NO. 92975-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In Re the Personal Restraint of

HEIDI CHARLENE FERO,

Petitioner.

AMICUS BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL)

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I. INTRODUCTION

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL submits this amicus brief limited to the issue of whether significant advances in scientific understanding occurring after trial constitute newly discovered evidence as that term is used in the post-conviction time bar (RCW 10.73.100(1)) and in the rules governing post-conviction relief (RAP 16.4(b)(3)).

II. ARGUMENT

New science can constitute newly discovered evidence. But, it often takes time for science to change and for petitioners to bring claims based on the new science. This Court should hold that material advances in science can justify an exception to the time bar and merit relief.

A Miscarriage of Justice in Not Always Evident Until Years Later

Bill Richards spent nearly 23 years behind bars in California for the murder of his wife based on the erroneous testimony of a forensic dentist who said a wound found on his wife's hand was a match to Richards's supposedly unusual dentition. The dentist told the jury that based on his 40-plus years in the field, he could say that out of 100 people, only "one or two or less" would have the same "unique feature" in their lower teeth.

At the time of Richards's conviction in 1997, bitemark match testimony was generally accepted and

admissible. Over time, the scientific consensus changed. Scientific bodies, including the National Academy of Sciences (NAS) and, most recently, by the President's Council of Advisors on Science and Technology (PCAST) found that bitemark analysis does not meet the scientific standards for foundational validity. "To the contrary, available scientific evidence strongly suggests that examiners cannot consistently agree on whether an injury is a human bitemark and cannot identify the source of [a] bitemark with reasonable accuracy." PCAST, "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods," archived at: https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

On May 26, 2016, the California Supreme Court reversed Richards's conviction in a 7-0 decision, after the expert recanted his testimony, saying that he had cited

statistics that lacked scientific support and never should have done so, "because it's inappropriate to cite percentages or things resembling percentages unless there has been some prior scientific study" to back up the assertion. *In re Richards*, 63 Cal. 4th 291, 293, 371 P.3d 195, 196–97 (2016).

On June 28, 2016, the prosecutor dismissed the murder charges.

DNA Exonerations Have Exposed That Faulty Forensic Science Often Leads to Wrongful Convictions

NACDL respectfully submits that a significant advancement in science made after trial can constitute newly discovered evidence. To hold otherwise would result in preventing the correction of wrongful convictions where forensics that were considered reliable and sometimes unassailable at the time of trial have since been repudiated or are at least now subject to serious doubt.

A study of DNA exonerations found that misapplication of forensic science is the second most

common contributing factor to wrongful convictions, present in nearly half (46%) of DNA exoneration cases. *See, e.g.*, Innocence Project, *Facts on Post-Conviction DNA Exonerations*, at http://www.innocenceproject.org (last visited April 20, 2017); Brandon L. Garrett & Peter J. Neufeld, Invalid *Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 14 (2009).

Over the last decade, much forensic evidence has been criticized for its lack of scientific validation, with the most significant and trenchant assessment coming from the National Research Council of the National Academy of Sciences ("NAS") in its 2009 report "Strengthening Forensic Science in the United States: A Path Forward." That report noted that advances in forensic science "have revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving

undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence." NAS Report, 4.

The scientific community is to be commended for reviewing the evidentiary reliability of methodologies employed and recommending changes or even discarding what was once believed to be scientifically sound methodology. But, flawed analytical methods are often not debunked and/or revised until years after a trial and conviction.

Newly Discovered Evidence Constitutes a Claim for Relief and an Exception to the Time Bar

A Personal Restraint Petition (PRP) provides a court the opportunity to correct legal errors that occurred during a criminal trial. Because most PRPs are based on the conduct of the trial and/or sentencing (or the failure of counsel to perform competently at trial), the legislature's

adoption of a one year limit for most cases strikes a balance between finality and the need to correct manifest injustices. RCW 10.73.090.

But, the Legislature further recognized that some PRPs involve the discovery of an impropriety more than a year after finality. For that reason, the Legislature created exceptions which include, for example, retroactive changes in the law, convictions premised on insufficient evidence, and double jeopardy violations. RCW 10.73.100(1)-(6). Included in the list of exceptions to the one-year time bar are cases involving the discovery of new evidence which is material to the determination of guilt, but which could not have been discovered previously with due diligence.

In Washington, newly discovered evidence can constitute both a claim for relief and an exception to the time bar.

The one year PRP time bar does not apply to a petition based on "[n]ewly discovered evidence, if the

defendant acted with reasonable diligence in discovering the evidence and filing the petition." RCW 10.73.100(1).

Likewise, under RAP 16.4, a court will grant relief to a petitioner if the petitioner's restraint is unlawful because, among other reasons, "(m)aterial facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding." RAP 16.4(c)(3).

The oft-cited newly discovered evidence test is: "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. The absence of any one of the five factors is grounds for the denial of a new proceeding." *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) (citations omitted)).

In other words, "newly discovered evidence" means evidence that was *unavailable* at the time of trial, not just *unexplored*. For that reason, Washington courts have correctly held that the newly discovered evidence test is not met where an expert witness reaches an opinion different than the opinion proffered at trial based on the same facts and science available at the time of trial because such "new" opinions could have been discovered and presented at trial with the exercise of due diligence, *State v. Harper*, 64 Wash. App. 283, 293, 823 P.2d 1137 (1992). While the failure to exercise diligence might support a claim of ineffectiveness, it does not justify an otherwise untimely PRP.

But, this case does not simply involve a "new" opinion "recently procured from well-compensated professional defense experts," as the State unfairly characterizes Ms.

Fero's claim. *State's Supp. Brief,* p. 13. This case involves advances in the science that put the previously known facts in a new and different light.

Advances in Science Can Constitute Newly Discovered Evidence

This Court should construe the phrase "newly discovered evidence" as used in RCW 10.73.100(1) to include material advances or changes in science and or medicine. Such a construction comports with the plain meaning of the statute and is consistent with the test employed by previous Washington courts. *In re Stenson*, 174 Wash.2d 474,276 P.3d 286 (2012) (undisclosed photographs which put previously known evidence in a new light constituted newly discovered evidence).

When there are significant advancements or changes in scientific methodology, the underlying facts may not be new. But, the science is new. And, with the new science the meaning or significance of the underlying facts can change. *See Sewell v. State*, 592 N.E.2d 705, 707-08 (Ind.

Ct. App. 1992). The rationale of *Sewell* is compelling. That court found that in "promoting the orderly ascertainment of the truth," post-conviction courts may consider scientific advances because "advances in technology may yield potential for exculpation where none previously existed." *Id.*[1] In other words, while each marginal advance in science cannot form the basis of a new trial, watershed developments are a different story.

It is for these reasons that numerous courts from other jurisdictions have recognized that advancements in science and/or medicine may constitute newly discovered evidence. *See e.g., Bunch v. State*, 964 N.E.2d 274, 289

[1] The position urged by Ms. Fero and amicus is hardly unprecedented. Courts have responded similarly in other legal contexts when strict adherence to time limits results in gross unfairness. One of the earliest examples of judicial response arose in a worker's injury case in which the plaintiff had contacted silicosis. Though a strict application of the statute of limitations had resulted in the dismissal of plaintiff's case, the United States Supreme Court construed the accrual of the claim to be at the time of manifestation and diagnosis of the disease that was much later than the time of contact. This manipulation of limitation periods, now commonly known as the delayed discovery rule, has been extended to civil cases involving professional liability, products liability, and other torts. *Urie v. Thompson*, 337 U.S. 163 (1949).

(Ind. Ct. App. 2012) ("we do agree with Bunch that, just as the evolving science of DNA analysis became accepted as the scientifically reliable method for accurately interpreting even previously-existing DNA evidence, fire victim toxicology analysis has become recognized as a scientifically reliable method to better interpret existing evidence, and that it has done so since the time of Bunch's trial); *Smith v. Florida*, 23 So.3d 1277, 1278 (Fla. Dist. Ct. App. 2010) (concluding that new comparative bullet lead analysis ("CBLA") research discrediting CBLA evidence presented at trial may constitute newly discovered evidence warranting a new trial); *Clark v. Florida*, 995 So.2d 1112, 1113-14 (Fla. Dist. Ct. App. 2008) (concluding that advances in science discrediting the scientific theory advanced by the state at trial may constitute newly discovered evidence warranting a new trial); *New Jersey v. Behn*, 868 A.2d 329, 343 (N.J. Super. Ct. App. Div. 2005) (granting new trial for murder and armed robbery

based on new scientific conclusions regarding composition bullet lead analysis, noting "[s]cience moves inexorably forward and hypotheses or methodologies once considered sacrosanct are modified or discarded").

A growing number of courts have recognized that new medical and scientific understanding of the "shaken baby syndrome" (SBS) theory constitutes newly discovered evidence which can merit a new trial. *People v. Bailey*, 144 A.D.3d 1562, 1564, 41 N.Y.S.3d 625, 627 (N.Y. App. Div. 2016) (concluding that defendant established 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, and whether other causes (such as short-distance falls) may mimic the symptoms traditionally viewed as indicating SBS); *Commonwealth v. Epps*, 474 Mass. 743, 766, 53 N.E.3d 1247 (2016) (granting new trial because "in view of the new research published after trial and the number of published

court cases where such experts have testified, competent counsel today would, with diligent effort, have been able to retain such an expert and offer the jury an alternative interpretation of the [SBS] evidence."); *Ex parte Henderson*, 384 S.W.3d 833, 833-34 (Tex. App. 2012) (granting a habeas corpus petitioner a new trial when she presented medical expert testimony stating that advances in science had shown that the type of injuries sustained by the child she was convicted of murdering "could have been caused by an accidental short fall onto concrete," and that there was no way to tell if the child's injuries were the result of intentional abuse).

As noted in the opinion below, the Wisconsin Court of Appeals considered a similar case in *State v. Edmunds,* 308 Wis.2d 374, 746 N.W.2d 590 (Wis.Ct.App.2008). Edmunds was convicted of first degree reckless homicide for allegedly shaking a seven-month-old child. *Id.* at 378. At her trial, the prosecution presented numerous medical experts who

testified that the cause of the child's head injury was violent shaking or violent shaking combined with an impact and that the child's condition would have appeared immediately abnormal. *Id.* The State then used testimony that the child had appeared normal when she was dropped off with Edmunds to argue that the injuries had to have been caused by Edmunds. *Edmunds,* 308 Wis.2d at 378, 746 N.W.2d 590.

To support her petition for a new trial,

> Edmunds presented evidence ... in the form of expert medical testimony, 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 ... syndrome.

Id. at 385–86.

The *Edmunds* court held that this developing medical debate constituted new evidence and warranted a new trial because there was a reasonable probability the result

would be different. *Id.* at 392. In holding it constituted new evidence, the court reasoned that "it is the emergence of a legitimate and significant dispute within the medical community as to the cause of [the child's] injuries that constitutes newly discovered evidence. At trial ... there was no such fierce debate." *Id.* And, in holding the new evidence warranted relief, the court reasoned,

> Now, a jury would be faced with competing credible medical opinions in determining whether there is a reasonable doubt as to Edmunds's guilt. Thus, we conclude that the record establishes that there is a reasonable probability that a jury, looking at both the new and the old medical testimony, would have a reasonable doubt as to Edmunds's guilt.

Id.

The criticism of the SBS methodology has also been recognized by courts considering timely challenges to convictions where counsel failed to call experts to present the current science. See *Commonwealth v. Millien*, 474 Mass. 417, 418, 50 N.E.3d 808, 809 (2016) (granting a new trial based on IAC based on counsel's manifestly

unreasonable decision not to hire experts to challenge state's SBS theory); *People v. Ackley*, 497 Mich. 381, 383, 870 N.W.2d 858, 859 (2015) (finding ineffective assistance of counsel for trial counsel's failure to investigate adequately and to attempt to secure suitable expert assistance because in the case involving the unexplained and unwitnessed death of a child, expert testimony was critical to explain whether the cause of death was intentional or accidental); *State v. Hales*, 152 P.3d 321, 337-344 (Utah 2007) (granting new trial for IAC when trial attorney failed to hire expert to examine CT scans to challenge the state's timing of the injuries). Further, a federal court in Illinois found that this new scientific evidence "established by a preponderance of the evidence that based on all of the relevant evidence, no reasonable jury would find her guilty beyond a reasonable doubt," and thereby waived the defendant's procedural default to preserve a claim in state court based on a finding of actual

innocence. *Prete v. Thompson*, 10 F. Supp. 3d 907, 909 (N.D. Ill. 2014).

Due Diligence Should Not Require Premature Filing

Developments in forensic sciences sometimes present a hard issue as to when they become ripe for the purposes of filing a postconviction claim. In many instances of scientific advancement, there is no single, decisive, watershed moment, but a gradually building stream of research and skepticism that undermined the prior scientific consensus.

As the amicus brief of the Innocence Network explains, while the first articles raising skepticism towards SBS theory were published before Fero's conviction, the major shift in medical opinion, to where those who question shaken baby syndrome have risen to a substantial proportion of the medical field, has occurred only recently.

RCW 10.73.100 does not attach a separate one-year limit following the discovery of newly discovered evidence

which could not have been previously discovered with due diligence. Instead, the statute requires reasonableness—both in terms of discovering the new evidence and then in filing a petition.

This Court should not adopt an overly strict definition of what constitutes a reasonable amount of time. While a petitioner is required to pursue his rights diligently, the appropriate standard should be "reasonable diligence," not "maximum feasible diligence." See *Holland v. Florida,* 560 U.S. 631, 653 (2010). *State v. Scott*, 150 Wn. App. 281, 207 P.3d 439 (2009) (Defendant acted with reasonable diligence in discovering new evidence in form of recantations by alleged victim and two witnesses; defendant was imprisoned and was barred by a no-contact order from contacting alleged victim, and it was also unlikely that the witnesses would have changed their stories earlier or that defendant could have done anything to cause those changes.). In claims such as this dealing

with newly discovered evidence based on new scientific research, this Court must not interpret the timeliness requirement too rigidly or injustice would undoubtedly occur.

To apply a one-year limitation commencing at the first public criticism of a type of forensic science would place petitioners in a Catch 22. If a petitioner filed too early, upon the first publication of a skeptical article, then her petition would certainly be denied, based on the reasoning that one rogue doctor's opinion was not a new fact and/or would not be enough to create a substantial probability that the jury would return a verdict in the defendant's favor. Thus, it is essential that a petitioner not file a PRP based on newly discovered evidence until there is a sufficient body of scholarly publications to cast serious doubt on the scientific reliability of the State's theory in a particular case.

Likewise, by adopting a strict timeliness rule if a defendant waited too long for the contrary scientific research to build, then he risks the claim being denied as untimely. It would require much more than due diligence for a defendant to discern the exact moment when medical science literature had reached its peak in order to file his postconviction motion.

This interpretation of timeliness is consistent with the approach taken by courts in an analogous line of cases dealing with the 2004 report by the National Research Counsel that discredited the reliability of Comparative Bullet-Lead Analysis ("CBLA"), and the decision of the FBI in 2005 to abandon CBLA entirely. Despite the publicity surrounding those actions, newly discovered evidence claims were found to be timely that were permitted to be brought over a period of years following that 2004 report. *More v. State*, 880 N.W.2d 487, 509 (Iowa 2016) (summarizing numerous post-conviction CBLA cases

brought under analogous "newly discovered evidence" provisions).

Both the Rule of Lenity and the Constitutional Avoidance Doctrine Mandate the Statutory Construction Urged by Ms. Fero.

There are two other reasons to construe the statute and court rule in the manner urged by Fero and NACDL. If this Court concludes the post-conviction statute's use of the phrase "newly discovered evidence" is ambiguous, "the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary." *In re Post Sentencing Review of Charles*, 135 Wash.2d 239, 249, 955 P.2d 798 (1998))

Likewise, because it would violate due process to foreclose relief where newly available evidence undermines expert testimony from trial (see *e.g.*, *House v. Bell*, 547 U.S. 518, 536-54 (2006)), it is the duty of this court to construe a statute so as to uphold its constitutionality. *State v. Houston-Sconiers*, __ Wn.2d __, 391 P.3d 409 (2017).

III. CONCLUSION

The exceptions to the post-conviction time bar exist to protect finality while still allowing a reviewing court to do justice. This Court should affirm the Court of Appeals decision granting Ms. Fero's PRP.

DATED this 21st day of April, 2017.

Respectfully Submitted:

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