

No. 92975-1

**SUPREME COURT
OF THE STATE OF WASHINGTON**

In re the Personal Restraint of Heidi Charlene Fero.

SUPPLEMENTAL BRIEF OF RESPONDENT HEIDI CHARLENE FERRO

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I. INTRODUCTION

The Court of Appeals unanimously held that Heidi Fero's conviction rested almost entirely on now-obsolete medical evidence. In doing so, it agreed with decisions from across the country that the medical community's understanding of the timing and causes of pediatric head trauma have changed dramatically since Ms. Fero's trial. Because this new medical evidence meets the RAP 16.4(c)(3) standard, the Court of Appeals correctly granted Ms. Fero's personal restraint petition.

The State has offered an evolving set of meritless arguments against Ms. Fero's petition. In its answer to the petition, the State argued that new expert evidence can never be new evidence under RAP 16.4 and that Ms. Fero did not present her new medical evidence soon enough. However, the State did not dispute the veracity of Ms. Fero's new medical evidence, argue the new evidence was immaterial, or discuss the numerous cases holding that evidence similar to Ms. Fero's justified post-conviction relief. Because there is no bar against presenting new expert opinions based on new medical evidence as newly discovered evidence under RAP 16.4(c)(3) and because Ms. Fero exercised reasonable diligence, the Court of Appeals rejected the State's arguments.

The State now raises new issues. It challenges the materiality and veracity of Ms. Fero's new medical evidence and argues that a Court of

Appeals can never grant a petition based on new expert evidence without first ordering a reference hearing. Because the State first raised these arguments in a motion for reconsideration, this Court should ignore them. If this Court considers the arguments, it should reject them as unsupported by the record or by case law. Finally, because the State waited too long to file its motion for discretionary review, this Court should dismiss review as improvidently granted. If it does reach the merits, this Court should affirm the lower court's determination that Ms. Fero's petition satisfied RAP 16.4(c)(3).

II. ARGUMENT

The Court of Appeals granted Ms. Fero's petition because her new medical evidence meets the standard for relief under RAP 16.4(c)(3):

“that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; *and* (5) is not merely cumulative or impeaching.”

In re Brown, 143 Wn.2d 431, 453, 21 P.3d 687 (2001) (quoting *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981)). The Court of Appeals discussed the first *Williams* factor at length, holding that

[A] jury in Fero's case today would be faced with medical opinions stating there is no way to determine Brynn was injured during the evening she was in Fero's care nor can it be determined what caused Brynn's injuries. Therefore, there is a reasonable probability that the result of Fero's trial

would be different given the new medical testimony she presents.

In re Fero, 192 Wn. App. 138, 159, 367 P.3d 588 (2016) (citation omitted), *review granted*, 187 Wn.2d 1024 (2017). In support of this conclusion, the Court of Appeals cited several cases from other jurisdictions that have reached a similar result.¹ The court combined its discussion of the second and third factors, holding that the medical paradigms had changed no earlier than 2009, and that Ms. Fero needed time to find new lawyers and to research and draft the petition. *Fero*, 192 Wn. App. at 160-61. It addressed the fourth factor, materiality, by noting that Ms. Fero's evidence would be admissible, that "[t]he State does not question Dr. Barnes or Dr. Ophoven as experts or question the opinions they present," and that the evidence would probably change the result of Ms. Fero's trial. *Id.* at 162. Finally, the court held that Ms. Fero's new evidence was not merely cumulative or impeaching because it was not the same kind of evidence as presented at trial; instead, it was critical evidence because it directly contradicted the trial testimony. *Id.* at 162-63.

¹ Since Ms. Fero filed her petition, additional courts have agreed the shift in medical science regarding shaken baby syndrome warrants post-trial relief. *See, e.g., Com. v. Epps*, 474 Mass. 743, 53 N.E.3d 1247 (2016); *People v. Bailey*, 41 N.Y.S.3d 625, 144 A.D.3d 1562 (N.Y. App. Div. 2016); *Wilkes v. State*, 380 Mont. 388, 355 P.3d 755 (2016).

In response to Ms. Fero's petition, the State did not argue the *Williams* factors at all. Instead, it argued that new expert evidence can never be "newly discovered evidence" within the meaning of RAP 16.4(c)(3) and that Ms. Fero waited too long after discovering that evidence to bring her petition. *See generally* Resp. to PRP. Below, section II.A explains why these arguments are wrong. In response to arguments that the State first made in a denied motion for reconsideration, section II.B explains why Ms. Fero's new medical evidence is material, and why the State is not entitled to a reference hearing. Finally, section II.C explains why this Court should dismiss the State's late motion for discretionary review as improvidently granted.

A. The arguments the State made in response to Ms. Fero's petition lack merit.

In its response to Ms. Fero's petition, the State made only two arguments: (1) that new expert evidence can never be "newly discovered" evidence under RAP 16.4(c)(3); and (2) that Ms. Fero did not exercise reasonable diligence. The Court of Appeals correctly rejected both arguments, and this Court should affirm.

1. New expert evidence can be "newly discovered evidence."

The State's primary argument was 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), prohibit a personal restraint petitioner from presenting newly discovered expert evidence to satisfy RAP 16.4(c)(3). No such bar exists. Moreover, there are fundamental differences between the type of evidence proffered in those cases and Ms. Fero's new evidence.

Evans, *Harper*, and *Copland* involved new expert opinions based on facts *that existed at the time of trial*. See Ans. to Mot. for Rev., at 7-9. In *Evans*, the court determined that an opinion from an expert who, at most, "did a more thorough job of evaluating" physical evidence available at trial was insufficient to support relief. 45 Wn. App. at 614. In *Harper*, an opinion from an expert who "reviewed the same evidence" as the defendant's trial expert was insufficient to support relief. 64 Wn. App. at 293-94. And in *Copland*, new opinions from experts who reexamined physical evidence available at trial did not warrant granting relief. 176 Wn. App. at 450-51. *Evans*, *Harper*, and *Copland* hold that new expert opinions based on trial evidence are not newly discovered evidence. These cases do not stand for the broad rule that new expert evidence can never support post-conviction relief.

Ms. Fero's expert declarations are based on new evidence not available at her trial—the new medical paradigms regarding the timing and causes of pediatric head trauma. The State's trial experts testified that

it would have been impossible for Brynn to remain lucid for more than a few minutes after suffering her injuries. *See, e.g.*, RP at 74 (Mar. 12, 2003) (Dr. Gorecki testifying Brynn may have remained lucid for five or ten minutes); RP at 195 (Mar. 11, 2003) (Dr. Lukschu testifying Brynn would have “immediately” lost consciousness). However, the medical community now understands that children with symptoms like Brynn’s can remain lucid for up to three days after suffering the underlying injury. PRP Br., at 27-29. Had this new medical evidence been available at Ms. Fero’s trial, the State could not have proved that Brynn was injured while in Ms. Fero’s care.

The State’s trial experts also testified that only two things could have caused Brynn’s symptoms—violent shaking or major trauma, such as falling from a multi-story building or being ejected from a moving car. *See, e.g.*, RP at 96 (Mar. 12, 2003) (Dr. Ockner testifying that falling out of bed or falling from a countertop could not cause Brynn’s injuries); RP at 30 (Mar. 13, 2003) (Dr. Bennett testifying that the force required to cause Brynn’s injuries was equivalent to “being ejected from a motor vehicle and smashing her face into a bank”). However, since the trial, the medical community has discovered a myriad of other causes of symptoms like Brynn’s, including causes as seemingly innocuous as a fall from a chair. PRP Br., at 30-31. Had this new medical evidence been available

during Ms. Fero's trial, the State could not have proven that Ms. Fero assaulted Brynn.

Ms. Fero's experts, Dr. Barnes and Dr. Ophoven, used these new paradigms to opine that it was not medically possible to tell when or how Brynn suffered her symptoms. The Court of Appeals distinguished their opinions from those offered in *Evans* and *Harper* as follows:

In Fero's case, Dr. Barnes and Dr. Ophoven are new experts, but their opinions establish that the scientific explanations that were offered as evidence against Fero in her trial are no longer generally accepted in the medical community. Moreover, their opinions state that based on the record that existed at Fero's trial and under the currently accepted paradigm, it is not medically possible to determine that Brynn's injuries occurred when she was with Fero, nor is it medically possible to determine how Brynn's injuries were caused.

Fero, 192 Wn. App. at 165. The Court of Appeals correctly held that this was newly discovered evidence under RAP 16.4(c)(3) warranting relief.

2. Ms. Fero exercised reasonable diligence.

Ms. Fero exercised the reasonable diligence necessary to secure relief under RAP 16.4 because (1) the paradigm shifts within the medical community occurred no earlier than 2009; and (2) Ms. Fero needed time to find new lawyers and to draft her petition after the paradigm shifts occurred. *Id.* at 160-61. The State argues that Ms. Fero should have brought her petition at least six or seven years earlier than she did (or sometime between 2006 and 2008). *See Mot. for Rev.*, at 12.

The American Academy of Pediatrics did not acknowledge that the medical community's understanding of the timing and causes of pediatric head trauma had changed until 2009. *See* Ophoven Decl., ¶ 15. Without citing any case law establishing a time limit on reasonable diligence, the State unreasonably implies that Ms. Fero's understanding of complex and evolving medical evidence should outpace that of the American Academy of Pediatrics. Ms. Fero filed her petition as quickly as she could, given the highly technical nature of the evidence, her need to secure new counsel and experts who would work pro bono to review the literature and the facts, and her lack of access to medical literature during her incarceration.

B. The State waived its remaining arguments by raising them too late, and they lack merit in any event.

After the Court of Appeals rejected the only two arguments that the State offered in response to Ms. Fero's petition, the State changed tactics. It filed a motion for reconsideration that argued, for the very first time, that Ms. Fero's new medical evidence was not material and that the State was entitled to a reference hearing. The Court of Appeals denied the State's motion, and the State reiterates its unpreserved arguments here.

By waiting to raise these arguments until it filed a motion for reconsideration, the State has waived them. *See, e.g., Sebastian v. State, Dep't of Labor & Indus.*, 142 Wn.2d 280, 286, n.1, 12 P.3d 594 (2000) (declining to consider an argument that had not been considered by the

Court of Appeals because it was raised for the first time in a motion for reconsideration); *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (holding that plaintiff could not raise arguments “based on new legal theories with new and different citations to the record” in a motion for reconsideration). As discussed below, these arguments also lack merit.

1. Ms. Fero’s new expert evidence is material.

As discussed above, Ms. Fero’s new evidence casts more than reasonable doubt on the State’s trial theories regarding when and how Brynn developed her symptoms. Had that evidence been available at trial, Ms. Fero could have disputed the State’s theories about where and when Brynn was injured. As the Court of Appeals held, either of Ms. Fero’s new lines of expert evidence independently supports a new trial. *See Fero*, 192 Wn. App. at 160.

The State now contends that this new medical evidence is not material because Brynn also had a broken leg and bruising. Neither Brynn’s broken leg nor bruising could independently sustain a charge of first degree assault of a child, because they are not “great bodily harm,” a necessary element of that charge. Additionally, neither Brynn’s broken leg nor her bruising establish when or how she was injured.

Great bodily harm is “bodily injury which creates a probability of death . . . or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110(4)(c). At trial, the State did not argue or introduce evidence suggesting that Brynn’s leg injury or bruising were “great bodily harm.” Nor could it have, because the leg injury and bruising were not permanent or life-threatening. *See* PRP Br., at 40-41. Only Brynn’s brain injuries could prove the “great bodily harm” element. Because new evidence establishes that the brain injuries could have occurred before Brynn arrived at Ms. Fero’s and that they could have been caused by something other than shaking, the new evidence is material.

The State also erroneously argues that Brynn’s leg injury and bruising establish the timing of Brynn’s head injuries. Contrary to the testimony of its medical experts at trial, the State now argues that Brynn’s leg injury must have occurred at Ms. Fero’s house. Mot. for Rev., at 15-17. But the State’s expert, Dr. Bennett, testified that Brynn could have broken her leg more than three days before arriving at Ms. Fero’s home, and conceded that the injury was consistent with “toddler fractures,” accidental injuries that occur when toddlers fall and twist their legs. RP at 10-26 (Mar. 13, 2003).

The State also argues that Brynn's bruising was the result of a hard kick or stomp, but this is not based on any trial evidence. *See* Mot. for Recons., at 18; Mot. for Rev., at 16. In fact, the State's expert, Dr. Gorecki, responded "no" when asked whether the bruise under Brynn's diaper could have been caused by a kick. *See* RP at 65, 68 (Mar. 12, 2003). Similarly, the State speculates that bruising on Brynn's face "could have been consistent with a hand grabbing Brynn's face." Mot. for Recons., at 17. But, the State cites testimony from Dr. Lukschu, a prosecution expert, who could not state at trial with a reasonable degree of medical certainty what caused the facial bruises. RP at 231 (Mar. 11, 2003). For that reason, the trial court prohibited parties from arguing that Dr. Lukschu's testimony established that grabbing caused the bruises, RP at 232-36 (Mar. 11, 2003), a prohibition the State has violated. Finally, the State's experts agreed that they could not state with any degree of medical certainty when the bruises occurred. RP at 204 (Mar. 11, 2003) (Dr. Lukschu agreeing that "bruises are hard to age"); RP at 65 (Mar. 12, 2003) (Dr. Gorecki agreeing that some of Brynn's facial bruising predated her arrival at Ms. Fero's).

As the State's medical experts agreed at trial, Brynn's leg injury and bruising are irrelevant to the timing and cause of her brain injuries. Because Ms. Fero's new medical evidence establishes that Brynn could

have suffered her brain injuries days before she arrived at Ms. Fero's and because those injuries could have an innocent explanation, Ms. Fero's new evidence is material.

2. The State's request for a reference hearing should be denied.

In its response to Ms. Fero's petition, the State neither requested a reference hearing nor described what that hearing should accomplish. Indeed, the Court of Appeals observed that the State did not contest the merits or credibility of Ms. Fero's new evidence. *Fero*, 192 Wn. App. at 162 ("The State does not question Dr. Barnes or Dr. Ophoven as experts or question the opinions they present."). Under these circumstances, it was proper to grant Ms. Fero's petition without ordering a reference hearing.

The State's counterargument, made for the first time in a motion for reconsideration, is that the Court of Appeals should never grant a personal restraint petition based on new expert evidence without ordering a reference hearing. The State cites no support for such a broad proposition.² Instead, the State argues that it could have disputed Ms. Fero's new evidence only by hiring its own experts and that credibility

² Because the State does not cite to any authority in support of this proposition, the Court may decline to consider it. See RAP 10.3(a)(6) (requiring that briefs contain argument and "citations to legal authority" supporting the argument); *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

determinations must be made by the Superior Court. The State is wrong on both counts and ignores the existing procedure in RAP 16 for deciding personal restraint petitions.

RAP 16.9 requires the State, in its response to a personal restraint petition, to “answer the allegations” and to “identify in [its] response all material disputed questions of fact.” The State must also respond to the petitioner’s evidence “with its own competent evidence.” *See In re Reise*, 146 Wn. App. 772, 780, 192 P.3d 949 (2008). The State’s response determines the need for a reference hearing and the questions to be resolved. *See In re Rice*, 118 Wn.2d 876, 886-87, 828 P.2d 1086 (1992) (“In order to define disputed questions of fact, the State must meet the petitioner’s evidence with its own competent evidence. If the parties’ materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.”).

After the State responds with its own evidence or by raising disputed questions of fact, the Court of Appeals has several options. RAP 16.11(a). *See also In re Crace*, 157 Wn. App. 81, 95, 236 P.3d 914 (2010), *rev’d on other grounds*, 174 Wn.2d 835, 280 P.3d 1102 (2012). If the petition is “not frivolous and can be determined solely on the record,” then a panel of the court should decide the petition. RAP 16.11(b). *See Hews v.*

Evans, 99 Wn.2d 80, 88, 660 P.2d 263 (1983) (“If the court is convinced a petitioner has proven actual prejudicial error, the court should grant the Personal Restraint Petition without remanding the case for further hearing.”). If, on the other hand, the petition cannot be decided on the record, then the court “will transfer the petition to a superior court for a determination on the merits or for a reference hearing.” RAP 16.11(b).

Here, the State chose not to put anything in the record suggesting that it disagreed with Ms. Fero’s new evidence. It also did not request a reference hearing. Therefore, the Court of Appeals decided the issues on the uncontested record, as allowed by RAP 16.11. *See also Hews*, 99 Wn.2d at 88.

The State complains that credibility determinations should not be made based on declarations. *See Mot. for Rev.*, at 22-23. But, the Court of Appeals may weigh the trustworthiness of proffered new testimony to determine its impact on the trial outcome. *See State v. Horton*, 116 Wn. App. 909, 922, 68 P.3d 1145 (2003); *Dorsey v. King County*, 51 Wn. App. 664, 675, 754 P.2d 1255 (1988). Moreover, Ms. Fero’s petition does not depend only on expert evidence. As noted in the brief supporting her petition, cases from across the country establish that the medical paradigms regarding lucid intervals and alternative causes of the triad have changed dramatically since Ms. Fero’s trial. PRP Br., at 32-37. The State

has never distinguished those cases. Nor did it include any challenge to the credibility of her supporting experts in its response.

The State also complains that it should not be required to hire its own experts to counter a petition based on new expert evidence. *See* Mot. for Rev., at 23. However, the Rules of Appellate Procedure do not dictate the form of evidence or argument required to identify material disputed questions of fact. *See* RAP 16.9; *see also State v. Visitacion*, 55 Wn. App. 166, 172 n.6, 776 P.2d 986 (1989) (“RAP 16.9 does not contain a requirement that the disputed questions of fact be set forth in a certain manner.”). Here, the Court of Appeals did not require the State to hire its own experts. Instead, it noted that the State did not question Ms. Fero’s new evidence *at all*. *Fero*, 192 Wn. App. at 162.

There are no material disputed questions of fact here. The State does not now, and never has, contested Ms. Fero’s underlying contentions that children can remain lucid for up to three days after suffering injuries that cause the triad. The State also does not dispute that medical experts now recognize many causes of the triad, including falls from a short height. Those are the only material facts that Ms. Fero raised in her petition. Had the State wanted to dispute them, RAP 16.9 required it to do so in response to the petition. Because the State did not dispute those

material facts in its response, it was not error for the Court of Appeals to grant Ms. Fero's petition without ordering a reference hearing.

C. The State's Motion for Discretionary Review was late.

The procedures in RAP 13.5 apply to motions for discretionary review of decisions on personal restraint petitions and establish a deadline to file the motion no more than 30 days after the Court of Appeals files its decision. RAP 13.5A(c); RAP 13.5(a). Unlike RAP 13.4(a), which tolls the deadline for filing a petition for review while certain motions are pending, RAP 13.5(a) does not toll the 30-day deadline for filing a motion for discretionary review for any reason. The State filed its motion³ 88 days after the Court of Appeals filed its decision. Therefore, the State's motion was late, and this Court should dismiss review of the motion as improvidently granted. This section addresses the State's arguments that RAP 13.5(a) does not apply or should be tolled.

The State argues that RAP 13.5 should not apply because the Court of Appeals decision is not an interlocutory decision. State Reply, at 2. An "interlocutory decision" is "any opinion, order, or judgment of the appellate court . . . which is not a decision terminating review." RAP 12.3(b). A decision terminating review is a decision filed after "review is

³ The State styled its filing as a petition for review. However, "[i]f the [personal restraint] petition is . . . decided by the Court of Appeals on the merits, the decision is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in rule 13.5A." RAP 16.14(c).

accepted.” RAP 12.3(a)(1). Here, the Court of Appeals did not accept review of a lower court decision. Instead, Ms. Fero initiated this civil action by filing a personal restraint petition in the Court of Appeals. *See* RAP 16.3(c) (noting that the Court of Appeals and Supreme Court have concurrent original jurisdiction over personal restraint petitions); *Toliver v. Olsen*, 109 Wn.2d 607, 746 P.2d 809 (1987) (same). Therefore, the Court of Appeals decision is not a decision terminating review because it does not terminate review of a lower court’s decision. Instead, it is an interlocutory decision governed by RAP 13.5.

Apparently assuming that the 30-day deadline in RAP 13.5(a) applies, the State offers several reasons why the deadline should be tolled here. It cites to numerous cases tolling deadlines in other circumstances, State Reply, at 2-3, but none of the cited cases involve Supreme Court review, let alone this Court’s review of interlocutory decisions. The State also argues that RAP 13.4(a) supports tolling the deadline. *Id.* at 3-4. But, RAP 13.4(a) applies to review of decisions terminating review, not decisions deciding personal restraint petitions. *See* RAP 13.5A(c).

Additionally, the State implies that RAP 12.4, the rule allowing a motion for reconsideration, provides a general right to toll a filing deadline while that motion is pending. State Reply, at 5. But, if RAP 12.4 provided a general right to toll a deadline, then the specific tolling provision in RAP

13.4, which applies to petitions for review, would be superfluous. That tolling provision is absent in RAP 13.5, which applies to motions for discretionary review.

Next, the State argues that if RAP 13.5(a)'s 30-day deadline applies, this Court should hold that "extraordinary circumstances" justify the missed deadline.⁴ The "extraordinary circumstances" test in RAP 18.8 is applied "rigorously" and "there are very few instances in which Washington appellate courts have found that this test was satisfied." *State v. Moon*, 130 Wn. App. 256, 260, 122 P.3d 192 (2005). Mistakes by counsel are not extraordinary circumstances. *See, e.g., Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 766, 764 P.2d 653 (1988) (finding no extraordinary circumstances under RAP 18.8 for a filing that was 10 days late where defense counsel admitted they "made a mistake" on the deadline due to attorneys leaving their firm and heavy workloads). There are no extraordinary circumstances here. RAP 13.5A applies the procedures of RAP 13.5(a) to motions for discretionary review of decisions regarding personal restraint petitions, and RAP 13.5(a) states in unequivocal terms that parties have 30 days to file those motions.

⁴ To the extent that the State's argument is a motion for extension of time under RAP 18.8, the State has violated RAP 10.4(d), which prohibits including motions in briefs unless the motion "would preclude hearing the case on the merits." RAP 10.4(d).

Finally, Ms. Fero is not the first to argue that RAP 13.5(a) does not allow for tolling. *See In re Morris*, No. 92426-1 (May 11, 2016), attached as Exhibit A. In *Morris*, the petitioner filed a late “Petition for Review”⁵ on the mistaken belief that RAP 13.4 governed the filing deadline. *Id.* at 1. In contrast to RAP 13.5, RAP 13.4(a) tolls the filing deadline while a motion for reconsideration or a motion to publish is pending.

The State, through the Snohomish County Prosecutor, consistent with Ms. Fero’s position here, argued that Mr. Morris’s motion for discretionary review was late, and the Supreme Court Commissioner agreed. The Commissioner stated that “[p]rocedural rules applicable to motions in this court govern in this circumstance,” where the Court of Appeals determined the merits of a personal restraint petition and that “[u]nder these rules, a motion for discretionary review must be filed not later than 30 days after filing of the decision for which the petitioner seeks review.” *Id.* at 2. The Commissioner noted that:

[T]hough RAP 13.5A(b) provides that motions for discretionary review of Court of Appeals decisions on personal restraint petitions are governed by the review criteria for petitions set forth in RAP 13.4(b), that rule, as indicated, also states that such motions are otherwise

⁵ Just as the State’s request for review was designated a motion for discretionary review here, Mr. Morris’ petition was designated a motion for discretionary review under RAP 13.5A. *See id.* at 2.

subject to the procedures governing motions for discretionary review, *which allow no delay in the filing deadline pending motions to publish.*

Id. at 3 (citing RAP 13.5A(c)) (emphasis added). The Commissioner ruled that Mr. Morris's motion for discretionary review was late. *Id.*

The Commissioner's interpretation is not binding on this Court, but that ruling shows that Ms. Fero's timing argument is not novel. In fact, the State has made the very same argument to urge this Court not to review a decision deciding a personal restraint petition. Under RAP 13.5(a), the State's motion was due 30 days after the Court of Appeals filed its opinion. Because the State missed that deadline, this Court should dismiss the State's motion as improvidently granted.

III. CONCLUSION

Ms. Fero followed the rules. She presented competent, admissible evidence that contradicted the only evidence the State offered at trial to establish her guilt for first degree assault of a child. If the State disagreed with the newly discovered evidence supporting Ms. Fero's petition, it had an obligation to say so in response to her petition. Because it did not do so, and because the State's other arguments are wrong, this Court should affirm the Court of Appeals or dismiss the State's late motion as improvidently granted.

DATED: April 14, 2017

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EXHIBIT A

FILED
MAY 11 2016
WASHINGTON STATE
SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:

MICHAEL JAMES MORRIS,

Petitioner.

NO. 92426 - 1

RULING

Michael Morris was convicted of first degree assault of a child, the victim being his six-week-old daughter. Division One of the Court of Appeals affirmed the judgment and sentence on direct appeal. Mr. Morris, represented by counsel with Innocence Project Northwest, timely filed a motion in superior court for relief from the judgment, which the court transferred to Division One of the Court of Appeals for treatment as a personal restraint petition. CrR 7.8. The Court of Appeals heard oral argument and denied the petition on the merits in an unpublished decision filed on July 13, 2015. Mr. Morris did not file a motion for discretionary review in this court within 30 days, as required under RAP 13.5(a), nor did he move for reconsideration in the Court of Appeals. The State filed a motion to publish the decision 10 days after the unpublished decision was filed, and the Court of Appeals granted the motion on August 24, 2015. The Court of Appeals entered an order correcting a spelling error (changing “inaffective” to “ineffective”), and published the opinion on September 3, 2015. *See In re Pers. Restraint of Morris*, 189 Wn. App. 484, 355 P.3d 355 (2015).

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On October 5, 2015, Mr. Morris filed in the Court of Appeals a pleading entitled “Petition for Discretionary Review.” The pleading was not received in this court until October 29, 2015. The deputy clerk redesignated the “petition” a motion for discretionary review and notified the State that it had until November 30, 2015, to file an answer. *See* RAP 13.3(d). The State timely filed the answer, and Mr. Morris filed a reply. The motion has been submitted to me for determination.

Preliminarily, the State asserts Mr. Morris’s motion for discretionary review is untimely. The State is correct. The Court of Appeals filed its decision on July 13, 2015. A Court of Appeals decision on a personal restraint petition may be challenged only by motion for discretionary review. RAP 13.5A(a)(1); RAP 16.14(c). Procedural rules applicable to motions in this court govern in this circumstance. RAP 13.5A(c); RAP 13.5(a), (c). Under these rules, a motion for discretionary review must be filed not later than 30 days after filing of the decision for which the petitioner seeks review. RAP 13.5(a).

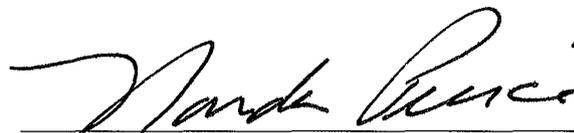
Mr. Morris filed his motion for discretionary review in the Court of Appeals on October 5, 2015, more than 30 days after the decision was filed. As noted, Mr. Morris erroneously designated his pleading “Petition for Discretionary Review.” A petition for review is a mechanism for challenging a Court of Appeals decision terminating review. RAP 13.3(a)(1), (b); RAP 13.4(a). By definition, a Court of Appeals decision terminating review is a decision filed after “review is accepted.” RAP 12.3(a)(1). Review is “accepted” after the filing of a notice of appeal or the granting of a motion for discretionary review. RAP 6.1, 6.2(a). Transfer of a CrR 7.8 motion for treatment as a personal restraint petition is not acceptance of a matter for review. As this court explained in *Toliver v. Olsen*, 109 Wn.2d 607, 746 P.2d 809 (1987), the superior court, the Court of Appeals, and this court have concurrent original jurisdiction of habeas corpus proceedings, although in the appellate courts those proceedings are now denominated as personal restraint petitions. Accordingly, a

Court of Appeals decision on a personal restraint petition is not “a decision terminating review” but falls within RAP 12.3(b), which designates any opinion, order, or judgment of the appellate court that is not a decision terminating review as an “interlocutory decision.” Under the rule’s definition of interlocutory, the result is the same as the explicit direction of RAP 16.14(c): “If the petition is dismissed by the Chief Judge or decided by the Court of Appeals on the merits, the decision is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in rule 13.5A.”

Mr. Morris may have proceeded under the mistaken assumption that he could challenge the decision by petition for review, which may be filed within 30 days after a decision determining a timely motion to publish a Court of Appeals decision terminating review. RAP 13.4(a). In this instance, the Court of Appeals filed an order to publish with correction of a misspelled word on August 24, 2015. But though RAP 13.5A(b) provides that motions for discretionary review of Court of Appeals decisions on personal restraint petitions are governed by the review criteria for petitions for review set forth in RAP 13.4(b), that rule, as indicated, also states that such motions are otherwise subject to the procedures governing motions for discretionary review, which allow no delay in the filing deadline pending motions to publish. *See* RAP 13.5A(c). But even assuming the rule delaying the time limit pending motions to publish applies, Mr. Morris did not file his motion for discretionary review until October 5, 2015, more than 30 days after the Court of Appeals granted the State’s motion to publish. Mr. Morris attributes the delay to the order correcting the opinion, but cites no rule that allows a further delay in the time to file a motion for discretionary review in light of a clerical correction. Mr. Morris also cites correspondence from the Court of Appeals court administrator/clerk, including a September 3, 2015, letter enclosing a copy of the Order Correcting Opinion and indicating that “[w]ithin 30 days after the order is filed, the opinion of the Court of

Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court.” As indicated, that rule does not apply, but Mr. Morris’ pleading seeking this court’s review was filed within this timeframe since October 5, 2015, was the first weekday following the 30th day. *Cf.* RAP 18.6(a) (if the last day is a Saturday, Sunday, or legal holiday, the period extends to the end of the next day that is not a Saturday, Sunday, or legal holiday).

Mr. Morris requests, without filing a motion, that this court exercise its discretion to enlarge the time to file a motion for discretionary review under RAP 18.8(a). The better procedure is for Mr. Morris to file a motion for extension of time. RAP 18.8(b). Accordingly, Mr. Morris shall file any motion for extension of time by June 1, 2016. The State may file an answer to the motion by not later than June 15, 2016. After the motion for extension of time and answer are received, the matter will be referred to a department of this court, together with Mr. Morris’s proposed motion for discretionary review. *See* RAP 17.2(b).



COMMISSIONER

May 11¹⁶, 2016

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 April 14, 2017, I caused to be served the following documents as indicated below:

- (1) SUPPLEMENTAL BRIEF OF RESPONDENT HEIDI CHARLENE FERRO; and**
- (2) CERTIFICATE OF SERVICE**

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Via Email

Dated this 14th day of April, 2017 at Seattle, Washington.


Cheryl Robertson
Cheryl Robertson