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A. ARGUMENT IN REPLY

I. NEWLY DISCOVERED EVIDENCE THAT BABY XANDER FELL AND HIT HIS HEAD WHILE AT THE CROCKFORD HOME.

a. Mrs. Crockford's Belief That The Baby Struck the Floor With His Head Is Supported by Circumstantial Evidence.

The prosecution suggests that the newly discovered evidence that baby Xander fell while in Mrs. Crockford's care is not really of great significance, because she acknowledges that she did not actually see the baby's head strike the floor. Citing to page 11 of the transcript [which misspells the baby's name as "Zander" instead of "Xander") of attorney Dunkerly's interview of Mrs. Crockford, the State alleges that Mrs. Crockford is "not even sure what part of his body struck the floor."

But the State ignores the strong circumstantial evidence that the baby's head *did* hit the floor. This inference flows from the supine position the baby was in before the fall, and the face down position the baby was found in immediately after the fall. Mrs. Crockford reports that after Mr. Brooks changed the baby's diaper, he put the baby back in the carrier that was used to transport the baby in the Brooks' car. He put the carrier on a corner of the couch in the Crockfords' living room, and then he left with Mr. Crockford, leaving the child in Mrs. Crockford's care.¹

¹ PC: Then at that particular moment – oh, no, then he said I'll need to change Zander. And I said I could change him, he said no,

All baby car seat carriers are designed so that the baby is on its back, (see, e.g., www.BabyUniverse.com, and www.dreamtimebaby.com) so it is obvious that the position that baby Xander was in just before his fall was the supine position.

Later, when Mrs. Crockford heard the baby cry, she came to the room where she had left the baby and saw that the baby was on the floor

I'll do that.
ED: Okay.
PC: And so he put him in the corner of the L-Shaped couch and took him out and went to change him, but he was soaked all the way through.
ED: Uh huh.
PC: So I went and got – I had a sack of clothes that Ethan was growing out of.

[Attorney Dunkerly asks Mr. Crockford to draw him a picture of something].

PC: So I brought out an outfit for him.
ED: Uh huh.
PC: For him to change into.
ED: So he got that on him.
PD: Yeah he changed his outfit.
PC: Then put him back in the –
ED: Carrier.
PC: In the carrier.
ED: Car seat thing.
PC: Yeah.
ED: Uh huh.
PC: In the corner of the couch and –
ED: In the corner he was – so he was in the – he was in the seat, so he was on the cushion part of the couch?
PC: Right, right.
ED: Okay, okay. And he puts him there and then did they go to the –
PC: Then Adrian [Mr. Crockford] and he left.

Appendix B, Transcript, p. 9.

and her own toddler child, Ethan, nearby. *Appendix B, Transcript, p. 10.*

In her interview Mrs. Crockford makes it clear that baby Xander had been ejected from his car seat, which was still resting on the couch:

PC: He went to the floor.

ED: Okay.

PC: And I –I don't remember – I do remember I was like how did he [her son Ethan] get there so quickly? And what happened? And, anyway, I ran and picked up Zander.

ED: And was Zander still in the car seat carrier?

PC: No, the car seat carrier was still on the couch.

Appendix B, Transcript p. 11.

When attorney Dunkerly asked how the baby came out of the car seat, Mrs. Crockford gave her opinion that when her own child, Ethan, pulled himself up to a standing position, he must have grabbed the front of the infant car seat, and that motion ejected baby Xander out of the seat.

ED: Okay, so he was – he had come, somehow out of it and –

PC: What I thought was either when he was pulling himself up off the couch, by where Zander was, or he might have, you know, touched the –

ED: Caught the edge –

PC: Or edge of –

ED: The carrier and pulled it forward?

PC: As he pulled himself up, yeah. Something like that.

Appendix B, Transcript p. 11.

Mrs. Crockford also reported that she found baby Zander on the floor in a face down position. *Appendix B, Transcript p. 11.*

To go from a supine -- face up -- position, to a face down position, the baby's body had to have undergone a 180 degree rotation. If her toddler son Ethan pushed down suddenly on the front of the car seat, that would apply torque to the car seat, so that the back of the car seat would come up while the front of the car seat went down. Such a resulting torque would throw the baby out of the car seat causing the baby's body to spin with the baby's head rotating towards his feet. The position she found the baby in -- face down -- was consistent with this explanation.

Moreover, common sense suggests that if the baby came to rest in a face down position, at some point the baby hit the front of his head on the floor. While it does not necessarily suggest that the baby's head was the very first part of his body to hit the floor, unless the baby's body in effect "bounced," and rolled over in the course of the bounce, the resting position of the baby's body would also reflect the position the body was in when it struck the floor.² Therefore, Mrs. Crockford stated that she

² This infant was less than two months old at the time of this incident at the Crockford home on January 17, 1998. (The baby was born on November 20, 1997. RP 878-79.)

believed the baby had probably hit the front of his head against the floor. Although the prosecution asserts that Mrs. Crockford only stated her belief that the baby hit the front of his head in response to “prompting from Mr. Dunkerly,” (*Brief of Respondent, at p. 3*) in fact the transcript show this is not accurate. The transcript clearly shows that first Mrs. Crockford made some kind of gesture that identified the front of the head as the part of the body that first hit the floor. Only after she made that gesture did Mr. Dunkerly use words to describe the body part that she had identified with her gesture:

ED: Okay, and did you know – do you have any idea where or what – I mean he hit the floor or which part of his body made contact with the floor first? I mean it’s kind of – I know you may not even know.

PC: *Oh probably his* – probably well.

ED: Probably – I mean did you see any indication of – to tell you *that’s where he hit?* That kind of thing. I mean, he probably hit the front of his head, somewhere, right.

PC: Probably.

ED: Okay. I mean that just makes common sense.

PC: Yeah. I –

As any parent knows, infants do not reach the stage where they can roll over by themselves until much later. The baby fell an estimated distance of roughly 30 to 36 inches (see *Appendix B, Transcript at p. 17.*) There is no reason to think that after falling such a distance and striking the floor, the limp body of a newborn baby would “bounce” up in the air, and come to rest on the floor a second time. And even if there were some reason to think that the baby’s body “bounced” to some degree, there is no reason to think that it flipped over and changed its position between bounces.

Appendix B, Transcript p. 11 (bold italics added). Since attorney Dunkerly's asks whether she saw anything to indicate "that's where he hit," Mrs. Crockford had to have done something prior to that point to identify the part of the baby's body that she thinks hit the floor. Thus it is clear that Dunkerly did not first prompt her to identify the front of the baby's head as the place of impact. On the contrary, first she identified that part of the baby's body without words, and then attorney Dunkerly used words to describe the part of the body she had already identified.

The prosecution also notes that during the interview with attorney Dunkerly, Mrs. Crockford was not sworn. *Brief of Respondent, at p. 2.* This ignores the fact, however, that more than one month after the interview, Mrs. Crockford gave Mr. Dunkerly a sworn declaration under penalty of perjury. In her declaration she repeats what she said in the unsworn interview, and notwithstanding the prosecution's objection that she didn't actually witness the fall itself, at several points in her declaration Mrs. Crockford specifically refers to "the fall" and to "Zander's fall." *See Appendix A, at ¶¶ 5, 6, & 9.*

b. The Fact That Xander Stopped Crying And Appeared to Be Acting Normally After The Fall Does Not Mean There is No Causal Link Between the Fall and His Neurological Distress Roughly Two Weeks Later. As Professor Denton's Case Study Shows, Babies Who Fall Relatively Short Distances Can Show A Complete Absence of Signs of Distress and Then Suddenly Die From Secondary Internal Brain Injuries Days Later Because The Absence of Symptoms Led Family Members to Think That All Was Well.

The prosecution argues that even "assuming that the child had struck his head on the floor," this fact is not significant. *Brief of Respondent, at p. 9.* "The child did not appear to be disoriented, cried for a short period of time and then stopped crying, appeared to the woman to be 'fine' with his eyes clear and being able to track as a normal baby would." Thus, the State argues that the fall is not related to Xander's later neurological distress. Since Xander showed no signs later that afternoon of being in distress, the State argues that he cannot possibly have suffered any injury serious enough to have caused his seizures two weeks later.

This argument ignores the fact that (1) newborn babies cannot talk and thus cannot express the fact that they are not all right and are not suffering from any kind of neurological distress; and (2) that after crying the baby "went to sleep" and slept a long time. Everyone knows that after a person suffers a concussion you are not supposed to let them go to sleep because that may deprive you of the opportunity to observe symptoms of

neurological distress -- like becoming unconscious.³ The fact that Xander seemingly went to sleep, tells us *nothing* whatsoever as to whether Xander suffered any neurological injury at that point.

The prosecution's contention -- that since the baby appeared to be fine, the fall was not significant and played no role in Zander's later neurological distress -- conflicts with recent reports in the medical literature. The prosecution simply ignores the report of a similar medical case which petitioner Brooks cited in her opening brief. That article documents a case where the baby "appeared" to be fine after suffering a short fall of about the same distance as baby Xander's fall. And yet that child was dead three days later. The article in question describes the apparent normal appearance and behavior of that child after the fall:

A 9 month-old black male child weighing 22 pounds (10 kg) and measuring 28 inches (71 cm), 80th percentile and 50th percentile for age, respectively, with a history of asthma treated with nebulizer, was witnessed by his grandmother to fall backwards off the edge of a queen sized bed, 30 inches off the floor. The child was sitting on the edge of the bed as his grandmother dressed her 2-year old daughter. The child fell backwards and rotated from the sitting position, striking the midback of his head on a vinyl-covered concrete floor at 8:00 a.m. He immediately began crying, and the grandmother placed ice on a knot on

³ It is precisely because we cannot immediately know what is going on inside the skull that victims of concussions are to be placed under careful observation for several hours afterwards. That is why running back Shaun Alexander was taken out of the Seahawk playoff game with the Washington Redskins and was not allowed back in the game even though after less than a minute Alexander appeared to be fine and did not exhibit any signs of neurological distress.

the back of his head. ***He stopped crying and was consolable within a few minutes.*** The child was taken to the babysitter's residence, where the babysitter was told of the fall and to watch for any behavioral changes. The mother was at work the morning the fall occurred. ***When the mother picked the child up at the babysitter's in the afternoon, he appeared well. The babysitter reported no problems and that he acted, ate, and behaved as usual. For the next two days, the grandmother, mother, and babysitter did not notice any abnormalities in either behavior or appearance of the child.***

Approximately 72 hours after the fall off the bed, the child was found at the foot of the mother's bed, where he usually slept, prone, cold, and unresponsive. Paramedics were called, and in spite of resuscitative efforts, he was pronounced dead upon arrival at the hospital.

Denton, "Delayed Sudden Death in an Infant Following an Accidental Fall," 24 American Journal of Forensic Medicine and Pathology 371 (December 2003) (bold italics added).

A post-mortem autopsy in the case described above revealed a subdural hematoma approximately 2 x 2 x 0.1 cm and severe edema inside the skull. Id. at 372. The medical investigators ultimately concluded that the baby's death was an accident, and that it resulted from the 30 inch fall off the bed. They concluded that the baby died of "secondary brain injury" – i.e. the swelling of the brain from internal hemorrhaging -- that came after the fall. Id. at 373.

What is widely understated and sometimes forgotten about is secondary brain injury, which occasionally may be the principal force determining the outcome ***after a seemingly***

trivial head injury.

Id.

As in the case study described by Professor Denton, baby Xander appeared to be behaving normally after his fall. But that normal appearance does not mean that the fall did not cause internal brain injuries, (such as a rebleed of an older subdural hematoma), which did not produce observable signs of neurological distress until many days after the fall.

c. Newly Discovered Evidence Does Not Have to Be Direct Evidence In Order to Warrant A New Trial.

The prosecution focuses on the fact that Mrs. Crockford did not see the baby's actual fall and did not see the child strike the floor. While this is certainly true, it is not material. The prosecution's position seems to be that newly discovered *circumstantial* evidence can never suffice to meet the test for new evidence that warrants the granting of a new trial. But any distinction between the weight to be accorded direct and circumstantial evidence was abandoned more than three decades ago. State v. Gosby, 85 Wn.2d 758, 766-67, 539 P.2d 680 (1975) ("simply untenable to assume that circumstantial evidence is less reliable than is direct evidence. Sometimes direct evidence is more probative or reliable, but many times circumstantial evidence may be more probative or reliable"); State v. Askham, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004) ("One is not more

valuable than the other”). Washington appellate courts have held that purely circumstantial evidence is sufficient to support a criminal conviction even though that requires proof beyond a reasonable doubt. See, e.g., State v. King, 123 Wn. App. 243, 269, 54 P.3d 218 (2002).

For purposes of a motion for new trial based on newly discovered evidence, the new evidence must be such that it would probably change the outcome of the trial. State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981). Thus a defendant need only show that the new evidence makes it more likely than not that at least one juror would have had a reasonable doubt as to the defendant’s guilt. This standard is far less than that required to support a conviction. If convictions can be upheld solely on the basis of circumstantial evidence which establishes factual propositions beyond a reasonable doubt, then new trials can be granted solely on the basis of circumstantial evidence which creates a likelihood that at least one juror would have had a reasonable doubt.

There is no requirement that the newly discovered evidence be direct evidence. Mrs. Crockford need not have seen the fall in order for her testimony to constitute newly discovered circumstantial evidence that the baby fell and hit its head. Circumstantial evidence regarding the causation of bodily injuries is nothing new. For example, in Conrad v. Alderwood Manor, 119 Wn. App. 275, 78 P.3d 177 (2003) one of the

disputed issues at trial was what caused a 91 year old nursing home patient to fracture his leg. The Court of Appeals noted that "There was no direct evidence here on just how Enid's femur fractured." Id. at 282. The parties presented alternative theories. The nursing home suggested that the fracture was caused simply by osteoporosis. The plaintiff argued it could only have occurred as a result of someone twisting the patient's leg, or dropping the patient on the floor while attempting to get her out of bed. The Court of Appeals held that there was sufficient circumstantial evidence to support a jury verdict that the fracture was caused by some negligence on the part of the nursing home staff. Even though no one saw the patient fall, and no one saw anyone mistreating the patient, the circumstantial evidence was sufficient to demonstrate that one of those things must have occurred.

In the present case, it is rather bold of the prosecution to assert that the circumstantial evidence that baby Xander fell and struck his head at the Crockford's is of no significance or force, since the prosecution's entire case against petitioner Brooks was based on circumstantial evidence. No one testified that they saw petitioner Brooks shaking her baby in an agitated and angry manner. And yet the prosecution's sole theory of the case was that Ms. Brooks *must* have done that, because under the circumstances there was no other conceivable, scientifically rational

explanation as to how the infant's subdural hematoma could have been caused. See RP 1061 ("there's no other explanation for these injuries"); RP 1101 (only violent shaking done by "somebody who's out of control" could cause the type of injuries seen by the doctor).

The prosecution's experts all focused on the circumstantial evidence that the baby's neurological trauma manifested itself while the baby was alone with Ms. Brooks. According to the prosecution's experts, when a baby is alone with one caregiver and begins to manifest neurological distress that later proves to be caused by a subdural hematoma, the circumstances of timing and of being alone with the caregiver circumstantially demonstrate that the injuries were caused by that caregiver. Both Dr. Wehby and Dr. Cristofani testified explicitly to this circumstantial inference. RP 1071-1073 ("Q. . . . who would be the person to cause the abuse? A. The person present at the time the problems happened."); RP 1169-1170 (opinion that suspicion should "focus upon that person that was with that child alone").

Finally, the prosecution's lead detective testified that even though no one witnessed what Ms. Brooks did with or to her baby, the baby's medical symptoms were such that circumstantially all of the doctors were confident that the narrative of what happened given by Ms. Brooks could not be accurate, and that she must have hurt her baby. RP 1461.

Given the prosecution's total reliance upon circumstantial evidence, it is perverse for the prosecution to contend that the newly discovered circumstantial evidence does not have any significance.

It was undisputed at trial that the baby suffered a subdural hematoma and that in turn caused severe neurological distress. The dispute was over what caused the recent (as opposed to the older) subdural hematoma. The prosecution's experts argued that it must have been the violent shaking of the baby by the mother, because they believed there was no other logical explanation. The mother now argues, in this personal restraint petition, it must have been the fact that the baby fell and hit his head, triggering a rebleed of the older subdural hematoma. Both parties rely on circumstantial evidence to explain the later subdural hematoma. But the prosecution argues that Ms. Brooks' newly discovered circumstantial evidence regarding the baby's fall at the Crockford's is insignificant, and the fact that the jury never got to hear this evidence is immaterial. The State's argument is simply that its own circumstantial evidence is reliable, and Brooks' new circumstantial evidence is not.

The Court of Appeals has previously rejected this kind of argument, as the decision in Pimentel v. Roundup Company, 32 Wn. App. 647, 649 P.2d 135 (1982) demonstrates. Just as it was undisputed in this case that the infant suffered a recent subdural hematoma causing

neurological distress, in Pimentel it was undisputed that a stack of paint cans fell, and one of the cans fell on the plaintiff's foot causing injury. The question in Brooks' case is what caused the recent subdural hematoma. The question in Pimentel was what caused the paint cans to fall. In both cases there was a complete absence of direct evidence.

In Pimentel the trial judge excluded the testimony of the plaintiff's expert witness. Had the expert been allowed to testify, he would have explained that given the circumstances of the weight of the paint can, and its position on the display shelf, it would only have had to be jostled and moved just a fraction of an inch to cause the paint can to fall off the shelf. Pimentel, 32 Wn. App. 647, 654, n.8, 649 P.2d 135 (1982) (“[T]he Pimentels argued Mr. Smith’s testimony was critical to show that by moving only 3/16 inch, the buckets reached balance, and by moving 5/16 inch, they fell.”) The Court of Appeals held that the exclusion of this circumstantial evidence required a new trial: “We conclude the court erred in refusing to permit circumstantial evidence which may have assisted in explaining what caused the paint can to fall.” Id. at 657.

In Pimentel the evidence was not presented because the trial judge did not allow its admission. In the present case the existence of the evidence was not known to petitioner Brooks, and so it was not presented. This is a distinction without significance. If a civil plaintiff is entitled to a

new trial in a personal injury action when the trial judge denies the plaintiff the opportunity to present circumstantial evidence of what caused the accident which injured the plaintiff, *a fortiori*, then, in a criminal case the defendant should be entitled to a new trial if, through no fault of her own, she did not discover and thus was denied the opportunity to present circumstantial evidence that strongly supports her claim of innocence by offering an alternate explanation of what caused the victim's neurological injuries.

d. If the Crockfords Had Told Mr. Brooks About Xander's Fall When it Happened on January 18, 1998, The Criminal Charges Might Never have Been Brought.

If Mr. and Ms. Brooks had known about Xander's fall at the Crockford residence, this case might well have been resolved like the case reported by Professor Denton. In that case, as in this one, police initially suspected that the child had been intentionally abused. But because the child's prior fall was reported and investigated, that suspicion of criminal activity was dispelled:

Upon extensive questioning about any possibility of inflicted trauma and abuse that the baby could have sustained, they both spontaneously gave the similar story of the fall three days prior. The babysitter was questioned and confirmed the accounts and timing of the reported events. Police detectives and evidence technicians accompanied the mother and grandmother back to their residence and verified the scene and reenactment of the fall. A week later, the prosecutor's pathologist (JSD) and a

specialist child death scene investigator of the Medical Examiner's Office went to the residence and again inspected the residence, interviewed the grandmother and mother, and reenacted the fall. As with the police detectives, all felt the grandmother and mother to be truthful, and grieving appropriately for the circumstances. After consideration of the autopsy, toxicologic, histologic, consultative and investigative findings, the death was certified as craniocerebral injuries due to a fall from the bed backwards onto a concrete floor. The manner was determined accidental.

Denton, supra, at 373.

Suppose the Crockfords had told Mr. Brooks about Xander's fall on January 17, 1998, and he, in turn, had told his wife about it. Two weeks later, when Xander started having seizures and his mother called 911, the authorities would have asked Ms. Brooks whether Xander had suffered any head trauma recently. Ms. Brooks would have recalled what her husband told her about Xander's fall at the Crockford house, and would have related the history of that fall to the police.

As in the case study described by Denton, the police might not have initially accepted that explanation. But if they had gone to Mr. Brooks for verification, he would have confirmed that Mrs. Crockford told him that Xander fell and hit his head two weeks earlier. And if the police still viewed that story with suspicion, they would have gone to Mrs. Crockford, who would also have confirmed the fact of the baby's fall. And if the authorities had then consulted with medical authorities, to ask

whether such a fall might have caused secondary brain injuries which could explain Xander's neurological distress two weeks later, the medical authorities might have acknowledged that it was possible that the fall did play a causal role in Xander's seizures and could have caused a subdural hematoma.

In short, this case might have proceeded along the lines of the case discussed by Professor Denton. The authorities might have decided that the death was accidental, that no assault occurred, and criminal charges might never have been brought. Even if criminal charges had been brought, Ms. Brooks would not have been in the position of having been unable to offer any explanation for her baby's condition that could be confirmed, and that could provide an alternative to the theory that she must have violently shaken baby Xander and thereby caused his injuries. The evidence of Xander's fall, discovered post-trial through no fault of the petitioner, strongly supports her claim of innocence, and her conviction should not be allowed to stand simply because it took the Crockfords years to come forward with the truth.

2. NEW SCIENTIFIC STUDIES AND RESEARCH

a. The Trend Towards Questioning the Very Existence of the Shaken Baby Syndrome.

The prosecution argues that at the time of trial, many of the

opinions expressed by defense expert Dr. Uscinski, were the “minority view” among the scientific community. *Brief of Respondent*, at pp. 10-11. This is certainly true, and Dr. Uscinski himself acknowledged this.

The prosecution then advances the unsupported proposition that Dr. Uscinski’s views “would continue to be the minority view in the scientific community.” *Brief of Respondent*, at p. 11. But the prosecution does not cite *anything* in support of this contention. The prosecution claims that the information contained in more recently published articles, which were cited by petitioner Brooks, indicate that the scientific propositions she advances “continue[] to be a minority view.” *Id.* at p. 11. But the State does not support that factual assertion with any citation to any medical journal article, or to anything else.

In fact, as several recent articles explicitly states, there has been a shift in thinking in both the medical and legal communities, and the opinions endorsed by petitioner Brooks enjoy considerably greater support today than they did five years ago. In one influential article, after reviewing the medical literature on the subject, the author concluded that “the commonly held opinion that the finding of subdural hematoma and retinal hemorrhaging in an infant was strong evidence of shaken baby syndrome was unsustainable.” Donohoe, *Evidence-Based Medicine and Shaken Baby Syndrome*, *American Journal of Forensic Medicine and*

Pathology 24:239-241 (2003). Shortly after this article was published, an editorial in another medical journal stated: “We need to reconsider the diagnostic criteria, if not the existence, of shaken baby syndrome.” Editorial, British Medical Journal 328:719-720 (March 27, 2004). About the same time a legal commentator concluded that evidence of subdural hematoma and retinal hemorrhaging “is insufficient proof that a crime has been committed” and noted that in other countries unless there are external signs of trauma to the head, such symptoms are “usually attributed to accidental, trivial head injury” and are not viewed as signs of child abuse. Comment, *Shaken baby Syndrome: A questionable Scientific Syndrome and a Dangerous Legal Concept*, Utah Law Review 1109 (2003).

The prosecution’s experts testified that in their view subdural hematomas were very rarely caused by the birth process. We now know that evidence has been collected which shows that this belief is simply unsupportable because the evidence is to the contrary. See Whitby, *Frequency and natural history of subdural haemorrhages in babies*, The Lancet, 362: 846-851 (March 2003).

The State would have this Court believe that despite such recent studies the majority of medical practitioners still persist in believing that such clinically silent birth induced subdural hematomas are very rare. The State does not offer any explanation as to why there would be such

persistence in the face of clear evidence to the contrary. Similarly, the State does not explain why it assumes that the medical profession in 2006, if polled, would be found to adhere to other propositions which have been recently undermined by research, such as the now demonstrably erroneous propositions that retinal hemorrhaging is only caused by violent shaking, that diffuse axonal injury is a prevalent marker of intentionally inflicted shaking abuse, and that neurological distress surfaces immediately whenever there is trauma to the brain, thus making it clear that whoever is present when the neurological distress first surfaces is very likely the perpetrator of abuse against the child.

Moreover, even assuming, *arguendo*, that the defense theory regarding rebleeds of subdural hematomas is still a “minority view” in the medical profession, this is utterly beside the point. This is not a case where the new scientific evidence involves any kind of new scientific test or principle that would trigger the Frye test. The new research is based simply on autopsies, histological studies of nerve cells, and case histories. No new scientific principle is being advanced. Researchers are merely collecting more data (something that the profession should have done before simply blindly endorsing the hypothesis that neurological distress must be caused by violent shaking of the child). To warrant a new trial, the petitioner need not persuade a majority of the defense community that

she is innocent, or that rebleeds are often triggered in infants by minor head trauma. She merely needs to persuade the Court that one or more jurors probably would not have been convinced beyond a reasonable doubt that she caused her baby's neurological distress by violently shaking it.

b. Whether or Not New Scientific Evidence Would Cause the State's Own Experts to Change Their Minds Is Not the Proper Standard by Which to Decide Whether a New Trial Should be Granted.

The prosecution asserts (again without offering any admissible evidence of the fact) that the new scientific research has not changed the mind of any of its expert witnesses. Assuming that this is true, and that all of the State's experts would, if asked, reaffirm all of their prior opinion testimony on these scientific subjects, that is immaterial. It does not matter that none of the State's witnesses are prepared to say that they have changed their minds, for that is not any part of the test of whether a new trial should be granted on grounds of newly discovered evidence.⁴

⁴ One hypothetical example illustrates this point. Suppose at trial three prosecution witnesses testify that Mr. Smith, the defendant, was the man that they saw robbing the convenience store in question. At trial Smith testifies that all three witnesses are mistaken, and that he was not the robber. The jury believes the prosecution witnesses, and the defendant is convicted. After trial, defense counsel discovers a new witness, who also witnessed the robbery. This new witness declares under oath that he recognized the robber to be a Mr. Jones, a person with whom he was acquainted, and that the robber was definitely not Mr. Smith. Suppose further that police then show the three trial witnesses a photo of Mr. Jones, and all three of them insist that they still believe the robber was Smith, not Jones.

Under these facts, assuming that the new witness could not have been discovered with due diligence prior to trial, Smith is entitled to a new trial. The fact that Smith's

3. INADMISSIBLE OPINION TESTIMONY AS TO THE IDENTITY OF THE CRIMINAL ASSAILANT

The prosecution seems to concede that it is legally improper to deliberately elicit an opinion from a witness as to the identity of the perpetrator of the crime charged. Instead, the State seems to be arguing that since none of its witnesses mentioned Cayce Brooks by name when they described the person upon whom their suspicion would focus, that no impermissible opinion regarding Cayce Brooks' guilt was rendered.

None of these witnesses testified that it was the defendant that had caused injuries to the child. Rather, because of the nature of immediate onset, it would most likely be the last person to have physical contact with the child that caused the condition.

Brief of Respondent, at 14.

But this argument simply ignores the case law that holds that neither an express **nor an implied** opinion as to the defendant's guilt is permissible. The prosecution simply ignores cases like State v. Dolan, 118 Wn. App. 323, 73 P.3d 1011 (2003). In that case also, the witnesses never specifically identified the defendant by name. But since the only people in the world who had access to the child at the time of his injuries were the defendant and the child's mother, by giving their opinion that the

new witness has not convinced the prosecution's three trial witnesses is irrelevant. What is relevant is whether the testimony of the new witness makes it likely that if a jury had heard the testimony of the new witness, the jury would have had a reasonable doubt as to the identity of the robber. It is the likelihood that the trier of fact might have had a reasonable doubt that is significant. The opinion of prosecution witnesses is not relevant.

mother didn't inflict the child's injuries, the prosecution witnesses gave the implied opinion that the defendant was the one who did. This Court held that such testimony was improper, violated the constitutional right to a jury trial, and constituted reversible error.

The State seems to argue that when it elicited the doctors' testimony that their suspicion focused on the person who was last with the child, it was not the prosecution's intent to elicit an opinion that Cayce Brooks was the person who assaulted the child. *Brief of Respondent* at p. 15 ("the State submits this was not asking the opinion of the officers as to whether or not the defendant had committed some type of criminal activity"). Assuming this is true and that the State had no such intent, it is irrelevant. Whether it was intentional or not, it happened.

The State claims that it did not ask the witnesses "whether or not the defendant had committed the crime," but instead "asked as to how quickly to expect an onset of the symptoms." *Brief of Respondent*, at 16. But this characterization of the questions asked is simply false. The prosecution specifically asked: "[C]an you tell me if you have a belief as to who would be the person to cause the abuse?" RP 1073. "Do you have an opinion . . . as to whether or not your suspicion would focus upon that person that was with the child alone?" RP 1170.

Moreover, once the testimony had been given the State clearly did

make intentional use of it and intentionally told the jury that the doctors believed that the defendant, Ms. Brooks, must have assaulted the child:

[T]hey asked the doctors, who should we look at, if there's a crime here, is there a crime here, did a crime occur. And the doctors said unanimously, You look to the person who was caring for the child, you look at the person who was with that child when that seizure happened.

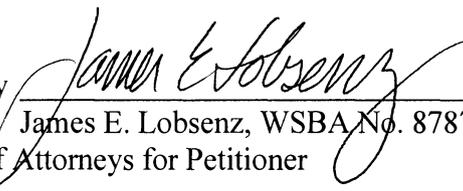
RP 3103 (bold italics added). This was a deliberate use of impermissible opinions from the doctors that the defendant was guilty as charged.

B. CONCLUSION

For the reasons stated above, petitioner asks this Court to grant her petition, to vacate her conviction, and to direct that a new trial be held.

DATED this 18th day of January, 2006.

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