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No. 33878-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

CO  
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STATE C  
BY

STATE OF WASHINGTON,

Respondent,

v.

TYRAN SMITH,

Appellant.

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STATE OF WASHINGTON  
BY [Signature]

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Stephanie J. Arend, Judge

STATEMENT OF ADDITIONAL GROUNDS  
RAP 10.10

TYRAN SMITH  
Appellant

TYRAN SMITH #847670  
MCC-WSRU, C-121-L  
P.O. Box 777  
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**STATEMENT OF ADDITIONAL GROUNDS**

(RAP 10.10)

1. ASSIGNMENT OF ERROR NO. 1

The trial court erred in admitting illegally viewed and seized video tape into trial pursuant to appellant's consent and the Inevitable Discovery Doctrine.

(a) ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 1

When detectives, pursuant to valid warrant, exceed the scope of that warrant through (1) viewing the appellant's untitled private camcorder tape--"without probable cause" to do so--via the appellant's video camcorder (located on the kitchen countertop), and based on what one detective had viewed, he (2) illegally seizes the tapes, only to later find out that the tapes were not included in the warrant issued, thus he (3) subsequently accosts the appellant--based on what he has illegally viewed on the tapes--and ultimately obtains his consent to keep the tapes that he's already illegally seized, and where the prejudicial nature of the tape's contents undoubtedly evoked inflammatory emotions from the jury upon viewing the tape--and incited comments from the court, limiting it being repeatedly played before the jury--, does the trial court err in admitting the tape for trial pursuant to the appellant's consent and the Inevitable Discovery Doctrine, requiring reversal of the appellant's conviction and remand for a new trial?

2. CrR 3.6 SUBSTANTIVE FACTS AND CONCLUSIONS OF LAW

3.6 TESTIMONY OF DETECTIVE WOOD

On 07/30/04, a 911 call was made by Ms. Tierce (appellant's codefendant), indicating that a child was experiencing life-threatening health complications. Upon questioning, Ms. Tierce and Mr. Smith provided detectives Shaviri and Berg with a detailed, but false babysitter story which essentially attributed blame for the injuries found on the child to the babysitter. 4RP 430-31.

Pursuant to a valid warrant, Detective Wood initiated a search of the appellant's residence, looking for "phone numbers, names," or anything that had information about the alleged babysitter, Jennifer Johnson, that maybe was left there. 4RP 431. The next day (07/31/04), Detective Wood returned to the scene and noticed a "video camera on the counter that was being watched the previous night by Detective Harai." He pressed play and fast forwarded past what Detective Harai was watching the night before and recognized the victim and possibly her sister on the tape, and then seized the camera and the tapes. 4RP 432-33.

After determining the tape to be relevant evidence, Detective Wood drove the seized items "back to the office," put them in a container, locked it up and went home. And on Monday, he was informed by Detective Harai, who wrote the search warrant, that neither the camera nor the tapes were listed on the warrant, so after speaking with DPA Mary Robnett, Detective Wood decided to attenuate his misconduct by going to "get consent from Mr. Smith and Ms. Tierce." 4RP 433-34.

Upon speaking with Mr. Smith, Detective Wood explained that he "took the camera and that there were some tapes with it" and if he could get his consent to look at it. In response, Mr. Smith explained that there were some "personal things" that Ms. Tierce might be embarrassed about on the video. Ms. Tierce also expressed concern about the embarrassing footage on the video, yet they both agreed to give their consent for Detective Wood to keep and view the tapes, based on what he had told them: That the tapes may be helpful to his investigation. 4RP 434-35.

Additionally, Ms. Tierce, while attempting to appear helpful, then indicated to Detective Wood that maybe the tape would be helpful in finding the babysitter, when in actuality, she knew that there was no babysitter, while simultaneously, Detective Woods never actually seen the babysitter on the tape. Further, he knew from the babysitter story, that the victim's sister was alleged to have been with the parents during the camping trip; thus it would be reasonable for him to infer that the voice he'd claimed he heard speaking cruelly to the victim, was in fact Ms. Tierce's. This conclusion can be confirmed by him later speaking with Ms. Tierce, ostensibly requesting hers

and Mr. Smith's consent to view the same tape he had, in fact, already viewed. 4RP 433.

Detective Wood also testified at the CrR 3.6 hearing that if Mr. Smith and Ms. Tierce would have refused to give their consent for him to keep and view the tapes, he would have ultimately applied for a search warrant to seize and view them. 4RP 441. Detective Wood was told by Detective Harai that he had viewed intimate scenes of Mr. Smith and Ms. Tierce on the videos, on 07/30/04. 4RP 444-45.

### 3.6 DEFENSE ARGUMENT

Schoenberger, defense counsel, argued that "its bad enough that the tapes were seized, but they were also veiwed." And not just once, but twice by two different detectives, one of which had the search warrant in his possession, yet still transgressed the terms of the warrant. 4RP 457-58. Citing State v. Johnson, a child sex abuse case, Schoenberger argues that in Johnson, the video tapes were suppressed because they were not in the search warrant, and that although in plain view, one could not have known what was on the tapes unless he or she pushed play without probable cause for doing so. 4RP 458-59. He further argues that Mr. Smith didn't make a knowing consent because he may have not been privy to the footage depicting the victim being cruelly spoken to. 4RP 460-63. He closed by arguing that the State's Inevitable Discovery argument should be denied because the tapes have to first be viewed, and only then can they be identifiable as evidence, per se.

### 3.6 STATE ARGUMENT

State argues that Mr. Smith had every right to refuse consent, whether he was informed of the tape's contents or not; thus his consent was valid. 4RP 464-67. It also argued that Washington courts have followed U.S. Supreme Court precedents in determining whether the consent was sufficiently attenuated by using four inquiry factors, thus surviving motions for suppression. 4RP 466-69.

In addressing the Inevitable Discovery Doctrine, the State argues the

officers would have stumbled upon this evidence through legal means, regardless of the illegal search, based on (1) if Mr. Smith would have refused consent, Detective Wood would have obtained a warrant anyway, and (2) in obtaining the warrant, the combined facts of the child killed, the babysitter story, and the babysitter having access to the "video camera," a judge would have signed the search warrant authorizing them to seize and view the tapes. 4RP 469-70.

### 3.6 DEFENSE ARGUMENT (CONT.)

Schoenberger argues that "the probable cause which is required for a search warrant would not have been available to Detective Wood. He would not have been able to formulate probable cause for seizing four videotapes" without extrinsic testimony or evidence, and that the detective would have to seek a warrant based on probable cause that was illegally obtained. Further, he noted that they may have had probable cause if they had first spoken with Mr. Smith and Ms. Tierce, which would have provided a foundation for probable cause, yet the detective's problem would have still existed in that they first viewed the tapes and then pursued consent on that basis. 4RP 470-72.

The court then asks a pertinent question: At what point did the detectives determine that the tapes and the camera were in the home while Ms. Tierce and Mr. Smith were allegedly camping and the babysitter would have had access to the items? This was found to be during the time of consent, which was after they had already viewed the tapes. 4RP 472-73.

### 3.6 COURT FINDINGS OF FACT AND CONCLUSIONS OF LAW

Court finds that the viewing and seizure of the tapes were beyond the scope of the search warrant and was a violation of Mr. Smith's Fourth Amendment rights. And citing State v. Armena, 134 Wn.2d 1 (1997), the court, with uneasiness regarding the temporal issues, expressed that it isn't sure in applying the factors outlined in Armena, yet held that they were met. 4RP 474-77. In addressing the Inevitable Discovery Doctrine the court agreed with the state that only after viewing the tapes would the detectives have probable cause to obtain the warrant, and that because the camera

and tapes were in an accessible place (kitchen counter), combined with the circumstances of the camping trip, that there would have been a sufficient basis upon which to obtain a warrant. And in conclusion, the court noted, "So if I'm wrong on the consent issue, I think it's subject to the inevitable discovery and would have been discoverable in any event."

3. TRIAL COURT RECORD OF VIDEOTAPE PRESENTATION PURPOSES AND COMMENTS (per RP), IN JURY'S PRESENCE (IJP) AND OUT OF JURY'S PRESENCE (OJP)

REPORT OF PROCEEDINGS No. 5

In its opening statements, the State prepares the jury for the highly disturbing nature of the videotape, explaining the victim's physical and mental condition: Obvious bruising, illness, inability to hold her head up, distress and in need of medical care. It also adds that various experts (doctors, medical examiners, and a pediatric specialist) will be testifying to the videotape's contents. PP. 512-13, IJP.

REPORT OF PROCEEDINGS No. 6

During defense cross-examination, Lakisha Combs testified that victim would not hold her head up or stand on her own. P. 717, IJP.

REPORT OF PROCEEDINGS No. 7

During state direct-examination, Det. Wood testified that the camcorder tape was redacted, and that two distinct portions of the camcorder tape were recorded onto one regular VHS videotape that was used at trial, labeled Ex. 12. P. 813, IJP. Exhibit 12 was played before the jury and State highlighted 3 scenes in video: (1-2) Victim dancing; and (3) victim sitting on playroom floor. P. 816, IJP.

During state direct-examination, Dr. Howard was asked whether he viewed a videotape of the victim sitting on floor. He testified that he noticed the victim kind of slumped, curved spine, and shoulders drooped. He also commented on the victim's head moving and she was responding with her eyes following verbal commands, which indicated brain functioning and that the victim was neurologically intact, but the head was kind of resting back, typical of

extremely weak child who is trying to balance her head with minimum effort to hold it up. Dr. Howard also opined that the victim seemed to be in very extreme illness or weakness. PP. 902-03, IJP. Also recognized by Dr. Howard was that the videotape depicted severe dehydration causing victim's weakness. Further claims of Dr. Howard were: That victim's appearance was consistent with the severe dehydration and at the time of the video, victim could have been revived if given proper care. PP. 904-06, IJP.

During defense cross-examination, counsel attempts to minimize the impact of Dr. Howard's testimony by exposing his medical uncertainties regarding the video and how it relates to time estimates of when or how the victim died. PP. 909-10, IJP.

#### REPORT OF PROCEEDINGS No. 8

The state indicates that it intends to again play the videotape to assist Dr. Duralde's medical testimony; however, the Court expressed its lack of excitement in replaying it before the jury due to the nature of its content. Defense objects based on it being cumulative. PP. 960-61, OJP. Defense reiterates that replaying the tape before the jury is merely cumulative and prejudicial. The Court agrees with defense and denies the State's request to replay the tape in the jury's presence, noting that "[i]t's too prejudicial to go through that again..." P. 966, OJP.

During state direct-examination, Dr. Duralde is questioned about her viewing of the victim in the videotape and about whether "the brain trauma, the shaking... would have occurred prior to the video being taken of this child?" Dr. Duralde then identifies the victim's movements and responses. PP. 981-82, IJP. She also testified that she noticed that the victim's eyes were sort of sunk in, and she had stuff in her mouth that had been there for a long time. She added that the child's appearance coincided with other medical assessments of dehydration. The video also depicted facial and arm bruising around the victim's elbow, she also found. PP. 983-84, IJP.

During state direct-examination, Det. Benson was questioned regarding his awareness of the videotape; he responded yes. He was further asked about efforts to figure out when the tape was made; he responded saying that tape

experts concluded that if the tape did not have the date and time stamp, there was no possible way of knowing when the tape was made. PP. 989-90, IJP.

During the defense's Directed Verdict motion, the state argues that Ms. Tierce's statements in the video, stating, "Daddy is waiting for you to lay down so he can get his belt," indicate sufficient evidence to submit the case to the jury. P. 1012, OJP. The Court addresses the defense, noting that in light of the few instances of discipline imposed on the victim by the defendant, that it believes there is still evidence in the videotape that works against him. It further noted that because the videotape showed Ms. Tierce threatening victim regarding Mr. Smith, it is evidence that prior beatings occurred, and that it is not reasonable for Mr. Smith to hit child on legs with belt. PP. 1015-16, OJP.

Additionally, the state argued that the tape essentially aids them in pinpointing when the cause of death occurred, i.e., based on the tape, there were prior beatings. P. 1017, OJP.

#### REPORT OF PROCEEDINGS No. 9

During defense direct-examination, Ms. Tierce testifies that Mr. Smith wanted her to record victim's unruly behavior to show her how she was acting. She also testified that she does not know when the recording occurred; however, she remembers that Lakisha was present and Mr. Smith was in the living room. And she adds that victim was wearing pajamas during her videotaping in the playroom. PP. 1172-73, IJP. Then she testifies that the victim was videotaped in pajamas on Friday the 30th of July. Then the defense shows Ms. Tierce a picture (Ex. 73) depicting the victim not wearing pajamas during the video--victim was wearing plain pants and a shirt with colored lining around the neck and arms--, thus contradicting her testimony regarding what clothing the victim had on. PP. 1178-79, IJP.

Ms. Tierce also alleged that after she videotaped the victim, she told Mr. Smith that she was done and then went back in room and brought victim back out into the kitchen to eat or drink, but victim wanted water, so she gave her some. P. 1180, IJP. Ms. Tierce also claimed that 20 minutes had past since her videotaping the victim and her bringing victim into the kitchen. P. 1181, IJP.

During state cross-examination, Ms. Tierce testifies that Mr. Smith told her to tell the judge that her attorney refused to move to suppress the videotape, and how important it was to suppress the video. PP. 1206-07, IJP. She acknowledges victim's unusual movements and posture that is depicted in the videotape. P. 1212, IJP. She is then asked about the photograph from video showing the victim's clothing and whether anyone changed her clothing within a 20 minute time period; she responded by saying that someone could have. PP. 1219-20, IJP. She denies remembering a bruise on the left side of the victim's face, as shown in a photograph taken subsequent to the video. P. 1222, IJP.

Contradicting her prior testimony, she later acknowledges the possibility that the videotape was not made on Friday because of the different clothing the victim had on during the video. P. 1223, IJP. Further, she acknowledges that because video does not show bruise on left side of face, but later picture does, one can infer that victim acquired bruise after the video was made. P. 1224, IJP.

#### REPORT OF PROCEEDINGS No. 12

During defense direct-examination, defense asks Mr. Smith about videotape and consent. Mr. Smith claimed to be unaware of damaging footage of victim, and that he was never informed of the footage by the detectives, prior to his consent. PP. 1356-57, IJP. He then claims that he had first seen 10 to 15 seconds of the playroom footage (with no sound) while being interrogated. During defense direct-examination, Mr. Smith testified that while being interrogated by Det. Benson and Det. Wood, he was showed the playroom footage, and this is when Det. Wood told him that his daughter was dying and Ms. Tierce didn't do nothing about it--and then Det. Wood stopped the tape. P. 1366, IJP.

Mr. Smith claimed that the next time he saw the videotape was when defense counsel showed it to him--in its entirety. P. 1368, IJP.

During state cross-examination, the state questioned Mr. Smith about when the detectives asked him who had access to the videotape, and his response to the detectives was that anyone could have had access to it. P. 1418, IJP.

During state cross-examination, Mr. Smith claims that he knew nothing of the videotape in the playroom, except the 10 to 15 seconds showed to him

during interrogation. He repeatedly claimed that besides the viewing of the tape at the police station, he never seen the playroom footage prior. PP. 1429-30, IJP. Additionally, he claimed that he knew Ms. Tierce, the victim, and Lakisha played with the camera on several occasions in the playroom. He further claims he had no knowledge of the tape being made on Friday, only that he knew that Ms. Tierce and the kids frequently played with the camcorder. PP. 1430-39, IJP.

#### REPORT OF PROCEEDINGS No. 13

During state cross-examination, the state relentlessly tries to show Mr. Smith was aware of video being made on the same day of the incident, and that he heard Ms. Tierce and the kids laughing and playing with the camcorder in the playroom. PP. 1458-59, IJP. State tells Mr. Smith about the video being seen by the jury in court, where Ms. Tierce is threatening victim by warning her that Mr. Smith will come with the belt, essentially instilling a fearful impression in the victim's mind that he will inflict punishment when he comes. State then directs Mr. Smith's attention to the belt hanging on the playroom door, questioning whether he put it there. P. 1491, IJP.

Moreover, the state questions Mr. Smith about the video, whether he seen the bruises on the victim's arms and face. PP. 1493-94, IJP. It further reminds Mr. Smith that he seen the video of the victim, played in court, but Mr. Smith claimed that he didn't watch it while it was being played. The state continues telling him that based on the video, the victim was very dehydrated and needs medical attention. P. 1503, IJP.

During defense redirect-examination, defense notes that state made a great deal about the video and what Mr. Smith knew about it. P. 1524, IJP.

#### REPORT OF PROCEEDINGS No. 14

Prior to closing arguments, the state informs the Court of its intention to play the video for a few minutes during closing arguments--thus before the jury. P. 1620, QJP. Defense objects to the state's request to play the tape during closing arguments, but the court perfunctorily fails to meaningfully address the defense's objection. P. 1621, QJP.

During state's closing arguments, it refers to the videotape depicting no bruise across the victim's face, but later photos do, however. P. 1636, IJP. It also refers to videotape's contrasting scenes of victim dancing and then ending in her not being able to hold her head up, which it alleged to occur when Mr. Smith began to potty train the victim. It further highlights the bruises on victim's face and Ms. Tierce's threats to victim that Mr. Smith will come in with the belt. Then the tape is again played before the jury. P. 1657-58, IJP.

The state also highlights the victim's awareness that she is going to get struck with a belt. P. 1660, IJP. Further, it argued that the videotape showed that assaults happened over an extended period of time, claiming that this was confirmed by the doctors who testified. P. 1663, IJP.

During state's closing rebuttal arguments, it refers to Ms. Tierce's video statements and how defense, in closing, conveniently avoided the issue of her statements of Mr. Smith getting belt and coming in the playroom if the victim layed down. P. 1732, IJP.

#### 4. 3.6 LEGAL ARGUMENTS

TRIAL COURT ERRED IN ADMITTING VIDEOTAPE THAT WAS ILLEGALLY VIEWED AND SEIZED WITHOUT REASONABLE BASIS FOR PROBABLE CAUSE, THUS VIOLATING MR. SMITH'S STATE AND FEDERAL CONSTITUTIONAL RIGHT TO (1) PRIVACY, AND HIS RIGHT TO (2) BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WITHOUT PROBABLE CAUSE

#### CONSTITUTIONAL PROVISIONS

The requirement of probable cause reflects the balance sought between the individual's right to privacy and an allowance for police officers to make mistakes when acting as "reasonable men." Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, L.Ed. 1879 (1949). Thus, in light of Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), the Fourth Amendment's right to privacy is applicable through the Fourteenth Amendment. And as supported by State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980), the Washington Constitution, Article 1, Section 7, is interpreted as being more protective than the Fourth Amendment.

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause...particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment further admonishes the guarantee that no state "shall deprive any person of life, liberty, or property, without due process of law..." Moreover, the Washington Constitution confers upon a defendant a higher degree of protection, clearly recognizing an individual's right to privacy with no express limitations. Id.

#### THE MISSING LINK (Probable Cause)

Mr. Smith contends that the trial court erred when it prematurely indulged in entertaining arguments on the Attenuation Exception of consent and on the Inevitable Discovery Doctrine, which were both advanced by the state, for it should have first adequately resolved the prerequisite issue of probable cause. By mistake, the trial court fell victim to the age old aphorism of "placing the cart before the horse."

In this instance, the trial court's error is elaborated on by the following state-court decisions: State v. Watkins, 76 Wn.App. 726, 730-31, 887 P.2d 492 (1995) (When an officer is intruding on a reasonable expectation of privacy, the officer must not exceed the scope of the warrant or any other source of authority under which he or she acts.); E.g., Coolidge 403 U.S. at 466, it used to be said that the officer must "inadvertently discover" the incriminating evidence; however, as noted in State v. Hudson, 124 Wn.2d 107 114 n.1, 874 P.2d 160 (1994), that idea has since been discredited, or at least refined, by both federal and state courts. Yet, as demonstrated in State v. Bustamante-Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999), the idea seems to persist in cases where it makes no difference.

As defense counsel correctly argued to the trial court, of which the trial court conceded, the police were only able to establish probable cause on what they had already viewed on the videotape, which was premised on the

illegal search itself. As explained in U.S. v. Boatwright, 822 F.2d 862, 864-65 (9th Cir. 1987), the Inevitable Discovery Doctrine applies only when the fact that makes discovery inevitable is born of circumstance other than those brought to light by the illegal search itself. And in "[a]pplying the inevitable discovery doctrine here would, therefore permit the government to ignore search requirements at any convenient point in the investigation, and would go well beyond the present scope of the doctrine. This we decline to do." Boatwright, at 865.

#### MISAPPLICATIONS OF THE INEVITABLE DISCOVERY DOCTRINE

The Inevitable Discovery Doctrine only applies when there are clear efforts to obtain an amended warrant by expanding the search warrant limitations, and thus widening the scope of what could be determined inevitable. E.g., in U.S. v. Turner, 169 F.3d 84, 88 (1st Cir. 1999), the court concluded that where an officer did not have lawful right to access closed computer files... while conducting search of defendant's house for evidence of assault, hence the evidence could not have been inevitable unless they made some effort to obtain a search warrant indicating, to the court, relative probable cause to expand the limitations of a warrant. Thus, without probable cause first establishing the lawful means to expand the warrant, the items cannot be said to be inevitable.

There are numerous instances where federal courts have prohibited state courts from applying the Inevitable Discovery Doctrine. For example, in U.S. v. Johnson, 22 F.3d 674, 683 (6th Cir. 1994), the Sixth Circuit concluded: "[T]o hold that simply because the police could have obtained a warrant, it was therefore inevitable that they would have done so would mean that there is inevitable discovery and no warrant requirement whenever there is probable cause." Accord U.S. v. Echevoyen, 799 F.2d 1271 (9th Cir. 1986).

This conclusion is similar to the argument advanced by the State when they claimed that if Mr. Smith had denied consent, the detectives would have simply went and got a warrant and then retrieved the tapes. However, as defense counsel noted, this plan may have been feasible if they hadn't already illegally viewed and seized the camcorder and videotapes, for they could not put the bird back into the egg from which it had already hatched.

Accordingly, in U.S. v. Mejia, 69 F.3d 309, 320 (9th Cir. 1995), the Ninth Circuit concluded: "[E]ven if we assume that the detectives were in possession of competent evidence showing probable cause at the time of the search, the inevitable discovery doctrine would not justify introduction of the evidence seized without a warrant... Had Mejia's statements been suppressed, the government would have lacked probable cause to search his home in any event." Mejia at 319.

Similar to Mejia, the Washington Supreme Court concluded in State v. Boland, 115 Wn.2d 571, 574, 800 P.2d 1112 (1990), that "[w]ithout the evidence taken from the garbage, no probable cause existed upon which to base the warrant." BUT SEE U.S. v. Robinson, 275 F.3d 371, 382 (4th Cir. 2001), where the evidence was not suppressed because officers suspended search and obtained second warrant before seizing item. Accord McReynolds 117 Wn.App. 322, 323-24, where "[p]olice conduct here was not flagrant. For all of the searches, the officers recognized the need for warrants and followed the constitutional process for obtaining approval." Also noted in McReynolds, evidence obtained in violation of valid warrants or "without probable cause" was suppressed.

Again, in U.S. v. Reilly, 224 F.3d 986, 994 (9th Cir. 2000), the Ninth Circuit noted: "We agree that the continued questioning of Reilly after he requested counsel violated Reilly's constitutional rights. We refuse to apply the inevitable discovery doctrine, however, to excuse the officer's misconduct." This is one more instance where the court's failed to address a prerequisite matter before they applied the Inevitable Discovery Doctrine.

#### CONSENT CANNOT BE BASED ON INFORMATION GATHERED FROM THE ILLEGAL SEARCH

As noted in U.S. v. Calhoun, 49 F.3d 231, 234 (6th Cir. 1995), consent cannot be based on information gathered through the illegal search itself. Here, the detectives sought consent only upon the information that they had obtained through their illegal search.

The state had also claimed that because they were investigating the fictitious babysitter, and not Mr. Smith, that this aids in the attenuation of Mr. Smith's consent; however, the [r]ight to be free from unreasonable searches and seizures does not extend only to those who are suspected of

criminal behavior. U.S. v. Erickson, 991 F.2d 529 (9th Cir. 1993). Thus, it does not matter whether he was a suspect or not, his right to be free from an unreasonable search and seizure remained intact.

The trial court effectually circumvented Article 1, Section 7, by applying the Inevitable Discovery Doctrine, for the evidence must have been discoverable through lawful means, which is based on probable cause.

#### REASONABLE EXPECTATION OF PRIVACY

When executing a search warrant, police must not seize items in an attempt to accelerate discovery. State v. Avila-Avina, 991 P.2d 720, 99 Wn.App. 9 (2000). According to State v. Richman, 85 Wn.App. 568, review denied, 950 P.2d 478, 133 Wn.2d 1028 (1997), for evidence to be admitted under inevitable rule, state must prove that police did not act unreasonable or in an attempt to accelerate discovery. In Richman, the officers actions necessarily include consideration of the nature of the privacy interest and the degree of its invasion. The ultimate question is: In the application of the Inevitable Discovery Doctrine, did police misconduct erode the protections of Article 1, Section 7. And given these safeguards, caution must be exercised so that the doctrine of inevitable discovery does not offend a defendant's state and federal constitutional protections.

Mr. Smith contends that a reasonable expectation of privacy in a premises is protected in the absence of probable cause. This being true, when the detectives, here, began viewing intimate footage of Mr. Smith and Ms. Tierce, they should have realized that they were violating their right to privacy, but without authority, they flagrantly continued viewing the tapes until they stumbled upon the playroom footage. Moreover, a precise description must be made when requesting a warrant, for the seizure of objects which have not yet been adjudged unlawful to possess, such as books or films, require a higher degree of scrutiny. Cf. State v. Perrone, 119 Wn.2d 538, 834 P.2d 611 (1992).

Here, the detectives violated Mr. Smith's constitutional protections of privacy, in that Mr. Smith did have a reasonable expectation of privacy in respect to the intimate footage of himself and Ms. Tierce contained on the videotape, for when the detectives accosted him and Ms. Tierce, seeking

consent to keep the camcorder and tapes they had already illegally viewed and seized, both Mr. Smith and Ms. Tierce expressed actual concern and sincere embarrassment regarding the intimate footage of themselves.

The problem is not that of the intrusion, per se, but of a general exploratory rummaging in a person's belongings. Andresen v. Maryland, 427 U.S. 463, 480, 96 S.Ct. 2727, 49 L.Ed.2d 627 (1976). And absent an exception, warrantless searches are invalid as a matter of law under the state and federal constitutions. State v. Clausen, 113 Wn.App. 657, 660, 56 P.3d 587 (2002). In the instant case, the detectives infringed upon Mr. Smith's reasonable expectation of privacy and search and seizure protections.

#### OVERWHELMING PREJUDICE OF ADMITTED VIDEOTAPE

Mr. Smith contends that the admission of the videotape at trial caused him substantial prejudice. Moreover, in light of the entire trial record, it would be inconceivable for anyone to advance the contention that the videotape did not prejudice Mr. Smith at trial. For the nature of the tape's contents was characterized as prejudicial by both defense counsel and the trial court, and implicitly confirmed by the state's repeated requests to play it before the jury and countless comments on it during trial. For example, the state made completely sure that the tape's contents were glued to the front of the jury's minds throughout the trial by questioning any and every witness it could about the nature of its inflaming contents.

Defense counsel tried tirelessly to avoid and minimize the prejudicial comments made by Ms. Tierce about Mr. Smith in the video. The state highlighted this fact during closing arguments. Defense also battled with several medical experts regarding their opinion of the videotape, which only exacerbated the apparent prejudicial nature of the victim's depleted physical and mental condition. Experts conducted numerous comparisons between the video and later photos of the victim and, based on the video, they offered various theories regarding the time and cause of the victim's death, including overwhelming opinions and analyses that not only enraged the jury, but also led them to speculate all sorts of imagined conclusions regarding the victim's cause of death and the defendant's criminal culpability.

To secure Mr. Smith's conviction, the state presented the tape for multiple purposes at trial to ultimately advance their theory of the defendant's culpability: That Mr. Smith requested for Ms. Tierce to videotape the victim; that Mr. Smith was aware of the playroom footage; that Mr. Smith inflicted prior beatings on the victim--based on Ms. Tierce's video statements, his prior discipline of victim and the belt hanging on the playroom door; that Mr. Smith was aware of the bruises and dehydration of the victim; and it helped the state to establish time estimates that challenged the reasonableness and competence of Mr. Smith's claims of where he was and what he was doing around the time that the video was made.

5. 3.6 CONCLUSION AND REQUESTED RELIEF

Based on the foregoing, Mr. Smith claims that his state and federal constitutional right to privacy and right to be free from unreasonable searches and seizures was violated by the detectives, and in error, the trial court abused its discretion in admitting the videotape at Mr. Smith's trial. Thus, Mr. Smith prays for this court to issue an ORDER reversing his conviction and remanding his case back for a new trial, absent the videotape OR to render any other remedial relief that this court deems just and appropriate, that has not been requested herein.

6. ASSIGNMENT OF ERROR NO. 2

The trial court erred in denying appellant's renewed Motion for Directed Verdict on Homicide By Abuse and Second-degree Felony Murder, because there was insufficient evidence to convict on either criminal charge.

(a) ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 2

When the State failed to prove the appellant was guilty of every element of Homicide By Abuse and Second-degree Felony Murder, beyond a reasonable doubt, does the trial court err in denying the appellant's renewed Motion for Directed Verdict at the close of the Defense's case, requiring an absolute dismissal of both criminal charges because, constitutionally, there was insufficient evidence to convict on either?

7. MDV SUBSTANTIVE FACTS AND CONCLUSIONS OF LAW

FIRST MOTION FOR DIRECTED VERDICT (At close of State's case)

The Defense introduces its Motion for Directed Verdict on Homicide By Abuse (further referenced as HBA) at the close of the State's case, to the trial court. He indicates, inter alia, that the charge requires "...that the person charged has previously engaged in a pattern or practice of assault or torture of [a] child." BRP 1000. Counsel correctly adds that "all of the evidence [must be considered] in the light most favorable to the non-moving party, in this case the State." He notes three elemental, HBA deficiencies: (1) No evidence of torture; (2) assault; or (3) pattern. Moreover, he concludes: "No evidence to support the charge of homicide by abuse, and that no one has testified during trial "that Mr. Smith or anyone else with whom he might have had an accomplice relationship ever assaulted this child, let alone that there was a pattern." BRP 1001.

He further notes numerous evidence facts that don't reflect Mr. Smith's culpability: (1) There's evidence of "the child crying all day on Tuesday"; (2) "crying on Thursday night"; (3) and "a child screaming on Tuesday"; "but," he notes, "there's no evidence of an assault other than the fact that we know the child was bruised and did die of injuries that are likely the result of an assault, but there's no evidence as to who committed or might have committed

or did commit any assault on this child." Counsel then claims that, "without that evidence, even given everything in favor of the State, it's insufficient to support the allegations of a pattern of assault or torture, and I think pattern or practice of assault or torture needs to be more than just a couple of days. It needs to be an ongoing situation." 8RP 1001.

The trial court then questions counsel whether there is any caselaw in support. Counsel responds that he has no caselaw on HBA where the assaults have been "so compressed in the time as to be within four days," i.e., Tuesday - Friday. He concedes that there is plenty of assault evidence, but no evidence that Mr. Smith or his codefendant has done anything. 8RP 1002.

#### STATE'S ARGUMENT OPPOSING DEFENSE'S MDV

State contends that Lakisha testified that she seen Mr. Smith hit victim "with a belt repeatedly." It then attributes Mr. Smith's one time--two-week prior--belt disciplining of the victim as the cause of the belt mark across the victim's face, as depicted in pictures taken two weeks later. And that it's clear that accomplice liability attaches to Mr. Smith because there was nobody around the victim except for him and his codefendant. 8RP 1006.

The State also claims that based on its evidence presented, that Mr. Smith "is liable both as a principle and as an accomplice to the assault to the child," and that the Defense has raised nothing that says a pattern or practice must be more than a few days. 8RP 1007.

#### TRIAL COURT'S FINDINGS ON PATTERN OR PRACTICE

The trial court responds that Russell is distinguished from Mr. Smith's case, i.e., the jury was not instructed on pattern or practice. However, it finds that Russell expresses that pattern or practice is something that the jury can figure out, unless an appellate court later determines otherwise, noting no current law deeming several days as insufficient for pattern or practice--neither a "practice to not seek medical aid after the child was injured as badly as she was..." Again referring to Russell, the court reads verbatim the appellate court's dictionary deferences to pattern or practice. 8RP 1008. In comparing Russell with Mr. Smith's case, the trial court concurs

with the State, that "there is clearly evidence of an assault. The question is whether or not this meets the definition of pattern or practice." Yet, the trial court still expresses interest in any caselaw defining pattern or practice. 8RP 1010.

#### STATE'S SUFFICIENCY OF EVIDENCE ARGUMENT

In support of pattern or practice, the State notes an unnamed second-degree assault case that has some pattern and practice language. It likened that case to Mr. Smith's case facts, i.e., Lakisha testified that Mr. Smith: (1) "was the one punished Tyshell;" (2) "used a belt when he did the punishing"; and (3) "he did it more than one time."

It added that Lakisha testified that: (1) "when he would punish the child, would cry more and the child would cry longer"; (2) "when he punished, he would punish harder"; and (3) "it used to scare her." 8RP 1010-11.

Furthermore, the State noted that the testimony of other witnesses supported Mr. Smith's guilt: (1) Dr. Howard testified that there were several-day-old bruises on victim's back, face, and arms; (2) the firefighter, Mr. Higgins, believed that the bruises on victim were of different ages; (3) the video shows bruises on right side of victim's face; however, (4) Dr. Duralde testified that there were no visible bruises on the left side of the victim's face, and that the left arm only had a small, dark bruise around the elbow; and (5) both medical experts testified that the head trauma, causing the death, occurred sometime after the video was taken, with no specific date and time as to when the video was taken, yet there is evidence that the video was not taken on July 30th; (6) the Tuesday-night screaming heard by Ms. Webb; and (7) an independent witness' claim of hearing 45 minutes of crying on Thursday night, while a couple argued over a child who was not eating. 8RP 1011-12.

Additionally, the State argued that the combination of (1) the codefendant's statements saying, "Daddy is waiting for you to lay down so he can get his belt," (2) the length of time that the child was with the defendant (two months), and (3) the ages of the bruises and speculation of when the assaults could have happened, that there was sufficient evidence showing a pattern or practice. 8RP 1012.

In desperation, the State also added the mistaken claim that the defendant exhibited a regular practice of punishing the victim with a belt, which ultimately resulted in her death, limited not only to the head injury, but also dehydration--claiming there was sufficient evidence. 8RP 1012.

#### TRIAL COURT'S FINDINGS AND CONCLUSIONS ON PATTERN AND PRACTICE

The trial court then concurs with the State that there is evidence of more than one occurrence, hence the question is a matter of law whether that constitutes a pattern or practice, but it will not rule on the Defense's Motion for Directed Verdict until it receives shepardized State v. Russell caselaw, indicating "the outer parameters of pattern or practice." And in respect to its pattern or practice determinations, the trial court thus denies the Defense's Motion for Directed Verdict if it's in any way founded upon sufficiency of evidence argument. 8RP 1013.

#### DEFENSE'S MDV ARGUMENT CONTINUED

Defense reminds the trial court that Lakisha only saw Mr. Smith discipline or punish Tyshell--on the lower legs--once using the belt. And that absent proof of the discipline rising to the level of assault, that essentially the State fails to establish the necessary elements of assault.

Counsel also advanced several testimonial facts that fail to evidence any criminal culpability of Mr. Smith's actions: (1) "The medical examiner has testified that all these bruises, with a few exceptions, were fresh," and (2) "Lakisha Coombs also testified that the child fell, hit her head on rocks outside her house," which explain the "little pin cushion bruises" on the victim's face that were "scabbed over and healing." Hence, he adds that "Even in the evidence best viewed for the State, from their own witness, happened when this child fell outside her house, hit her head on rocks." 8RP 1014.

In response, the trial court expressed that "there is clearly evidence that there was some event prior to the event that ultimately resulted in [the victim's] death that either constitutes an assault or torture," to which counsel agreed. However, the court misplaces blame on the defendant when it noted the codefendant's criminal mistreatment depicted in the video: "I saw on

the tape as far as a child who apparently had food in her mouth was asking for water, was being denied water, and was being taunted by Christina Tierce. If that doesn't meet the definition of torture of a small child, I don't know what does."

Counsel agrees and reminds the trial court that the tape shows a child in distress, and the medical expert says she was dehydrated, but the bruising on the right side of the victim's face may have been the likely result of her fall where she hit the right side of her face, yet the bruises to the left eye might be consistent with the State's belt claim--without proving who did it. And finally, counsel addresses the conflicting expert testimony about the bruising on the arms. 8RP 1015-16.

The trial court responds that its clear "from the tape that some time prior to the tape that child had been hit with the belt by her father, or the statement by Ms. Tierce basically threatening her that her father was going to come and hit her with the belt would have been of no moment to her. But it clearly was, which indicates that there had been prior beatings with the belt..." It added that "it's not -- a child of that size and age to be struck with a belt about the legs or other parts of the body is not -- is not within what's reasonable." 8RP 1016.

#### STATE'S SUFFICIENCY OF EVIDENCE ARGUMENT CONTINUED

The State then notes: (1) The trial court's conclusion regarding pattern and practice; (2) "that the head injury that was the primary cause of death occurred after the video"; (3) that "the victim was completely dehydrated to the where she couldn't stand at the time of the video"; and (4) that "she was beaten prior to that," which it characterized as torture.

#### TRIAL COURT'S CONTINUED "PATTERN AND PRACTICE" UNCERTAINTY, AND ITS FINDINGS AND CONCLUSIONS REGARDING THE SUFFICIENCY OF THE STATE'S EVIDENCE

The trial court still wishes to have something more than the Russell case to help it define pattern or practice, to aid in determining whether Dr. Duralde's testimony regarding a violent shaking, coupled with Mr. Smith's belt beating and dehydration, i.e., denial of water, that if "these could all be

different things that in my mind could constitute a pattern or practice of torture even though they are different types of inflicting it upon the child." In respect to the short time period of these acts, the trial court still remains uncertain, and hence uncomfortable, with the time limits set by the appeal courts. 8RP 1017-18.

To ease the court's uncertainties, the State indicates that it will provide it with the prior mentioned unnamed caselaw to assist it in determining pattern and practice of assault or torture. 8RP 1018. In addressing the court's inquiry regarding the Defense's motion for the State to specify a predicate, the State alleges that the trial court has recognized that Mr. Smith, at some point, engaged in the assault of the victim where she ended up dying, adding that it's a pattern of assaults. 8RP 1019-20.

The trial court denies the Defense's motion regarding specifying predicate unanimity, absent caselaw or adequate constitutional argument, and the Defense elects to proceed with presenting its case. 8RP 1022-23.

#### SECOND MOTION FOR DIRECTED VERDICT (At close of Defense's case)

Defense renews its Motion for Directed Verdict regarding HBA, noting that after it "put on its testimony, including Christina Tierce, the witness under contract to the State to testify against Mr. Smith, and she provided no evidence of any pattern or practice or abuse or torture. There was discipline, and that was it." 14RP 1615.

#### STATE'S ARGUMENT OPPOSING DEFENSE'S MDV

The State responds to the Defense's renewed Motion for Directed Verdict by contending that: (1) "The child was beat over the period of several weeks, and that became actually more clear in the defendant's case when the defendant testified on direct that he hit her with a belt sometime around July 15th-ish"; (2) the codefendant did not contradict what Ms. Webb or what Mr. Spraw said and heard; (3) medical testimony confirms that "abuse was going on for a period of time, long enough for there to be various stages of healing in these injuries and this comes down to, now, credibility as to who dunnit because there is no issue that this girl was beat over a long period of time." 14RP 1616.

DEFENSE'S MDV ARGUMENT CONTINUED

Defense disagrees with the State's contention, arguing that "[t]he testimony of Lakisha Coombs, Christina Tierce, and Tyran Smith clearly demonstrate that this child fell on Friday night, the 23rd." The testimony of all three confirm that the victim fell twice, which resulted in "injuries to her forehead which were healing and scabbed over," and thus were not the result of abuse or prior beatings, as the testimony shows. 14RP 1616-17.

Counsel adds "that Traya (victim's sister) cried a lot, sometimes all day long," so when Ms. Webb testified she heard crying, she could have confused the victim crying with Traya. Also, it was established that there were three fences between Ms. Webb's house and Mr. Smith's, so this would create added difficulty in distinguishing which child was crying. Hence, counsel concludes: "The State has not met its burden of prima facie proof on that element of a pattern and practice of torture and abuse." 14RP 1617.

TRIAL COURT'S FINDINGS AND CONCLUSIONS REGARDING DEFENSE'S MDV

The trial court responds by saying that, with exception to the caselaw presented to it by the State, there is no present law defining a "bright line as to a temporal dimension to pattern or practice..." The court then found that: (1) "There's been testimony that Tyshell was struck with a belt on the 15th"; (2) The jury could determine whether it was reasonable discipline or assault; (3) the victim died 2 weeks later on the 30th; (4) in between those time periods, "somehow the child suffered a blunt force trauma to the head and obviously some form of assaultive behavior in as much as her body was covered head to toe in bruises; (5) "the child was taunted also, based on the videotape, was taunted and tortured, and I believe the testimony supports the idea of the dehydration and that that didn't just occur on the 30th," but "had to have happened over period of time and allowing a child to dehydrate to such an extent that she's unable to stand up is, in my opinion, torture."

Therefore, the trial court concluded that it thinks that "there is sufficient evidence to send the question to the jury of whether or not they believe that this was -- that the acts were committed by this defendant; that they were in fact assaults or torture; and that they constitute a pattern or practice of assault or torture." 14RP 1618.

8. CLOSING ARGUMENTS OF THE STATE AND DEFENSE

STATE'S CLOSING - PART I

The State tells the jury that "The the real question becomes who did it?" And that "the defendant did. We know because like we talked about earlier, truth. You ask yourselves who's telling the truth, and you will come to the only conclusion you can -- the defendant murdered Tyshell Smith."

THE LIES MAKE HIM GUILTY

Furthermore, the State claims that the facts proving Mr. Smith murdered the victim are: (1) The codefendant lying to the 911 operator about a babysitter; and (2) Mr. Smith standing next to the codefendant while she tells a false babysitter story to the 911 operator, describing bruises on the victim's legs and head. 14RP 1627-28.

Also indicative of the defendant's culpability, the State argues that: (1) Mr. Smith lied to medical personnel, firefighters, and police officials about a babysitter and camping trip story when he's asked by these various professionals what had happened; (2) the coordinated babysitter and camping trip story between Mr. Smith and his codefendant; (3) their quick-witted ability to furnish such a story before calling the 911 operator; and (4) how many of the false claims regarding the babysitter and camping trip story coincided with the facts of the victim's bruising. 14RP 1629-33.

LAKISHA'S CREDIBLE TESTIMONY MAKES HIM GUILTY

The State tells the jury that there's no reason not to judge Lakisha's testimony as credible, i.e., Mr. Smith was (1) trying to potty train the victim; (2) he would yell at the victim loudly; (3) he would spank the victim most of the time; (4) he hit the victim with a belt, "not Christina"; (5) when he would hit the victim, she would cry harder than if the codefendant hit her. 14RP 1634. Further, the State tells jury that Lakisha testified that: (1) Mr. Smith was home the day of the victim's death; (2) he wasn't gone very much; (3) he was sitting around watching TV most of the time. 14RP 1635.

MR. SMITH'S ONE-TIME, JULY 15th DISCIPLINING WITH BELT MAKES HIM GUILTY

State tells the jury that because Mr. Smith disciplined the victim on July 15th, that this portrays a continued pattern of beatings over a two-week period, and that he's responsible for the numerous assaults inflicted on the victim. Yet, the State never presents any direct or circumstantial evidence--beyond speculation--of how hard Mr. Smith spanked the victim on the July 15th, e.g., did he spank her with soft to medium force--leaving no marks or bruises--, but yell so loud that the victim cried? 14RP 1637.

Furthermore, the State tells the jury that: (1) "[T]hey hit her on the head," 14RP 1637-38; (2) the victim was "shaken violently, and you can fill in the blank because it's either dammit, you're going to learn to potty train, bam, or dammit you're going to learn to eat, ba-am, ba-am," 14RP 1639; (3) "[w]hich one of them is big enough and strong enough to pick up the 36-inch child and shake her so violently and slam her head against the wall or some other object," 14RP 1639; (4) because Ms. Webb associated hearing a baby crying and a man's voice saying "That's what you get. That's what you get," without ever knowing which baby was crying, alleging that this proves Mr. Smith beat the victim, 14RP 1640; and (5) because Mr. Spraw hears a man and a woman arguing about who was going to discipline the child, and then he hears a child crying as if the child is "being hit with a spoon or a coat hanger," yet the State never produces any direct or circumstantial evidence--beyond speculation--distinguishing the victim's cry from her baby sister's (Traya), who may have been awakened from the adults arguing and started crying because of the noise or for a nighttime feeding. 14RP 1641.

WHAT MR. SMITH SAYS MAKES HIM GUILTY

State tells the jury that Mr. Smith, during interrogation, repeatedly told Detective Wood that, "Christina didn't do it," yet the State quotes Mr. Smith's testimony out of context where, actually, he thought the detectives were trying to blame Ms. Tierce for the bruises that the victim acquired from from her two falls, of which Ms. Tierce was not responsible for, as far as Mr. Smith knew. 14RP 1642. The State also tells the jury that Mr. Smith is guilty because he's protecting himself by lying about the babysitter and the camping

story, yet the facts indicate that Ms. Tierce initiated the stories while on the phone with the 911 operator, and that Ms. Tierce gave the 911 operator a different babysitter number than the one she gave to the detectives. 14RP 1643-44.

#### POTTY TRAINING THE VICTIM MAKES HIM GUILTY

The State tells the jury that Mr. Smith is guilty because Ms. Tierce said that (1) he relieved her of the potty-training task, and (2) he was there most of the time, yet even if these were true, the State fails to produce any direct or circumstantial evidence--beyond speculation--that the victim was abused or assaulted outside of reasonable discipline. 14RP 1645-46.

#### MS. TIERCE'S VIDEO STATEMENTS MAKES HIM GUILTY

State tells the jury that what Christina says in the video makes him guilty, yet it fails to present any direct or circumstantial evidence--beyond speculation--that he actually abused or assaulted the victim, for in context of a hostile, social atmosphere and negative insinuations, it's easy to lead a naive child to believe that a loving person can also be a threatening disciplinarian. 14RP 1658, 1660.

#### THE VICTIM'S BLUNT TRAUMA, BRUISING, AND DEHYDRATION MAKES HIM GUILTY

The State tells the jury that Mr. Smith picked up the victim, shook her, and slammed her head into the wall or some other object, so he's guilty of extreme indifference, yet it fails to present any direct or circumstantial evidence--beyond speculation--that he performed the acts, had knowledge of them, nor acted in accomplice with another who performed them, 14RP 1661; nor does the State present any direct or circumstantial evidence--beyond speculation--that Mr. Smith denied the victim water, as it told the jury, 14RP 1666; nor does the State present any direct or circumstantial evidence--beyond speculation--that Mr. Smith caused any bruising when he disciplined the victim on two different occasions (on her legs with a belt, and on her diaper with his hand), for the only date specified was July 15th, which was two weeks prior to death (July 30th). 14RP 1667.

#### DEFENSE'S CLOSING

Defense tells the jury that: (1) Mr. Smith can't be standing right next to Ms. Tierce while she is on the phone with the 911 operator, because he is in the middle of performing CPR, thus he can't be in two places at the same time; and (2) that the potty training continued as a joint task of Mr. Smith and Ms. Tierce. 14RP 1673-74.

#### MR. SPRAW'S TESTIMONY IS MISDATED AND USELESS

Defense tells the jury that Mr. Spraw's testimony was incorrect based on the contradicting testimony of Mr. Smith, Ms. Tierce, and Lakisha. And that even if he heard a baby crying on another date, Mr. Spraw failed to distinguish which child was crying: Tyshell or Traya. Hence in actuality, Mr. Spraw's testimony is useless. 14RP 1675.

#### MR. SMITH NEVER BEAT THE VICTIM, HE ONLY DISCIPLINED HER

Defense tells the jury that the State characterizing Mr. Smith's discipline as beatings is misleading, for even Ms. Tierce testified that Mr. Smith disciplined the victim because she wouldn't eat and adamantly persisted in playing with her food. 14RP 1675-76.

#### THREE POSSIBILITIES OF WHO CAUSED VICTIM'S DEATH

Defense tells the jury that there are three different possibilities of who caused the victim's death: "One, both Christina and Tyran assaulted Tyshell; two, that Tyran alone assaulted Tyshell; or three, that Christina alone assaulted Tyshell." And he tells the jury that they have to look at the evidence, because there are "lies, lies, and more lies; all those damn lies." 14RP 1679.

#### MS. TIERCE TELLS THE 911 OPERATOR AND DETECTIVES ABOUT THE VICTIM'S BRUISING

Defense tells the jury to pay attention to all of the details that Ms. Tierce gave to the 911 operator regarding the victim's bruising locations, i.e., (1) On the arms; (2) lower back above the diaper; (3) not on the chest; and (4) the right side of her head when she fell. 14RP 1681. The Defense

further highlights that Ms. Tierce said she and Mr. Smith switched off when it came to potty training, but she never says Mr. Smith abused the victim while he potty trained, neither does she specify an exact date as to when he potty trained. Further, she says that she would take her diaper off when she took the victim to the potty. 14RP 1682.

The Defense also highlights Ms. Tierce's response when the detective asked her, "Did you notice anything to her vaginal area?", and her response was, "No. No. I wiped her and I did. I had a problem -- I was wiping 'cuz, um, I thought, um, Jennifer left poop on her, like she went to the bathroom, and she had poop left on her, and I was wiping it and it wasn't poop. It was, I think, I don't know. It looked like maybe a little bruise across her -- across the two lip section." 14RP 1683-84. Further noting other statements by Ms. Tierce: "I'm the one that took her to the bathroom,"... "She wetted her pants. At that time she didn't have a diaper on,"... "That's when I observed the bruises on her because I was changing her clothes,"... "I put a diaper on her." Ms. Tierce goes on and on about how she was familiar with the victim's bruising and the locations of the bruising. 14RP 1684-85.

#### OBVIOUS EMOTIONAL CONTRAST BETWEEN MR. SMITH AND MS. TIERCE

Defense tells the jury to recognize the emotional contrast between Mr. Smith and Ms. Tierce, as testified by the firefighter, Mr. Billings, i.e., Ms. Tierce was blank faced and showing no emotion and Mr. Smith was showing emotion and concern. Mr. Billings also noticed Ms. Tierce was unfazed and seemed disconnected, yet Tyran was excited and anxious..." 14RP 1687, and that Mr. Smith grabbed his chest and grabbed the policeman because he was so emotional, to the point he had to lay down and Ms. Tierce, on the other hand, stood by the car and showed very little emotion. 14RP 1689-90. Moreover, when Detective Benson expressed to Ms. Tierce his disbelief in her story, he said she then smiled at him and became uncooperative, calm and unemotional. 14RP 1691.

#### MS. WEBB'S TESTIMONY IS UNRELIABLE AT BEST

Defense highlights to the jury the unreliability of the substance of Ms.

Webb's testimony because of the distance between her house and Mr. Smith's and because she wasn't personally familiar with Mr. Smith or his crying children, she may have been mistaken as to who she was hearing, e.g., another neighbor. 14RP 1692.

#### DEFENSE WITNESS'S TESTIMONY CORROBORATES MR. SMITH'S CLAIMS

Defense tells jury that Lakisha's testimony only corroborates Mr. Smith's and Ms. Tierce's, i.e., he disciplined the victim with a belt on one occasion, and that Ms. Tierce performed the care-taking tasks of cooking the kids food, getting them dressed, giving them baths, doing their hair, and getting them ready for bed. 14RP 1694.

Further, the Defense tells the jury that Ms. Tierce's testimony corroborates Mr. Smith's claims saying that he disciplined the victim two times (on her legs, but over her pants, and on her bottom, but over her diaper). 14RP 1698. Additionally, counsel apprises the jury of Ms. Tierce's hostility towards the victim. 14RP 1699-1700.

Defense also notes to the jury how Mr. Smith's whereabouts were accounted for and corroborated by numerous witnesses, and how the testimony contradicted the testimony of Ms. Tierce. 14RP 1702-04. Counsel also tells the jury why Mr. Smith was quite frequently away from home, i.e., he accounted for this by showing that he had numerous vehicles with mechanical problems that needed fixing. 14RP 1705, 1710.

#### WHO DUNNIT?

Defense draws the jury's attention to the fact that an assault resulted in the victim's death, but there is no direct evidence linking Mr. Smith to the crime, and that Ms. Tierce's taunting might amount to torture, but that is all on Ms. Tierce, for Mr. Smith was not involved. 14RP 1711-12.

#### WAS IT REASONABLE DISCIPLINE OR ASSAULT?

Defense indicates that the force used by Mr. Smith when disciplining the victim did not rise to assault, and the State has not proven that he acted in an unlawful manner. 14RP 1712.

#### NO EVIDENCE PROVING COMPLICITY

Defense indicates that there was no evidence that Mr. Smith knew of Ms. Tierce inflicting any assaults upon the victim, nor did he promote, facilitate, aid or agree to aid, assist, encourage or support, and finally the State did not prove--beyond speculation--that he did know. 14RP 1713-15.

#### "THERE'S NOTHING HERE. IT'S ALL SPECULATION"

Defense tells the jury that the State claimed in closing that "Tyran shook her violently and then threw her against the wall..." The Defense then told the jury: "[W]e don't convict people in this country on speculation. We convict them on evidence, and there is none." 14RP 1716-17. And in conclusion, the Defense added: "[T]he State has missed proving Tyran Smith guilty of anything by a wide, wide margin..." 14RP 1718.

#### STATE'S CLOSING REBUTTAL - PART II

State disagrees with Defense's claim of speculation, because "[t]here were only two people capable of committing this crime in that house." Then the STATE CONCEDES, saying: "They either did it alone or they did it in concert." It adds that there is no speculation because of the following assertions: (1) A child was murdered; (2) she was beaten to death; (3) she was dehydrated so severely that it was life threatening; and (4) "if he was in that house and he knew what was going on, not speculation." 14RP 1719.

Hence, again the STATE CONCEDES to the Defense's speculation in various ways: (1) he would have known; (2) if he saw and knew; (3) he would have known, he must have known; (4) if he knew that she was ill; and (5) he must have known. 14RP 1719.

#### STATE'S GARGANTUAN MISSTATEMENT OF LAW

State misstates the law in an attempt to mislead the jury to believe that in order for Mr. Smith to be found not guilty, "you have to believe his story. That's the bottom line. You have to believe it. You have to find that he is credible, believable, worthy of being believed, worthy of being trusted." 14RP 1720-22.

STATE RIDICULES ANY POTENTIAL JUROR WHO MAY EXONERATE MR. SMITH

The State then ridicules the jury's independence by insinuating that any of them who Mr. Smith's convinced with his lying and tears has been fooled. 14RP 1723. This effective ploy would immobilize a juror's desire to find Mr. Smith not guilty by making him or her feel like a fool for doing so.

#### MS. TIERCE'S PREJUDICIAL VIDEO STATEMENT

State twice highlights Ms. Tierce's video statement about Mr. Smith, and how the Defense tried to conveniently avoid her statement by omission: "Daddy's waiting for you to lay down. You lay down, and he's coming in here with a belt." 14RP 1732.

#### 9. MDV AND INSUFFICIENCY OF EVIDENCE LEGAL ARGUMENTS

MR. SMITH CONTENDS THAT THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT HIM ON EITHER CHARGE OF HOMICIDE BY ABUSE OR SECOND DEGREE FELONY MURDER, THUS VIOLATING HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, RESULTING IN A MANIFEST INJUSTICE

#### PREFATORY CONSIDERATIONS

Although an age-old constitutional contention, many criminal appellants challenge the insufficiency of the State's evidence to support the jury's verdict. E.g., a criminal appellant may urge earnestly that the evidence established at most defendant's "mere presence" at or near the scene of the crime. After the prosecution points to several bits of evidence indicating defendant's additional involvement in planning or otherwise aiding in the commission of the crime, there is literally nothing more to be said. In a nutshell, this is usually the case with insufficiency arguments on appeal; however, in this underwhelming case, the facts are vividly different.

#### CONSTITUTIONAL PROVISIONS

The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is

charged." In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Further, in Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), a defendant has a constitutional right not to be convicted on the basis of evidence that could not support a verdict of guilty. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982)(If the evidence is insufficient to support the convictions, defendant is entitled to dismissal with prejudice); State v. Floreck, 43 P.3d 1264, 111 Wn.App. 135.

#### PRESERVATION OF MR. SMITH'S INSUFFICIENCY OF EVIDENCE CLAIMS

In this case, Mr. Smith not only raised insufficiency of evidence through a Motion for Directed Verdict, but also renewed it with a Motion to Dismiss at the close of the Defense's case. Yet, Mr. Smith concedes that a Motion for Directed Verdict is considered waived upon the Defense presenting evidence in opposition to the State's case.

As explained in United States v. Alvarez-Venezuela, 231 F.3d 1198, 1200-01 (9th Cir. 2000), when a defendant does not preserve a claim of insufficiency of evidence by failing to make a motion for acquittal at the close of the evidence, the review is deferential, requiring reversal only upon plain error or to prevent a manifest injustice. Accordingly, Mr. Smith contends that his insufficiency claims have been preserved, and adds that review should be made to prevent a manifest injustice, of which is unjustly based on insufficient evidence to convict on either Homicide By Abuse or Second Degree Felony Murder.

#### STANDARD OF REVIEW FACTORS FOR DETERMINING INSUFFICIENCY OF EVIDENCE CLAIMS

As stated in State v. Green, 91 Wn.2d 431, 442, 588 P.2d 1370 (1979): "[R]eview of the sufficiency of evidence is limited to a determination of whether the State has produced substantial evidence tending to establish circumstances from which a jury could reasonably infer the fact to be proved." In determining whether the necessary quantum of evidence exists, it is necessary for the [reviewing court] to be satisfied of guilt beyond a reasonable doubt. It is only necessary for it to be satisfied that there is substantial evidence to support the State's case or the particular element in

question," id at 442-43; Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979).

In challenging the sufficiency of the State's evidence--and for argument's sake--, Mr. Smith openly admits the truth of the State's evidence and all reasonable inferences from the evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Sufficient evidence supports a conviction if any rational trier of fact could find each element of the crimes charged beyond a reasonable doubt, id at 201. To survive a challenge to a claim of sufficiency, the evidence need only be sufficient to permit conviction by a rational trier of fact. State v. Munden, 81 Wn.App. 192, 195, 913 P.2d 421 (1996). State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990)(We draw reasonable inferences from the evidence in the light most favorable to the State).

Additionally, in determining guilt, circumstantial evidence is as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); State v. Zamora, 63 Wn.App. 220, 223, 817 P.2d 880 (1991)(Circumstantial evidence is no less reliable than direct evidence for purposes of determining whether the evidence is sufficient to sustain a criminal conviction). United States v. Montgomery, 150 F.3d 983 (9th Cir. 1998)("Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction")(citation omitted).

And more importantly, U.S. v. Martin, 228 F.3d 1 (1st Cir. 2000) notes: Courts must credit both direct and circumstantial evidence, without evaluating or speculating on the weight the juror has given different pieces of evidence, and without making its own judgments as to credibility.

It is thus for the trier of fact to determine the credibility of witnesses--which includes Mr. Smith or any other witness testimony that contradicts another's--, and such determinations will not be overturned on appeal. State v. Madarash, 116 Wn.App. 500, 66 P.3d 682 (2003). State v. Camarillo, 115 Wn.2d 60, 71 794 P.2d 850 (1990)(Courts do not review the jury's credibility determinations).

Therefore, in establishing his insufficiency claim, Mr. Smith welcomes this court to conduct thorough review according to the means afforded it by state and federal law.

## THE DILEMMA OF SPECULATION-BASED JURY VERDICTS

Was the verdict arrived at through legitimate inference from evidence or by mere speculation? That is one of the most difficult questions which can be presented to an appellate court, since, in the absence of a definite boundary between these two methods of arriving at a conclusion, what one man classifies as legitimate inference is very apt to be regarded by another as mere speculation. Here, the defense repeatedly asserted the conclusion of speculation to the jury, however, apparently, the jury remained hardened by the nature of this case or they either failed to truly grasp what speculation was, at least its legal definition.

Although its trivial definition haunts those who attempt to understand its meaning and applied context, speculation has, nevertheless, been defined by various legal means. "[T]he law demands that verdicts rest upon testimony and not upon conjecture and speculation. There must be some proof connecting the consequence with the cause relied upon. The testimony, whether direct or circumstantial, must reasonably exclude every hypothesis other than the one relied on." Bland v. King County, 55 Wn.2d 902, 905 (1959)(citing Anton v. Chicago, M. & St. P.R. Co., 92 Wash. 305).

While it is rare, courts have concluded that jury verdicts have rested on speculation. E.g., in Neel v. Henne, 30 Wn.2d 24, 35-36, (1948), the court concluded, "[I]t seems to us that the opinions of these witnesses... are based entirely upon assumption, speculation, and conjecture." Moreover, opinion evidence alone is not conclusive in any case. The jury must pass upon the probabilities, and unless the opinion relied on is within the scope of reason and common sense it should not be regarded at all. Hence, when the circumstances lend equal support to inconsistent conclusions with contradictory hypotheses, the evidence must not be held sufficient to establish the asserted fact. Speculation is defined by Black's Law Dictionary, Seventh Edition, Bryan A Garner, P.1407, as: "The act or practice of theorizing about matters over which there is no certain knowledge."

Further explaining speculation, State v. Borg, 49 Wn.2d \_\_\_\_ (1956) notes: [I]n order to sustain a conviction on circumstantial evidence, the circumstances proved by the state must not only be consistent with the

hypothesis that the accused is guilty, but also must be inconsistent with any hypothesis or theory which would establish, or tend to establish, his innocence. And for further clarification, Garder v. Seymour, 27 Wn.2d 802, 808-10 (1947) notes:

"The rule is well established that the existence of a fact or facts cannot rest in guess, speculation, or conjecture. It is also rule that one having the affirmative of an issue does not have to make proof to an absolute certainty. It is sufficient if his evidence affords room for men of reasonable minds to conclude that there is a greater probability that the things in question, such as the occurrence of a fire, happened in such a way as to fix liability upon the person charged there with than it is that it happened in a way for which a person charged would not be liable. In applying the circumstantial evidence submitted to prove a fact, the trier of fact must recognize the distinction between that which is mere conjecture and what is a reasonable inference. 'The burden of proving proximate cause is not sustained unless the proof is sufficiently strong to remove that issue from the realm of speculation by establishing facts affording a logical basis for all inferences necessary to support it.' (citing Paddock v. Tone). Proximate cause... may be adduced as an inference from other facts proven, but because no legitimate inference can be drawn that an [event] happened in a certain way by simply showing that it could have happened in that way, and without further showing that it could not reasonably happened in any other way."

Additionally, circumstances equally consistent with contradictory hypotheses are insufficient to establish the material fact and leave it in the realm of speculation. Falconer v. Safeway Store, Inc., 303 P.2d 294, 49 Wn.2d 478 (1956). For example, as concluded by the Ninth Circuit Court in United States v. Vasquez-Chan, 978 F.2d 546, 549 (9th Cir. 1992), when there is an innocent explanation for a defendant's conduct as well as one that suggests that the defendant engaged in wrongdoing, the government must produce evidence that would allow a rational [not emotional] jury to conclude beyond a reasonable doubt that the latter explanation is the correct one.

#### SPECULATION-BASED JURY VERDICTS MUST NOT BE GRANTED A "FREE PASS"

Like many defendants, Mr. Smith contends that the evidence presented against him merely suggested that he was caught in extremely incriminating

circumstances, which paves the road for speculation-based verdicts. To render a guilty verdict, however, the jury must hear sufficient evidence to avoid resorting to excessively strained inferences or guesswork. And it is such, that when a verdict may have rested on any of several grounds, one of which was improper, the conviction cannot be upheld. U.S. v. Peterson, 236 F.3d 848 (7th Cir. 2001).

For it is in these trivial and incriminating circumstances that jurors are led to believe that sufficient circumstantial evidence has been presented against the defendant. Thus, a jury left unschooled on these trivial matters, will usually resort to a conclusion based on ignorance rather than on that of which the constitution requires. Moreover, while circumstantial evidence, combined with reasonable inferences, may be enough to sustain [a conviction], this does not relieve the government of its burden to prove every fact necessary to convict a defendant beyond a reasonable doubt. U.S. v. Orduno-Aguilera, 183 F.3d 1138 (9th Cir. 1999).

It is important, therefore, for courts not to grant jury verdicts a "free pass," and, if the evidence, when viewed in the light most favorable to the government, gives equal or nearly equal circumstantial support to theories of guilt or innocence, convictions must be reversed. U.S. v. Martin, supra. Further, courts must not allow jurors to use their personal knowledge to substitute for evidence. E.g., in the Oregon case of State v. Cervantes, 848 P.2d 118, 121 (Or.App. 1993), the court concluded: "[T]he jurors could only have speculated or used their personal knowledge that Coos Bay is in Coos County. The Constitution does not permit neither."

JURIES CANNOT CONVICT MR. SMITH SOLELY UPON ITS BELIEF THAT HE'S A LIAR

Although Mr. Smith conceded at trial that he lied about the babysitter and camping story, this alone cannot suffice a conviction, absent other evidence. In U.S. v. Zimmitti, 850 F.2d 869, 874-76 (2d Cir. 1988), the Second Circuit Court concluded:

Government cannot prove that an event occurred simply by putting a witness on the stand, allowing him to testify that the event did not

occur, and asking the jury to disbelieve that testimony... [A] verdict of guilt cannot properly be based solely on the defendant's denial of the charges and the jury's disbelief of his testimony. 'Many of the inferences suggested by the government are contradicted by [state witness] testimony and are not supported by any evidence.'... [T]he scant information elicited by the questions that were asked plainly did not provide an adequate basis for inferring any particular knowledge, awareness, or inferences on the part of DiPietro."

"When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." U.S. v. Tyler, 758 F.2d 66, 70 n.3 (2d Cir. 1985). "[A]lthough the jury's disbelief of a defendant's testimony may supplement already existing evidence and help make the evidence in a borderline case sufficient, in the instant case there was simply no existing evidence to supplement." United States v. Taylor, 758 F.2d 66, 70 (1985). Therefore, Mr. Smith contends that--in any case--it would not matter whether he lied prior to or during trial; this alone, would make him a liar, not a murderer.

Similar to flight evidence, Mr. Smith's lying was of marginal relevance in determining guilt. For the evidence against him merely showed that he lied after the crime occurred, and not before. And as expressed in Lee v. United States, 376 F.2d 98, 102 (9th Cir. 1967), the Ninth Circuit Court concluded:

"Miss Lee's attempt to escape gives rise to the inference that she knew something wrong was going on and that she did not want to become implicated in it. But it does not show that her attempted escape or any of her actions prior thereto, were for the purpose of aiding and abetting Lewis in transporting narcotics, or that they had that result. Affirmed as to Lewis. Reversed and remanded as to Ms. Lee, with directions to enter a judgement of acquittal as to her."

A lie is just that: A lie, and not evidence. Likewise, in Evans v. United States, 257 F.2d at 126 (\_\_\_\_), the court concluded: "[A] suspicion, however strong, is not proof... A conclusion that Lonnie and Johnnie lied about Lonnie's knowledge is not evidence that Johnnie told Lonnie about the heroin." Accordingly, Mr. Smith's lying, alone, will not suffice as guilt.

## REASONABLE DISCIPLINE VS. ABUSE OR ASSAULT

There are two central cases that assist courts in determining abuse and assault of a child, versus reasonable discipline: State v. Russell, 69 Wn.App. 237, 848 P.2d 743 (1993) and State v. Madarash 116 Wn.App. 500, 66 P.3d 682 (2003). Russell holds that [d]eath must be caused "under circumstances manifesting an extreme indifference to human life"; neither premeditation nor intent is required. 9A.32.055. However, the State is required to prove that the defendant "previously engaged in a pattern or practice of assault or torture" of the person killed," id.

Secondly, Madarash holds that [a]t common law, an assault could be committed in three ways: "(1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [battery]; and (3) [intentionally] putting another in [reasonable] apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm." Likewise, in determining assault, the Washington appellate court reasoned in State v. Brown, 60 Wn.App. 60, 67-68, 802 P.2d 803 (1990): [I]t appeared from some of the marks that the belt buckle came in contact with the child's buttocks... Finally, Brown's own testimony indicated that he lost his temper while disciplining Jesse, and that he used "a little too much force" while hitting the child.

In the Brown case, it was reasonable for a jury to conclude, based on pictures and medical testimony--in addition to his own testimony--that Brown used too much force when disciplining his child. Moreover, he was the only one in his son's presence who could have committed the assault; thus he was convicted of second degree assault. These facts are diametrically opposed to the facts of Mr. Smith's case. Hence, Mr. Smith contends that the State failed to prove that he (1) abused, (2) assaulted, or (3) committed any unreasonable acts when disciplining the victim. For according to RCW 9A.16.100, the policy reads in part:

It is policy of this state to protect children from assault and abuse and to encourage parents...to use methods of correction and restraint of children that are not dangerous to the children. However, the physical discipline of a child is not unlawful when it is reasonable

and moderate and is inflicted by a parent...for purposes of restraining or correcting the child. Any use of force on a child by any other person is unlawful unless it is reasonable and moderate and is authorized in advance by the child's parent or guardian for purposes of restraining or correcting the child.

The following actions are presumed unreasonable when used to correct or restrain a child: (1) Throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) Shaking a child under age three; (4) interfering with a child's breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks. The age, size, and condition of the child and the location of the injury should be considered when determining whether the bodily harm is reasonable or moderate. This list is illustrative of unreasonable actions and is not intended to be exclusive. (emphasis added).

In the instant case, the record was devoid of sufficient evidence of abuse or assault. Mr. Smith testified that he once spanked the victim a few times with a belt on the legs--over her pants--, because after several warnings, she continued to throw her food on the floor and play with it. The victim cried as any normal child would when being yelled at and disciplined. And afterwards, Mr. Smith removed her from her highchair and took her to her bedroom. These acts, per se, cannot be said to constitute abuse or assault, for he merely disciplined, restrained, and confined her to her bedroom as a reasonable form of correction. It's not losing your temper, per se, that constitutes abuse or assault; it's when one loses his or her temper and exceeds that prescribed by law. An important note: The State failed to prove that Mr. Smith exceeded the law in disciplining his child, for as human beings, we are all prone to frustration.

Now bear in mind: (1) Mr. Smith was the victim's parent, (2) he had a right to exercise discipline, provided he did not cause bodily harm greater than transient pain or minor temporary marks; (3) he spanked his child on her legs, which were covered by pants; and (4) he had a right to restrain his child.

Secondly, Mr. Smith spanked the victim one time on her buttocks, over her diaper, when she persisted in dirtying her diaper instead of using the potty. This too is deemed by RCW 9A.16.100 as lawful discipline. In consideration of

the spanking location, i.e., over the victim's diaper, Mr. Smith's acts were reasonable as the parent.

The two acts of discipline denoted above was the only evidence the State presented to the jury to convict Mr. Smith, besides the video statement of Ms. Tierce. And although it was circumstantially obvious that abuse and assault was perpetrated against the victim, there was no evidence that Mr. Smith was involved in the crimes he was convicted of. Neither did the State prove that his discipline of the victim exceeded that prescribed by law. For the only time identified that he disciplined the victim was two weeks prior to her death, which is beyond any reasonable time consistent with the proximate cause of death—as determined by the medical experts.

Additionally, the State argued that Mr. Smith's acts, although infrequent, were sufficient to establish a pattern of abuse. However, they cannot overreachingly argue a pattern of abuse without first establishing the necessary element of abuse. Likewise, they cannot argue assault without first establishing the necessary element of assault. Otherwise, the law would have to be written as: "A pattern of discipline, in the event that the element of abuse or assault has not been proven." This, however, would of course be the job of legislature, and not that of the prosecutor or the court.

The opinions and theories testified to by the State's medical experts merely showed the potential causes of death; however, this did not relieve the State from its burden of proving that Mr. Smith participated—as principal or accomplice—in the charged crimes. Yet, if he were the only person in the victim's presence during the period of time that the injuries were most likely inflicted, it could easily be presumed that he was the perpetrator, but as shown during trial, Ms. Tierce spent ample time with the victim during the possible time periods of injury. This, then leads us to the unavoidable issue of "Who dunnit?"

#### THE ANCIENT ENIGMA OF "WHO DUNNIT"

In a perfect State case, the guilty party would confess to the crime and plead guilty, but not everyone is so apt to do so and risk losing a substantial portion of his or her freedom. However, there is yet one more

scenario that poses a less-than-perfect State case, which would be that Mr. Smith nor Ms. Tierce admit to committing a crime. Yet, Ms. Tierce did plead guilty--up to a point. This creates a dilemma as ancient as the biblical day of King Solomon. For instance, in The Holy Bible, Book of Kings I, 3:16-28, the story goes:

Upon King Solomon receiving his throne, he was presented with a difficult case between two prostitutes who had both bore a child. The child of one of the two prostitute's had died during the night, so treacherously, while the other prostitute was still sleeping, she replaced her dead child with the living child of the other prostitute. In the morning, the other prostitute realized that the dead baby lying next to her was not hers, while the treacherous prostitute claimed that it was, so when the case was presented to King Solomon, he decided that the emotions of the real mother would be evident when the living child's life was threatened. Thus he gave an order to cut the child in half, and while the real mother said, "Don't kill him!", the treacherous mother said, "Cut him in two!" The child was given to the mother who pleaded for the child's life.

Likewise, Mr. Smith's emotions should have convinced the jury that he was innocent, but, unfortunately, the jury was misled to believe the unlawful suggestions of the State, i.e.: (1) he was guilty because he lied, (2) he was guilty because he disciplined his child; and (3) he was guilty because he was there and he should have known what was going on, but these conclusions are constitutionally unsound. For when the jury is burdened with the issue of who dunnit, its realm of speculation quite naturally will invade the defendant's constitutionally protected right to a fair trial and Due Process of law, thus creating a manifest injustice.

In State v. Baylor, 17 Wn.App. 616, 618, 565 P.2d 99 (1977), our Washington appellate court held: "In this state when it cannot be determined which of the two defendant's actually committed a crime, and which one encouraged or counseled, it is not necessary to establish the role of each. It is sufficient if there is a showing that each defendant was involved in the commission of the the crime, having committed at least one overt act..." State v. Carothers, 84 Wn.2d 256, 261, 525 P.2d 731 (1974)(Supreme Court held: "The jury was abliged to decide who held the gun or who committed the physical

act... If it was convinced that the alleged crimes were committed and that the petitioner participated in each of them, it was justified in returning a verdict of guilty on each count.)(emphasis added).

NOT GUILTY BY ASSOCIATION OR PRESENCE

It has been long been the onus of appellate courts to revisit and rectify guilty convictions based on association and relationship. As in the instant case, the primer of Mr. Smith's conviction is questionably based on the relationship he had with his codefendant and his alleged presence around the time of the victim's death. The basis for drawing such conclusions, however, can only serve to perpetuate Mr. Smith's wrongful conviction. Accordingly, Mr. Smith contends that regardless of his relationship to his codefendant and his sporadic presence at home around the time of the victim's death, without evidence of knowledge and complicity of the crimes charged, the jury thus had no reasonable basis to conclude that he participated in any criminal undertaking.

As neither the first nor the last defendant, Mr. Smith and others will continue to face illegitimate guilty-by-association-and-presence convictions. For example, in Delgado v. U.S., 327 F.2d 641 (9th Cir. 1964), the [d]efendants, who lived together as "common law" husband and wife, were convicted of receiving, concealing and facilitating the transportation of marijuana on the basis of marijuana found in the defendants' bedroom nightstand. This court held that individual guilt on the part of either defendant had not been proven; it was "pure speculation" whether both of the defendants had possession of the marijuana or, if not both, which defendant had possession; see also, U.S. v. Daniels, 549 F.2d 665 (1977)(Government failed to attribute individual guilt to either of the appellants.) For verdicts must be supported by evidence and not be founded on mere theory or supposition. Gardner v. Seymour, supra.

The court further noted in Delgado:

[I]t is fundamental to our system of criminal law that guilt is individual. Here, that means that there must be sufficient evidence to support a finding, as to each defendant, that he or she had possession

of the marijuana. Possession can be joint as well as several, "constructive" as well as "actual." It must be knowing. But here it is pure speculation as to whether Rodriguez alone, or Delgado alone, or both of them, had possession. No doubt one of them did; perhaps both did. But proof that does not give a rational basis for resolving the doubts necessarily present in the situation pictured to the jury in this case is not sufficient. (See Evans v. United States, 257 F.2d 121 (9th Cir. 1958); Williams v. United States, 290 F.2d 451 (9th Cir. 1962).) The judgement is reversed."

Again, in Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962), the Ninth Circuit reasoned in part: "...[w]e cannot view this as conclusively incriminating circumstances because the presence of the narcotics is also exactly coincidental with the presence of her husband and Mrs. Arellanes' presence with both is as fully explained by her attachment to her husband..."

MR. SMITH CONTENDS THERE'S NO EVIDENCE OF PRINCIPAL OR ACCOMPLICE

Clearly, nothing at trial showed that Mr. Smith was the principal in the charged crimes. This leaves a reasonable mind with only one other avenue to attach guilt: Accomplice. This means of guilt, however, demands that several obstacles be overcome to succeed in confirming guilt. Accomplice is legally defined as: "A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either: (1) Solicits, commands, encourages, or requests another person to commit the crime; or (2) Aids, or agrees to aid another in planning or committing the crime. The Washington Supreme Court held that physical presence of an accused at the scene of a crime is not sufficient evidence to establish his participation as an accomplice; there must be substantial evidence that the accused had (1) knowledge of the wrongful purpose of the perpetrator, and (2) intent to encourage the perpetrator in that wrongful purpose. In re Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979).

It is not as easy as one thinks to convict as an accomplice, for the law imposes a gamut of protections ensuring the defendant a fair trial. State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); In re Wilson at 491, (The State must prove that the defendant was ready to assist in the crime); State v. Roberts, 80 Wn.App. 342, 356, 908 P.2d 892 (1996)(Jury cannot convict

defendant as accomplice based on fact, merely amounting to presence and assent to criminal activity. Prosecutor's argument exhibited a misunderstanding of accomplice liability and effectually mislead the jury); Cf., State v. Amezola, 49 Wn.App. 78, 89, 741 P.2d 1024 (1987)("One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his actions to make it succeed."); State v. Ferreira, 850 P.2d 541, 69 Wn.App. 465 (1993)(Person charged with being accomplice must knowingly aid or agree to aid; "aid means all assistance whether given by words, acts, encouragement or support."); State v. Robertson, 947 P.2d 765, 88 Wn.App. 836 (1997)(Accomplice liability requires showing that alleged accomplice acted with general knowledge of the principal's substantive crime.); State v. Modest, 944 P.2d 417, 88 Wn.App. 239 (1997)(Unlike the criminal conspiracy statute, accomplice liability statute requires only a state of knowledge rather than intent, and requires a completed crime rather than merely a substantial step toward commission of the crime.); State v. Bolar, 74 P.3d 663 (2003)(The men's rea for accomplice liability is knowledge, and the legislature intended that culpability of an accomplice not extend beyond the crimes of which the accomplice actually has knowledge.)

#### INSUFFICIENT, AFTER-THE-CRIME ACCOMPLICE EVIDENCE

A conviction cannot be established on after-the-crime accomplice evidence. As our state-court has concluded in State v. Luna, 71 Wn.App. 755, 759-60, 862 P.2d 620 (1993):

"The State's evidence is insufficient to prove that Mr. Luna possessed the mental state required of an accomplice. While Mr. Luna knew, after the fact, that Mr. Lauriton took the truck without permission, there is no evidence that he knew of, or even suspected, Mr. Lauriton's intent before the theft occurred. Neither can it rationally be concluded under the evidence that Mr. Luna, by following the stolen truck in the Camaro, promoted or facilitated the theft, or aided Mr. Lauriton in stealing the truck. Mr. Luna did not, by driving away in the Camaro, seek to make the theft succeed, since it had already occurred and as he was unaware of Mr. Lauriton's plans after the point... [T]here is no evidence, direct or circumstantial, to suggest that Mr. Luna knew that Mr. Lauriton was going to stop the stolen truck, or that Mr. Brown

was going to take over driving it. Therefore, Mr. Luna cannot have known that he was aiding in the crime by driving Mr. Brown to the place it occurred. We reverse the conviction."

Moreover, in State v. Robinson, 73 Wn.App. 851, 872 P.2d 34 (1994), Robinson, without knowing beforehand that his codefendant (Baker) planned on committing a robbery, fled the crime scene subsequent to the crime. However, prior to or during the robbery, he neither associated himself with Baker's undertaking, participated in it with the desire to bring it about, nor sought to make the crime succeed by any of his own actions, for Baker had spontaneously committed the crime. Accord, In re Wilson, supra; State v. Galisia, 63 Wn.App. 833, 839, 822 P.2d 303, review denied, 119 Wn.2d 1003 (1992)(Mere knowledge or physical presence at the scene of the crime neither constitutes a crime nor will it support a charge of aiding and abetting).

Additionally, without the mental element of knowledge, even a postal carrier would be guilty of a crime were he to innocently deliver a package which in fact contained forbidden narcotic. Such a result is not intended by the legislature. Guilty knowledge must be proven beyond a reasonable doubt. State v. Boyer, 91 Wn.2d 342, 344, 588 P.2d 1151 (1979).

Therefore, Mr. Smith contends that prior to the crime, guilty knowledge must be proven beyond a reasonable doubt, for otherwise, if an unsuspecting parent were to legally discipline his or her child, anyone else would be able to—in secret—subsequently abuse or assault the child and then deny doing so, thus incriminate the innocent parent. This is why, like evidence of flight after the crime, evidence of lying after the crime must be considered to be of marginal relevance in determining guilt. Here, however, the State was consumed by the idea that Mr. Smith's lying was sufficient in establishing his guilt. Hence, it relentlessly argued to the jury this misstatement of law.

#### WHICH CHILD WAS CRYING: TYSHELL OR TRAYA?

During trial, Mr. Smith's neighbors testified that they heard a child crying, but they failed to distinguish which child it was, for they were not personally familiar with either child. Further, at trial, the State alleged that during these crying episodes, Mr. Smith was abusing or assaulting the

victim. Yet, neither neighbor testified that he or she seen Mr. Smith abuse or assault the child, nor did neither of them testify that he or she knew which child was crying. Furthermore, neither neighbor testified that he or she knew why the unknown child was crying; they merely speculated enough for the State to mislead the jury to believe that Mr. Smith was abusing or assaulting the crying child--whichever child it was: Tyshell or Traya.

There are several reasonable conclusions that could lead a rational--not emotional--juror to believe that the child was not being abused or assaulted: (1) The child just woke up and was hungry; (2) the child was placed in her room against her will; (3) while running through the house, the child could have slipped and stubbed her toe, yet prior, she was told to quit running. There is absolutely no way anyone can infer that a child is being abused or assaulted because she is crying. And lastly, what if the child was crying because she was being reasonably disciplined, but she cries in an exaggerated manner. This isn't to say that the victim's cries during her abuse or assault weren't caused by unreasonable discipline, it is only suggesting that crying--even coupled with two adults arguing--without further evidence (direct or circumstantial), is inadequate to establish Mr. Smith's convictions of HBA and 2nd° Felony Murder.

#### CRYING, PER SE, DOES NOT CONSTITUTE ABUSE, ASSAULT, OR TORTURE

Mr. Smith contends that neither the testimony of Ms. Tierce nor Lakisha establish that when Mr. Smith disciplined the victim, her crying amounted to abuse, assault, or torture. For Ms. Tierce's testimony only corroborated Mr. Smith's testimony, i.e., he disciplined the victim twice. Notedly, Ms. Tierce did not present any testimony that Mr. Smith's acts went beyond what is considered reasonable discipline--as defined by 9A.16.100 and the trial court's jury instruction on reasonable discipline.

Lakisha testified that although Mr. Smith spanked the victim, she did not know how hard it was because she was never spanked by him. However, she did testify that it was harder and more frequent than Ms. Tierce. Then later, she contradicts herself and says that she seen Mr. Smith spank the victim only one time. She then added: On occasion, she heard the victim crying, but did not

visually witness Mr. Smith spanking the victim; she obviously likened Mr. Smith's yelling with him spanking the victim, for she said she was in the other room when she heard the victim crying. The question here is: Was it Mr. Smith's normal means of disciplining the victim, by voicing his frustration by yelling at her? And would this yelling, per se, constitute physical abuse or assault? Surely, this was never the legislature's intent in regards to the elements of the charged crimes, for then anyone who gets frustrated and yells at their child would face criminal charges.

While cross-examining Mr. Smith, the State tirelessly attempted to establish how hard Mr. Smith spanked the victim, for this was critical in proving unreasonable discipline. However, the State fell short, for they could not establish: (1) That although Mr. Smith testified he spanked the victim a few times on the legs--over her pants--, the force he used was not unreasonable; (2) Whether the victim sustained any severe bruising as a result of being spanked on her legs, for the event occurred two weeks prior to death, which extends beyond any proximate time reasonable to infer that the bruising showed at death was the result of the prior event; (3) whether the child's spanking caused her to experience more than mere transient pain; and (4) whether the victim's crying was exacerbated by Mr. Smith yelling at her. These are all reasonable factors in considering whether Mr. Smith's prior spanking of the victim, was, per se, unreasonable and thus established a pattern or practice of assault.

#### THE STATE'S LAST CRUCIAL PREDICATE: CRIMINAL MISTREATMENT

Besides the pattern or practice of assault or torture element of HBA (9A.32.055), and the First (9A.36.011) and Second (9A.36.021) Degree assault predicates of Second-degree Felony Murder (9A.32.050), Mr. Smith has one more predicatory obstacle of Second-degree Felony Murder to surmount: Criminal mistreatment (9A.42.020). The definition of Criminal Mistreatment in the First degree reads as follows:

A parent of a child, the person entrusted with the physical custody of a child or dependent person, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of

criminal mistreatment in the first degree if he or she recklessly, as defined by RCW 9A.08.010, causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life.

Here, it was conceded to by Ms. Tierce, herself, that while the victim was in her care, she almost exclusively assumed the tasks of caring for the the victim and the other children. Mr. Smith and Lakisha also testified that Ms. Tierce assumed the responsibilities of feeding, bathing, and dressing the victim and the other children. Also testified to by Mr. Smith, when he was present during which the child ate or drank, the evidence showed that, in concern, he played an active role with the victim eating, for this was somewhat one of the reasons why she was spanked by him: For not eating and playing with her food. Moreover, there was no evidence that Mr. Smith withheld any basic necessities of life from the victim, nor was there any evidence produced by the State that--while Mr. Smith was rarely home, due to spending significant amounts of time trying to fix his cars and hanging out with his friends--proving that Mr. Smith was aware that the victim was being denied water or was dehydrated. The evidence, in sum, shows that--while he was home--Mr. Smith exercised care and concern regarding his daughter's "basic necessities of life." Additionally, simply implementing a rule that a child must eat her food before getting full from her drink, is not unusual among parents. Thus, such a rule, per se, is insufficient to establish that Mr. Smith denied the victim water or anything else necessary for life.

#### THE INADMISSIBLE VIDEOTAPE INVITED JUROR PREJUDICE AND SPECULATION

In light of Ms. Tierce's video statement about Mr. Smith, at most, the jury could infer: (1) Ms. Tierce was cruel; (2) Her treatment of the victim was torturous in nature; (3) She painted a negative picture of Mr. Smith in the victim's mind, who at such a young age can be easily convinced into believing that someone who loves her will treat her badly without good reason; (4) Mr. Smith will discipline his child; and (5) Mr. Smith was not present during this event to either protect his child from mistreatment or defend himself against the misleading statement told to the victim by Ms. Tierce.

No one knows what Mr. Smith's reaction would have been, had he been

present during Ms. Tierce's videotaping of his daughter, the victim. However, the tape was introduced to the jury in such a prejudicial manner--not to mention its self-evident inflammatory nature, i.e., the victim's depleted physical and mental state--, in which one can easily presume that the jury speculated that, based on the videotape statement, Mr. Smith beat his child on a regular basis. There is insufficient evidence, however, to draw such a conclusion, for to do so, Mr. Smith would have to possess prior knowledge of the nature of Ms. Tierce's videotaping, not only that she videotaped, but videotaped with such evil purpose. For Ms. Tierce videotaped the children regularly without evil purpose, of which Mr. Smith had no concern or reason not to believe that the videotaping was anything less than good-natured.

#### A CASE COMPARABILITY ANALYSIS

To assist this court in determining whether any of Mr. Smith's acts were unreasonable or immoderate, he's provided three relevant Washington court conclusions from the following caselaw:

(1) State v. Berube, 150 Wn.2d 498, 512, 79 P.3d 1144 (2003) ("[A]lthough Berube and Nielsen denied abusing Kyle alone or in concert with each other, their testimony and other witness testimony at trial contradicted their claims, proving that they were active participants in the repetitive beatings worked together to assault Kyle, and engaged in a pattern of abuse."); (2) State v. Madarash, 116 Wn.App. 500, 66 P.3d 682 (2003) ("[T]he jury could have drawn fair inferences from photographic evidence. We have reviewed the photos and the medical testimony; we hold that the evidence was sufficient to establish pain and agony to be the equivalent of torture."); and (3) State v. Edwards, 92 Wn.App. 156, 961 P.2d 969 (1998) ("[T]he record contains ample evidence that Edwards engaged in a pattern or practice of assaulting his daughter and that his actions demonstrated an extreme indifference to her life.") THE COURT'S FINDINGS IN EDWARDS INCLUDED: (a) Giving Amber non-prescribed medication; (b) being the only person present when the assault took place; (c) Liquieu finding clumps of Amber's hair on the floor and bald spots on her scalp...to which Edwards admitted picking the victim up by the hair; (d) Liquieu noticed deep bruising...to which Edwards admitted to inflicting; (e) Edwards admitted to blowing marijuana smoke in Amber's face; (f) Edwards admitted to the police that he shoved Amber to the floor and she hit her head; and (g) medical experts testified that the abuse was ongoing.

There is one thing in particular that this court should consider: In Edwards, because Edwards' girlfriend, Liquieu, was usually away at work when the assaults took place, she was not charged; and when she became aware of Amber's abused condition, she accordingly sought medical care. But if she had ever reasonably disciplined Amber herself and persisted in a joint lie with Edwards, after the crime occurred, she would most likely have been convicted based on speculation, and sent to prison for almost 50 years--as Mr. Smith has been.

10. INSUFFICIENT EVIDENCE CONCLUSION AND REQUESTED RELIEF

Based on the foregoing, Mr. Smith claims that his state (Wash. Const., Art. 1, §3) and federal (U.S. Const., Amend. XIV) constitutional right to Due Process of Law and a fair trial was violated when he was convicted based on insufficient evidence. Thus, Mr. Smith prays for this court to issue an ORDER remanding his case back for a dismissal of the action, based on insufficient evidence OR to render any other remedial relief that this court deems just and appropriate, that has not been requested herein.

In conclusion, Mr. Smith asks that if this court determines that the trial court erred in admitting the videotape at his trial, to accordingly consider his insufficient evidence argument, i.e., without the videotape.

DATED THIS 8<sup>th</sup> DAY OF OCTOBER, 2006.

Respectfully Submitted,

x Tyran Smith

Tyran Smith

APPELLANT

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STATE OF WASHINGTON

BY Tyrann Smith  
Clerk

IN THE WASHINGTON STATE  
SUPERIOR COURT FOR  
PIERCE COUNTY

Case No: (COA)33878-5-II

STATE OF WASHINGTON,

Plaintiff,

vs.

Tyran Smith,

Defendant.

DECLARATION OF MAILING

I, Tyran Smith, appearing pro se, do hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

That on the 9<sup>th</sup> day of October, 2006, I did process through the Law Library at the Washington State Reformatory, in accordance with institutional mail policy, postage prepaid, United States Mail addressed to the following:

Washington Court of Appeals Div II  
950 Broadway, Suite 300  
Tacoma, WA. 98402-3094

Gerald Horne  
Pierce County Prosecutor  
930 Tacoma Ave S.  
Tacoma WA 98409-7498

Kathryn Russell Selk  
1037 NE 65<sup>th</sup> Box 105  
Seattle, WA. 98115

One (1) true copy of the following document(s) in the above referenced case.

RAP 10.10 Statement of Additional Grounds

DATED this 9<sup>th</sup> day of October, 2006, at Monroe, WA.

Respectfully Submitted,

Tyran Smith

Tyran Smith, Pro se