

NO. 92975-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:
HEIDI CHARLENE FERRO

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

SUPPLEMENTAL BRIEF OF PETITIONER

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ISSUES PRESENTED

- I. The Court of Appeals erred in reversing the conviction and ordering a new trial based on newly discovered evidence where the *Williams* factors for newly discovered evidence are not satisfied.**
- II. The Court of Appeals erred in reversing the conviction based on newly discovered evidence without first ordering a reference hearing where the Superior Court can determine the credibility and weight of the new expert opinions.**
- III. The filing of the motion for discretionary review was timely and the motion should be reviewed on its merits.**

STATEMENT OF THE CASE

The State incorporates and adopts the factual statement set forth by the Court of Appeals in its original decision in this case, found in *State v. Fero*, 125 Wn.App. 84, 104 P.3d 49 (2005) (*Fero I*). The State has added a short statement of supplemental facts below. The State does not agree with the factual statement set forth by the Court of Appeals in the decision below, *In re Fero*, 192 Wn.App.138, 367 P.3d 588, (2016). The State also adopts its factual statement from the Motion to Reconsider.

Heidi Fero was a twenty-four year-old exhausted mother of two very young children when she gravely assaulted fifteen month-old Brynn Ackley. 3/17/03 RP, p. 65. Fero lived with her boyfriend, Dustin Goodwin, and her two children aged one and five. *Id.* Fero occasionally

babysat Brynn and her four year-old brother, Kaed. Id. at 69-70. Fero did not babysit Brynn and Kaed in the two weeks prior to Brynn's near murder at Fero's home on January 7, 2002. Id. at 72. In fact, Fero had been seriously ill in the two weeks prior to Brynn's assault, having been bedridden and at one point being hospitalized for dehydration. 3/11/03 RP, p. 89, 3/12/03 RP, p. 159-60, 173. On January 7, 2002, she arrived home between 2:30 and 3:00 p.m. after working a shift at a furniture store and appeared stressed. 3/12/03 RP, p. 159, 177. At that point Dustin left for work and Fero was left alone with four children under the age of five for the next eight hours. 3/17/03 RP, p. 73-74.

Breanna Franck picked up her children, Brynn and Kaed, from their father's house after Kaed got out of school that day. 3/11/03 RP, p. 153. Brynn was running around while at her father's house and had no trouble walking. Id. at 165, *State v. Fero (Fero I)* 125 Wn.App. 84, 90, 104 P.3d 49 (2005). Brynn also had no bruising on her face and no bruising on her pelvic area. Id. at 153-154, *Fero I* at 90. Breanna arrived at Fero's apartment with Brynn and Kaed at around 2:00 p.m. *Fero I* at 90. Brynn walked into Fero's apartment on her own. Id. at 165. Brynn did *not*, as the opinion below states, arrive at the apartment in her car seat. Fero told 911 that Brynn had been running around with her brother earlier in the evening, and her daughter, Rachel, testified that Brynn had been running

around with her and Kaed that night. 3/17/03, p. 48, 98. “Brynn had neither bruises nor any trouble walking before being left with Fero.” *Fero I* at 90.

At 9:57 p.m. paramedics were dispatched to Fero’s apartment. 3/10/03 RP, p. 37. The paramedics found Brynn unconscious, limp like a rag doll, and looking barely alive. 3/11/03 RP, p. 39. Fero was hyper and upset, bouncing around. *Id.* She repeatedly asked “did I do the right thing?” *Id.* Fero told the paramedics that Brynn’s four year-old brother had swung Brynn against the wall like a baseball bat. *Id.* at 40. Fero didn’t mention Brynn having been injured with any weapons or toys. *Id.* This account of Brynn being swung like a baseball bat disappears from Fero’s story after this night.

Although Fero would later claim that she saw bruises on Brynn while giving her a bath, Fero denied giving Brynn a bath in her statement to police. 3/12/03 RP, p. 193. In fact, she told police that Brynn had not been upstairs the entire time she’d been at the apartment that day. *Id.* She told the police that she hadn’t even changed Brynn’s diaper in the nearly seven hours Brynn had been at her home before calling 911. *Id.* at 194. Fero would later change all of these statements. Fero told Vancouver Police Officer Scott Telford that she was not good in stressful situations, especially involving children. 3/11/03 RP p. 90. Fero made so many

additional inconsistent statements that they are too numerous to list. They are documented in the State's Motion for Reconsideration.¹

Six medical doctors testified at Fero's trial. Dr. Lukschu is a pediatrician at Legacy Emanuel hospital in Portland. 3/11/03 VRP, p. 174. He has training in child abuse assessment, and has been a consultant on child abuse for Legacy Emanuel. *Id.* at 175-76. He attends continuing medical education in child abuse once a year. *Id.* at 177. Child abuse is a clinical diagnosis, diagnosed by a combination of physical findings, laboratory tests, X-rays, clinical symptoms, and patient history. *Id.* at 176-77. He is familiar with the shaken baby syndrome diagnosis, and testified that depending on how vigorous the assault, symptoms can range from a mild change in mental status and vomiting, on one end of the spectrum, to cardio/respiratory arrest and severe brain damage on the other. *Id.* at 179-80. A patient can be slightly dazed to being totally unconscious and not breathing. *Id.* at 180. The change in mental status, whether slight or serious, would occur immediately in his opinion. *Id.* at 180. The typical

¹ The Court of Appeals presented several of Fero's claims as fact in its opinion below, even though they were necessarily rejected by the jury. Each and every fact listed in paragraphs 4, 5, 6, 7, 9, and 10 of the Court's opinion below came from Fero or her boyfriend, Dustin Goodwin. Fero did not, as the Court claimed, see several bruises on Brynn's body when she gave Brynn a bath. Fero initially denied even giving Brynn a bath. When she called Brynn's father, she did not mention bruising on Brynn—much less bruising on her vagina and above her vulva. Fero's statements about seeing bruising on Brynn during the bath came much later, and were only made to her mother and her boyfriend—not to the paramedics or the police.

patient is under six months of age, but he has treated a patient two to three years old. *Id.* at 181. Dr. Lukschu examined Brynn on January 8, 2002, in the ICU. *Id.* at 182. Brynn was on a ventilator and had cerebral edema and bleeding inside her brain. *Id.* at 183. She had large bruising on her cheeks, chin, chest, above her vagina and on the labia majora. *Id.* at 184. She had a laceration on her labia, which he described as a disruption of the skin. *Id.* It is very unusual to have bruising in the genital area. *Id.* 187. It would be very hard to get that bruising from a fall. *Id.* Also, the bruising on Brynn's cheek and face were unusual as well, in that children will typically bruise themselves on their chin, nose, and forehead by falling. *Id.* at 188.

The multiplicity and location of the bruising led him to opine that the bruises were inflicted, and likely inflicted at the same time. *Id.* He would expect to see this type of facial bruising within an hour or two of infliction. *Id.* at 188-89. Brynn's tibia fracture was at an angle, meaning there was a twisting type of force applied to the leg. *Id.* at 189. The fracture would require a lot of force. *Id.* In his opinion, a four-and-a-half year-old child would have neither the strength nor the developmental abilities to cause this fracture. *Id.* at 190. Regarding abusive head trauma, Dr. Lukschu opined that a child would suffer an immediate loss of consciousness *if* the shaking is severe enough. *Id.* at 193. He did not testify that immediate unconsciousness would occur in all cases of shaking. With

the severity of Brynn’s particular brain injury, he opined that she would have been unconscious “almost immediately.” *Id.* at 195. This could mimic sleeping, and it is possible she didn’t shut her eyes. *Id.* Specifically, Brynn could have had an immediate initial loss of consciousness or major alteration in her level of consciousness, and then come out of that a little bit. *Id.* at 229. Barnes, in his declaration, exaggerates Dr. Lukschu’s testimony. See Barnes Dec. at 26. Dr. Lukschu opined that Brynn would not have had a lucid interval based on the severity of her injury. *Id.* He did *not* opine that lucid interval cannot occur in traumatic brain injury. Fero elected not to ask that question—likely because her theory of the case was that Brynn was injured while in her care at the hands of Kaed. He opined that a four year-old would not have had the strength required to shake Brynn hard enough to cause this severe injury. *Id.* at 196. He opined that with a brain injury as severe as Brynn’s, it would likely not have resulted from falling off a counter or a bed. He did *not* opine that traumatic brain injury cannot occur from short falls. Again, Fero chose not to ask that question, likely not only because she argued that Kaed deliberately inflicted this injury, but because Brynn did not suffer a fall. Finally, Dr. Lukschu testified there are “many causes of retinal hemorrhages,” including birth injury, being squeezed, bleeding disorders, and severe trauma. *Id.* at 197-98.

Dr. Gorecki is an emergency room doctor at Southwest Washington Medical Center, where Brynn was initially brought. 3/12/03 VRP, p. 49. Brynn arrived at SW at 10:20 p.m. *Id.* at 53. She presented with injuries to her face, torso, and genitals. *Id.* at 53. The bruise on the vulva was accompanied by bleeding. *Id.* at 76. The injuries (bruising, blood) depicted in the photographs of Brynn were not due to medical treatment. *Id.* at 54-55. Brynn was deemed too sick to remain at SW Medical, and was transferred to Legacy Emanuel hospital at 11:45 p.m. that night. *Id.* at 61. In Dr. Gorecki's opinion, based on clinical experience and keeping abreast of the literature, a four-and-a-half year-old child could not have inflicted all these injuries. *Id.* at 64. It would take quite a bit of repetitive force to inflict these injuries, and children, even if they cause one bruise, are unlikely to continue the behavior "unabated." *Id.* at 64. Dr. Gorecki testified that the onset of unconsciousness in a brain injury depends on the swelling of the brain. *Id.* at 70. Dr. Gorecki did not testify, as Barnes claims in his declaration, that Brynn lost consciousness immediately after infliction of the injury. See Barnes Dec. at 26.

Dr. Ockner, a radiologist at Southwest Washington Medical Center, testified about the mechanism of traumatic brain injury. 3/12/03 VRP, p. 77-97. Dr. Ockner has completed a fellowship in neuroradiology. *Id.* at 78. Inter alia, he testified that *if* a blow to the head or shaking is

severe enough, it would “typically” result in loss of consciousness right away. *Id.* at 97. He did not testify, as Barnes claims in his declaration, that Brynn lost consciousness immediately after infliction of the injury. See Barnes Dec. at 26.

Dr. Kent Grewe is a neurosurgeon at Emanuel Hospital who treated Brynn. 3/13/03 VRP, p. 36-37. Brynn required three brain surgeries. P. 38, 44. In her first surgery, a large flap of her skull was removed to allow her brain to swell and a large blood clot was removed. *Id.* at 38. An intercranial pressure monitor was put into her head. *Id.* Brynn suffered a large stroke on the left side of her brain. *Id.* at 42. Dr. Grewe testified that Brynn would likely not have had a “lucid interval” following the injury, based on the gravity of her injury. *Id.* at 43. Dr. Grewe defined his use of the term “lucid interval” to mean that the child is fine for that period of time, perhaps after an initial period of unconsciousness from which they wake up and seem normal, and then slowly decline thereafter. *Id.* Dr. Grewe did not testify that a child with traumatic brain injury cannot have a lucid interval. Dr. Grewe did not think Brynn would appear normal after sustaining this injury, which is consistent with both versions offered by Fero in her inconsistent accounts of what occurred: In the first account, Brynn suffers the injury at the hands of Kaed more than two hours before she called 911, during which time she believed Brynn was asleep on the

futon. In the second account, Brynn suffers the injury at the hands of Kaed a matter of minutes before she calls 911. In both accounts, Brynn is altered mentally. Dr. Grewe testified that after this injury was inflicted Brynn could have been moving a little and moaning, and her eyes could be open or closed. *Id.* at 47.

Dr. Goodman is a pediatric ophthalmologist. 3/13/03, VRP p. 52. She testified that Brynn had hemorrhages in both her retinas, which is frequently consistent with trauma (although not always). *Id.* at 63. They could be a result of accidental or nonaccidental trauma. *Id.* at 63. Dr. Goodman testified she could not distinguish the mechanism of injury by the retinal hemorrhages. *Id.* at 67. Dr. Goodman agreed that retinal hemorrhages cannot be equated with child abuse. *Id.* at 70-71. Dr. Goodman testified that she would be surprised that blows from a toy plastic hammer could cause the retinal hemorrhages. *Id.* at 74. Brynn had no history of abnormal bleeding which would explain the hemorrhages. *Id.* at 75-76.

Dr. Bennett is a pediatric radiologist at Emanuel Hospital. 3/13/03 VRP, p. 6. He has extensive experience with pediatric patients who've suffered broken bones. *Id.* at 8. He explained that bones can be broken intentionally. *Id.* Dr. Bennett testified extensively about "toddler fractures," and explained why Brynn's tibial fracture was not a "toddler

fracture.” *Id.* at 10-14. Brynn’s tibial fracture was in the mid-part of the left tibia, and it was “significantly displaced.” *Id.* at 13, 31. Unlike a toddler fracture in which the fracture line is barely visible, in Brynn’s fracture the bone was pulled apart. p. 15. The fracture was caused by a torsional, twisting force as opposed to a direct blow to the leg. *Id.* at 16. This fracture also would not have been caused by someone jumping on the leg, unless a twisting component were applied. *Id.* at 16. He testified to a reasonable degree of medical certainty that a four-and-one-half year old child could not twist Brynn’s leg hard enough to cause this fracture. *Id.* at 17. This is a violent injury, and a four-and-a-half year old would not be strong enough to break Brynn’s leg. *Id.* Children’s legs do not yield easily. *Id.*

A child would not walk on her leg at all with this fracture. *Id.* at 16. It would be too painful. *Id.* Indeed, the example X-rays that Dr. Bennett used to illustrate a toddler fracture were taken from a toddler who refused to walk on his leg with a comparatively minor fracture. *Id.* at 11-12.

Dr. Bennett testified that if blows to the face had caused Brynn’s extremely severe brain injury, the force of the blows would have destroyed the face. *Id.* at 34. One would not see merely swelling and bruising but

destruction of all the bones of the face. *Id.* Dr. Bennett did not believe that a four year-old could cause this brain injury. *Id.* at 34.

The declarations of Fero's experts, Barnes and Ophoven, do not establish "newly discovered evidence" as to whether a four year-old child could have inflicted the multiplicity of injuries suffered by Brynn. The declarations do not dispute Dr. Bennett's testimony that Kaed could not have inflicted the torsional, twisting displaced spiral fracture to Brynn's leg, or that Brynn could not have walked on her leg after it broke.

Rachel Fero, who was five at the time of the assault, testified in her mother's defense. Her testimony was wildly inconsistent and, at times, appeared scripted—at least to defense counsel, who devoted his re-direct examination to rehabilitating her. 3/17/03 VRP, p. 39-57. Rachel testified that she was running around playing with Brynn that night, and that Brynn was a "fast runner." *Id.* at 48. Rachel also testified that Fero did not give Brynn a bath that night, contrary to later statements by Fero. *Id.* at 50. Rachel didn't speak to Detective Norton until January 9, 2002. *Id.* at 60.

Fero was convicted of assault of a child in the first degree and the Court of Appeals upheld her conviction in *State v. Fero*, 125 Wn.App. 84, 104 P.3d 49 (2005). Fero brought this petition in May of 2014, more than eight years after her case became final.

ARGUMENT IN SUPPORT OF ISSUES PRESENTED

I. The Court of Appeals erred in reversing the conviction and ordering a new trial based on newly discovered evidence where the *Williams* factors for newly discovered evidence are not satisfied.

Under RAP 16.4(c)(3), a new trial may not be awarded in a personal restraint petition on the basis of newly discovered evidence unless “[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.” *State v. Jeffries*, 114 Wn.2d 485,493, 789 P.2d 731 (1990). To determine whether a petitioner has demonstrated that “newly discovered evidence” warrants reversal of her conviction, the evidence is subject to the same test that applies 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); *State v. Harper*, 64 Wn.App. 283, 292, 923 P.2d 1137 (1992)). The test for newly discovered evidence is a five factor test set forth in *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981):

- (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.

Additionally, because Fero's petition was brought over eight years after her amended sentence was imposed, Fero must also satisfy RCW 10.73.100, which requires her to additionally show she acted with reasonable diligence in filing the petition. The absence of any one of the factors compels denial of the motion for new trial or dismissal of the petition. *Williams*, supra, at 223. Fero failed to satisfy these factors in her petition.

First, Fero fails to show that her "new" opinions, recently procured from well-compensated professional defense experts, are "evidence" within the meaning of the rule." The law in Washington on this is well settled. In *State v. Evans*, 45 Wn.App. 611, 613-14, 726 P.2d 1009 (1986), *rev. denied*, 107 Wn.2d 1029 (1987), the Court of Appeals reversed the trial court's award of a new trial on the basis of a different opinion from an expert the defendant retained after trial. In reversing the trial court, the Court was concerned with the lack of finality that would accrue in awarding new trials on the basis of different expert opinions applied to facts that were known at trial. The Court said:

In sum, this strikes us as a classic case: the defendant loses, then hires a new lawyer, who hires a new expert, who

examines the same evidence and produces a new opinion.
We cannot accept this as a basis for a new trial.

Id. at 614-15.

In his concurrence, Judge Reed noted that such experts “rarely agree” and

...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. As Judge Reed’s concurrence explains, there can be no finality of a case involving scientific or medical evidence if a new trial, based on different medical opinions, can be obtained with such ease.

In *State v. Harper*, 64 Wn.App. 283, 292, 923 P.2d 1137 (1992), the defendant was convicted of Attempted Murder. At trial he raised the diminished capacity defense and presented expert testimony in support of his claim. *Id.* at 287. In his personal restraint petition, the defendant presented an affidavit from a new doctor whose opinion differed from the expert opinion presented at trial. *Id.* at 290. If credited by the jury, this opinion would probably have changed the result at trial. *Id.* at 291. The Court of Appeals denied the petition, relying on *Evans, supra*: “[W]e have the same situation as in *Evans*, the retention of new counsel, who retains a

new expert, who reviews the same evidence, and presents a new opinion.”
Harper at 294. In the recent *In re Copland*, 176 Wn.App. 432, 451, 309 P.3d 626 (2013), *review denied* 182 Wn.2d 1009, 343 P.3d 760 (2015) the Court of Appeals reiterated the principle that different, tardily procured expert opinions applied to facts known at the time of trial are not newly discovered evidence.

The Court of Appeals’ holding in this case departs from established precedent by finding a new expert opinion based on facts known at the time of trial constituted newly discovered evidence. This type of opinion merely impeaches the testimony offered at trial.

Second, Fero failed to show that an opinion like the one she recently solicited was not known to her or her attorney at the time of trial, or could not have been discovered with the exercise of due diligence. The opinion in question, as it relates to Fero’s case, is as follows: That a child can suffer a traumatic brain injury and remain lucid and asymptomatic for as long as three days before the sudden onset of symptoms. This is *not* a new opinion. It was an available opinion at the time of trial. It was, in fact, the theory presented by Louise Woodward, the Boston Nanny, at her highly publicized murder trial in 1997. Lucid interval was discussed several times at Fero’s trial, both by her retained attorney, Mark Muenster,

and by the medical witnesses.² The Court of Appeals' "new evidence" holding can be summarized like this: This is an old argument that's gotten better. But even if that were true, neither this Court nor the Court of Appeals has ever applied such a broad construction to the concept of newly discovered evidence. The standard applied below would gut the requirements for obtaining a new trial on the basis of newly discovered evidence.

In holding that Fero did not and could not have discovered this opinion by the time of her trial and that she acted with reasonable diligence in bringing this petition, the Court of Appeals stated that Fero was excused from the strictures of the due diligence rule because she was "convicted in 2003 and incarcerated at the Washington Corrections Center for Women until her release on July 30, 2014," that she has no medical training and should not be expected to "keep up with the relevant medical literature and case law while incarcerated..." *In re Fero*, slip opinion at 11-12. But Fero remained out of custody until February 24, 2006. And if Fero could not be expected to "discover" these opinions without medical training, that condition existed up until she filed her petition and presumably will exist in perpetuity. When would she ever be held to a

² Lucid Interval was discussed in the oft-cited 1998 article *Interval Duration Between Injury and Severe Symptoms in Nonaccidental Head Trauma in Infants and Young Children*, M.G.F. Gilliland, 43 J. Forensic Science 1998, 723-725, attached to the State's Motion to Reconsider as Exhibit 4.

diligence requirement under this standard? Despite her incarceration Fero filed her 226-page personal restraint petition two months *before* her release. The primary article relied upon by Barnes and Ophoven, the literature review by Donohoe, was nearly three years old by the time Fero's mandate was issued and she ceased being represented by counsel. The Court of Appeals has effectively written the due diligence standard out of the newly discovered evidence test.

The passage of time here is devastating to the State. Two of the main witnesses in this case were very young children. If Fero could have brought this petition even six or seven years before she did she should be precluded from relief because the memories of the State's witnesses would be expected to fade over time. In fact, the primary case the Court of Appeals relied on in reversing Fero's conviction, Wisconsin's *State v. Edmunds*, 308 Wis.2d 374, 746 N.W.2d 590 (2008), was decided in 2008. The "evidence" at issue here is documentary, opinion piece-type evidence—not witness gathering or boots on the ground investigation. Though the Court of Appeals necessarily found that Mark Muenster, her trial attorney, was unaware of the lucid interval issue, the lack of any declaration from Muenster strongly rebuts this conclusion. The Court of Appeals erred in holding that Fero acted with reasonable diligence in "discovering" this opinion and in bringing this petition. The Court erred in

finding, without any evidence, that Fero’s attorney was not aware of this available argument at the time of trial, nor could he have been with the exercise of due diligence.

Third, this “new” opinion, applied to facts that were known at trial, would not probably change the result on re-trial and is not material. In considering whether newly discovered evidence warrants a new trial, the Court must consider whether the evidence will probably change the result of the trial. “[W]e do not consider what effect the newly discovered evidence may have on the defendant's case, but rather we weigh the newly discovered evidence against the strength of the State's evidence. *See State v. Peele*, 67 Wash.2d 724, 732, 409 P.2d 663 (1966).” *In re Faircloth*, 177 Wn.App. 161, 168, 311 P.3d 47 (2013). In a child abuse case in which the head trauma is the *only* evidence of assault, lucid interval can be relevant where it would expand the universe of suspects. The opinion recognizes this, in holding that the potential for a so-called “lucid interval” would probably change the result in this case—because Fero could put the blame on one of Brynn’s parents rather than herself (or a four year-old). But this holding ignores the inescapable fact that Brynn Ackley was assaulted *at Heidi Fero’s house*. “Lucid interval,” much like the litany of other alternative theories Barnes and Ophoven point to in their declarations, has *no relevance* to this case.

This is not merely an abusive head trauma case. This case involved a life-threatening, recent assault in which Brynn was seriously beaten about the face and torso and sustained a “significantly displaced” spiral fracture to her tibia that would have prevented her from walking. The pictures of Brynn viewed by the jury, attached hereto, demonstrate this. The pictures reveal that Brynn was brutally assaulted, and that the assault was recent. Indeed, Brian Dohman, the lead paramedic who initially treated Brynn that night, testified that during the twenty minute ambulance ride Brynn’s bruising progressed rapidly, especially around her face. 3/11/03 VRP, p. 23. Dr. Lukshcu, the pediatrician with special training in child abuse assessment, testified the pattern of bruising could have been consistent with a hand grabbing Brynn’s face. *Id.* at 227. Dustin Goodwin testified that Brynn had *no* noticeable bruising to her face when her mother brought her over. 3/12/03 VRP, p. 158. During the 7:34 p.m. phone call Fero placed to Brynn’s father, she did not mention bruising on Brynn. 3/11/03 VRP, p. 120. Moreover, it is obvious that Brynn did not arrive at Fero’s apartment in that condition. No reasonable person would receive a child in that condition and let it pass without comment or action. The jury would have had to believe that Fero arrived home to babysit and found Brynn looking like she’d just lost a boxing match with an adult—and said nothing about it. Finally, Brynn’s spiral leg fracture indisputably

occurred at Fero's house. Brynn walked into Fero's apartment that day, and Fero's daughter, Rachel, testified that Brynn was running around and playing with her and Kaed that day/night, which precludes Brynn having arrived at the apartment with a displaced spiral fracture to her tibia.³

(3/17/03 RP p. 48).

The pictures of Brynn are shocking. The bruising around the vulva, in particular, reveals a vicious assault. It appears that Brynn was kicked—hard—directly against her vagina, sans diaper, with her legs spread, and was either kicked or stomped above the vulva. The impact was so hard that it caused a laceration. The pictures make it clear why Mark Muenster, Fero's retained attorney, chose not to deny that Brynn was assaulted at Fero's home, nor did he try to push back the timing of the assault by arguing "lucid interval"—which was a known concept at the time of trial. To do so would have been ludicrous.

Fero had four possible defense theories from which to choose: 1) Accidental infliction of all injuries. The pictures of Brynn, as well as her displaced spiral tibia fracture, precluded this theory. No person would

³ The State's theory of the case, which it maintains, is that Brynn was likely in such distress after Fero violently twisted her leg and fractured it – possibly during the bath upstairs that Fero initially denied giving Brynn – that Brynn's ensuing crying caused the exhausted, overwhelmed Fero to further violently assault Brynn, resulting in the abusive head trauma as well as the extreme bruising depicted in the photographs of Brynn in the hospital.

believe it. 2) Intentional infliction of *all* injuries, having occurred up to three days prior to Brynn's arrival at Fero's house. This is the theory in which "lucid interval" would play center stage, and it is nonsense. No one would believe that all of these injuries occurred prior to Brynn's arrival at Fero's, much less three days prior as Ophoven postulates in her far-fetched declaration. 3) Head injury occurring up to three days before Brynn's arrival at Fero's (either by accidental or non-accidental infliction), with remaining injuries occurring at Fero's at the hands of Brynn's four year-old brother, Kaed. This is the "lightning strikes twice" theory, equal to theory #2 in its folly. It would require the jury to believe in unbelievable coincidence; that Brynn was just the unluckiest child in the world. This unreasonable defense, if offered, would rely on "lucid interval." 4) Kaed did it—at Fero's house. This is the defense that Fero selected, and it was the only viable defense. In light of Kaed's presence at the apartment for the entire time that Fero was with Brynn (although not a witness to anything that occurred upstairs, where Fero bathed Brynn), this was an excellent trial strategy. That the jury did not agree with it is of no moment.

In addition to the serious bruising, the spiral tibial fracture is a critical piece of evidence in this case, if not the key piece of evidence. First, the presence of a long bone fracture coupled with the severe head trauma that Brynn suffered is indicative of non-accidental infliction of

both injuries. See Mot. to Recon., Ex. 2 at App. B, p. 968. Second, the fracture was spiral, displaced, and the result of violent twisting or torsional force, according to Dr. Bennett. The declarations of Barnes and Ophoven do not refute this or even address this. Finally, the fracture was sustained *at Fero's house*.

In order to conclude these opinions would probably change the result on re-trial, the jury must not only find the opinions credible, but must be willing to entirely overlook the fact that Fero has already set her story in stone: Kaed did it. At retrial, Fero will *again* be changing her story, this time asserting that the head injury was caused by Brynn's mother or father prior to January 7, 2002. How then will she explain the other injuries to Brynn? The leg fracture and the severe bruising are critical to this case: Because those injuries occurred at Fero's house, no reasonable juror would believe that the head injury was inflicted by a different actor on a different date. Indeed, Fero is not required to even raise this argument at a new trial just because she raises it in this petition. She can simply use this petition as a gateway to re-argue that Kaed, (who is now nineteen years-old and fully grown), is the one who did it—a theory heard and rejected by the jury, and which cannot form the basis of a claim of newly discovered evidence.

For the same reasons that the tardily presented opinions on lucid interval would not probably change the result on re-trial, the opinions are not material. The materiality factor looks at whether the new opinions would have changed the outcome of the trial had they been presented to the jury at the original trial. See *Peele*, supra, at 727. Although this factor overlaps to a degree with the first factor, it is not identical. This factor requires the court to look at the evidence actually presented at trial (the actual testimony, exhibits, and arguments) and determine that the opinions offered would have resulted in an acquittal in spite of everything the jury heard and saw. *Peele* at 730-31. This factor fails. As explained above, this case is not a classic “shaken baby case.” This case involved a brutal, full-body assault on Brynn that undeniably occurred at Fero’s apartment. Thus, the question the jury had to decide in this trial was whether Fero committed the assault on Brynn or whether someone else who was at the apartment committed it. The jury heard testimony from five doctors that it was extremely unlikely that Kaed, a four year-old, had either the strength or developmental ability to inflict these injuries. The tardy opinions now offered are not material and the Court of Appeals erred in holding they were. This Court should reverse the Court of Appeals.

II. The Court of Appeals erred in reversing the conviction based on newly discovered evidence without first ordering a reference hearing where the Superior Court can determine the credibility and weight of the new expert opinions.

The Court of Appeals granted the personal restraint petition, reversed Fero's conviction, and remanded this case for a new trial without first ordering a reference hearing to determine the credibility of the new opinions brought forth by Fero's hired experts. This was error.

As an initial matter, there has been no "paradigm shift" on abusive head trauma. In *In re Morris*, 189 Wn.App. 484, 355 P.3d 355 (2015), Division I of the Court of Appeals held:

Abusive head trauma as a diagnosis, and shaking as a cause of such injuries, are generally accepted theories in the relevant scientific community. At trial, the State offered position papers from the American Academy of Pediatrics, the Academy of Ophthalmology, and the National Association of Medical Examiners, as well as a publication from the Centers for Disease Control and Prevention. Each of these recognizes abusive head trauma and accepts shaking as a mechanism for injury. Further, the State now presents a 2011 article listing various international and domestic medical organizations "that have publicly acknowledged the validity of [abusive head trauma] as a medical diagnosis." Among the 15 listed is the World Health Organization. The article further states that "it is virtually unanimous among national and international medical societies that [abusive head trauma] is a valid medical diagnosis." And it states that while some courts have concluded that the diagnosis is based on inconclusive research, the vast majority have not.

In re Morris, 189 Wn. App. 484, 493-94, 355 P.3d 355, 360 (2015), as corrected (Sept. 3, 2015).

Despite all the ballyhoo, there has been no paradigm shift in the scientific support for the diagnosis of AHT/SBS. The empirical evidence includes a continuously growing body of ‘evidence-based, peer-reviewed medical literature with 40 years of contributions by pediatricians, neuroradiologists, clinical and forensic pathologists, ophthalmologists, and physiologists clearly supporting the construct of a medical diagnosis of AHT.

Joelle Moreno and Brian Holmgren, *Dissent Into Confusion: The Supreme Court, Denialism, and the False ‘Scientific’ Controversy over Shaken Baby Syndrome*, 2013 UTAH L. REV. 153, 160 (2013).

If the Court of Appeals believed that Fero met her burden of demonstrating all five *Williams* factors, the Court of Appeals erred in not ordering a reference hearing before granting relief. The Court of Appeals claims that the declarations of Barnes and Ophoven were “not contested” by the State. This is incorrect and reflects a fundamental misunderstanding of the collateral attack process.

The State is not required to procure, at substantial cost, new experts to refute claims in a personal restraint petition before the court of review has even determined that the new “evidence” is, in fact, evidence (as opposed to impeaching opinion), and that the *Williams* factors and RCW 10.73.100 have been satisfied. There should be no fault to the State

for arguing, instead, that the petition is time-barred. More importantly, the Court of Appeals' opinion misunderstands how credibility determinations are made. If the State had produced competing affidavits, a trier of fact would be required to decide which side to believe. The Court of Appeals cannot make that determination. As in cases involving witness recantations, credibility determinations need to be made by the Superior Court in a reference hearing. See generally *State v. Scott*, 150 Wn.App. 281, 207 P.3d 495 (2009); *State v. D.T.M.*, 78 Wn.App. 216, 221, 896 P.2d 108 (1995). See also *Morse v. Antonellis*, 149 Wn.2d 572, 575, 70 P.3d 125 (2003), *State v. Davis*, 25 Wn.App. 134, 138, 605 P.2d 359 (1980), *State v. Statler*, 160 Wn.App. 622, 632, 248 P.3d 165 (2011), and *Herrera v. Collins*, 506 U.S. 390, 417, 113 S. Ct. 853, 869, 122 L. Ed. 2d 203 (1993) ("In the new trial context, motions based solely upon affidavits are disfavored because the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations.")

The Court of Appeals was free to dismiss Fero's petition if it found that any of the five criteria for granting a new trial on the basis of newly discovered evidence were not met. It was not, however, free to find her experts credible (or to find that a jury would credit their testimony at a new trial), and grant her petition without a reference hearing. The State

cannot cross-examine a declaration. Likewise, the only method the State has to “dispute” the defendant’s declarations is to hire experts to produce competing declarations. The State cannot “dispute” a declaration by simply opining, in its Brief of Respondent, that the declarants are not credible. At a reference hearing, the State would cross-examine Barnes and Ophoven and demonstrate their lack of credibility. Cross-examination would reveal what materials they relied on in forming their opinions, which they curiously failed to identify in their declarations, any personal bias or investment in these issues, and their clear profit motive to provide opinions helpful to convicted defendants in this case and others. The characterization of the State as having failed to contest the credibility of Barnes and Ophoven is significant in this case because the Court of Appeals seemed to use that theory to get around the idea that it made a credibility determination it was not otherwise at liberty to make. Alternatively, the Court believed that finding Barnes and Ophoven credible in the first instance was within its prerogative because the State chose to argue the petition was time-barred due to the *Williams* factors not being met.

This Court should reverse the Court of Appeals and hold that while an appellate court may deny a personal restraint petition based on a claim of newly discovered evidence if it finds that any one of the *Williams*

factors are not satisfied (or, in the case of an untimely petition, that RCW 10.73.100 is not satisfied), the Court may not *reverse* a conviction on this basis without first remanding the case to superior court for a reference hearing.

III. The filing of the motion for discretionary review was timely and the motion should be reviewed on its merits.

The State adopts and incorporates the arguments it made in its Reply to Fero’s Answer to the Motion for Discretionary Review, and adopts and incorporates the arguments of the Washington Association of Prosecuting Attorneys in its amicus brief. The State maintains that the “decision” from which it sought review was the decision denying the motion to reconsider, in which the underlying opinion of the Court of Appeals inheres. Alternatively, if this Court finds that the motion for discretionary review was due within thirty days of the issuance of the Court of Appeals’ opinion, this Court should nevertheless review this case on the merits because the RAPs on this matter are inconsistent and confusing, both for practitioners and for the Court of Appeals, as demonstrated in the appendix to the amicus brief of the Washington Association of Prosecuting Attorneys. The ends of justice warrant review.

APPENDIX

CLARK COUNTY PROSECUTING ATTORNEY

April 14, 2017 - 4:20 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 92975-1
Appellate Court Case Title: Personal Restraint Petition of Heidi Charlene Fero
Superior Court Case Number: 02-1-01117-9

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