruises, other than to say that some were newer and some were older. *See, e.g.*, RP at 204 (Mar. 11, 2003) (Dr. Lukschu agreeing that "bruises are hard to age with any kind of pinpoint accuracy because of the differences in people's skin"); RP at 65 (Mar. 12, 2003) (Dr. Gorecki agreeing that some of the bruises on Brynn's face predated Brynn's arrival at Ms. Fero's); RP at 68 (Mar. 12, 2003) (Dr. Gorecki agreeing that the bruise above Brynn's vulva possibly predated Brynn's other injuries).

The State's experts also did not know what caused the bruises. Without citing any evidence, the State's Motion postulates that the bruise on Brynn's pelvis came from her being kicked. State's Mot. for Discretionary Rev., at 16. That is the opposite of what the State's expert, Dr. Gorecki, said at trial. RP at 68 (Mar. 12, 2003) (Dr. Gorecki responding "no" when asked whether the bruise near Brynn's vulva could have been caused "by either being kicked or knee dropped").

Regarding the bruises on Brynn's face, the State's Motion cites to Dr. Lukschu's speculation that the pattern of those bruises "could be" consistent with a hand grabbing Brynn's face. State's Mot., at 15. That

same expert admitted that he could not say, with a reasonable degree of medical certainty, what caused the bruises. RP at 231 (Mar. 11, 2003). Because Dr. Lukschu had no idea what caused the bruises, the defense moved to strike that portion of his testimony. RP at 231 (Mar. 11, 2003). In response, the trial court prohibited the parties from arguing that his testimony established gripping the face as the cause. RP at 235-36 (Mar. 11, 2003). The State's Motion violates that prohibition and mischaracterizes Dr. Lukschu's testimony.

The State's Motion also asserts that Ms. Fero, when shown pictures of Brynn in the hospital after surgery, "refused to state" whether Brynn looked like she did in the pictures when she was in Ms. Fero's care. State's Mot., at 16. The transcript indicates otherwise. The State asked about two photographs, and, each time she was asked, Ms. Fero identified similarities (like the bruising) and differences (like the medical equipment) between the photographs and Brynn's condition while at Ms. Fero's. *See* RP at 116-118; 120-121 (Mar. 17, 2003).

In addition to mischaracterizing the trial record regarding Brynn's other injuries, the State overstates their relevance to Ms. Fero's conviction. The State's Motion refers to Brynn's broken leg as "a critical piece of evidence in this case, if not the key piece of evidence." State's Mot., at 18. If that were true, then the State should have discussed

Brynn's leg injury in response to Ms. Fero's PRP. It did not do so. In fact, the State first argued the alleged importance of Brynn's broken leg in its motion for reconsideration. The same is true of Brynn's bruises. Arguments raised for the first time after the close of briefing are waived. *State v. Nelson*, 18 Wn. App. 161, 164, 588 P.2d 984 (1977) ("In any event, the argument is waived insasmuch as it was raised for the first time during oral argument."). This Court should not grant review based on new, inaccurate, and misleading arguments raised in the State's Motion.

**2. The State is not entitled to a reference hearing.**

The State urges this Court to make a new rule that a Court of Appeals "may not *reverse* a conviction [on the basis of *Williams*] without first remanding the case to superior court for a reference hearing." State's Mot., at 24. The State does not explain why creating this new rule is an issue of substantial public interest under RAP 13.4(b). Alternatively, the State argues that the Court of Appeals should have ordered a reference hearing to allow the State to challenge Ms. Fero's evidence. The State mischaracterizes the collateral attack processes.

If a petitioner alleges that she is entitled to relief based on newly discovered evidence, and demonstrates that the evidence is competent and admissible, then the State is required to respond to that evidence. *In re Reise*, 146 Wn. App. 772, 780, 192 P.3d 949 (2008) ("The State must

respond to a properly supported petition with its own competent evidence; if its response reveals disputed material issues of fact, then we generally order a reference hearing or a determination on the merits in superior court.”). The rules governing personal restraint petitions require the State to substantively respond: “Respondent should also identify in the response all material disputed questions of fact.” RAP 16.9.

Here, the State neither identified its own competent evidence nor identified “material disputed questions of fact.” Because the State cannot argue that it has contested the credibility of Ms. Fero’s experts in response to her PRP, its Motion argues that it was not obligated to submit declarations from its own experts. State’s Mot., at 22. Whether submitting competing declarations was the only way for the State to meet its burden of producing competent evidence is beside the point. The State did not satisfy its basic obligation to alert the Court of Appeals that “material disputed questions of fact” exist. Nor did the State attempt to distinguish the cases from other jurisdictions recognizing the paradigm shifts described in the declarations from Dr. Barnes and Dr. Ophoven. *See Fero*, 192 Wn. App. at 157-60 (describing cases).

Whatever its reasons, the State decided not to address Ms. Fero’s new evidence in any way. In light of the State’s failure to meet its basic obligation, the Court of Appeals’ reversal without remand for a reference

hearing was “appropriate relief” within the meaning of RAP 16.4(a). This Court should deny the State’s request for another bite at the apple.

**E. The State’s Motion does not challenge an independent basis of the Court of Appeals decision.**

The Court of Appeals held that two independent lines of new medical evidence entitle Ms. Fero to a new trial under RAP 16.4:

[D]octors now know children can remain lucid for much longer periods of time after suffering the injury and *that doctors now know there are several causes for injuries one thought to be indicative only of abuse.*

*Id.* at 160 (emphasis added). The State’s Motion only challenges the Court of Appeals’ acceptance of the lucid interval evidence. But the other line of new evidence, regarding alternate causes of the triad, also undermines Ms. Fero’s conviction and directly rebuts the State’s contention that Brynn was shaken. The State does not argue otherwise.

The new evidence presented in Ms. Fero’s PRP, and accepted by the Court of Appeals, shows that there are multiple causes and mimics of the triad. *See id.* at 156-57. Ms. Fero’s theory at trial was that Brynn’s brother inadvertently injured Brynn. The State’s experts testified that he could not have generated enough force to do so. The new evidence shows that even low-force events, like falling off a chair, can cause the triad. *See Henderson*, 384 S.W.3d at 833-34 (granting a defendant a new trial after expert witnesses testified that the victim’s injuries could be explained by a

short fall onto concrete); Ophoven Decl., ¶¶ 8-10. This new evidence shows that the State's trial experts were wrong and that Brynn's brother could have inadvertently hurt her. Alternatively, this new evidence shows that some other accidental event could have caused Brynn's head injuries.

Because there is an independent, unchallenged basis supporting the Court of Appeals decision, the State's Motion should be denied.

#### **V. CONCLUSION**

The State's Motion does not raise an issue meriting review under RAP 13.4. Moreover, the State argues issues never briefed to the Court of Appeals, mischaracterizes the trial record, and fails to challenge an independent basis for the Court of Appeals' decision to grant Ms. Fero's petition. The State's Motion should be denied.

DATED: May 2, 2016

**PERKINS COIE LLP**

By: 

J. Christopher Baird  
WSBA No. 38944  
Margaret C. Hupp  
WSBA No. 43295  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000

**INNOCENCE PROJECT  
NORTHWEST**

By:  for

M. Fernanda Torres  
WSBA No. 34587  
PO Box 85110  
Seattle, WA 98145-1110  
Telephone: 206.543.5780

Attorneys for Respondent  
Heidi Charlene Fero

May 02, 2016, 3:20 pm

RECEIVED ELECTRONICALLY

No. 92975-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Petitioner

v.

HEIDI CHARLENE FERRO, Respondent

---

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

---

**CERTIFICATE OF SERVICE**

---

I, Cheryl Robertson, declare under penalty of perjury under the laws of the State of Washington, that on May 2, 2016, I caused to be served the following documents as indicated below:

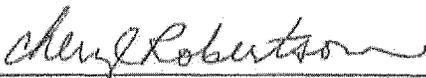
*Respondent Heidi Charlene Ferro's Answer to Motion for Discretionary Review; and*

*Certificate of Service*

Anne M. Cruser, WSBA #27944  
Clark County Prosecuting Attorney's Office  
P.O. Box 5000  
Vancouver, WA 98666-5000  
Email: [Anne.Cruser@clark.wa.gov](mailto:Anne.Cruser@clark.wa.gov)

Via Email

Dated this 2nd day of May, 2016 at Seattle, Washington.

  
Cheryl Robertson

## OFFICE RECEPTIONIST, CLERK

---

**To:** Robertson, Cheryl (Perkins Coie)  
**Cc:** Baird, J. Christopher (Perkins Coie); Hupp, Margaret C. (Marcy) (Perkins Coie);  
anne.cruser@clark.wa.gov  
**Subject:** RE: Filing - Supreme Court No. 92975-1 (In re the Personal Restraint of Heidi Charlene Fero)

Received 5-2-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Robertson, Cheryl (Perkins Coie) [mailto:CRobertson@perkinscoie.com]  
**Sent:** Monday, May 02, 2016 3:20 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** Baird, J. Christopher (Perkins Coie) <JCBaird@perkinscoie.com>; Hupp, Margaret C. (Marcy) (Perkins Coie) <MHupp@perkinscoie.com>; anne.cruser@clark.wa.gov  
**Subject:** Filing - Supreme Court No. 92975-1 (In re the Personal Restraint of Heidi Charlene Fero)

Re: In re the Personal Restraint of Heidi Charlene Fero  
Supreme Court No. 92975-1  
Court of Appeals, Div. II No. 46310-5-II

Dear Clerk,

Attached for filing please find **Respondent Heidi Charlene Fero's Answer to Motion for Discretionary Review** and the **Certificate of Service**.

Thank you.

Cheryl Robertson

**Cheryl Robertson | Perkins Coie LLP**  
LEGAL SECRETARY to Margaret C. (Marcy) Hupp  
1201 Third Avenue Suite 4900  
Seattle, WA 98101-3099  
D. +1.206.359.6643  
F. +1.206.359.9000  
E. CRobertson@perkinscoie.com



Please consider the environment before printing this email. Thank you.

---

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.