

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. -----

-----,

Defendant.

**NOTICE OF MOTION AND MOTION FOR CONTINUANCE OF
JURY TRIAL**

The Defendant, appearing specially by his attorneys, X & X, S.C., Attorney X D. X, will move this Court, the Honorable X X presiding, at the X County Courthouse, on the ____ day of _____, 2014, at _____.M., or as soon thereafter as counsel may be heard, for an order granting a continuance of the jury trial in this case, which is currently scheduled to begin on April 7, 2014.

History

On October 12, 2012 Mr. X was charged with Child Abuse – Intentionally Causing Great Bodily Harm and Neglecting a Child – Great Bodily Harm. A preliminary hearing was held on October 22, 2012 at which time Mr. X was bound over for trial. Discovery was turned over by the State on or about the same time. The case, at that point, was classified as “child abuse” and so it was assigned to Judge X X.

Assistant District Attorney X X and the undersigned appeared in Judge X’s court on November 16, 2012 at which time the case was rescheduled for pretrial conference on December 20, 2012. There was some discussion at that time regarding the child’s condition, and the prognosis did not look good. In order to properly defend this case, the

defense needed all of the child's medical records, from conception through placement in Children's Hospital. Initially the State objected to the defendant's request. As a result of this objection, Judge X ordered the undersigned to file a formal motion with the court. On February 5, the court docketed the defendant's motion to compel the release of these medical records. A hearing was held on February 28, 2013 at which time the State rescinded its objection to the defendant receiving the medical records. Judge X signed seven subpoenas and the matter was adjourned for a "status conference" on April 25, 2013, so that the various medical records could be obtained from the various providers.

The defense was not sitting on its hands during this time. Simultaneously, the defense prepared a motion to suppress Mr. X's statements. The "confession" secured from Mr. X was the product of multiple interrogations, over the span of two days. In that filing (which has yet to be ruled on), the defense asserts that the tactics used by Detective Fonte were so extraordinary, that they overcame Mr. X's free-will. The defendant told Fonte over two dozen times that he did not cause injuries to his son, but Fonte would not accept any such claim. The motion filed by the defense was extraordinarily detailed – it is 24 pages long. The defense analyzed the interrogations that the defendant was subjected to and supported those arguments with an extensive amount of research and authority. The undersigned also applied for expert funding with the public defender's office and funding was approved to employ Dr. X X out of Beloit College. Dr. X is an expert on false confessions, having studied these matters in a professional capacity. Dr. X has also agreed to testify for the defense at the motion hearing scheduled on this issue.

On April 25, 2013 an amended complaint was filed, because Mr. X's son had passed away. On May 3, 2013 an arraignment was held in front of Judge X, who was in

“homicide court” at that time. Because subpoenas for medical records had already been signed, the defense had been receiving thousands of pages of records from the seven different entities involved. The parties made their first appearance in front of Your Honor on July 18, 2013. At that time, the defense still did not have the autopsy report. Without that report, it was impossible to determine which specialists would be needed for this case.

This case is extraordinarily complex and is even more complex than most “ordinary” shaken baby cases. The child in this case was born prematurely and as a result, the birth records were significantly more voluminous than normal. This case was also complicated by the length of time that life support measures were used to keep the child alive (something like six months).

Once the autopsy report was prepared and once the defense had secured all of the medical records, the public defender’s office approved funding for Nurse Deb X to organize more than 2,000 pages of medical records and to prepare summaries. Our firm has defended numerous cases of this nature, and the experts who will consult with the defense will not do so until the medical records are organized and summarized. Once the autopsy report was turned over, we reviewed it immediately. In order to move as expeditiously as possible my partner, Attorney X X, spoke with the State’s medical examiner, Dr. Brian Peterson, about his findings. Of particular note was the fact that he noted “**clinical history** of injury to the spine” and “**clinical history** of fractured ribs.” This was significant in that it suggested that Dr. Peterson did not actually observe any fractured bones – either fractured or healing. This suggested the possibility of Rickets existing in the child. Rickets is a condition that can be mistaken for fractures. This is

significant in that the defendant is accused of causing numerous fractures to the ribs of the child, but it appeared after reviewing the autopsy report, that there may not even have been fractures. If it could be substantiated that there were no broken ribs, and that Ricketts had been mistaken for the fractures, the defendant's "confession" would further be called into question.

So, our office consulted with Dr. X out of Hershey Medical Center in Hershey, Pennsylvania. Dr. X is a radiologist and has worked closely with us on other similar cases. Based on her preliminary review, she instructed us to consult with Dr. X X at Oxford in England. Dr. X is a pathologist but she is one of the premier experts on venous thrombosis. Venous thrombosis is essentially a blood clot occurring inside a blood vessel. These can embolize and can cause death. Because this may have been the cause of death (rather than shaking or impact), Dr. X advised us to first get a report from Dr. X.

Our office moved promptly on this. On August 19 and again on August 22, our office was in email contact with Dr. X. Her initial impression was that there might indeed be venous thrombosis in the child. She requested the brain dura and spinal cord sections with recuts. Dr. X provided us with a standard "tissue request" on August 20, 2013. None of the attorneys in this case possess the actual tissue samples, those are possessed by the medical examiner's office. This request therefore had to go through their office. Attorney X was in regular contact with the medical examiner's office, but the tissues were never sent. On October 14, 2013 the medical examiner's office assured us that these samples would be shipped. Finally, the tissue samples were shipped and on October 23, 2013 Dr. X confirmed that she was in receipt of them. Dr. X then requested that our office provide her with the autopsy, birth labs, birth radiology reports, birth summary, Children's

Hospital lab results, Children's Hospital radiology reports, Children's Hospital summary, pediatric records and vitamin notes.

While Dr. X was working on her end of things, we were consulting with Dr. Patrick Barnes out of Stanford. We have a working relationship with him, from our defense of other cases of this nature. Dr. Barnes and his wife are the best experts on Ricketts disease, which as noted above, was a condition we believed the child to have had. Our office was in regular contact with Dr. Barnes and he kept telling us he would get to this project.

Roughly a week after she received the tissue samples from the State's medical examiner, Dr. X asked that our office provide powerpoint images of the scans that were done on the child and she also asked for autopsy pictures of the brain. Meanwhile, Dr. X had prepared a useful powerpoint presentation to aid Dr. X in her review. The powerpoint and autopsy pictures were provided forthwith to Dr. X. She then informed us that she would need additional radiology records. We made sure these were sent to Dr. X and she returned them to our office on November 9, 2013. That same day, we sent them via fed-ex to Dr. X, so she could continue with her work.

In addition to these specialists, our office has retained Dr. X X so that she can prepare a complete forensic report, tying together the different conclusions from the different experts. Dr. X's powerpoint presentation was sent to Dr. X on December 3, 2013. On December 4, we followed up with Dr. Barnes regarding the Ricketts condition and he informed us he would be working on it. On January 3, 2014 we again wrote to him, stressing the importance of these conclusions and the need to have a report generated. On January 9, 2014 we received our final report from Dr. X regarding the

venous thrombosis. That report was promptly turned over to Assistant District Attorney X. Her conclusions supported what we expected. Based on her review of the dura membrane of the deceased child she concluded that the injuries were older than thought – perhaps by weeks or months. She also studied the brain pathology and the cysts that developed after admission and she concluded that these were not supportive of trauma. Her conclusions were extremely significant in that she concludes that the imaging, pathology and clinical history are consistent with venous thrombosis.

Dr. Barnes informed our office in late January that he was not going to be able to work on this case, after all. This created a problem given the April trial date and the need to have a determination on the Rickets and the supposed fractures. As noted, we had also been working closely with Dr. X out of Hershey. When Dr. Barnes gave us this news, we immediately asked Dr. X to do a draft report, addressing these issues. We made this request on January 29, 2014. Throughout the entire month of February our office has been in constant contact with Dr. X, primarily via email.

On February 11, 2014 Assistant District Attorney X asked us to provide him with a second expert report, if one existed. Dr. X informed our office that she had a trial, deposition and clinical assignments. We asked her to make this a priority but she requested that we compile and send her a significant amount of additional materials, including the “first hospital and labs at first hospital, transfer EMT notes and admission notes to second hospital.”

Dr. X completed her initial review and reported back that the child had an elevated parathyroid hormone level. An elevated parathyroid hormone is unusual and because this was a prematurely born infant, we need a specialist to examine this

condition. Dr. X also noted that the child's presentation was predominantly one of seizures that led to the intubation. Our office has been referred to Dr. Chuck X to examine the elevated parathyroid hormone and to Dr. Joseph X for neurology.

We have immediately contacted both of these doctors. Both are willing to assist. Dr. X can provide an initial overview relatively quickly, but it will take him until late March or early April to study the entire medical history and to provide that analysis. Dr. X reports that he will review the materials that are already uploaded to dropbox and he will be able to provide us with a report in that same time period.

Legal Analysis

The United States Supreme Court has warned that a trial court's insistence upon expeditiousness in the face of a defendant's justifiable request for delay can violate the defendant's right to due process. *See Ungar v. Sarafite*, 376 U.S. 575, 589 (1964), *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983). The Supreme Court has also held that the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). This includes a defendant's right to be heard in his or her defense and the right to compel the attendance of witnesses the defendant wishes to call, to offer their testimony, and to question them. *See In re Oliver*, 333 U.S. 257, 273 (1948). Indeed, few rights are more fundamental than of an accused to present witnesses in his own defense; the ability to do so is "an essential attribute of the adversary system itself." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). Of course, these rights are meaningless unless they can be effectively carried out by defense counsel on behalf of a defendant. ABA Defense Function Standard 4-4.1, titled "Duty to

Investigate,” puts into sharp focus what acts the undersigned must take on behalf of the Defendant as she represents her in this complex medical case:

(a) *Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused’s admissions or statements to defense counsel of facts constituting guilt or the accused’s desire to plead guilty.*

(4-4.1(a)) (emphasis added).

The Seventh Circuit Court of Appeals has recited several factors a court should consider when deciding a motion to adjourn or continue, including: (1) the amount of time available for preparation; (2) the likelihood of prejudice from the denial of the continuance; (3) the defendant’s role in shortening the effective preparation time; (4) the degree of complexity of the case; (5) the availability of discovery from the prosecution; (6) the likelihood that a continuance will satisfy the movant’s needs; and (7) the inconvenience and burden to the court and its pending case load. *See United States v. Crowder*, 588 F.3d 929, 936 (2009). In the present case, virtually all these factors weigh in favor of Mr. X’s continuance request.

First, the amount of time to prepare is limited by the speed with which the experts can evaluate the medical reports. Second, substantial prejudice will occur without an adjournment, because the defendant will be deprived of the best defense he can have. Cases of this nature are different than virtually every other type of criminal case – in some respects, they are more akin to civil cases because of the size and complexity of the technical medical issues. Third, the Defendant had no role in shortening the effective

preparation time for this new information, as our office has worked diligently on this and been in contact with numerous medical experts, every step of the way. Fourth, this is a highly complex case, as discussed above. Fifth, preparation in this case for both the Defendant and the State has little relation to the formal “discovery process,” but is dependent on the speed by which medical experts can analyze complex reports, render opinions, and make themselves available to testify. Sixth, the adjournment requested will satisfy the Defendant’s needs by allowing time to complete the medical investigation, and prepare for trial accordingly. Seventh and lastly, while an adjournment is an inconvenience in the present case, this cannot be permitted to outweigh and trump all the other concerns present in allowing the Defendant to present a complete defense and in allowing counsel to provide effective assistance of counsel. *See Ungar and Morris, supra.*

In recent years, there has been an “emergence of a legitimate and significant dispute within the medical community as to the cause of” injuries that have traditionally been attributed to intentional head trauma. *State v. Edmunds*, 2008 WI App 33, ¶ 23, 308 Wis. 2d 374, 392, 746 N.W.2d 590, 599. As Justice Crooks noted in his dissent in *State v. Ward*, 2009 WI 60, 318 Wis. 2d 301, 767 N.W.2d 236, “Medical evidence in so-called ‘shaken baby’ cases is very much in dispute at the moment, and the risk of wrongful convictions based on powerful but ultimately discredited expert testimony is significant.” *Id.*, ¶ 84 n.4, 318 Wis. 2d at 362 n.4, 767 N.W.2d at 266 n.4. Justice Crooks made this observation in a dissent opened with his self-identification as “a father and a grandfather” *Id.*, ¶ 69, 318 Wis. 2d at 355, 767 N.W.2d at 262.

Conclusion

Mr. X is in custody, but he has been kept apprised of every update in this case and he understands just how significant the medical evidence is for his defense. This Court rightly expects that matters will be diligently investigated and pursued. Mr. X's matter has been given the attention it deserves and we have been in regular contact with all of the specialists that we need in this case.

The undersigned truly believed that an April 7, 2014 trial date would be realistic when it was set. On an almost daily basis our office has taken some direct action to further Mr. X's defense. It is clear at this point, however, that our investigation of the medical issues will not be complete until the end of April. Consequently, a realistic trial date is in June. It would be our proposal that the final deadline for providing medical summaries to the State be May 1, 2014, with a trial date scheduled in June. There have been delays in this case, but many of them have little to do with any action or inaction on the defense side (for example the two month delay in providing the autopsy report, the delay in the medical examiner providing tissue samples to our expert, and the initial delay in releasing medical records because of the state's objection).

This motion is offered so that Your Honor has a complete historical picture of this case. The defense has sent a memo to each of the possible experts (Dr. X, Dr. X, Dr. X, Dr. X, and Dr. X) and will have exact dates by which they would be available for trial, when this motion is heard. A realistic length for this trial is 7 – 10 days, given the complexity of the medical issues. The State has also indicated it may raise Daubert challenges to one or more defense experts, which will require a hearing as well.

Dated this 23rd day of February, 2014.

X & X, S.C.

X D. X
State Bar No.