

No. 31122-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

GARY MICHAEL BENN,

Appellant.

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

The Honorable Vicki Hogan, Judge

OPENING BRIEF OF APPELLANT

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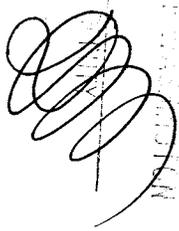
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I.
ASSIGNMENTS OF ERROR

- 1) The trial court erred in permitting the State to seek the “single act” aggravating factor at Benn’s second trial. CP 440-41.
- 2) The trial court erred in admitting the transcript of Walter Hartman’s testimony from the first trial. CP 284-85. This ruling was based in part on the erroneous finding that Benn had a “similar motive” to cross-examine Hartman at the first trial.
- 3) The trial court erred in precluding the defense from cross-examining State experts Michael Grubb and Rod Englert in the following ways:
 - a) The testimony of both experts was inconsistent with statements in learned treatises.
 - b) Englert altered his testimony on various issues from case to case to favor the party that hired him.
 - c) Englert made false statements in other cases about his educational and teaching experience in bloodstain analysis.
 - d) On direct examination, Englert claimed he had concluded that a substance was blood without performing a confirmatory test “over a thousand” times and he had never erred. The defense wished to show that Englert once testified that he never concluded something was blood without a confirmatory test, and that he had once concluded that a substance was blood based only on a presumptive test, but the Honolulu crime laboratory proved him wrong.

- 4) The trial court erred in permitting the State to present hearsay statements of the decedent, Jack Dethlefsen, suggesting that Benn had assaulted Dethlefsen a day or two before the killings.
- 5) The trial court erred in denying Benn's motion to dismiss all charges based on the state and federal double jeopardy clauses. CP 117-18.

II.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE PERTAINING TO ASSIGNMENT OF ERROR 1

- a) At the first trial, the jury found the "common scheme or plan" aggravating factor, but left blank the special verdict form concerning the "single act" aggravating factor. The trial court dismissed the jury without inquiring whether it was hopelessly deadlocked and without declaring a mistrial. Did the federal double jeopardy clause bar the State from seeking the single act factor at the second trial?

ISSUES PERTAINING TO ASSIGNMENT OF ERROR 2

Walter Hartman testified at the first trial. Benn ordered his lawyers not to cross-examine him based on his belief that Hartman would kill his family if they did. The defense maintained that this belief was delusional, while the prosecutor maintained that it might be justified. Trial counsel erroneously believed that he was bound by his client's wishes and did no cross-examination, although substantial impeachment was available. Hartman died before the second trial.

- a) Did Hartman's testimony fall within the hearsay exception of ER 804(b)(1)?

- b) Did the admission of Hartman's testimony violate Benn's Sixth Amendment right to confront witnesses?

ISSUES PERTAINING TO ASSIGNMENT OF ERROR 3

- a) Did the hearsay exception of ER 803(a)(18) ("Learned Treatises") apply when the State's experts agreed that certain books were authoritative in the field of bloodstain analysis?
- b) Was Benn entitled to establish Englert's bias by showing that he changed his testimony from case to case to suit the party that hired him?
- c) Was Benn entitled to rebut Englert's claims concerning his presumptive blood testing in other cases by questioning him about some of those cases?
- d) Did the restrictions on cross-examination violate Benn's Sixth Amendment right to confront witnesses and his Fourteenth Amendment right to due process?

ISSUES PERTAINING TO ASSIGNMENT OF ERROR 4

Gary Benn's brother, Monte Benn, testified over objection that decedent Jack Dethlefsen told him he had been beat up in the kitchen and "he wanted to talk to Gary about it." In closing argument, the State said this proved that Gary assaulted Jack.

- a) Did the admission of Dethlefsen's statements violate the hearsay rule, ER 802.
- b) Did the admission of the statements violate Benn's Sixth Amendment right to confront witnesses?

ISSUES PERTAINING TO ASSIGNMENT OF ERROR 5

- a) When a defendant's conviction is reversed due to intentional and egregious prosecutorial misconduct, do the federal and state double jeopardy clauses bar retrial?

III.
STATEMENT OF THE CASE

A. THE FIRST TRIAL AND APPEALS

Gary Benn was convicted and sentenced to death in 1990. The State's theory was that Benn and the two victims were involved in an insurance fraud scheme. According to the State, the victims arranged a fire at Benn's trailer in exchange for a promised share of the proceeds. Benn ultimately killed the victims so he could keep all the money. See State v. Benn, 120 Wn.2d 631, 653-54, 845 P.2d 289, cert. denied 510 U.S. 944, 126 L. Ed. 2d 331, 114 S. Ct. 382 (1993). The only direct evidence of this theory came from a "jailhouse informant," Roy Patrick, who claimed that Benn confessed everything to him. Id. at 640-41, 653-55. The jury convicted Benn on two counts of first-degree murder and found as an aggravating factor that multiple victims were killed as part of a common scheme or plan. Id. at 647.

The Washington Supreme Court denied Benn's appeal in the above-cited case, and later his personal restraint petition in In re Benn, 134 Wn.2d 868, 952 P.2d 116 (1998). The U.S. District Court for the Western District of Washington granted a writ of habeas corpus and the Ninth Circuit affirmed in Benn v. Lambert, 283 F.3d 1040 (9th Cir.), cert. denied, 537 U.S. 942, 154 L. Ed. 2d 249, 123 S. Ct. 341 (2002).

The prosecution failed to disclose multiple pieces of critical impeachment information that could have been used to undermine the credibility of Patrick, a prosecution witness whose testimony was crucial to the state's claims of premeditation and common scheme or plan, as well as to

the state's theory regarding Benn's principal motive for killing the two individuals. Because Patrick is a witness whose "reliability ... may well be determinative of guilt or innocence,' nondisclosure of evidence affecting [his] credibility falls within [the Brady] rule." *Giglio*¹, 405 U.S. at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 269, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959)).

Benn v. Lambert, 283 F.3d at 1054. The State also withheld evidence that the fire at Benn's trailer was an accident, which further undermined its "insurance fraud" theory. Id. at 1060-62.

B. THE SECOND TRIAL

On retrial, the State declined to seek the death penalty. Trial began on October 15, 2003. RP 664.

On February 10, 1988, Gary Benn called 911 from the home of his half-brother, Jack Dethlefsen, to report that Dethlefsen and his friend, Michael Nelson, had been shot. RP 738-42. Deputy James Junge arrived at the scene and determined that Dethlefsen and Nelson were dead. RP 746-47. He found a semi-automatic gun on the floor. RP 749. Dethlefsen was lying on the floor with his arm near the broken glass of his gun cabinet. RP 775-76. There was a baseball bat lying nearby. RP 757-58.

Deputy James Jones noted that it appeared Dethlefsen was "trying to get into it [the gun cabinet] after having been shot to get to a weapon." RP 825. He found a boot print on some of the broken glass that appeared to match Benn's boots, but Benn denied going near the bodies. RP 808-

¹ U.S. v. Giglio, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972).

12. One of the officers at the scene found a .22 caliber pistol beneath the right front seat of Benn's car. RP 2155-56.

The kitchen contained blood stains that were not fresh. RP 887. The police at the scene did not analyze the trajectories of the bullets. RP 1145.

The police took Benn to the police station. RP 762-63. He gave a statement in which he denied shooting the two men. RP 1218-20.

Forensic pathologist Dr. John Howard testified that Dethlefsen had some injuries to his face that occurred at least several days before his death. RP 1288-90. Dethlefsen's urine tested positive for codeine and valium. RP 1293. His blood-alcohol level was .07, which would have had a "cumulative effect" with the medications. RP 1408. Dethlefsen was shot first in the chest and then in the head. RP 1319. The shot to the head was from closer range than the shot to the chest. RP 1310-13. Dethlefsen would have been capable of getting up and moving after being shot in the chest. RP 1320. "[H]e would still have several seconds, even perhaps a minute or so, of movement under his own will, under his own power, his own coordination, before collapsing from blood loss." RP 1321. His strength and coordination would not immediately be affected by the first shot. RP 1322. Dethlefsen was likely leaning or moving forward at the time he was shot in the chest. RP 1405-06.

Nelson was also shot first in the chest and then in the head, with the shot to the head being from closer range. RP 1351-67. He too could

have survived seconds or minutes after the first shot. RP 1366. Nelson's blood-alcohol level was 0.11. RP 1409.

Michael Grubb, formerly of the Washington State Patrol Crime Laboratory, testified that certain tiny stains on Benn's boots were blood and most likely came from the head wound to Nelson. RP 1814. He performed only a presumptive and not a confirmatory test for blood on the boots. RP 1835.

Rod Englert testified as a "crime scene reconstructionist." RP 1648. He claimed to have determined the positions of the shooter and the victims. He opined that Dethlefsen was shot in the chest as he was seated on the couch and Nelson was shot as he was standing between the dining room and the entry way. Both of them then moved under their own power to the positions where they were shot in the head. RP 1907-08. He admitted that under his analysis the bullet to Dethlefsen's chest should have ended up in the wall behind the couch, although it was in fact found in the floor. RP 1726. Further, he was hampered by the lack of accurate information about the positions of various items at the scene; the distances between them; and the trajectories of the bullets. RP 1984-91; 2004; 2032-34. He acknowledged that the documentation of the crime scene was sloppy. Id.

Englert testified that the stains on Benn's boots were high-velocity blood spatter. RP 1994. He based his opinion that the stains were blood on Grubb's presumptive chemical test and on the visual appearance of the stains. RP 1898. The current Washington State Patrol's written policies

prohibit concluding that a substance is blood from only a presumptive test and a visual examination. RP 2135-36.

Anthony Miller, a tenant in Benn's trailer park, originally told the police that he saw Benn by his boat on the afternoon of the shootings. RP 1567-68. Detective Sweem then suggested he might be guilty of "perjury" and "false information to a police officer," and that if he maintained his statement he would be "part of this conspiracy." RP 1445. Sweem told Miller that if he stuck to his story he could go to jail and lose his wife. RP 1443. See also RP 1584-90 [check that]. Sweem also told Miller that he knew Benn's true whereabouts on that afternoon. RP 1591-92. Miller then said that he lied about seeing Benn because Benn had asked Miller to "cover" for him. RP 1564-65, 1570.

Walter Hartman testified at the first trial but died before the second one. CP 135. Over a defense objection, a slightly redacted copy of the transcript from the first trial was read to the jury. RP 1501; Ex. 113; Supp. CP ____²; App. A. Hartman was a tenant in Benn's trailer park. He claimed that Benn offered to pay him to shoot Dethlefsen in January of 1988. Hartman did not mention this to the police when they first questioned him about Benn's whereabouts shortly after the shootings. Id.

Former defense investigator Charles Bonet testified about his interview with Hartman on April 13, 1990. RP 2121-22. Hartman boasted about his ability to drink a fifth of whiskey and not feel the effects. RP

² The court reporter at the second trial did not transcribe Hartman's testimony.

2122. He also said he was taking about six Valium pills a day in addition to his drinking. RP 2123. On the night that he claimed Benn brought up the subject of killing Dethlefsen, Hartman was drinking gin which, unlike whiskey, did affect him. RP 2124.

The State introduced a diagram of the crime scene that Benn drew while in jail in 1989. RP 1229.

Benn testified that Dethlefsen had a long history of violence and alcoholism. RP 2277-79. His weapons of choice were a baseball bat, brass knuckles, and a switch blade knife. RP 2280. He also had a gun which he kept on the end table by his couch. Id. He tried to break away from Dethlefsen at times, but he decided to make contact again during Christmas of 1987. RP 2281. Dethlefsen was drunk and planning to commit suicide. Id. Benn decided to move in with Dethlefsen and try to help him. Id. He stayed there until January 7, 1988, during which time he helped Dethlefsen with his finances, took him to surgery for his knee problems, and took him to an alcohol detoxification center. RP 2282. Benn continued to check in on Dethlefsen after January 7. RP 2284.

On February 10, 1988, Benn spoke with Dethlefsen on the telephone and could hear that Dethlefsen was drunk. RP 2288. That upset Benn because they had made a bet that Dethlefsen could stay sober for several months. Id. Benn headed to Dethlefsen's house planning to "grab him by his butt and take him back to detox." RP 2290.

When Benn arrived, Dethlefsen and Nelson were arguing and yelling. RP 2291. Benn saw blood on Dethlefsen and in the kitchen, but

Dethlefsen and Nelson would not tell him what happened. RP 2293.

When Benn went into the kitchen he saw the phone number of his ex-girlfriend, Gail Fisk, written on a piece of paper. RP 2296. He knew someone had been making harassing telephone calls to her. RP 2297.

When he confronted Dethlefsen about that he said, "You got us, Chief." RP 2298.

In the course of the argument, Nelson said, "I should have finished what I started Friday. My daughter is scared of him, he is nothing but a bastard." RP 2301. As Nelson approached Dethlefsen, who was sitting on the couch, Dethlefsen picked up his pistol off the coffee table. RP 2302. Dethlefsen shot Nelson in the chest and then staggered into Benn. RP 2303. After Nelson fell down, Dethlefsen staggered over, put the gun on top of Nelson's head and shot him. RP 2304. Dethlefsen then told Benn he would have to help dispose of the body, but Benn refused. RP 2306. The two argued until Dethlefsen pointed his pistol at Benn. RP 2306-07. Benn grabbed the gun away, but Dethlefsen reached up from the couch to grab the gun and pull it toward him. Benn then pulled the trigger because he was frightened for his life. RP 2308.

After being shot, Dethlefsen came after Benn and pushed him into the gun cabinet. Dethlefsen fell to the ground, holding onto Benn's leg. RP 2308. Dethlefsen said, "I am going to put my baseball bat up your ass." RP 2309. Benn knew the bat was nearby and had seen Dethlefsen use it as a weapon in the past. Benn tried to shoot Dethlefsen in the hand

but instead shot him in the head. RP 2309. After the incident, he had trouble remembering the details at first. RP 2311.

Benn drew a diagram of the crime scene while in jail because he was switching lawyers and he wanted to familiarize the new lawyer with the discovery. RP 2319-20. It summarized his understanding of the State's theory of the case, based on his review of the discovery. RP 2320.

Monte Benn, Gary's brother and Jack's half-brother, confirmed that Jack Dethlefsen would keep his .45 pistol on the end table next to his couch. RP 2481. On February 9, 1988, Gary and Monte discussed Jack's drinking and deteriorating health. RP 2484-85. Gary seemed concerned about Jack, but not angry at him. RP 2486.

After the shootings, Gary gave several inconsistent statements to Monte. RP 2495-2512. Gary also told Monte that his memory of the incident was "blurry" because his emotions were overloaded. RP 2514. Benn also gave an inconsistent statement to the probation officer who prepared a report after the first trial. RP 2527-32.

Larry Kilen, a friend of Benn's and Dethlefsen's, testified that Benn was trying to help Dethlefsen quit drinking near the time of the shootings. RP 1342. He knew that Dethlefsen's drinking had become more pronounced around that time. RP 1343.

The State conceded it had presented insufficient evidence of the "common scheme or plan" aggravating factor. Over defendant's objection, the court permitted the jury to consider the "single act" factor. The jury found Benn guilty of two counts of first-degree murder, and

found the aggravating factor by special verdict. CP 487-90. The court sentenced Benn to life in prison without the possibility of parole. CP 493-500.

Additional details are discussed within the appropriate section of argument.

IV. ARGUMENT

A. THE DOUBLE JEOPARDY CLAUSE PRECLUDED THE STATE FROM SEEKING THE "SINGLE ACT" AGGRAVATING FACTOR A SECOND TIME

At the first trial, the jury found the "common scheme or plan" aggravating factor, but made no finding regarding the "single act" factor. At the second trial, the jury found only the "single act" factor. The trial court should have granted the defense motion to dismiss the single act factor at the second trial under the federal double jeopardy clause.

As discussed above in section III(A), the State's theory at the first trial was that the murders stemmed from an insurance fraud scheme in which Benn and the two victims were involved. The jury was instructed that it could find one or both of the following aggravating factors:

As to Count I and II was there more than one victim and were the murders:
part of a common scheme or plan _____ (Yes or No), or
the result of a single act of the defendant _____ (Yes or No)?

It wrote in "Yes" in the first blank, and left empty the second one. CP 510 (attachment to Memorandum in Support of Defendant's Motion to Dismiss Aggravating Factors). Neither side asked that the jury be sent

back to deliberate further, and the court did not declare a mistrial. CP 414. Rather, it accepted the verdict, discharged the jury, and proceeded to sentencing. Id.

Benn's postconviction investigation thoroughly discredited Roy Patrick and the entire arson/insurance fraud theory. See Benn v. Lambert, 283 F.3d 1040 (9th Cir.), cert. denied, 537 U.S. 942, 154 L. Ed. 2d 249, 123 S. Ct. 341 (2002). At the retrial, the State abandoned that theory entirely. It conceded that it could not prove that the murders were part of a common scheme or plan, and it relied solely on "single act." RP 700; 2185; CP 440.

The trial court denied the defense motion to dismiss the single act factor based on double jeopardy. CP 440-41. "Because that portion of the special verdict form was left blank, the jury did not unanimously find it was not an aggravating circumstance, and therefore, jeopardy did not attach to that alternative aggravating circumstance." Id. The jury was instructed only on "single act," CP 468-69, and it convicted on that aggravator. CP 488; 490.

The trial court's reasoning was faulty because jeopardy attaches once a jury is empaneled and sworn; the defendant need not show that the jury actually reached a verdict. Crist v. Bretz, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978). The jury's failure to make a finding generally has the same effect as an acquittal. Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).

In Green,

[t]he jury found Green guilty of arson and of second degree murder but did not find him guilty on the charge of murder in the first degree. Its verdict was silent on that charge. The trial judge accepted the verdict, entered the proper judgments and dismissed the jury.

Id. at 186. Green appealed and his conviction was overturned. On remand he was retried for first-degree murder and convicted. Id. The Supreme Court held that double jeopardy prohibited retrial on the first-degree murder charge even though the jury made no finding on that charge one way or the other.

[I]t is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be charged again.

Id. at 188. The Court did not rely on the assumption that the jury implicitly acquitted Green of murder in the first degree. Id. at 190-91.

For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principals of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: "We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree."

Id. at 191. Mr. Green did not waive this issue by appealing the findings actually made by the jury. Id. at 191-92.

The same principles apply to aggravating factors at a capital trial. See Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981).³

Of course, double jeopardy is not violated when a trial court properly declares a mistrial due to “manifest necessity.” Arizona v. Washington, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). But the mere failure of the jurors to make a required finding does not meet that standard; the court must find that the jurors are “genuinely deadlocked” before it excuses them. Id. at 509.

Washington law is in accord. In State v. Kirk, 64 Wn. App. 788, 828 P.2d 1128 (1992), the defendant was tried for first-degree statutory rape and the jury convicted him of the lesser-included charge of communication with a minor for immoral purposes. Id. at 790. The Court polled the jurors and they indicated they were unable to agree as to the greater charge. Id. The Court then discharged the jury. Id. The State argued that Green v. United States should not apply because Kirk’s jury did not merely neglect to make a finding, but was actually hung on the statutory rape charge. Id. at 792. The Court rejected that argument because “[t]he discharge of a jury without the defendant’s consent has the same effect as

³ In fact, in view of Ring v. Arizona, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002), it is now clear that aggravating factors must be treated in all ways the same as other elements of the crime.

an acquittal unless the discharge was necessary in the proper administration of justice.” Id. at 793. In Kirk’s case, the trial court failed to determine whether the jury was hopelessly deadlocked before it discharged the jury. Id. at 792-93. Because there was no showing of “extraordinary and striking circumstances,” the trial court’s act of discharging the jury terminated Kirk’s jeopardy. Id. at 794.

This case is indistinguishable from Green and Kirk. At the first trial, the Court discharged the jury without any inquiry into why it had not returned a verdict on the single act aggravating factor. There was no showing that the jury was hopelessly deadlocked. The Court never asked the jury whether it might be able to reach a verdict on that issue after further deliberations.⁴ The court never declared a mistrial, and it certainly never obtained the defendant’s consent to do so. Of course, had the court declared a mistrial, the State would have had only 60 days to proceed to retrial; it could not wait 13 years.

In short, the State had a full opportunity to obtain a finding that the killings were the result of a single act and it failed to do so. The double jeopardy clause prohibited the State from seeking such a finding again.

In the trial court, the State argued that the jury’s failure to make a finding regarding “single act” had no preclusive effect, citing to Sattazahn

⁴ Most likely, the jurors mistakenly believed they could not answer the verdict form unless they were unanimous. In fact, the jurors should have answered “no” if even one of them believed the State had failed to meet its burden of proof. State v. Goldberg, 149 Wn.2d 888, 894, 72 P.3d 1083 (2003). Had the court polled the jury, it probably would have learned that they actually had reached a verdict of “no.”

v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003).

That case is readily distinguishable.

In Sattazahn's capital trial, the jury indicated that it was "hopelessly deadlocked" at the sentencing phase. Id., 537 U.S. at 104. After inquiry, and with the consent of the defendant, the court discharged the jury as hung. Id. at 104-05. Under Pennsylvania law, the trial court was required to impose a life sentence under those circumstances. Id. at 105. The defendant appealed his conviction and obtained a new trial at which he was convicted and sentenced to death. A majority of the Supreme Court found that this did not violate double jeopardy because there was a hung jury the first time around. That Pennsylvania chose a "default" sentence of life under such circumstances did not change the fact that a mistrial had occurred. Sattazahn, 537 U.S. at 112-13.

The Sattazahn court did not overrule Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957), on which Benn relies. In fact, the majority cited Green with approval, noting that jeopardy terminated in that case whereas it did not in Sattazahn's case. Sattazahn, 537 U.S. at 113. The distinction is that the State should have "one complete opportunity to convict those who have violated its laws," which is not the case when the trial court properly declares a mistrial following a hung jury. Sattazahn at 115, quoting Arizona v. Washington, 434 U.S. at 509.

Here, the State had a complete opportunity to prove the single act aggravating factor. When the jury failed to check either "yes" or "no" on

the verdict form, the State could have asked that the jury be sent back for further deliberations, but it did not. The trial court never found that the jury was hopelessly deadlocked, and it never declared a mistrial. The court simply accepted the common scheme or plan finding and proceeded to the sentencing phase. Thus, this case is controlled by Green rather than Sattazahn.

B. THE TRIAL COURT SHOULD HAVE EXCLUDED WALTER HARTMAN'S TESTIMONY FROM THE FIRST TRIAL

1. Procedural History

Shortly before resting its case at the first trial, the State produced Walter "Pete" Hartman as a surprise witness. Benn then informed his lawyers that he could not testify, nor could his lawyers cross examine Hartman, because Hartman would harm or kill Benn's family. The defense then sought and obtained a competency hearing. See State v. Benn, 120 Wn.2d at 645-46.

At the hearing, the defense expert, Dr. Cripe, and an independent expert retained by the court, Dr. Trowbridge, both testified that Benn was genuinely delusional. The State's expert, Dr. Reddick, disagreed. Id. at 646. At the hearing, prosecutor Christine Quinn-Brintnall suggested that Benn's fears of Hartman were actually real and justified. RP* 1693, 1696.⁵ She argued similarly to the judge at the end of the evidentiary hearing.

⁵ RP* stands for the transcript from the first trial. For the Court's convenience, defendant has attached the relevant portions as App. B. All such portions were brought to the trial court's attention. See CP 152-53.

And the question is, is having some concerns about another individual indicative of delusional thinking? . . . We know that Pete was thought by the defendant to be a hit man, based on his own statements. Either he was thought to be a hit man because Pete held himself out to the defendant to be . . . or Benn approached him to do the job, knowing . . . that Jack had a reputation for violence . . . [T]here is evidence that Pete is capable of violent conduct.

RP* 1781-82.

The trial court found Benn competent to proceed. Hartman then testified that Benn attempted to hire him to kill Jack Dethlefsen. State v. Benn, 120 Wn.2d at 644. Immediately after the direct examination, defense counsel Thoenig requested an *ex parte* hearing. He explained that Benn had directed him not to cross-examine Hartman because of a delusional fear that it would cause his family to be harmed. RP* 1865-66. Counsel stated that he believed he was bound to follow his client's wishes under State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983), unless the court directed otherwise. Counsel maintained that "we will not be doing cross examination, and the reason we will not is counsel's reading of State v. Jones and our client's specific instructions not to . . ." RP* 1866. See also, In re Benn, 134 Wn.2d at 894.

Defense counsel's reading of Jones was not reasonable. Jones held only that a trial court cannot enter a plea of Not Guilty by Reason of Insanity ("NGI") on its own motion when a competent defendant refuses to make such a plea. Benn's attorneys apparently read the language at pages 740-41 of the opinion to establish a defendant's right to control the defense. The Jones court, however, stated only that "a defendant has a

constitutional right to *at least broadly* control his own defense.” Id. at 740 (emphasis added). In context, it is clear that the Court was referring to the exercise or waiver of such important rights as the right to trial or the right to counsel. Nothing in the opinion suggests that an attorney must permit his client to control every strategic choice that comes up during the course of a trial. Further, such an interpretation is inconsistent with State v. Ortiz, 104 Wn.2d 479, 483, 706 P.2d 1069 (1985), cert. denied, 476 U.S. 1144, 106 S. Ct. 2255, 90 L. Ed. 2d 700 (1986), which explained that while Jones required a defendant to have the ability to “choose among alternate defenses” before he could knowingly and intelligently waive his right to plead NGI, it did *not* require such an ability for a finding of competence to stand trial. Implicit in this ruling is that there is no error when defense counsel make the strategic decisions during trial.⁶ Other authorities are in accord. See ABA Standard 4-5.2 (“The decisions on . . . whether and how to conduct cross-examination . . . and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client.”); Hopkinson v. State, 664 P.2d 43, 79 (Wyoming), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983) (strategic decisions such as whether to call a witness are within province of attorney). Thus, counsels’ failure to cross-examine Hartman was based entirely on a mistaken interpretation of the law and cannot be considered a strategic decision.

⁶ If counsel had “Shepardized” Jones, they would have found Ortiz listed as a case which “explained” Jones.

Benn was prejudiced by this mistake because counsel could easily have called into question Hartman's ability to perceive, remember, and relate conversations with Benn. Hartman had admitted to DAC investigator Charles Bonet that he had hearing difficulties, and that he was drinking up to a fifth of whiskey, smoking "dope," and taking up to six valiums *a day* around the time that he claimed Benn talked with him about killing Dethlefsen. See Ex. A to defendant's motion in limine (Declaration of Charles Bonet); CP 160-66.⁷

Further, the defense could have explored Hartman's bias. He may well have understood that he could avoid prosecution for what the State believed his role to be in the killings if he testified against Benn. Hartman may have also been concerned about prosecution for his drug dealing, which he also admitted to the defense investigators. CP 166.

The Washington Supreme Court found that Benn could not claim ineffective assistance in this regard because Thoenig was following his directions. In re Benn, 134 Wn.2d 868, 894-895, 952 P.2d 116 (1998). The federal courts did not reach this issue because Benn was entitled to a new trial in any event because of prosecutorial misconduct. Benn v. Lambert, *supra*.

⁷ The State may argue that there was no prejudice because the trial court permitted Benn to present Bonet's testimony at the second trial. There is a big difference, however, between mentioning impeachment evidence and *confronting* a witness with it. The jury could not evaluate whether Hartman became defensive or evasive when confronted. In some cases, witnesses will recant their testimony when confronted with effective impeachment.

Hartman died before the second trial. CP 136. The State moved to admit Hartman's prior testimony, CP 135, and the defense moved to exclude it. CP 152. The State argued that the mere opportunity to cross examine at the first trial was dispositive. RP 294-95. "[T]here is no . . . authority . . . which says that . . . this Court has to also look at whether or not it would be fair or unfair." Id. "Counsel talks about motive, that there is no similar motive. It doesn't matter . . . Was there an opportunity. That is the magic word." RP 295. The trial court agreed. "Mr. Thoenig was given an opportunity to cross examine Mr. Hartman and that is sufficient." RP 296. The court's written findings also include, without explanation, a finding that the defense had a "similar motive" to cross-examine Hartman at the first trial. CP 284-85.

2. The Evidence was Inadmissible Under ER 804(b)(1) and the Confrontation Clause

ER 804(b)(1) provides a hearsay exception for the former testimony of an unavailable witness "if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

Washington's rule is the same as Federal Rule 804. See Advisory Comments to ER 804. As the federal advisory committee explained, "the question whether prior testimony should be admitted is, in essence, the question 'whether fairness allows imposing, upon the party against whom now offered, the handling of a witness on the earlier occasion.'" See United States v. Salerno, 505 U.S. 317, 329 n.6, 112 S. Ct. 2503, 120 L.

Ed. 2d 255 (1992) (Stevens, J. dissenting), quoting Advisory Committee's Notes on Fed. Rule Evid. 804(b)(1).

Our own cases dealing with the "similar motive" requirement of rule 804(b)(1) have indicated that in determining similarity of motive the court should look first to what examination in fact occurred at the prior proceeding, in order to determine whether the prior examination was "the equivalent of what would now be done if the opportunity [to examine] were presented."

United States v. Salerno, 974 F.2d 231, 239 (2nd Cir. 1992) (on remand from Supreme Court).

In this case, it would be unfair to impose upon Benn his prior attorney's handling of Hartman. Benn had neither the same motive, nor the same opportunity, for cross-examination at the first trial. His motivation was not to help himself prevail in the trial, but rather to prevent his family from being killed by Hartman. If this was based on delusion, it would be unfair to hold Benn to his incompetent decision. Likewise, if Benn's fears of Hartman were justified – as the prosecutor suggested – it would be unfair to hold him to a coerced decision. Cf. State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984) (a coerced plea of guilty is invalid). There could be no valid, strategic reason for Benn to prohibit cross-examination of Hartman. The testimony was clearly harmful, and the defense had effective impeachment tools at its disposal.

The analysis is similar as to defense counsel. Thoenig's only motivation was to follow his client's wishes, even though he freely acknowledged that this was a poor strategic decision. It is true that

counsel had the actual opportunity to cross-examine Hartman, *but he erroneously believed he did not*. Benn maintains that this amounted to ineffective assistance of counsel under the Sixth Amendment.⁸ But even if it did not, it was unfair to admit the prior testimony at the second trial. The rationale for the hearsay exception in ER 804(b)(1) is that the prior opportunity for cross-examination makes the former testimony nearly as trustworthy as live testimony at the current trial. See 5C Teglend, Evidence Law and Practice, § 804.14 (4th Ed. 1999); Advisory Committee's Notes on Fed. Rule Evid. 804(b)(1). Here, there was neither any adversarial testing of the testimony, nor any rational decision that the testing would be unhelpful, so the testimony has no indicia of reliability.

The trial court's written finding that Benn had a "similar motive" to cross-examine Hartman at the first trial is clearly erroneous in that it lacks any support in the record. As discussed above, it is undisputed that Benn's motive was quite different at the two trials.

The State may cite to cases finding prior testimony admissible even when the defense attorney declined to cross-examine the witness at the

⁸ Benn has not found a case in which a defendant sought to exclude evidence under ER 804(b)(1) because his prior attorney was ineffective. There are many cases, however, holding that prior testimony is inadmissible when the defendant was completely denied counsel at the earlier hearing. See, e.g., Pointer v. Texas, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965); Petit v. Rhay, 62 Wn.2d 515, 383 P.2d 889 (1963). The U.S. Supreme Court has explained that the right to counsel means the right to effective counsel, not merely the right to have a member of the Bar present in the courtroom. See generally, Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

prior proceeding. The rationale for those rulings, however, does not apply here.

The reason is that, wherever the opponent has declined to avail himself of the offered opportunity, it must be supposed to have been because he believed that the testimony could not or need not be disputed at all or be shaken by cross-examination. In having the opportunity and still declining, he has had all the benefit that could be expected from the cross-examination of that witness.

5 Wigmore, Evidence § 1371 at 55-56 (Chadbourn rev. 1974). Here, however, Hartman's highly incriminating testimony obviously needed to be disputed if Benn was to prevail at trial. And counsel could easily have "shaken" Hartman's testimony with the impeachment evidence noted above. Defense counsel recognized this, but believed he was bound to decline cross-examination.

The State may cite to State v. Roebuck, 75 Wn.2d 67, 448 P.2d 934 (1968), but it is readily distinguishable. In that case, defense counsel did cross-examine the witness at a preliminary hearing. Id. at 68. The testimony was used at trial and defendant was convicted. On appeal, defendant argued that counsel was unprepared at the preliminary hearing, but he did not support that assertion with any evidence. The Supreme Court noted that trial counsel did not request a continuance of the preliminary hearing, and it presumed that he was fully prepared and conducted a competent examination. Id. at 71. Here, on the other hand, counsel performed no cross-examination whatsoever, and the reasons for this omission are fully documented in the record.

Thus, the prior testimony should not be permitted under ER 804(b)(1).

Admission of the testimony would also violate Benn's right to confrontation under the Sixth Amendment to the U.S. Constitution. Prior testimony may be admissible under the Confrontation Clause, but only if there was an "adequate" opportunity for cross-examination. Crawford v. Washington, -- U.S. --, 158 L. Ed. 2d 177, 124 S. Ct. 1354, 1367 (2004). The opportunity cannot be adequate if defense counsel believes he is prohibited from conducting any cross-examination at all.⁹

The Colorado Supreme Court recently applied Crawford to the preliminary hearing testimony of a witness who died before trial. People v. Fry, 92 P.3d 970 (2004). In Colorado, the court generally makes no credibility findings at a preliminary hearing so defense counsel has no motivation to question the witness' credibility. Id. at 977-78. Thus, although defense counsel technically had an opportunity for cross-examination at the prior hearing, it was not sufficient to satisfy the federal confrontation clause. Id. at 980. The same can be said here.

C. THE TRIAL COURT IMPROPERLY LIMITED CROSS-EXAMINATION OF THE STATE'S EXPERT WITNESSES

⁹ The testimony in this case would not satisfy even the more liberal standard of Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), that was overruled in Crawford. Roberts found prior testimony admissible to the extent that the prior opportunity for cross-examination provides sufficient indicia of reliability. Id. at 64. The Roberts Court did not decide whether the "mere opportunity to cross-examine" or "*de minimis* questioning" was sufficient, because the cross-examination at the earlier hearing in Roberts was extensive. Id. at 70. Here, however, the complete lack of cross-examination at the first trial in the face of useful impeachment evidence renders the testimony unreliable under the Roberts test.

1. The Court Precluded Cross-Examination Based on Learned Treatises

Forensic scientist Michael Grubb testified for the State concerning bloodstain analysis. RP 1786-1814. Based largely on the size and shape of the stains he observed on Benn's boot, he opined that "the head wound to Mr. Nelson is far and away the most likely source of the firearm back spatter on the boot." RP 1814. This depended on his conclusion that the stains were so small that they could only have come from a "high velocity" blood source, such as a gunshot. RP 1808-10. Defense counsel Phillip Thornton attempted to discredit this conclusion by relying on recognized authorities in the field of bloodstain analysis.

Grubb acknowledged that a good scientist must "keep up with the literature." RP 1819. He admitted that he would rely on the works of several nationally recognized experts in the field, including Herb McDonnell, William Eckert, Stewart James, Tom Belville, Ross Gardner, and Dr. Henry Lee. RP 1819-21. See also RP 1827. Grubb considered their writings to be "learned treatises in this field" or "reference book[s]." RP 1828. Nevertheless, the court sustained the State's objection when Thornton attempted to bring out the credentials of these experts through Grubb. RP 1821.

Thornton then attempted to show that Grubb's conclusions were inconsistent with the literature.

Q: You classified this as high velocity blood spatter; is that correct?

A: Yes, I did.

Q: And you are familiar, as you just testified, with Herb McDonald¹⁰'s work in this area, correct?

A: Yes.

Q: And he has actually given a definition of what the size range of high velocity blood spatter is, has he not?

A: I am sure he did.

Q: Would you --

MR. NEEB: Your Honor, I would object to any question about what Mr. McDonnell has classified. He is not the witness.

THE COURT: Sustained.

RP 1826. In voir dire of the witness, prosecutor Neeb brought out that Grubb did not rely on McDonnell's work to determine whether the stains were high velocity spatter (although he did rely on McDonnell "to determine the distance that a blood stain of this size can travel.") RP 1828.

The court continued to sustain objections each time Thornton attempted to point out inconsistencies between Grubb's testimony and the writings of experts in the field. RP 1826-39. One example follows:

Q: You found no blood drops less than .1 millimeter, correct?

A: That's correct . . .

Q: You are familiar with the work of William Eckert and Stewart James?

¹⁰ The court reporter inconsistently refers to one expert as "McDonnell" or "McDonald."

A: Yes, I am.

Q: The Interpretation of Blood Stain Evidence at Crime Scenes?

A: Yes.

Q: Would you consider that a treatisey [sic] in this field as well?

A: Yes, I would.

Q: Would you agree that Dr. Eckert and Mr. James also state that high velocity mist should be less than .1 millimeter in diameter?

MR. NEEB: Object, Your Honor. They are not testifying. They didn't state anything.

THE COURT: Sustained.

RP 1832-33.

At the next break, with the jury out, Thornton cited the court to ER 803(a)(18) and "Tegland's handbook on evidence." RP 1847-48.

Nevertheless, the court stated: "I have already ruled on this a number of times, and I am going to continue to sustain the objection with regard to this matter." RP 1849.

The same issue recurred during the testimony of State expert Rod Englert. Englert was initially trained in bloodstain analysis by Herb McDonnell. RP 2042. Englert agreed that McDonnell was "one of the foremost authorities on blood stain pattern interpretation." *Id.* Englert also recognized Stewart James, Tom Bevill, Ross Gardner and Dr. Henry

Lee as authorities on the subject. RP 2043-45. Englert relied on their books. Id. Nevertheless, the State's objections were sustained every time Thornton attempted to show that the published works of these experts disagreed with Englert. RP 2046, 2048, and 2049.

The court erred. ER 803(a)(18) (entitled "Learned Treatises") explains that the following may not be excluded as hearsay:

To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits . . .

Here, Thornton relied only on treatises established as reliable by the State's witnesses themselves, attempted to call them to the attention of the experts on cross examination, and attempted to read excerpts into evidence. This practice complied fully with the rule.

The State appeared to have two misconceptions about the rule, both of which were accepted by the court. First, there is no requirement that the author of the treatise be presented as a witness. That is the very reason for the hearsay exception. Second, it was not necessary for Thornton to show that the expert actually relied on the treatise for his analysis.

When the use of the treatise is limited to cross-examination, the foundation requirements are less rigorous. The rule requires only that the treatise be "called to the attention of"

the witness. The cross-examiner need not establish that the witness has relied upon the publication or that the witness regards it as authoritative. If the rule were otherwise, the witness could frustrate cross-examination by refusing to acknowledge the treatise.

Tegland, Evidence Law and Practice (4th Ed. 1999) at §803.68, citing, among other cases, Falk v. Keene Corp., 53 Wn. App. 238, 767 P.2d 576 (1989), remanded on different issue, 113 Wn.2d 645, 782 P.2d 974 (1989).

This evidentiary error was highly prejudicial. It was critical to the State's case that Benn's foot was very close to Nelson's head when Nelson was shot in the head, and that he was relatively far from Dethlefsen when Dethlefsen was shot in the chest. RP 2929-33; 2938-41. The jurors could not evaluate the testimony of the State's experts based on their common experience. The average person would not know, for example, how small blood stains must be before they can be considered "high velocity," or how far bloodstains of various velocities can travel. The jurors would undoubtedly accept the testimony of Grubb and Englert unless the defense could show that other experts disagreed with them.

The court's evidentiary error also violated Benn's right to due process under the Fourteenth Amendment of the U.S. Constitution, and his right to confrontation under the Sixth Amendment. "The Sixth Amendment and Const. art. 1, § 22 (amend. 10) grant criminal defendants the right to confront and cross-examine adverse witnesses." State v. Russell, 125 Wn.2d 24, 73, 882 P.2d 747 (1994).

[I]t is clear that any attempt to limit meaningful cross-examination, whether it be by legislative act, judicial

pronouncement or court ruling upon the admissibility of evidence, court rule, or the common law, must be justified by a compelling state interest. Where a statute or court ruling is challenged on grounds that it unduly restricts the Sixth Amendment right to confrontation, the state's interest in the rule must be balanced against the fundamental requirements of the constitution. Davis v. Alaska,¹¹ *supra*, People v Kahn, 80 Mich App 605, 612; 264 NW2d 360 (1978).

State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983) (emphasis in original). Here, the trial court's limitation on meaningful cross-examination was not based on *any* state interest, much less a compelling one. It was based solely on a misunderstanding of the rules of evidence.

2. The Defense Was Precluded From Impeaching Rod Englert In Other Ways

Prior to trial, the defense moved for disclosure of a letter from the Ethics Committee of the American Academy of Forensic Sciences ("AAFS Letter") to the State's expert, Rod Englert. CP 145. During a defense interview, Englert acknowledged that the Academy asked him to address 11 issues, including representations in his curriculum vitae and his testimony in criminal cases. CP 147-48. Englert handed the letter to prosecutor John Neeb, but Neeb would not disclose it to the defense. CP 148.

The Defense anticipates the record will reveal the lack of procedures and standards for which the expert may testify as an expert in this particular field of expertise, concerns regarding evidence handling, the disregard of protocol and

¹¹ 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974).

procedure, and destruction of records and exculpatory material, and the deception within the State's expert's prior testimony in criminal cases.

CP 150. The State maintained that the letter was not discoverable because the defense cannot use "unproven allegations against a witness at trial."

CP 180. In the State's view, Englert's denial of the allegations made them inadmissible and therefore not discoverable. Id. Only if the Ethics Committee ultimately found the complaints to be true would they be admissible. CP 183. But as the State noted, that could not happen until long after Benn's trial. CP 181. The Court declined to disclose the letter. RP 231; CP 207-08.

Ultimately, the defense obtained independent evidence of many of the allegations apparently contained in the letter. As discussed below, the court then ruled that the defense could not question Englert about the subject matter of the allegations in any way, even if it made no mention of the letter or the fact that a complaint had been made to the AAFS.

Before the jury, the State devoted 18 pages of transcript to developing Englert's credentials and expertise as a "crime scene reconstructionist." RP 1647-62; 1665-66. Among other things, Englert went through the many organizations he belonged to, including the AAFS, his education, his teaching experience, the many times he testified in court as an expert, and specific, high-profile cases in which he testified. The next 34 pages of transcript were devoted to Englert's description of general principles of crime scene reconstruction, including bloodstain analysis. RP 1666-99. Only then did he turn to his work in the Benn case.

Prior to cross-examination, the State asked the court to exclude “any accusations by Mr. Thornton of Mr. Englert related to his credentials, his curriculum vitae, his resume, his training or his experience without a prior offer of proof and a ruling outside the presence of the jury.” RP 1932. The court followed that approach. RP 1943-44.

The court first made it clear that it would not permit any cross-examination regarding the facts underlying the complaints discussed in the AAFS Letter. RP 1939. Thornton protested that he had actual transcripts showing that Englert had testified inconsistently from case to case on various issues. RP 1941. He noted that this went to Englert’s credibility as well as his bias (that is, his tendency to alter his opinions to suit the party paying his bill). Id. Thornton agreed to avoid any mention that these matters were related to a pending complaint before the AAFS. Id. The court stood by its decision. RP 1943.

Thornton then explained that he wished to explore “a number of different statements that Englert has made under oath in various different trials.” RP 1950. Before even hearing the details, the court responded, “I am not going to go there, so don’t bother. I am not.” Id. Thornton also wished to bring out that Englert had made false statements about his educational and teaching experience in bloodstain analysis. RP 1955. To demonstrate his good faith basis for the questions, Thornton produced a letter from Herb McDonnell. RP 1956-57. Englert testified that he originally learned bloodstain analysis from McDonnell. RP 2042. The court excluded such questioning. RP 1958-59.

Thornton then explained that he had transcripts showing that Englert had testified inconsistently from case to case concerning matters relevant to this case, such as the manner in which high velocity blood spatter can be created, the definition of high-velocity spatter, and the distances it can travel. RP 1959-60. Thornton explained that he would initially ask Englert whether he had testified inconsistently in other cases and if Englert did not agree, show him transcripts to refresh his recollection. If that did not work, Thornton would then call the court reporters to authenticate the prior testimony. RP 1961. The court responded: "It's not going to happen." RP 1961.

THE COURT: You can certainly ask him a definition. I don't have any problem with that.

MR. THORNTON: And if he gives me something different than what he previously said then I am unable to say in another case you said --

THE COURT: That's right . . . Because then that brings up the testimony of another trial, fact pattern is different, you are right.

MR. THORNTON: But with regard to definitions . . . we would be able to show that he patterns his definition to the facts of a specific case . . . He changes the definition to suit his own standard, or to meet the facts of what he wants or is asked to say.

THE COURT: I understand, and I have already ruled on that. Okay. Nobody likes the hired guns, and this is the clear explanation as to why.

RP 1961-62.

As discussed above in section III(B), Englert testified that he concluded the stains on the boot were blood after performing only a presumptive and not a confirmatory test. As discussed above in section IV(C)(1), Thornton was not allowed to show that this approach contradicted various learned treatises. On redirect, Englert testified that he had concluded that the substance was blood based without a confirmatory test “over a thousand” times and that he was never wrong. RP 2072-73. Before re-cross, Thornton requested permission to contradict that testimony. He possessed a transcript of a trial in which Englert testified that a substance was blood based on a presumptive test, and reports showing that the Honolulu crime lab later determined the substance was not blood. RP 2087. Thornton also had a transcript in which Englert testified that he had never identified something as blood without confirmatory testing. RP 2088. The court prohibited questioning on either point. RP 2090.

As discussed above in section IV(C)(1), a trial court’s limitations on meaningful cross-examination violate the federal confrontation clause unless they are justified by a “compelling state interest.” Here, the court’s absolute prohibition on any reference to Englert’s work or testimony in other cases served no such interest. The defense had a right to impeach his credibility by exploring his questionable testimony in other cases. In particular, the defense has a clear right under the Sixth Amendment to explore a witness’ bias towards the State. See Davis v. Alaska, supra. Here, the defense could have shown through Englert’s own sworn

testimony that he varied his opinions from case to case to suit the party paying his bill. The trial court appeared distracted by the fact that the same allegations had been raised to the AAFS and had not yet been upheld by that organization. But that was a red herring. Whether or not the allegations had been presented to the AAFS – or in any other forum – the defense was entitled to present the underlying evidence in this case.¹²

Benn also had a right under the federal due process clause to rebut evidence presented by the State. See Simmons v. South Carolina, 512 U.S. 154, 164-65, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994); Skipper v. South Carolina, 476 U.S. 1, 5 n.1, 90 L. Ed. 2d 1, 106 S. Ct. 1669 (1986); Ake v. Oklahoma, 470 U.S. 68, 83-87, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985); Gardner v. Florida, 430 U.S. 349, 362, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977); United States v. Crenshaw, 698 F.2d 1060, 1065-66 (9th Cir. 1983). After the State's extensive efforts to "puff" Englert's credentials on direct examination – including discussion of his work in other cases – the defense had every right to show that Englert was fallible. In particular, when Englert opened the door by testifying that he had performed a certain analysis over a thousand times and had never been proved wrong, the defense had a right to refute that claim.

D. THE STATE'S USE OF DETHLEFSEN'S HEARSAY STATEMENTS VIOLATED BENN'S RIGHT TO CONFRONTATION

¹² Even if the AAFS had already ruled on the allegations, its findings would not be binding on Benn's jury. (Although perhaps the trial court could rely on well-reasoned findings from that body to determine whether or not the evidence was more probative than prejudicial under ER 403.)

Benn testified that he saw blood in the kitchen on the day of the shootings, and described circumstances suggesting the blood resulted from Michael Nelson beating up Jack Dethlefsen on a prior occasion. RP 2292-2301. In cross-examination of Monte Benn, the State brought out – over objection – that Dethlefsen told Monte he had been beat up in the kitchen and that “he wanted to talk to Gary about it.” RP 2490. In closing, the State argued that this showed that Gary, rather than Nelson, beat up Dethlefsen. RP 2637.

The State’s use of this out-of-court statement of Dethlefsen’s was hearsay under ER 801 and fell outside any exception. It therefore should have been excluded under Washington’s rules of evidence. ER 802. Further, because the declarant was not subject to cross-examination, and the statement bore no indicia of reliability, its use violated Benn’s Sixth Amendment right to confront witnesses. See Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).

E. THE SECOND TRIAL IN THIS CASE VIOLATED DOUBLE JEOPARDY

1. Introduction

In a pretrial motion, Benn argued that a second trial would violate double jeopardy, in view of the prosecutorial misconduct at the first trial. CP 13-24. The trial court denied the motion. CP 117-18.

This Court should find that Washington’s Double Jeopardy Clause provides greater protection than its federal counterpart. It should adopt the test used by the Pennsylvania Supreme Court: reprosecution is prohibited

when the State's conduct is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial. Because the State's conduct at the first trial in this case easily meets that standard, the Court should reverse and remand with directions to dismiss the information.

2. Relevant Facts and Procedural History

As discussed above in section III(A), Benn's conviction and death sentence were reversed due to prosecutorial misconduct. See Benn v. Lambert, 283 F.3d 1040 (9th Cir.), cert. denied, 537 U.S. 942, 154 L. Ed. 2d 249, 123 S. Ct. 341 (2002). The suppressed evidence included jailhouse informant Roy Patrick's unreliability in other cases, that Patrick made a false allegation about Benn being the Green River Killer, and that the prosecutor was protecting Patrick from prosecution for several offenses. Id. at 1054-58. The Ninth Circuit rested its decision on Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), because that was the only claim addressed by the federal district court. Under Brady, the good faith or bad faith of the State is irrelevant. See Benn v. Lambert, 283 F.3d at 1058 n.11. The Benn court noted, however, that the prosecutor's conduct went beyond a mere Brady violation.

Here, there is evidence that the state lied to defense counsel when it "falsely claimed" that Patrick was in a witness protection program. There is also evidence that the state knowingly allowed Patrick to commit perjury when it stood by and said nothing while Patrick perjured himself by stating that he did not use drugs while acting as an informant. Similarly, the prosecution said nothing when Patrick lied at trial about never having previously served as an informant in a murder case. There is also evidence of other prosecutorial misconduct that corrupted the truth-

seeking function of the trial. For example, the prosecution blatantly violated state discovery rules by failing to disclose Patrick's identity to the defense until the day before trial, even though the prosecution had recorded his statement over a year earlier; the prosecution did not even attempt to obtain information about Patrick's informant history despite a court order to do so; and the detective who prepared the March 30, 1988 report "selectively omitted" information that the fire was accidental. See discussion *supra* Section I.B. 2. Consequently, a stricter standard of materiality applies to the Brady analysis. It is, however, unnecessary to apply that standard in this case because the prejudice resulting from the suppression of the impeachment evidence here was so great that it would satisfy any rational standard of materiality.

Id. at 1058 n.11. The Ninth Circuit found that Patrick's testimony was critical, and that the withheld evidence would have undermined his credibility. Id. at 1059.

The State also failed to disclose exculpatory forensic evidence showing that the fire at Benn's trailer was accidental. Id. at 1060. This evidence "would have substantially undermined the state's principal theory of motive and its main support for the aggravating factor of common scheme or plan, as well as its contention that the killings were premeditated." Id. at 1062.

The Ninth Circuit made it quite clear that this was not a run-of-the-mill Brady case but rather an extreme example of prosecutorial overreaching.

Here, the state failed to take any measures to safeguard the system against treachery. To the contrary, the state suppressed material exculpatory and impeachment evidence that would have destroyed the credibility of its principal

witness, severely undermined its theory of motive, and left it without substantial evidence of premeditation or an aggravating circumstance . . . To say that we have a firm conviction that the state court erred in its application of Brady and its progeny would be a gross understatement indeed.

Id. at 1062.

Judge Stephen S. Trott¹³ concurred in order to emphasize the seriousness of the misconduct that occurred here. He viewed this case as a “textbook example of the abuse of executive power.” Benn v. Lambert, 283 F.3d at 1063 (Trott, J., concurring). “Such reprehensible conduct shames our judicial system.” Id.

Based on its own investigation, the Washington State Bar Association initiated disciplinary proceedings against prosecutor Michael Johnson concerning his conduct in this case.

3. The Federal Double Jeopardy Clause Was Violated

The United States Supreme Court has ruled that retrial is barred following a mistrial "where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial." Oregon v. Kennedy, 456 U.S. 667, 72 L. Ed. 2d 416, 102 S. Ct. 2083 (1982) (Kennedy I). The federal standard does not appear to be any more favorable to the defendant if the prosecutorial misconduct led to a reversal following appeal, rather than to a mistrial. Benn does not maintain that the

¹³ Judge Trott was appointed by Ronald Reagan after serving as U.S. Attorney for the Central District of California. Prior to that, Mr. Trott headed the Justice Department's task force prosecuting General Manuel Noriega.

prosecutor was trying to obtain a mistrial at the first trial, but rather that he was trying to obtain a conviction. Although it does not appear that Benn can prevail under the current federal standard, he raises the claim here to preserve it for possible federal review.

4. Washington's Double Jeopardy Clause Offers Broader Protection Than its Federal Counterpart

This Court should find that the Washington Constitution's double jeopardy clause encompassed in article I, section 9 provides greater protection than its federal counterpart. Under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), the Court must consider six non-exclusive factors: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in the structure between the federal and state constitutions; and (6) matters of particular state concern. Gunwall, 106 Wn.2d at 61-62.

The Washington Supreme Court has recognized that our double jeopardy clause was patterned after the same Oregon constitution double jeopardy clause at issue in Kennedy, and contains very similar language. State v. Hopson, 113 Wn.2d 273, 277-78, 778 P.2d 1014 (1989). The Washington Supreme Court has not yet decided whether the federal or the Oregon test is a more appropriate interpretation of the Washington Constitution. Hopson, 113 Wn.2d at 283-84; State v. Lewis, 78 Wn. App. 739, 743, 898 P.2d 874 (1995). It will make this determination "when a

set of facts that would require different results under the Oregon and federal analyses is before the court . . . " Hopson at 283-84.

The Washington Supreme Court rejected an independent analysis of the state double jeopardy clause in State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995). That case, however, dealt with the test for determining whether two crimes were the "same offense" for double jeopardy purposes, not with the circumstances under which a retrial is permissible for a crime that is unquestionably the "same offense" as that in the first trial. Thus, Gocken is not controlling on this issue. See State v. Lynch, 84 Wn. App. 467, 475 n.9, 929 P.2d 460 (1996). "Even though a particular state constitutional provision might afford broader protection than federal law in some applications, it may not in others." Malyon v. Pierce County, 79 Wn. App. 452, 466, 903 P.2d 475 (1995), overruled on other grounds, 131 Wn.2d 779; 935 P.2d 1272 (1997).

i. Textual language of the state constitutional provision and significant differences between that and its federal counterpart.

Article 1 section 9 provides: "[no person shall] be twice put in jeopardy for the same offense." The Fifth Amendment provides that "[no person shall] be subject for the same offense to be twice put in jeopardy of life or limb." Although the language is similar, Washington is free to adopt a different interpretation. State v. Davis, 38 Wn. App. 600, 605 n. 4, 686 P.2d 1143 (1984).

ii. State constitutional and common law history.

Washington's article I, section 9 was patterned after article I, section 12 of the Oregon Constitution. Hopson, 113 Wn.2d at 277-78. Oregon cases interpreting article I, section 12 are therefore relevant to the analysis. Following Kennedy I, the Oregon Supreme Court determined that art. I, sec. 12 provided greater protection than the federal double jeopardy clause. State v. Kennedy, 295 Or. 260, 276, 666 P.2d 1316 (1983) (Kennedy II). Under Oregon's test, retrial is barred if the official knows his or her conduct is improper and prejudicial and he or she either intends or is indifferent to the resulting mistrial or reversal. Id.

The point is not that the state's constitutional guarantees are more or less protective in particular applications, but that they are meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law both in method and in specifics. State courts cannot abdicate their responsibility for these independent guarantees, at least not unless the people of the state themselves choose to abandon them and entrust their rights entirely to federal law.

Kennedy II, 295 Or. at 270-71.

A test limited to intentional provocation of mistrials, however, has two shortcomings besides the question of proof. First, the Supreme Court's analysis focused on prosecutorial misconduct, as in this case. The Court adopted that test in part because, within the limits of professional ethics and the state's other overriding values, prosecutors are expected to strive for convictions, and "overreaching" could be asserted of every prejudicial error that may require a retrial. But prosecutors are not the only officials whose conduct may cause a mistrial or a reversal.

Second, a finding that a prosecutor initially pursued a course of prejudicial misconduct for the purpose of forcing a mistrial is a grave matter. Such behavior is a contempt of court. It is also a violation of professional standards that can lead to disbarment or other discipline, and perhaps of federal civil rights statutes. A judge prepared to make such a finding properly would not only declare a mistrial without the possibility of re prosecution but also report also report the episode to the Oregon State Bar . . . That places too heavy a burden on the inference that a defendant must ask a judge to draw from objective conduct and circumstances.

Kennedy II, 295 Or. at 275-76 (citations and footnotes omitted).

Many commentators agree that the U.S. Supreme Court's decision in Kennedy I does not adequately protect a defendant against multiple prosecutions. See Henning, Prosecutorial Misconduct and Constitutional Remedies, 77 Wash.U. L.Q. 713, 803-808 (1999); Ponsoldt, When Guilt Should be Irrelevant: Government Overreaching as a Bar to Re prosecution Under the Double Jeopardy Clause After Oregon v. Kennedy, 69 Cornell L.Rev. 76, 94-99; Rosenthal, Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence, 71 Temple L.Rev. 887, 892-895, 909-917, 961 (1998); Thomas, Solving the Double Jeopardy Riddle, 69 So.Cal. L.Rev. 1551, 1563-1564 (1996); Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U.Pa. L.Rev. 1365, 1425-1428 (1987). For example, as noted by Professor Reiss in Prosecutorial Intent, *supra*, 135 U.Pa. L.Rev. page 1426: "When a defendant's 'valued right to have his trial completed by a particular tribunal' is threatened by serious prosecutorial misbehavior at trial, Kennedy does much to deny any protection of the right ... [because it]

eliminates any double jeopardy concern with prosecutorial overreaching prompted by improper motives other than the intent to provoke a mistrial. Thus, a defendant faced with a prosecutor who is willing to commit reversible error for other improper reasons ... has no redress under the clause."

In addition to Oregon, at least seven states have interpreted their double jeopardy provisions more broadly than the U.S. Supreme Court did in Kennedy I. See People v. Batts, 30 Cal. 4th 660, 68 P.3d 357, 134 Cal. Rptr. 2d 67 (2003); State v. Rogan, 91 Haw. 405, 984 P.2d 1231, 1249 (1999); State v. Breit, 1996 NMSC 67, 930 P.2d 792, 803, 122 N.M. 655 (1996); Bauder v. State of Texas, 921 S.W.2d 696, 699 (Tex. Crim. App. 1996); Commonwealth v. Smith, 532 Pa. 177, 180-81, 615 A.2d 321, 325 (1992); Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261, 271-272 (1984).

iii. Remaining Gunwall factors

The fourth factor, preexisting state law, "usually pertains to state law preexisting ratification and for that reason is nondispositive here." Malyon v. Pierce County, 131 Wn.2d 779, 797, 935 P.2d 1272 (1997).

The fifth factor, the differences in structure between state and federal governments, "always favors an independent state interpretation." Richmond v. Thompson, 130 Wn.2d 368, 922 P.2d 1343 (1996); State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

The sixth factor favors independent state analysis because protecting the double jeopardy rights of Washington citizens is a state concern. State v. Gocken, 127 Wn.2d 95, 105, 896 P.2d 1267 (1995).

Thus, a Gunwall analysis leads to the conclusion that the Washington Constitution should afford greater protection than the federal constitution to defendants forced into a retrial because of prosecutorial misconduct.

5. This Court Should Adopt a Test Similar to Those in Pennsylvania and Hawaii and Grant Relief

As discussed above, at least eight state courts have found that their constitutions bar retrial in circumstances under which the federal constitution would not. Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321, 325 (1992), appears to be the most closely on point with this case. Smith was convicted of murder and sentenced to death. After the direct appeal, Smith learned that the prosecutor failed to reveal that it extended favorable treatment to a key witness. Id., 532 Pa. at 180-81. In addition, the State withheld forensic evidence that would have supported the defense theory of the case. Id. at 181-82. As discussed above, both factors are present in this case. The Pennsylvania Supreme Court reversed under the following test: retrial is prohibited when “the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.” Id. at 186. The Court did not limit relief to conduct intended to create a mistrial because the defendant suffers even

worse when the prosecutor's intent is "that the defendant should never know how his wrongful conviction came about." Id. at 180-81.

The Hawaii Supreme Court applied a similar test in a case involving retrial following an appellate reversal due to prosecutorial misconduct. "Reprosecution of a defendant after a mistrial or reversal on appeal as a result of prosecutorial misconduct is barred where the prosecutorial misconduct is so egregious that, from an objective standpoint, it clearly denied a defendant his or her right to a fair trial." State v. Rogan, 91 Haw. 405, 423, 984 P.2d 1231 (1999). The court found that the prosecutor's single racist comment during closing argument met this standard.

Benn would be entitled to relief under either of these tests. As the Ninth Circuit found, the State in this case intentionally withheld evidence and suborned false testimony in an effort to obtain a conviction and death sentence. In fact, the State's misconduct was remarkably similar to that in Smith. Further, as in Rogan, the conduct was "so egregious that, from an objective standpoint, it clearly denied [Benn] . . . a fair trial." Thus, this court should dismiss the charges under Washington's double jeopardy clause.

V.
CONCLUSION

For the reasons stated, this Court should reverse and remand with instructions to dismiss the charges as barred by double jeopardy. In the alternative, it should find that the "single act" aggravating factor, at least, was barred by double jeopardy, and should remand for retrial on charges of murder without aggravating factors.

DATED this 13th day of September, 2004.

Respectfully submitted,



David B. Zuckerman, WSBA #18221
Attorney for Gary M. Benn

CERTIFICATE OF SERVICE

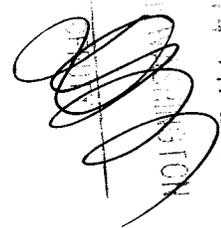
I certify that on the date listed below, I served by United States Mail
a copy of this pleading on the following individuals:

Mr. John Neeb
Pierce County Deputy Prosecuting Attorney
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930 Tacoma Avenue South
Tacoma, Washington 98402

Mr. Gary M. Benn #238345
MCC – Special Offender Unit
PO Box 514
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SEPTEMBER 13, 2004
Date

Christina Alburas
Christina Alburas

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COURT OF APPEALS
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STATE OF WASHINGTON
BY 

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App. A

Exhibit 113, Testimony of Walter "Pete" Hartman (First Trial), State v. Gary M. Benn, Pierce County Superior Court No. 88-1-01280-8

PENGAD-Bayonne, N. J
PLAINTIFF'S
EXHIBIT
113

88-1-01280-9

1 ~~might be too late. I think it's appropriate at this~~
2 ~~time. I think the deprivation of confrontation with~~
3 ~~respect to Mr. Patrick's testimony, that it should be~~
4 ~~striken at this time. I don't see how it can depend~~
5 ~~upon Mr. Hartman's testimony.~~

6 ~~THE COURT: I will deny the motion.~~

7 ~~MR. THOENIG: Thank you.~~

8
9 ~~(WHEREUPON, the jury returned~~
10 ~~to the courtroom.)~~

11
12 WALTER PETER HARTMAN having been duly sworn by the
13 court, testified as follows:

14 DIRECT EXAMINATION

15
16 BY MS. QUINN-BRINTNALL:

17 Q Will you please state your full name for the record
18 and spell your last name?

19 A Walter P. Hartman.

20 Q What is your middle name, Mr. Hartman?

21 A Pete. Peter.

22 ~~THE COURT: Before we proceed further,~~
23 ~~I will give the limiting instruction.~~

24 ~~Members of the jury: This witness is~~
25 ~~going to be permitted to answer certain questions by~~

002584

1 ~~the State. Before the witness is permitted to answer~~
2 ~~these questions, the court advises you that you may~~
3 ~~consider the answers only for the purpose of proving~~
4 ~~the defendant's intent as to the victim, Jack~~
5 ~~DeLothson, not for any other purpose.~~

6 ~~All right, you may proceed.~~

7 Q Do you go by the name Pete?

8 A Yes.

9 Q Where were you living in January of 1988?

10 A At Gary's Mobile Manor.

11 Q And who owned Gary's Mobile Manor at that time?

12 A I believe Gary Benn.

13 Q ~~Do you see Gary Benn in the courtroom today?~~

14 A Yes.

15 Q ~~Would you describe him for the record, please?~~

16 A ~~Dark haired gentleman with the brown sweater,~~
17 ~~checkered, diamond.~~

18 Q Other than the fact that Gary Benn was your landlord
19 in January of 1988, did you have any other business
20 dealings with Mr. Benn?

21 A Yeah.

22 Q And what dealings were those?

23 A Mr. Benn asked me to shoot somebody.

24 Q And who did he ask you to shoot?

25 A A gentlemen by the name of Jack.

002585

1855

- 1 Q Did you ever meet Jack?
- 2 A Once.
- 3 Q Where?
- 4 A At Mr. Benn's home.
- 5 Q What was the occasion for being at Mr. Benn's home?
- 6 A He just purchased a big screen television.
- 7 Q How many people were there when you met Jack?
- 8 A Approximately about 5, 6 people.
- 9 Q How did it come about that Mr. Benn asked you to shoot
- 10 Jack?
- 11 A He said something about some child problems, hassles
- 12 with his children, and molestation, and stuff.
- 13 Q Did Mr. Benn tell you how old these children were?
- 14 A No, he didn't.
- 15 Q Did you have any idea from what he was saying how old
- 16 these children were?
- 17 A No, I didn't.
- 18 Q How many times did you talk with Mr. Benn about
- 19 killing Jack?
- 20 A Just a few times.
- 21 Q Did he ever suggest to you how you were to kill Jack?
- 22 A Yes, he did.
- 23 Q When did he suggest that to you?
- 24 A He took me out to Mr. Benn's ~~(sic)~~ home.
- 25 Q To whose home?

002586

1856

1 A Jack's.

2 Q And when was this?

3 A I can't recall the dates.

4 Q Approximately when was it?

5 A Sometime in January.

6 Q January of 1988?

7 A I believe so, yes.

8 Q And he took you out there and what, if anything, did
9 he say to you when he took you out there?

10 A He just basically plotted out how he wanted Jack shot.

11 Q And what did he say?

12 A He wanted me to go to the door and shoot him when he
13 opened the door.

14 Q Did he point out Jack's home to you?

15 A He pulled into the driveway.

16 Q And where was this located?

17 A Up on South Hill of Puyallup.

18 Q Do you remember anything about the house?

19 A Just that it was an end home, cul-der-sac (sic).

20 Q Did Mr. Benn provide you with the means for killing
21 Jack?

22 A Yes, he did.

23 Q How did he do that?

24 A He pulled a handgun out of his glove box.

25 Q What did the gun look like?

002587

1857

1 A About like a .38 to maybe a .45, .9 millimeter. I am
2 unsure.

3 Q Was it a revolver or automatic, or do you remember?

4 A Automatic.

5 Q How were you supposed to gain access to Jack's house?

6 A With a vehicle, pull up to the home, ring the
7 doorbell.

8 Q And what were you supposed to get if you did what Mr.
9 Benn asked you to do?

10 A A vehicle, lots of money, possible motorcycle.

11 Q What kind of a vehicle?

12 A Ford Bronco truck.

13 Q What year?

14 A '79.

15 Q Did Mr. Benn actually have this car?

16 A Yes, he did.

17 Q When were you supposed to shoot Jack?

18 A Sometime in January.

19 Q Did you ever take money from Mr. Benn?

20 A No, ma'am.

21 Q Did you ever shoot Jack Deflethson?

22 A No, ma'am.

23 Q Why would you even consider taking a contract like
24 that?

25 A I really didn't consider it. I thought it was just

002588

1 go through with the contract?

2 A I gave gave him no answers on anything.

3 Q When did you leave Gary's Mobile Manor?

4 A I believe in January, or the following month.

5 Q When did you find out Jack was dead?

6 A I didn't know until I was approached by the officers.

7 Q And when was that?

8 A Just recently here, Wednesday.

9 Q So you didn't know until Wednesday of 1990? ~~(sic)~~

10 A I knew something had happened but I didn't know that
11 he had actually killed anybody or anyone was killed.

12 Q How did you find out something happened?

13 A Two detectives came to my home.

14 Q When?

15 A I believe it was a Wednesday, on the 11th of this
16 month.

17 Q So you didn't know anything about this in 1988?

18 A Nope.

19 Q Do you remember what day of the week you moved out of
20 Gary's Mobile Manor? Whether it was a weekend or
21 during the week?

22 A I believe it was during the week.

23 Q Were you the actual attendant of the Mobile Manor?

24 A Yes, I was.

25 Q And did you share the trailer with anyone else?

002590

- 1 A Yes, I did.
- 2 Q Was the trailer in your name or somebody else's?
- 3 A I believe both of our names.
- 4 Q When was the last time ~~other than during Court~~
5 ~~proceedings~~ that you saw Gary Benn?
- 6 A The day that he asked me and took me out to Jack's
7 house.
- 8 Q And that was sometime in January or February of '88;
9 is that correct?
- 10 A That's correct.
- 11 Q When you were moving out of Gary's Mobile Manor in
12 February or January of 1988, were there any police
13 officers around at that time?
- 14 A Yes, there was.
- 15 Q Did you talk to any of them?
- 16 A Yes, I did.
- 17 Q What did they ask you?
- 18 A They asked me if I knew anything, or the whereabouts
19 of Mr. Benn.
- 20 Q And what did you tell them?
- 21 A Told them no.
- 22 Q Did they say why they were asking about Mr. Benn?
- 23 A No, they didn't.
- 24 Q So you didn't know that Jack was dead until this
25 month?

1 A No. I knew something had happened, though.

2 Q You knew something had happened?

3 A By the police being there. But I didn't know what
4 they were there for.

5 Q This something that had happened, did you have any
6 indication that it was connected with Jack?

7 A No, just by what I thought, my opinions.

8 Q You referred to the house that you were taken to as
9 Mr. Benn's house. What was your understanding of the
10 relationship between Jack and the defendant?

11 A I understood he was his brother.

12 ~~MR. QUINN DRINEMILL: No further~~
13 ~~questions.~~

14 ~~MR. TROENIS: Your Honor, we have a~~
15 ~~matter to bring up with you.~~

16 ~~THE COURT: Would the jury please step~~
17 ~~in the jury room and do not discuss the case.~~

18
19 ~~(WHEREUPON, the following proceedings~~
20 ~~were heard outside the presence of~~
21 ~~the jury:)~~

22 ~~MR. TROENIS: I would ask that the~~
23 ~~courtroom be cleaned.~~

24 ~~THE COURT: Does this have to do~~
25 ~~with --~~

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1 talk.

2 Q You got all the way out to a house on the end of a
3 street, and you say that you didn't even consider
4 taking the contract?

5 A No.

6 Q Didn't you know that that's where you were going when
7 you got in the car?

8 A No.

9 Q Well, how is it that you ended up there, then?

10 A We were supposed to go get some parts at Ernst and Pay
11 'N Pak. He asked me along for the ride.

12 Q And then what happened?

13 A Then he said he had to go to his brothers's house.

14 Q And then what happened?

15 A Then he explained how he wanted his brother shot.

16 Q Did he tell you why he wanted him killed?

17 A Yes.

18 Q What did he say?

19 A For things that he's done to his children and family.

20 Q Did he elaborate on that?

21 A That was all that was spoken about it.

22 Q What did you understand that Mr. Deflethson had done
23 to his children and family?

24 A Raped, assaulted them, destroyed, damaged things.

25 Q Did you ever tell Gary Benn that you were not going to

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App. B

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And I don't think that that is enough basis for believing anything so serious.

Q But then you don't know what the rest of the information is in connection with this case or the investigation, do you?

A That's right. I don't think I need to know.

Q Well, what if the rest of the investigation showed telephone threats to the witnesses and to the defendant and direct threats of physical violence if he didn't take the fall for this murder?

MR. THOENIG: Your Honor, I hate to interrupt, but it's the type of hypothetical that can't be posed in this. They have to be from facts in evidence, and there are no such facts in evidence in this case. And they have no relevancy to those facts in evidence.

MS. QUINN-BRINTNALL: I disagree, Your Honor. We're here determining the defendant's competency, and we don't have to base it specifically on the facts in evidence in this trial because that's not what the issue is at that particular point in time.

MR. THOENIG: Well, for example, I can hypothesize what if the evidence shows that he killed four other people prior to this, Your Honor. It has

no relevance. Unless we have a factual basis for it, those types of hypotheticals, referring to hypothetical facts that haven't been proved, have no relevancy, and his testimony would have no relevancy.

THE COURT: Any further response?

MS. QUINN-BRINTNALL: It would not be possible for me, Your Honor, in the trial in the case in chief, to bring in individuals who would testify before the jury to the various threats that would have been going with a --

THE COURT: It wouldn't be possible in the case in chief, but is it possible now in this hearing?

MS. QUINN-BRINTNALL: Yes.

THE COURT: Do you intend to do that?

MS. QUINN-BRINTNALL: I had not intended to do it, no.

THE COURT: Well, unless you intend to do it, I'm going to sustain the objection.

MS. QUINN-BRINTNALL: Very well.

Q So your determination that the defendant's belief that he or members of his family could be in danger by testifying truthfully to what actually occurred, is based solely on what he has told you?

A Yes, it's based upon my observations of him.

Q If there was testimony in the trial that he had attempted to hire an individual to kill a state's witness who was going to testify against him, would that in any way affect your determination that Mr. Benn's concerns, if he were to testify, would be delusional?

A Well, all of that information would have to be weighed by the Court. I would have to have a lot of information to make some of those decisions. I would want to know what the reality is of that complaint. I would want something pretty solid before I would jump to any conclusions. So I don't know how to answer that, to be blunt about it. Obviously if certain information came along, it would have to be checked out and verified. On the other hand, I'd have to really make sure that it was solid information before I would vary my opinion. The reality is I think you can interact with another human without knowing all of this contextual information out here and determine whether or not they have a delusion. I don't think you would have much problem with it if you would just really listen. And you wouldn't have to have the Contextual information. If you came up to me and said, you know Dr. Cripe, I think the witnesses in this case are going to kill me. Well, the first thing

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CRIPE - Cross (Comp. Hg.)

I would say, well, that sounds terrible, how do you know that? And if you had nothing to substantiate it except maybe you overheard a whisper or something in the hall, I would have concerns about you and I wouldn't need all of the other information.

Now, if you can prove to me and it came along that there were in fact people threatening your life, then it would be another story. But I don't think the evidence exists. It's too thin of information on which to base such a firm belief that he has about this. So I think it's stepped beyond the line of just conjecture into a firm delusional, irrational belief, and I think you can make that judgment without always knowing all of the external realities.

Q Assume, for the sake of argument right now, that the defendant made attempts to hire an individual to kill Pete, and that -- anticipated -- assume that the defendant made attempts to hire an individual to kill Pete. That when Pete was found, mid trial, the defendant's mental state changed so that he feared testifying because he thought Pete would kill him. Now, would that change?

A Well, it certainly should affect the Court's thinking if the evidence for all that could be very solid, and not just, of course, hearsay or whatever. So I would

1 concerns about another individual indicative of
2 delusional thinking? If it is, half of the state's
3 witnesses who are afraid of the defendant would, by
4 that analysis, be considered delusional. We know that
5 Pete was thought by the defendant to be a hit man,
6 based on his own statements. Either he was thought to
7 be a hit man because Pete held himself out to the
8 defendant to be -- that's one of the stories that he
9 has told -- or Benn approached him to do the job,
10 knowing -- and we have this on the record -- that Jack
11 had a reputation for violence. That was why it was
12 going to be necessary for Pete to knock on the door
13 and shoot immediately when the door was opened. We
14 know the defendant wanted Pete killed, and we know
15 that the defendant wanted Bill Hastings implicated and
16 blamed for the killings of Jack Deflethson and Mike
17 Nelson and Pete. We know some or several of the
18 witnesses on the protection list are cooperating with
19 the State; they're testifying by subpoena only. Some
20 of them are indicating that they will only testify if
21 there is a penalty phase. We know that the witnesses
22 are afraid of Benn, even though he is in jail and
23 potentially or presumably unable to reach. And I ask
24 again, are they delusional? And I submit that they
25 are not; that there is evidence that Benn is capable

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of violent conduct, just as there is evidence that Pete is capable of violent conduct.

We know something else. We know that everything that has been testified to here is minimal compared with Harris' testimony. We know that Harris met the minimum competency requirement. He had a fixed delusion of a conspiracy of the local Klu Klux Klan; he indicated that he believed he had been shot by the Green River Killer previously; he indicated that the detective involved in his case was involved with a woman who reputedly saw all the testimony go just right on down the line with the delusions and the accusations against the State and against his own counsel, and the Supreme Court still held that he was capable of making determinations concerning his defense.

We know that in this case. We know that he faked bad the MMPI, we know that Dr. Cripe hit it; we know that when Dr. Reddick presented him with another MMPI, he would not take it. He made a conscious decision at that time to protect himself by not taking the test that he knew was going to demonstrate that he was malingering. There's no evidence in this Court of erratic behavior.

And the other point that is perhaps the

1 (Sealed portion.)

2
3 MR. THOENIG: Your Honor, I am a little
4 bit unclear --

5 THE COURT: We still have the witness
6 here. Please step down, and, let's see, where can we
7 have you go? Can he stand right in there for a
8 minute?

9 THE JAILER: (Nods head affirmatively.)

10 MR. THOENIG: Your Honor, we have been
11 directed by Mr. Benn not to cross-examine this witness
12 out of fears that he has for his family's safety,
13 motivated.

14 I personally am in a conflict with
15 State v. Jones. I am not sure how to read that case.
16 Arguably under that, this is one of the critical
17 witnesses. It's the defendant's family that he fears
18 for. I think under Jones he has a right to control
19 that. Unless I am directed to do otherwise, Mr. Alton
20 and I will not conduct a cross-examination on the
21 belief that we cannot go against our client's wishes
22 with respect the to this witness.

23 THE COURT: I'm not going to direct you
24 to do anything. I have given you what I indicated
25 what I think is contrary law, and that is the ABA

1 Standard 4-5.2, which indicates that, Subsection B,
2 decisions on what witnesses to call, whether and how
3 to conduct cross-examination, and so on. All other
4 strategic and tactical decisions are the exclusive
5 province of the lawyer, after consultation with the
6 client.

7 MR. THOENIG: I understand, Your Honor.
8 I just wanted to make it clear on the record that we
9 will not be doing cross-examination, and the reason we
10 will not is counsel's reading of State v. Jones and
11 our client's specific instructions not to, because he
12 fears if we did, it would result in fear (sic) to his
13 family. And we believe these matters are delusional,
14 but we state that we believe that they are sincere.

15 THE COURT: All right.

16 MR. THOENIG: Thank you. Bring
17 everybody back.

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