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A. INTRODUCTION

Largely due to the lack of an alternative explanation, the State accused Benjamin Pingle of killing one of his twin infant daughters, Justice, and assaulting the other, Liberty. At the close of a trial that lasted more than three weeks, the deputy prosecutor summed up the State's evidence for the jury, "I can't tell you what exactly he did. But we know what it did to Justice. . . . He killed her." RP 3405. In fact, the State's evidence consisted of the testimony of experts who reached their conclusions that Justice died of diffuse axonal injury based not on what they saw but rather what they did not.

These experts concluded the fact that no physical evidence of the injury was observed did not mean the injury they were looking for had not occurred. Instead, the experts opined the injury must have occurred too close in time to Justice's death for it to be visible. But the State's assumptions did not stop there, as by assuming the injury was both present and recent, the State then was able to point to Mr. Pingle as the person who caused Justice's death because he was the only adult with Justice in the hours immediately before to her death. Thus, the State charged Mr. Pingle with the murder of his daughter. In addition, because Liberty

had bruising on her body, but without any additional evidence that Mr. Pingle caused the bruising, the State charged Mt. Pingle with assaulting Liberty.

To topple the house of cards that was the State's case, the defense offered the testimony of a neurosurgeon, Dr. Ronald Uscinski, and a neuropathologist, Dr. Jan Leetsma, who each concluded Justice died of a chronic subdural hematoma: long-term and repeating bleeding below and within the outer lining of the brain. Dr. Leetsma would have testified that his opinion of a chronic process was bolstered by the presence of "iron-laden alveolars" in Justice's heart and lungs. The State argued Dr. Leetsma's testimony must be limited to rebutting the testimony of the State's neuropathologist. The State conceded its objection had no grounding in the rules of evidence. The State further conceded defense counsel had disclosed Dr. Leetsma's proposed testimony at least two months prior to the start of trial. Nonetheless, the trial court excluded this evidence that Justice died of natural causes concluding it was new evidence and its admission would be unfair to the State.

Following the exclusion of this exculpatory evidence, the jury acquitted Mr. Pingle of second degree murder and second degree

assault of a child but convicted him of alternative charges of first degree manslaughter and third degree assault of a child.

B. ASSIGNMENTS OF ERROR

1. The trial court deprived Mr. Pingle of his Sixth Amendment right to present a defense when it barred the admission of relevant exculpatory evidence.

2. Mr. Pingle was denied his Sixth Amendment right to the effective assistance of counsel.

3. The trial court deprived Mr. Pingle of Due Process by entering a conviction in the absence of sufficient evidence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment to the United States Constitution guarantees an accused person the right to present a defense and meet the charges against him. Here, the trial court barred Mr. Pingle from introducing relevant evidence from a qualified expert that Justice's death was the result of natural albeit tragic circumstances rather than unobservable inflicted injury as the State theorized. Did the court deprive Mr. Pingle of his right to present a defense?

2. The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel. Generally where

joinder of cases for trial will prejudice a defendant a court should sever the matters on the defendant's motion pursuant CrR 4.4. If a motion to sever is denied, and not renewed at a later point in trial, the claim is waived. Mr. Pingle was prejudiced by joinder of the homicide charge and assault charge. Defense counsel made a motion to sever the counts before trial, which the court denied, but did not renew the motion. Did defense counsel's failure to renew the motion deny Mr. Pingle his Sixth Amendment right to the effective assistance of counsel?

3. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State prove each element of an offense beyond a reasonable doubt. Where the State's evidence in its most favorable light did not establish that Mr. Pingle killed his one daughter and assaulted to the other, was Mr. Pingle denied the due process of the law?

D. STATEMENT OF THE CASE

Justice and Liberty Pingle were born about four weeks premature in October 2006. On January 22, 2007, the twins' mother, Krystal Pingle, discovered Justice was not breathing. RP 2203-04. Ms. Pingle described Justice as crying more than usual in the preceding days. RP 2197. Specifically, Ms. Pingle recalled that

the evening before her death Justice seemed to be in pain, crying whenever she was picked up. RP 2196. Extensive resuscitative efforts were unsuccessful and Justice died. RP 677.

Stunned by Justice's sudden and unexplained death, the Pingles asked that Liberty be admitted to the hospital and examined for any potential problems. RP 2511. That examination provided no indications of medical problems. RP 856. In the course of that examination, emergency room staff observed what they believed to be bruises on Liberty's face. RP 1019-20..

Dr. Clifford Nelson, a forensic pathologist employed by the Oregon Medical Examiner's Office but on contract to perform autopsies in Cowlitz County, performed an autopsy on Justice. RP 1719, 1741. As part of his examination, Dr. Nelson removed the brain and spine and prepared slides of the dura, the outer covering of the brain and spine. Dr. Nelson took the brain and spine to Dr. Marjorie Grafe, a neuropathologist at the Oregon Health Sciences University who regularly consults for the Oregon Medical Examiner's Office. Dr. Nelson did not take the dura to Dr. Grafe, but rather only provided her slides of portions of the dura. RP 1833.

While he did not observe any direct physical evidence of such injury, RP 1875, Dr. Nelson opined Justice died of diffuse axonal injury resulting from forward and back shaking. RP 1852. Because she was merely consulting, Dr. Grafe did not reach nor offer an opinion as to the cause of death. RP 2033.

Axonal injury, or tearing of nerves within the brain, can be detected either microscopically or by use a of stain which reacts with the proteins at the torn ends of the nerves. RP 1859-60. Dr. Nelson did not perform a microscopic examination and the stain test was negative. RP 1859. Dr. Nelson admitted that a negative stain result meant either the injury was too recent to detect¹ or there was no injury at all. Id. However, Dr. Nelson decided the first of these occurred, and having done so placed the time the injury was inflicted within about two hours of Justice's death, RP 1859-60. Mr. Pingle was caring for his daughters in the 2 hours before Justice's death. RP 2196-2203.

Despite the presence of a "large amount of fresh" subdural blood at the time of death, RP 1804, Dr. Nelson concluded Justice did not die of the effect of that subdural hemorrhage. RP 1895, 1949. Both Dr. Nelson and Dr. Grafe observed hemosidrin-laden

¹ Dr Nelson and Dr. Grafe testified the stain will not react if the injury occurred within 2 to 3 hours of death. RP 2057-58.

macrophages² beneath and within the dura. RP 2063 The presence of these cells indicates the presence of subdural and intradural blood at some previous point. RP 2063. Dr. Nelson, nonetheless, concluded there was no evidence of an older or chronic subdural hematoma. RP 1828-31. Dr. Nelson supported this conclusion by the absence of grossly-visible neomembrane.³

A few days before trial was to begin, during interviews with Dr. Nelson and Dr. Grafe, defense counsel learned for the first time that after receiving a report from a defense expert, Dr. Nelson had asked Dr. Grafe to examine slides of portions of dura and render her opinion as to the presence of a neomembrane. RP 155-57. Defense counsel also learned through his interview of Dr. Grafe that her expected testimony was correspondingly broader than what the State had previously represented. RP 159. Specifically, defense counsel learned that Dr. Grafe would now testify that there was no evidence of a neomembrane, contrary to the opinion of a forensic pathologist with whom the defense had consulted. RP 153. Finally defense counsel learned that the State experts would testify the defense expert was not qualified to render her opinion or

² The experts described these as essentially scavenger cells which break down blood and fluid which has escaped blood vessels. RP 1827-29.

³ A neomembrane was described as a layer of dural cells which encapsulate subdural blood. RP 1828.

to challenge the opinion of the State's experts because she was not a neuropathologist. RP 159.

The prosecutor acknowledged the State knew of Dr. Grafe's expanded opinion three months earlier, but the State did not disclose it to the defense. The prosecutor explained "I'm thinking so what basically. When the defense interviews Dr. Grafe they will find it out." RP 154. Having learned this information the week before trial, defense counsel was compelled to ask the court to continue trial to permit the defense to consult and or retain and neuropathologist. RP 1598-60.

Though the State had admittedly withheld the evidence for a period of several weeks and acknowledged the State's impeachment of the defense expert would focus on her qualifications to render the opinion, RP 162, the prosecutor objected to any continuance and dismissed the need for the defense to consult a neuropathologist. Yet the prosecuting attorney stated "I feel so passionately right now about wanting the truth in this case that the expert[s] . . . report could have a substantial effect on this case going forward so - - I'm only interested in the truth." RP 171-72.

The court granted the defense request for a continuance to retain a neuropathologist saying the evidence in question was “evidence of the actual truth” of the allegations. RP 171.

The defense retained the services of Dr. Leetsma and provided a copy of his report about three months later in February 2008. CP 131-37. Dr. Leetsma disagreed with the autopsy conclusion that Justice died of an injury inflicted close to her death. Instead he concluded Justice died “of the effects of subdural hematoma the bulk of which appears to have been ‘recent’ but also involved an older a subdural hemorrhage that could conceivabl[y] date to birth.” CP 135. Dr Leetsma concluded “a neomembrane was surely present and photographable.” CP 136. Dr. Leetsma found additional support for a chronic subdural hemorrhage in the presence of “iron-positive alveolar macrophages” which suggested a “prior on-going element of cardiac failure.” CP 137. Finally, Dr Leetsma found no evidence of inflicted head injury. CP 137.

Apparently the State’s passion for the truth ebbed by the time Dr. Leetsma submitted his report, as the prosecuting attorney then took the position that Dr. Leetsma testimony should be substantially limited to specifically rebutting the claims of the State’s experts that a neomembrane was not present. CP 115.

Specifically, the State objected to Dr. Leetsma testifying that he concluded Justice suffered from long-term hematoma, because it did not rebut Dr. Grafe's opinion that no neomembrane was present. Id. The State objected to Dr. Leetsma's findings that "deposits of inflammatory cells" along with the presence "iron-positive alveolar macrophages" in Justice's lung suggested a "prior on-going element of cardiac failure." CP 117. Claiming it was speculative, the State objected to Dr. Leetsma's conclusion that that the reported dehydration in the days before Justice's death could have resulted from an "increasing intracranial mass." CP 117, see also, CP 136.

Tellingly, the State prefaced its motion by saying "[w]e're not basing this necessarily on the rules of evidence or anything like that." RP 246. Indeed, at no point did the State ever cite a single rule or case which barred admission of the evidence. The evidence was unquestionably relevant. Moreover, as the State conceded, Dr. Leetsma was qualified under the rules of evidence to render an opinion on general pathology. RP 248. The State had Dr. Leetsma's report long before the start of trial. The report, dated February 21, 2008, was attached as Exhibit 2 of the State's motion to suppress its contents. CP 131-37. In fact the State admitted

“the [February 21] dates wrong. We got it a little - - a couple of weeks before that . . . We are not claiming surprise, that’s not the issue.” RP 250

The thrust of the State’ motion was that because Mr. Pingle had been forced to seek a continuance because of the State’s belated disclosure of its intent to call a neuropathologist, the neuropathologist retained in response should be limited to the rebutting the issues as framed by the State, i.e. that there was not a neomembrane. But the court never limited the continuance in that fashion. More importantly, the State was unable to articulate a legal basis to support its request to suppress the evidence.

The defense proffered Dr. Leetsma’s observations of “iron-positive alveolar macrophages” was related to the cause of death and indicated a longer-term process. Specifically they indicated the Justice “died of the complications and problems of an evolving and chronic subdural hematoma.” RP 2938. This was wholly consistent with the doctor’s remaining testimony that Justice suffered a long-term or chronic subdural hematoma which rebled. RP 2937. His observations suggesting of “a long-term process” leant support to the correctness of his conclusion, and directly rebutted the State’s evidence as to the cause of Justice’s death.

(Dr. Leetsma report, which was attached to the State's motion to suppress his testimony is attached as an Appendix).

The court agreed to suppress the testimony. Importantly, the court did not find the evidence was irrelevant, the court did not find Dr. Leetsma unqualified to offer the testimony, nor did the court agree with the State's view that Dr. Leetsma's testimony was somehow limited to direct rebuttal of the State's experts. Instead, and despite the State's admission that it had long known of Dr. Leetsma's proposed testimony, the trial court concluded Dr. Leetsma's testimony concerning those findings which supported his conclusion of a chronic subdural hemorrhage constituted new evidence that defense could not introduce at trial. RP 2939-40, 2943.

Dr. Grafe testified there were no signs of a neomembrane in the dural slides provided to her by Dr. Nelson. RP 2062. However, she disagreed with Dr. Nelson and concluded that blood was present subdurally at least several days prior to death and perhaps weeks or months prior to death. RP 2101-03, compare RP 1826 (Dr. Nelson testifying no evidence of older bleeding).

Dr. Uscinski and Dr. Leetsma concluded Justice died of a chronic subdural hematoma which had rebled. RP 2736, 2762,

3051. Dr. Leetsma testified that a negative result on the axonal stain test meant that diffuse axonal injury had not been demonstrated. RP 2995, 3112-13. Dr. Uscinski testified a diagnosis of diffuse axonal injury was impossible as the stain test was negative and there was no evidence of bleeding at the site of the believed injury. RP 2741.

Additionally, Dr. Uscinski testified that short of an external impact on the skull, of which there was no evidence here, a person could not generate the force necessary to cause such injury in a child. Dr. Uscinski testified the force threshold to cause that injury in an adult or child was the same. RP 2727. However, because of the relatively smaller mass of a child's skull the acceleration necessary to cross that force threshold had to be correspondingly higher and was not attainable by shaking alone, but could be if accompanied by an impact. RP 2757-59. There was no evidence of such an impact here.

A jury acquitted Mr. Pingle of the charges of second degree murder for the death of Justice and second degree assault of a child for the injuries to Liberty. CP 41, 43. However the jury convicted Mr. Pingle of the alternative charges of first degree manslaughter and third degree assault of a child. CP 40-42.

E. ARGUMENT

1. THE TRIAL COURT DENIED MR. PINGLE
HIS SIXTH AMENDMENT RIGHT TO
PRESENT A DEFENSE WHEN IT
SUPPRESSED RELEVANT EVIDENCE

a. The Sixth Amendment guarantees an individual the right to present a defense. The Sixth Amendment and the Washington State Constitution protect an accused person's right to obtain witnesses and a meaningful opportunity to present a defense. Holmes v. South Carolina, _ U.S. _, 126 S.Ct 1727, 1731, 164 L.Ed.2d 503 (2006).⁴ A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). "[A]t a minimum, . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

⁴ U.S. Const., amend. VI; Const., Art. I, § 22; Douglas v. Alabama, 380 U.S. 415, 419, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); see also RCW 10.52.040; CrR 6.12.

“Due process demands that a defendant be entitled to present evidence that is relevant and of consequence to his or her theory of the case.” State v. Rice, 48 Wn.App. 7, 12, 737 P.2d 726 (1987). Facts that are “of consequence” include facts that present both direct and circumstantial evidence of any element of a claim or defense. Id.

In order to be effective as demanded by the Sixth Amendment, counsel often must obtain experts to aid in the defense. See, e.g., In re the Personal Restraint Petition of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (finding counsel ineffective for, *inter alia*, failing to retain a single mental health expert until one month prior to trial, despite being on notice of client’s mental health issues); State v. Maurice, 79 Wn.App. 544, 903 P.2d 514 (1995) (finding counsel deficient for failing to call a mechanic or accident reconstructionist as an expert witness, where such an expert’s testimony could have attributed loss of control of the vehicle to mechanical failure---and not negligence).

The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts.... [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”

Washington, 388 U.S. at 19.

While there is no absolute right to the services of any expert the defendant chooses, the Constitution nonetheless safeguards his right to the appointment of a competent expert for the purpose of evaluating his potential defenses. Ake v. Oklahoma, 470 U.S. 68, 83, 104 S.Ct 1087, 84 L.Ed.2d 53 (1985). A court's denial of experts necessary to the defense and limitation on access to expert services based solely on financial considerations therefore violates both the defendant's constitutional rights to a present a defense and to compulsory process. Maupin, 128 Wn.2d at 924 (reversing murder conviction where defendant was barred from presenting witnesses in his defense).

[M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and... a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the [Supreme] Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system."

Ake, 470 U.S. at 77.

The court's refusal to permit the defense to present relevant testimony by a qualified expert deprived Mr. Pingle of his Sixth Amendment right to present a defense.

b. The court's suppression of relevant testimony from a qualified expert deprived Mr. Pingle of his rights to present a defense and to a fair trial.

i. Dr. Leetsma's testimony was relevant to the central issue in the case, and he was unquestionably qualified to offer the testimony. Relevant evidence tends to make a material fact more or less probable. ER 401. Relevant evidence is generally admissible. ER 402.

The court initially reasoned that it would not allow Dr. Leetsma to testify the those findings supported a cause of death other than a subdural hematoma; the doctor's stated conclusion. RP 285. Defense counsel's proffer established Dr. Leetsma's testimony was limited to factors which he observed and which supported his conclusion of the cause of death; a chronic subdural hematoma. RP 2934. The court questioned Dr. Leetsma who stated his observations of "iron-positive alveolar macrophages" was related to his findings of the cause of Justice's death. Specifically that it was long term process and not the inflicted injury the State

theorized. RP 2938. This was wholly consistent with the doctor's remaining testimony. RP 2937. His observations suggesting of "a long-term process" were consistent with and added further weight to his conclusion.

Thus, the testimony plainly made a fact of consequence, the cause of death, more or less likely. The evidence was relevant.

ii. Dr. Leetsma was qualified to express his opinion as to the cause of Justice's death. A witness may offer an opinion on a matter which is based on the perceptions of the witness and helpful to a clear understanding of a fact in issue. ER 701. Moreover, if the witness is qualified as an expert based on his or her experience, training, or knowledge, the witness may testify by way of opinion where doing so will assist the trier of fact. ER 702. An expert may base his or her opinion on matters which are not otherwise admissible. ER 703.

"We are not attacking his credentials or his ability to express the opinion. . . . We are not saying he does not have the ability under the rules to provide this opinion." RP 248. Thus, the State conceded Dr. Leetsma was competent under the rules to offer his opinion.

Beyond the State's concession, Dr. Leetsma's Curriculum Vitae, established his qualifications to offer the opinion; e.g. his 11 years of experience consulting in death investigations for the medical examiner in Cook County, Illinois. CP 123-30 (Dr. Leetsma's Curriculum Vitae, which was attached to the State's motion to suppress, is attached as an Appendix). Defense counsel invited the court to conduct voir dire of Dr Leetsma with respect to his qualifications. RP 2938. The court declined based upon the court's conclusion Dr. Leetsma's testimony constituted new evidence that defense could not introduce at trial. RP 2939-40, 2943.

Dr. Leetsma was qualified to render the opinion and as set forth below it was not new evidence.

iii. The State was aware of the proffered testimony long before trial. The State had Dr. Leetsma's report long before the start of trial. The report, dated February 21, 2008, was attached as Exhibit 2 of the State's motion to suppress its contents. CP 131-37. In fact the State admitted "the [February 21] date's wrong. We got it a little - - a couple of weeks before that . . . We are not claiming surprise, that's not the issue." RP 250. The State had Dr. Leetsma's report nearly two months before trial.

Despite the State's concession that it had long known of Dr. Leetsma observations and conclusion, and was not claiming surprise, and although the court had heard the same argument 19 days earlier, RP 246-85, the court stated it was the first time the court had heard this "totally new" issue and concluded it was improper for defense to raise such anew issues at that juncture. RP 2938, 2949. The court found the introduction of such a new issue "at this point in trial is totally inappropriate." RP 2950. The court concluded "I'm not going to allow the testimony as it relates to this particular item. It's a new item." *Id.*

The record simply does not support a finding that Dr. Leetsma testimony was a surprise to the State. The State freely acknowledged it new of the evidence long before trial.

iv. The court wrongly excluded the testimony of a qualified expert who offered relevant evidence of the cause of Justice's death, the central issue of the case. The State's novel theory that testimony of defense experts must be limited to rebutting specific claims and findings of the prosecution experts has no support in the law. Essentially, the State claimed that because Mr. Pingle was forced to seek a continuance to retain Dr. Leetsma following the State's last-minute disclosure of its own

neuropathologist's opinion somehow required the Court to limit Dr. Leetsma's testimony.

First, it was the State's failure to timely disclose the opinion of its experts that forced the defense to seek a continuance. Having created the situation, the State cannot assert any notion of fairness allows it to limit the defense response.

Second, a defendant is constitutionally entitled to present his theory of the case and to present facts which support it. A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide where the truth lies. Washington v. Texas, 388 U.S. at 19; Chambers, 410 U.S. at 294-95.

Where the central issue in a case is the cause of an unexplained death of an infant, nothing limits defense experts to simply rebutting the testimony of the State's experts. Nothing limits the evidence defense experts may consider in forming their opinion, to the evidence the state's experts considered. In fact, nothing could be more powerful to a jury than learning of evidence the State overlooked in reaching its conclusions. Evidence offered by an expert in support of his opinion as to the cause of death is critical to the jury's truth finding. The trial court's suppression of Dr.

Leetsma's relevant testimony denied Mr. Pingle his Sixth and Fourteenth Amendment rights

v. Even if the trial court could have correctly found the testimony was new evidence, suppression was not the proper remedy. Ignoring the report provided to the State in February, and assuming instead the court could have properly found Mr. Pingle had not complied with the discovery rules and had not disclosed the nature of Dr. Leetsma testimony, suppression of the testimony is not the proper remedy. State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991) (Suppression of evidence is not one of the sanctions available for failure to comply with CrR 4.7 governing discovery in criminal cases). Thus, even if the court's conclusion of surprise had support in the record, the court erred in excluding Dr. Leetsma's testimony.

c. The denial of Mr. Pingle's right to present a requires reversal of both convictions. In order to rule that a constitutional error during trial court proceedings was harmless, an appellate court must find beyond a reasonable doubt that the error "did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United

States v. Neder, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

The State theorized Justice's died of diffuse axonal injury, a tearing of nerves in the brain. Such injury is observed by introducing a staining agent which reacts with proteins at the torn nerve ends. That test was negative in this case. But rather than conclude the evidence did not support their preferred conclusion, the State's experts instead surmised the absence of a positive result merely meant that the injury had occurred within two hours of death – this had the added benefit from the State's perspective of eliminating all other suspects as Mr. Pingle was the lone adult with the children in the two hours preceding death. Thus, the State relied not upon physical evidence to support its case, but rather on the absence of physical evidence to support its case.

By contrast, defense proffered Dr. Leetsma's testimony of observed evidence supporting his conclusions. Dr. Leetsma pointed to processes in Justice's heart and lungs that, while not absolutely conclusive, supported the conclusion that she died as a result of a chronic subdural hematoma. Plainly the jury harbored doubts as to the State's case as it was, as the jury acquitted Mr. Pingle of the greater charges of second murder and second degree

assault. CP 41, 43. The State cannot establish beyond a reasonable doubt that had the jury heard additional evidence supporting the defense expert's conclusion it would have nonetheless reached the same verdict.

While Dr. Leetsma testimony concerned Justice death alone, the erroneous suppression of the evidence requires reversal of the assault conviction pertaining to Liberty as well. The State's evidence that Mr. Pingle assaulted Liberty, bruises on her face, testimony that all such bruises on a three month-old infant were indicative of abuse, coupled with the propensity effect of the murder allegations. The State offered no evidence that Mr. Pingle, as opposed to his wife caused the bruises on Liberty. Indeed the State's only evidence that Mr. Pingle killed Justice was the spectacular jump the state's experts took from the wholesale absence of any physical evidence to confirm the theory of diffuse axonal injury to the conclusion that the unobserved injury occurred within the two hours preceding death.. Without that bald speculation as to who caused Justice's death, the jury had absolutely no evidence from which to conclude Mr. Pingle assaulted Liberty. The State cannot established beyond a reasonable doubt, that the jury would have reached the same

verdict on the assault charge, had it heard the evidence supporting Dr. Leetsma's conclusions with respect to Justice. Thus, the assault conviction must be reversed as well.

This Court must reverse Mr. Pingle's convictions.

2. MR. PINGLE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO RENEW THE MOTION TO SEVER CHARGES

a. Mr. Pingle had the right to the effective assistance of counsel. The Sixth Amendment guarantees the right to the effective assistance of counsel in a criminal proceeding. See Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)). If he does not have funds to hire an attorney, a person accused of a crime has the right to have counsel

appointed. Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

The right to counsel includes the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Strickland, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. Strickland, 466 U.S. at 687; McMann, 397 U.S. at 771. To prevail on a claim that he was denied this right:

First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

b. Defense counsel's unreasonable failure to renew the motion to sever prejudiced Mr. Pingle. In assessing counsel's performance it is not enough that the action, or failure to act, might be termed "strategic." Rather, the "relevant question is not whether counsel's choices were strategic, but whether they were

reasonable.” Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

CrR 4.4 provides:

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

.....

Having made the initial motion to sever there could be no professionally reasonable basis not to renew the motion as required by CrR 4.4(a)(2). The only evidence the State could muster to prove Mr. Pingle guilty of assault of Liberty was the evidence that he caused the death of Justice. There is no conceivable tactical basis not to renew the motion.

Although CrR 4.3 permits joinder of offenses for purposes of trial, “[a] risk of prejudice, either from evidentiary spillover or transference of guilt, inheres in any joinder of offenses or defendants.” See CrR 4.3; United States v. Sutton, 605 F.2d 260, 271 (6th Cir. 1979). The risk is tolerated for purposes of judicial

economy, so long as prejudice does not result. Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964).

While the decision to grant or deny a motion to sever is discretionary, Washington courts have recognized joinder is inherently prejudicial. State v. Smith, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), vacated in part, 408 U.S. 934, 33 L.Ed.2d 747, 92 S.Ct. 2852 (1972), overruled on other grounds, State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975). “Joinder of counts should never be used in such a way as to unduly embarrass or prejudice a defendant or deny him a substantial right.” State v. Russell, 125 Wn.2d 24, 62, 882 P.2d 747 (1994) (citing Smith, 74 Wn.2d at 754-55). “Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition.” State v. Sutherby, __ Wn.2d __, 2009 WL 943858 (citing Russell, 125 Wn.2d at 62-63).

A defendant may be prejudiced by joinder if: (1) he is embarrassed or confounded in presenting separate defenses; (2) the jury uses the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may

cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990) (quoting Smith, 74 Wn.2d at 755). To determine whether the inherent prejudice of joinder requires severance, a trial court must consider: (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) if an instruction can properly guide the jury to consider the evidence of each crime; and (4) the cross-admissibility of evidence of the charges even if the offenses are not joined. Russell, 125 Wn.2d at 63.

The strength of the State's case on the two charges was markedly different. Although the State had no evidence of causation of Justice's death, the evidence pertaining to the assault charge was even weaker. The State had no ability to establish a timeframe for the bruises on Liberty's, and thus could not say that Mr. Pingle was even with Liberty at the time she was injured. Other than the propensity evidence that Mr. Pingle caused the death of Justice, the State had no evidence that he injured Liberty.

With respect to the murder/manslaughter charge, Mr. Pingle's defense was that she had not died from natural, albeit tragic, circumstances. His defense to the assault charges was

largely that any bruises were accidentally caused. But any clarity between those defense was greatly overshadowed by the State's reliance upon the propensity value of joining the cases.

Finally, the evidence would not have been cross-admissible at separate trials. The State contended the evidence was cross-admissible as a common scheme. RP 118. But this is not a scenario in which the State could independently prove Mr. Pingle committed one act and thus logically could be found to have committed the other. The State could only establish the foundation of an exception in ER 404(b) by first assuming, rather than proving, Mr. Pingle was the person responsible for each act. Evidence is not cross-admissible merely because the State lacks any other evidence other than the propensity evidence.

For example, had the State proceeded on the assault charge by itself it is highly unlikely that it would have obtained a conviction, as there was no independent proof he committed the assault. There is no authority that would then permit the State to introduce the evidence of that acquitted conduct as evidence of a common scheme, or any other exception in ER 404(b), in the murder trial. With respect to each charge evidence of the other would have no

value beyond mere propensity, and would be excludable under ER 404(a).

Strickland requires a showing that counsel's deficient performance prejudiced Mr. Pingle; that it "undermine confidence in the outcome." 466 U.S. at 694. That showing is easily made. Defense counsel's failure to renew the motion to sever allowed the cases to go to the jury together. Moreover, the failure to renew the objection precludes Mr. Pingle from addressing this otherwise meritorious claim on appeal. This Court should reverse Mr. Pingle's convictions and remand for separate trials.

3. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT EITHER OF MR. PINGLE'S CONVICTIONS

a. Due process requires the State prove each element of the offense beyond a reasonable doubt. In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Additionally, the identity of a criminal defendant and his presence at the scene of a crime must be proven beyond a reasonable doubt.

State v. Thomson, 70 Wn.App. 200, 211, 852 P.2d 1104 (1993),
review denied, 123 Wn.2d 877 (1994). Evidence is sufficient only
if, in the light most favorable to the prosecution, a rational trier of
fact could have found the essential elements of the crime beyond a
reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct.
2781, 61 L.Ed.2d 560 (1979).

b. The State did not present sufficient evidence to
support either the manslaughter or assault convictions. To convict
Mr. Pingle of first degree manslaughter the State was required to
prove beyond a reasonable doubt he recklessly caused the death
of Justice. RCW 9A.32.060. To convict of third degree assault of a
child the State was required to prove beyond a reasonable doubt
that Mr. Pingle negligent caused injury to Liberty. RCW 9A.36.140.

At the end of more than three weeks of trial, the sum of the
State's proof that Liberty was assaulted was the presence of
bruises. See RP 3405-06. The sum of the State's proof that Mr.
Pingle was the person who assaulted Liberty was Ms. Pingle's
denial of responsibility and the supposed evidence suggesting he
killed Justice. Id.

With respect to the murder/manslaughter charge all the
State could say was "I can't tell you what exactly he did. But we

know what it did to Justice. . . . He killed her.” RP 3405. But other than the fact the Justice had died, nothing at all was certain. While the State’s experts opined that she had died of diffuse axonal injury, there was in fact no physical evidence confirming that. Indeed it was the absence of physical evidence, the lack of a positive stain, that constituted the State’s only “evidence” that Mr. Pingle was the one responsible for his daughter’s death.

Even assuming a reasonable jury could look at the State’s evidence and find Mr. Pingle guilty of the manslaughter, the only way to reach the same conclusion on the assault charge would have been by concluding that if Mr. Pingle killed Justice he must have been the one who assaulted Liberty. That logic and conclusion, however, was expressly barred by the Courts’ instruction that the jury must consider each charge separately. CP 49 (Instruction 3). Alternatively, that logic demonstrates precisely why the case should not have been tried together.

The State did not offer any evidence to establish Mr. Pingle assaulted Liberty. The State did not offer sufficient evidence to establish Mr. Pingle caused Justice’s death.

c. The court must reverse Mr. Pingle’s conviction.

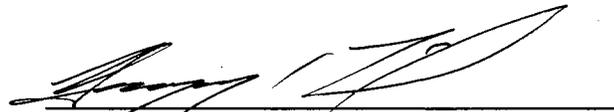
The Fifth Amendment’s Double Jeopardy Clause bars retrial of a

case where the State fails to prove the crime charged. Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Because the State failed to prove he committed the assault and manslaughter, the Court must reverse Mr. Pingle's convictions and dismiss the charges.

F. CONCLUSION

The Court must reverse Mr. Pingle's convictions.

Respectfully submitted this 10th day of April, 2009.

A handwritten signature in black ink, appearing to read "Gregory C. Link", is written over a horizontal line.

GREGORY C. LINK – 25228
Washington Appellate Project
Attorney for Appellant

APPENDICES

Curriculum Vitae

[as of September, 2007]

JAN EDWARD LEESTMA, B.A.,
M.D., M.M.

PERSONAL: Married with two adult children and three grandchildren.

Born: November 30, 1938. Flint, Michigan.

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EDUCATION:

*Undergraduate: Hope College, Holland, Michigan:
1956-60. A.B. in Chemistry and Biology

*Medical School: University of Michigan: 1960-64.
M.D.

*Residency: University of Colorado Medical Center,
Denver: Anatomic Pathology, 1964-66;
Neuropathology, 1966- 67.

*Fellowship (Neuropathology): Albert Einstein
College of Medicine, Bronx Municipal Hospital
Center, Bronx, NY, 1967-68.

*Sabbatical: Guest Researcher (Experimental
Neuropathology): Karolinska Institute, Huddinge
University Hospital, Institute of Pathology,
Stockholm, Sweden, 1981-82.

*Graduate School: J.L. Kellogg Graduate School of
Management, Northwestern University. Executive
Master's Program. Masters of Management Degree
(M.M.), 1986.

MILITARY SERVICE:

* Captain, USAF, MC: Armed Forces Institute of
Pathology, Washington, D.C. (Genitourinary
Pathology Branch), 1968-69.

* Major, USAF, M.C.: Armed Forces Institute of
Pathology, Washington, D.C. (Neuropathology
Branch), 1969- 71.

* Honorably Discharged: 1971.

LICENSURE-BOARDS:

* State of Michigan: Medical License, 1965-to
present. [#026842]

* State of Illinois: Licensed as Physician and
Surgeon, 1971-to present. [36-44272]

* American Board of Pathology: Certified, Anatomic
Pathology (1970); Neuropathology (1970).

ACADEMIC APPOINTMENTS:

* Instructor: University of Colorado School of
Medicine (Pathology). 1967-68.

* Assistant Professor: Northwestern University
School of Medicine (Pathology and Neurology).
1971-75.

* Associate Professor (Tenure): Northwestern
University School of Medicine (Pathology and
Neurology). 1975-1986.

* Professor: University of Chicago, Division of the
Biological Sciences and the Pritzker School of
Medicine (Pathology and Neurology). 1986-87.

HOSPITAL APPOINTMENTS:

* National Naval Medical Center, Bethesda,
Maryland: Consultant Neuropathologist, 1969-71.

* D.C. General Hospital, Washington, D.C.:
Consultant Neuropathologist, 1969-71.

* Chicago Wesley Memorial Hospital, Chicago, IL:
Associate Attending Physician, 1971-73.

* Passavant Memorial Hospital, Chicago, IL:
Associate Attending Physician, 1971-73.

* Northwestern Memorial Hospital, McGaw Medical
Center, Chicago, IL: Associate Attending Physician,
1973- 77; Attending Physician, 1977-1986.

* VA Lakeside Hospital, Chicago, IL: Consulting
Neuropathologist, 1971-82.

* VA North Chicago (Downey), North Chicago, IL:
Consulting Neuropathologist, 1972-82.

* West Suburban Hospital, Oak Park, IL: Consulting
Neuropathologist, 1976-85.

* Children's Memorial Hospital, Chicago, IL:
Attending Physician, 1982-2001.

* University of Chicago Hospitals and Clinics,
Chicago, IL: Attending Physician, 1986-87.

* Columbus Hospital Medical Center, Chicago, IL:
Attending Physician, 1987-2001. (Hospital closed).

* St. Joseph's Hospital, Chicago, IL: attending staff:
2001-2003; Emeritus: 2003.

* Advocate Illinois Masonic Hospital, Chicago, IL:
Consulting Neuropathologist, 1991-2003.

- * Advocate Ravenswood Hospital, Chicago, IL: Consulting Neuropathologist: 2001-2002.
- * Neurosurgical and Orthopedic Institute of Chicago (formerly Ravenswood Hospital): 2002-2003; Emeritus: 2003.
- * Children's Memorial Hospital, Northwestern University Medical Center, Chicago IL: Emeritus Attending Physician, 2003. Consulting Neuropathologist: Dec. 2003-2005.

OTHER APPOINTMENTS AND PROFESSIONAL ACTIVITIES:

- * Assistant Medical Examiner (Neuropathology), Office of the Medical Examiner, Cook County (Chicago), IL. 1977-1987.
- * Private consultant practice in forensics and neuropathology: 1973-present
- * Baxter-Travenol Laboratories Inc., Morton Grove, IL: Consultant. 1973-79; 80-82.
- * American Association of Neuropathologists: Member of Professional Affairs Committee;
- * Councilor to International Society of Neuropathology, 1985-89; Program Committee, 1986-1990.
- * Cyberonics, Inc., Webster, TX: Consultant: 1996-99.
- * Institute of Forensic Sciences of Puerto Rico (San Juan, PR): Neuropathology Consultant: 1997-2001.

ADMINISTRATIVE APPOINTMENTS:

- * Northwestern University Medical Center: Director of Neuropathology, 1971-81. Director of Residency Training in Pathology. 1979-81; Chairman, Admissions Committee for Transfer Students (Northwestern University Medical School), 1977-79.
- * Society of Sigma Xi, Northwestern University Chapter, President, 1981.
- * Children's Memorial Hospital: Chief of Neuropathology, 1982-86.
- * The Division of the Biological Sciences and Pritzker School of Medicine, University of Chicago: Dean of Students for the Division 1986-87.
- * The Chicago Institute of Neurosurgery and Neuroresearch, Columbus Hospital: Associate Medical Director, 1987-1999.
- * The Chicago Institute for Neurosurgery and Neuroresearch, Inc., Executive Director of Research, 1990-1999.
- * Chief Executive Officer, Neurotherapeutics Management Co., Chicago, IL: 1994-1999.
- * Co-Founder, Chief Medical Officer, Secretary-Secretary-Treasurer, and Board of Directors member: Nyxis Neurotherapies, Inc., Chicago, IL: 1999-2007.

- * Member, Board of Directors, The Chicago Institute of Neurosurgery and Neuroresearch Medical Group: 1997-1999.
- * Partner, The Chicago Institute of Neurosurgery and Neuroresearch Medical Group: 1987-2003.
- * Advisory Board Member: The Falk Center for Molecular Therapeutics, Department of Biomedical Engineering, The McCormick School of Engineering and Applied Science, Northwestern University, Evanston, IL. (2003-present).
- * Member, Board of Directors, and Secretary-Treasurer, Naurex Inc., 2007-present.

EDITORSHIPS/PARTICIPATIONS:

- * The Year Book of Pathology and Clinical Pathology: Associate Editor, 1973-1980.
- * Medical Trial Technique Quarterly: Editorial Board, 1977-1999.
- * Periodic peer reviewer: New England Journal of Medicine; Journal of Neuropathology and Experimental Neurology; Journal of the American Medical Association; Epilepsia; Archives of Pathology and Laboratory Medicine, The American Journal of Forensic Medicine and Pathology, American Journal of Physicians and Surgeons, and other professional journals.
- * Ad hoc grant reviews and site visits for National Science Foundation and the National Institutes of Health (NINCDS).
- * Member: Consensus panel: Acoustic Neuroma: NIH, 1991.
- * Editorial Board: American Journal of Forensic Medicine and Pathology: 2002-present.

HONORS AND AWARDS:

- * University of Michigan School of Medicine: Special Studies Program, 1962-64.
- * American Cancer Society Fellow, 1967-68.
- * Grantee, National Institutes of Health (RO-1), NINCDS, 1974-77.
- * George H. Joost Outstanding Teacher in the Basic Sciences. Northwestern University School of Medicine, 1979.
- * Guest Researcher, Karolinska Institutet (Pathology Institute-Huddinge Sjukhus), Stockholm, Sweden, 1981-82.

CIVIC INTERESTS:

* Juvenile Protective Association of Chicago (direct services to abused and neglected children and their families): Board Member (1977-present); Assistant Treasurer (1980-82); Vice President (1983-85).

* Chicago Council on Foreign and Domestic Affairs: Executive Board, 1974-82; 87-89.

* Horizon Hospice of Chicago: Board Member, 1988-1992. Medical advisor, 1992-1998.

* Board Member and Chairman of Grants Committee, The Columbus-Cabrini Medical Center Foundation, 1988-2000.

* Board Member and Secretary, The Chicago Institute for Neurosurgery and Neuroresearch, Inc. (not-for-profit research institute) Chicago: 1998-2004.

PROFESSIONAL MEMBERSHIPS:

* American Association of Neuropathologists

* Chicago Institute of Medicine

* Illinois Society of Pathologists

* International Society of Neuropathology

* American Academy of Forensic Sciences: Associate Member, 2004-2006; Member, 2006—present.

Lectures, Courses and Abstracts: not listed.

Professional Publications:

1. Miller, E.K., Willey, E.N., Leestma, J.E., and Riggs, J.L.: Non-immune fluorescent protein staining of neoplasms. *Exp. & Molec. Path.* 2:144-156, 1963.

2. Schneck, S.A., and Leestma, J.E.: The Central Nervous System. (Chapter 15). In-Ultrastructural Aspects of Disease (Ed.-King, D.W.), Hoeber, New York, 1966.

3. Schneck, S.A., and Leestma, J.E.: The Muscular System. (Chapter 13). In-Ultrastructural Aspects of Disease (Ed.-King, D.W.), Hoeber, New York, 1966.

4. Schneck, S.A., Fulginiti, V., and Leestma, J.: Measles virus and panencephalitis. *Lancet* 1:1381-1382., 1967.

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9. Leestma, J.E., and Andrews, J.M.: The fine structure of the Marinesco Body. *Arch. Path.* 88:431-436, 1969.

10. Leestma, J.E. Major USAF MC: Armed Forces Institute of Pathology CPC #7-69. American Registry of Pathology. Armed Forces Institute of Pathology, Washington, D.C., 1969.

11. Dehner, L.P., Leestma, J.E., and Price, E.B. Jr.: Renal cell carcinoma in children: a clinical-pathologic study of 15 cases and review of literature. *J. Pediat.* 76:597-368, 1970.

12. Mostofi, F.K., and Leestma, J.E.: CONCEPTS OF DISEASE. A Textbook of Human Pathology. Brunson, J.G., and Gall, E.A. (eds.), MacMillan, New York, 1971: Chapter 9.: Special Aspects of Cell Function, Growth, and Structure—The Genitourinary Tract.

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14. idem: Chapter 22.: Special Aspects of Infection, Immunity, and Hypersensitivity--The Genitourinary Tract.

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Exhibit 2

JAN E. LEESTMA, MD, MM

NEUROPATHOLOGY

February 21, 2008

James K. Morgan, Esq.
Attorney at Law
155 Third Avenue, Suite A
Longview, WA 98632

Dear Mr. Morgan:

It is my understanding that the Court has requested that I prepare a report stating the substance of the facts and opinions which I would expect to provide in the course of my testimony at trial of this matter (State of Washington vs. Benjamin Pingle).

I have been provided the autopsy report, autopsy photographs, microscopic tissue slides, a radiological (plain skeletal) study on the deceased child (Justice Pingle), birth records and other medical records relating to this baby and her twin, Liberty, as well as in-life photographs of the two babies. I used these materials to formulate my analysis and opinions regarding the case. I have also reviewed two defense expert reports, that of Dr. Ron Uscinski and Dr. Janice Ophoven but did not use these to formulate my opinions.

My understanding of the case, in brief, is that the deceased baby was one of twins born on 10/28/2005 to a gravida 1, para 0 mother. The delivery was premature at 34.5 weeks gestation.

After birth an ultrasound study was done on Justice because of swelling of the head. This study is reported to have been negative. The child apparently had progressed normally. In the 2-3 days prior to death the child had reportedly suffered from a cough and stuffy nose, but had been vomiting and had had diarrhea. On the morning of 1/22/2006 the child had fed only a little and had reportedly not wet a diaper for the entire day. The father, Benjamin Pingle, was caring for the child and had put her to bed and later found her pale, and lifeless. Emergency assistance was summoned and resuscitation was attempted but intubation was not successful. About 30 minutes afterward at 3:08 PM the child was declared dead.

An autopsy was performed under the auspices of the Cowlitz County Coroner's Office. The following findings were reported in the autopsy report. There were several contusions on the left check-cornor of the eye and forehead as well as abrasions of the right cheek and the left neck. A faint contusion was noted on the back near the right iliac crest. Reflection of the scalp revealed a deep scalp contusion above the right orbital ridge. No skull fracture was noted. Upon opening the skull the autopsy pathologist reported about 50 ml blood came out. He reported that the hematoma involved both vertices and some areas of the base in various locations as well. Examination of the eyes revealed a small retinal hemorrhage in the left eye and optic nerve sheath hemorrhages in both nerves. The microscopic examination reported confirmed the optic nerve sheath hemorrhages but not the retinal hemorrhage. No abnormality was found in the viscera. Microscopic examination of the dura is reported as showing scattered hemosiderin laden macrophages, fresh subdural hematoma, and no neomembrane. A contusion on the left back was reported to show a fresh subcutaneous hemorrhage with no inflammation. The right back contusion was reported to show very slight subcutaneous hemorrhage. The left iliac crest contusion showed no hemorrhage. The pathologist concluded that the child had died from closed head trauma (subdural hematoma) and the manner of death as homicide.

A neuropathologist examined the brain, but apparently the cerebral dura was not provided for examination. This examination reported subarachnoid hemorrhage on the brain and along the

spinal cord. Mild white matter gliosis was reported though edema was not. The ependyma was reported as having areas of denudement. Beta-app immunochemical staining was performed on a few blocks and was reported as negative.

My examination of the autopsy photographs reveals what appear to be three or four contusions on the left side of the face (cheek, corner of the eye and lower forehead) as well as abrasions on the right cheek, and skin of the neck. An ill-defined possible bruise is noted on the left back near the iliac crest. A photograph of the reflected scalp shows a small galeal contusion near the scalp of the left orbital ridge. Photographs of the open cranium show puddled recent blood in the skull cap as well as some discoloration that might represent an older subdural hematoma, especially posteriorly. The vertex of the brain shows several dilated cerebral veins near the midline on both sides with some associated subarachnoid blood. The brain does not appear particularly swollen with visible sulci.

My examination of the microscopic tissue slides of the brain reveal evidence of a diffuse subarachnoid hemorrhage of recent origin with intact red cells, but there is a diffuse chronic inflammatory mild infiltrate with macrophages, some of which contain pigmented material present as well. There is diffuse microscopic cerebral edema in the white matter. There are early diffuse hypoxic-ischemic neuronal changes and an obvious Sommer's sector hypoxic lesion in the section of hippocampus provided. The white matter shows the expected myelination gliosis but no abnormal gliosis. B-app stains are negative. In the sections of the spinal cord a few of them have associated dura. These sections show an subtle but obvious spinal subdural hematoma with a cellular reaction at the interface of the arachnoid and dura (boundary layer) with pigmented macrophages. Sections of the eyes show no retinal hemorrhage but both optic nerves have recent hemorrhage in them with an early reaction. There is extensive denuding of the ependyma. Sections of the dura reveal obvious neomembranes of chronic subdural hematomas ranging from very thin to about the thickness of the normal dura. These neomembranes contain fibroblasts and collagen, capillaries, chronic inflammatory cells including hemosiderin laden macrophages that

are very obvious in H&E and Iron stains. In some sections there is an overlying recent clot with preserved red cells.

My examination of the microscopic tissue slides of the viscera and skin reveal congestion but no obvious pathology in the spleen, liver, thymus, pancreas, adrenals, or kidneys. The heart shows a subtle deposit of inflammatory cells in some small myocardial arterioles in several areas. There is no obvious fiber pathology or other inflammatory infiltrate. The lung sections show congestion and some element of pulmonary edema with iron-positive alveolar macrophages present. There are scattered lymphoid interstitial collections. Sections of the larynx show squamous metaplasia of the respiratory epithelium but little active inflammation. Sections of the skin (left back) show a subcutaneous hemorrhage with an inflammatory and repair reaction in the fat. Other sections do not reveal any injury.

My interpretation of the findings are that this child died from the effects of a subdural hematoma the bulk of which appears to have been "recent" but also involved an older subdural hemorrhage that could conceivably date back to birth. There is evidence of a prior subdural hematoma in the spinal dura as well. The siderophages that are present have clearly been there for some time and are scattered throughout the thickness of the neomembrane and do penetrate the dura somewhat. Siderophages can make their appearance in a hemorrhage between 5-7 days, and increase in number and obviousness of their appearance for weeks or longer and may persist for months or longer. The thickest parts of the subdural neomembrane may be a month or more in age using histological criteria. Aging of subdural hematomas beyond a few weeks is not precise, especially in infants. While there is a recent subarachnoid hemorrhage, beneath it is a chronic inflammatory infiltrate that contains macrophages some of which have pigment in them, indicating there has been a subarachnoid hemorrhage sometime in the past. The denuding of the ependyma indicates that most likely there was some element of intraventricular hemorrhage, likely associated with birth. This occurrence is quite common in premature twin pregnancies and may or may not be appreciated at birth.

With respect to the skin lesions; the only one that I can see, on the left orbital region, extended to the lower regions of the scalp but did not leave a hematoma there. This lesion is likely an impact but its significance is very unclear. The contusion of the back is aging and is likely a few days old. Again, the significance of this bruise is unclear. There is no convincing major impact site to the head to account for the extensive subdural hematoma. The presence of an obvious histological neomembrane provides an explanation for the newer subdural hematoma via the mechanism of rebleeding perhaps exacerbated by other concurrent conditions the baby had. The presence of one retinal hemorrhage and the optic nerve sheath hemorrhages probably correlates with increased intracranial pressure from the subdural hematoma and not to any particular mode of injury. The presence of iron-positive alveolar macrophages in a baby who experienced only 30 minutes of resuscitation suggests a prior on-going element of cardiac failure. The reported 2-3 days of illness with poor feeding and minimal urine output on the day of death strongly implies some element of dehydration in this baby, perhaps as a result of an increasing intracranial mass lesion like a subdural hematoma. While no histological sections were made of the vertex cortical veins, their gross appearance at least suggests possible cortical venous thrombosis. This condition occurs with dehydration, sepsis, and other issues and may cause subarachnoid as well as subdural hemorrhage and cerebral edema, mimicking head trauma.

In summary, I have to take issue with the autopsy report that no neo-membrane in the dura is present. It surely is and is photographable. The consultant neuropathologist didn't report on this lesion since she was not provided with the dura specimen. I cannot find a convincing head impact site which would cause the cranial subdural hematoma. Chronic subdural hematomas in infancy can and do rebleed, sometimes catastrophically. The illness of the child for the 2-3 days prior to death with probable dehydration provides another explanation for the subdural hematoma, that of cortical vein thrombosis with rupture into a prior subdural hematoma. I cannot find convincing evidence that this child was the victim of inflicted head injury. I hold these opinions to a reasonable degree of medical and scientific certainty.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Jan E. Leestma, MD".

Jan E. Leestma, MD, MM

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 37858-2-II
v.)	
)	
BENJAMIN PINGLE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF APRIL, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> SUSAN BAUR, DPA COWLITZ COUNTY PROSECUTOR'S OFFICE 312 SW 1 ST AVENUE KELSO, WA 98626-1799	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> BENJAMIN PINGLE 3056 FLORIDA LONGVIEW, WA 98362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF APRIL, 2009.

X _____ 

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