CASE NO. 15-1145

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Terry Ceasor,

Petitioner-Appellant

v.

John Ocweija, Warden

Respondent-Appellee

On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division; Case No. 5:08-CV-13641, Honorable John Corbett O'Meara

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AMICUS CURIAE BRIEF OF THE INNOCENCE NETWORK IN SUPPORT OF THE PETITIONER-APPELLANT'S REQUEST TO VACATE AND REMAND THE DISTRICT COURT'S DECISION

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 15-1145 Case Name: Ceasor v. Ocweija

Name of counsel: Foley & Lardner LLP

Pursuant to 6th Cir. R. 26.1, The Innocence Network as amicus curiae
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on November 10, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Tamar N. Dolcourt (P73425)
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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STATEMENT OF QUESTIONS INVOLVED

In its September 21, 2015 Order granting Petitioner-Appellant Terry Ceasor's ("Ceasor") Motion for Certificate of Appeal, this Court instructed the parties to brief Ceasor's claim for ineffective assistance of appellate counsel.

In this brief, the Innocence Network will focus solely on the key issue of whether this Court should follow an emerging trend and find ineffective assistance of counsel where, in a case involving Shaken Baby Syndrome ("SBS") and no direct evidence of abuse, defendant's counsel fails to call a qualified expert witness to rebut the testimony of the prosecution's expert witness.[1]

Petitioner-Appellant says "Yes"

Respondent-Appellee says "No."

Amicus curiae, Innocence Network, says "Yes."

[1] This case comes to this Court because of the ineffective assistance of Ceasor's appellate counsel that arose from appellate counsel's failure to adequately develop a record on the ineffective assistance of Ceasor's trial counsel and particularly trial counsel's failure to call an expert witness to counter the State's expert.

AMICUS IDENTITY, INTEREST AND AUTHORITY

The Innocence Network ("Network") is an international affiliation of more than 70 different organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working to redress the causes of wrongful convictions. The Network seeks to remedy wrongful convictions and prevent the continued incarceration of innocent individuals. Improper forensic science is a leading contributing cause of wrongful convictions in the United States. In fact, one study found that in 60% of cases involving wrongful convictions, "forensic analysts called by the prosecution provided invalid testimony at trial—that is, testimony with conclusions misstating empirical data or wholly unsupported by empirical data." B. Garrett & P. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1 (2009) cited by the U.S. Supreme Court in *Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014).

Cases in which defense counsel simply cross-examines prosecution experts instead of providing available contradictory expert testimony must be deemed ineffective assistance of counsel, especially in cases for which prosecutors rely on expert testimony to establish the only evidence of a crime. As a result, the Network has a strong professional interest in the determination of the issues presented in this case.

Counsel for the parties consented to the filing of this amicus brief. *See* Fed. R. App. P. 29.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5): (i) neither party's counsel authored this brief in whole or in part; (ii) neither party's counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) no person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

Ceasor's trial and appellate counsel were ineffective because: (i) trial counsel failed to secure an expert witness to testify on the validity of a diagnosis of Shaken Baby Syndrome based exclusively on the presence of certain medical symptoms, which was the sole issue in the case, and failed to investigate whether the State would provide funds for such an expert (it would); and (ii) appellate counsel failed to follow Michigan Court Rules in developing an evidentiary record to demonstrate trial counsel's ineffectiveness.

A growing body of authority at both the federal and state level, including precedent from the United States Supreme Court, recognizes that when the only evidence in a criminal case is testimony from the prosecution's expert witness, counsel may be ineffective for failing to call an expert to challenge that testimony.

In cases involving what is colloquially called Shaken Baby Syndrome ("SBS"), also known as Abusive Head Trauma ("AHT"), the failure to call an expert is indefensible for two reasons. First, these cases tend to involve no direct evidence of abuse or outward signs of trauma. Instead, the diagnosis, and therefore the entire case, relies on finding three clinical symptoms: (1) retinal hemorrhages (bleeding on the inside surface of the rear part of the eye), (2) subdural hemorrhaging and/or hematoma (bleeding between the outer layers of brain tissue), and/or (3) cerebral edema (brain swelling) (collectively the "triad"). Testimony

regarding the triad involves reading and interpreting medical test results, and therefore the case rests entirely on the testimony of the experts involved.

Second, and perhaps more critical, the science surrounding SBS/AHT is far from certain. At one time, many experts believed that outside of severe physical trauma such as a car accident, the triad could only arise in cases where the victim was severely and intentionally shaken. However, over the past 15 years, that conclusion has been tested and found lacking. *See*, *e.g.*, Mark Donohoe*, Evidence-Based Medicine and Shaken Baby Syndrome: Part I: Literature Review, 1966-1998*, 24 Am. J. Forensic Med. & Pathology 239, 239 (2003). There is now significant evidence that the findings commonly associated with SBS/AHT can arise without any abuse whatsoever. Because of this new evidence, which undercuts the traditional triad-based SBS/AHT diagnosis, there is a growing recognition that in cases where there is no other evidence of abuse, the failure of a defense attorney to call a qualified expert to testify about the uncertainty of an SBS/AHT diagnosis constitutes ineffective assistance of counsel. *See* D. Tuerkheimer, *Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 Ala. L. Rev. 513, 529-532 (2011) (collecting examples of courts questioning the science behind SBS/AHT convictions).

STATEMENT OF RELEVANT PROCEEDINGS AND FACTS

The factual and procedural background of this case is set forth in Ceasor's Brief on Appeal, pages 3-31.

ARGUMENT

I. Public Policy Compels A Finding Of Ineffective Assistance Of Counsel In Cases Where There Is A Significant Scientific Dispute Over The Evidence And The Defense Fails To Produce An Expert Witness

A. Prosecutions That Rely Almost Entirely Upon Expert Testimony Regarding Untested Hypotheses, Such as the Shaken Baby Hypothesis, Pose a Uniquely Serious Risk of Wrongful Conviction

SBS/AHT is a uniquely problematic legal phenomenon because it is often based entirely on expert testimony: testimony regarding a particular set of injuries establishes the presence of SBS/AHT; testimony regarding the force necessary to cause the injuries establishes the mechanism of death, causation and intent; and testimony regarding the rapid onset of symptoms identifies the perpetrator by mere physical proximity to the injured party. *See* D. Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome And The Criminal Courts*, 87 Wash. U. L. Rev. 1, 5 (2009). Therefore, defense counsel's failure to provide available contradictory expert testimony must be deemed ineffective assistance of counsel in cases that rely solely on such testimony to establish the only evidence that a crime was even committed.

In cases where the triad was present, the mere existence of injuries has been used, and was used in the case before this Court, to sustain proof of guilt beyond a reasonable doubt even in the absence of direct evidence of abuse. However, there is significant, longstanding, credible, scientific literature showing that a diagnosis

of SBS/AHT based on the triad alone is scientifically unsupportable. This "medical diagnosis of murder" poses a substantial threat of wrongful conviction because it is based solely on testimony that rests on an uncertain foundation. *See* Tuerkheimer, *Innocence, supra*, 5. For these reasons, the triad can no longer support, by itself, a finding of guilt beyond a reasonable doubt. Tuerkheimer, *Innocence*, *supra*, 16; S. Narang, *A Daubert Analysis of Abusive Head Trauma/ Shaken Baby Syndrome*, 11 Hous. J. Health Law and Pol'y 505, 529-532 (2011).

In addition, where expert testimony provides the basis for conviction, the lack of scientific training and knowledge among the public is a significant challenge to innocent defendants seeking to offer contradictory medical or scientific evidence. Tuerkheimer, *Innocence, supra*, 40. The problem is not just lack of scientific knowledge, but a body of outdated and invalid knowledge that has been, and often continues to be, an active part of prosecutorial training. *Id*. at 26-30.

Courts often assume that the adversarial system will expose any weaknesses. The Supreme Court has stated that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharms*., 509 U.S. 579, 596 (1993). However, this presumes competent representation and fails to address the problems defendants face in

identifying, accessing and paying for experts—problems not faced by the state. In addition, research shows that jurors, perhaps because of their lack of scientific training, are often less likely to understand weaknesses in expert testimony based on attorney cross-examination rather than those highlighted by expert testimony. *See* Jenifer E. Laurin, *Criminal Law's Science Lag: How Criminal Justice Meets Changed Scientific Understanding*, 93 Tex. L. Rev. 1751, 1758 n. 42 (2015); *see also Showers v. Beard*, 635 F.3d 625, 631 (3d Cir. 2011) (finding that although defense counsel cross-examined the prosecution witness "his testimony was not nearly as strong as that which could have been provided by an expert" and thus the defendant was entitled to a new trial where counsel failed to call an expert witness to contradict the prosecution's expert).

For these reasons, cases in which defense counsel simply cross-examines prosecution experts instead of providing available contradictory expert testimony must be deemed ineffective assistance of counsel in SBS/AHT cases that rely on expert testimony to establish the only evidence of a crime.

B. SBS/AHT Convictions Based Solely On The Presence of Certain Medical Findings Were Never Supported By Sound, Evidence-Based Science

What we see in the case of SBS/AHT convictions based on the presence of the triad is not merely the evolution of medical and scientific knowledge, but a narrative of scientific and prosecutorial overreach. The scientific and medical

evidence never supported the conclusion that these three particular injuries are sufficient to support a medical diagnosis of SBS/AHT, nor could it support a legal conclusion of proof beyond a reasonable doubt.[2] SBS/AHT is a hypothesis that has never been rigorously tested. What little was once thought true about the diagnosis has proven false in the years since it was first proposed. In fact, one of the doctors who initially hypothesized that shaking could explain these injuries now strenuously counsels against medical professionals making such a diagnosis based solely on the presence of these particular injuries. *Compare* A. Norman Guthkelch, *Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury*, 12 Hous. J. Health L. & Pol'y 201 (2012) *with* A. Norman Guthkelch, *Infantile Subdural Hematoma and its Relationship to Whiplash Injuries*, Br. Med. J. May 22:2 (5759):430–431 (1971); *see also Ex parte Henderson*, 384 S.W.3d 833, 833-34 (Tex. Crim. App. 2012) (medical examiner, who testified for the state at trial, switched sides and at the evidentiary hearing and stated "he now believes that there is no way to determine with a reasonable degree of medical certainty whether [the victim's] injuries resulted from an intentional act of abuse or an accidental fall").

[2] While some abuse cases may involve direct evidence of guilt, cases that rely solely on the triad of retinal hemorrhaging, subdural hematoma and/or brain swelling are insufficient to sustain either a medical diagnosis or a legal finding of guilt. *See, e.g.*, Tuerkheimer, *Innocence*, *supra*, 6-7, 11.

SBS/AHT emerged in the 1970s as a hypothetical explanation for children exhibiting injuries including retinal hemorrhage, subdural hematoma and/or brain swelling with no external signs of trauma. *See* Guthkelch, *Whiplash*, *supra*; John Caffey, *On the Theory and Practice of Shaking Infants*, 124 Am. J. Diseases Children 161(1972). Yet, the first crack in the scientific moorings of the triad hypothesis were apparent as early as 1987 when a team of researchers that included both biomechanical engineers and neuroscientists concluded that "severe head injuries commonly diagnosed as shaking injuries require impact to occur and that shaking alone in an otherwise normal baby is unlikely to cause the [Triad]." A.C. Duhaime et al., *The Shaken Baby Syndrome: A Clinical, Pathological, and Biomechanical Study*, J. Neurosurg. 66:409 (1987). While this early study exposed the flaws in the triad hypothesis, it was not until the late 1990s that the early studies supporting the triad hypothesis were widely exposed as invalid by advances in medical imaging technology and the emergent "evidence-based medicine" movement. *See* Donohoe, *supra,* 239; Tuerkheimer, *Innocence*, *supra*, 14.

By 2003, researchers had reviewed the growing body of research assembled and concluded that the early research contained "inadequate scientific evidence to come to a firm conclusion on most aspects of causation, diagnosis, treatment, or any other matters pertaining to SBS . . . [and] serious data gaps, flaws of logic, [and] inconsistency of case determination" meant that the conclusion that the triad

was diagnostic of shaking "was unsustainable." Donohoe, *supra*, 241. To this day the triad remains an untested hypothesis plagued by circular research—a fact acknowledged even by it supporters—which has never been exposed to rigorous, randomized, controlled studies. *See*, *e.g.*, Narang, *supra*, 529-532.

An influential study published in 2001 by Dr. John Plunkett demonstrated that children could suffer fatal falls of three feet or fewer and present with retinal hemorrhage, subdural hematoma, and cerebral edema or encephalopathy. John Plunkett, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, 4 Am. J. For. Med. Path 24 (2001). In addition to short falls, evidence-based research now shows that a number of conditions cause the same findings often attributed to shaking or abuse, including, but not limited to: congenital malformations, metabolic disorders, hematological diseases, infectious diseases, autoimmune conditions, birth defects, birth injury, and hypoxia. Tuerkheimer, *Epistemic Contingency*, *supra*, 517.

For these reasons, contemporary scientific consensus agrees that suspected cases of SBS/AHT be treated to a rigorous differential diagnosis that requires evidence of abuse **in addition to** the presence of the triad. Tuerkheimer, *Innocence*, *supra*, 16; Narang, *supra*, 572-573.

II. The Failure To Adequately Investigate An Expert Witness And Present Expert Testimony In An SBS/AHT Case Constitutes Ineffective Assistance Of Counsel

Both the United States and Michigan Constitutions afford criminal defendants the right to effective assistance of counsel. U.S. CONST., amend. VI; MICH. CONST. of 1963, art. I, § 20 (1963). *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (To establish ineffective assistance of counsel, a defendant must show: (a) "that counsel's representation fell below an objective standard of reasonableness and (b) "that the deficient performance prejudiced the defense."); *Evitts v. Lucey*, 469 U.S. 387, 388 (1985) (the 6th and 14th Amendments also guarantee criminal defendants the right to effective assistance of appellate counsel); *Roe v. Ortega*, 528 U.S. 470, 476-77 (2000) (courts must apply the same standard to claims of ineffective assistance of appellate counsel as they do for claims of ineffective assistance of trial counsel).

A. Failure Of Defense Counsel To Adequately Investigate The Availability Of Expert Witnesses Is Objectively Unreasonable

In making choices related to trial strategy, including whether and how to use an expert witness, defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "To make a reasoned judgment about whether evidence is worth presenting, one must know what it says . . . A lawyer cannot make a protected judgment without investigating the potential bases for it." *Couch*

v. Booker, 632 F.3d 241, 246 (6th Cir. 2011). Although there may be strategic reasons for not seeking expert assistance, "the label 'strategy' is not a blanket justification for conduct which otherwise amounts to ineffective assistance of counsel." *Lovett v. Flotz*, 884 F.2d 579 (6th Cir. 1989).

A defense counsel's duty to investigate extends to the facts and laws that directly impact decisions related to the defendant's case. When defense counsel has a mistaken belief on a point of law or fact and fails to undertake an investigation which would correct that mistaken belief, a failure to investigate is objectively unreasonable. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 395 (2000) (defense counsel deficient where failure to uncover records beneficial to the defendant's case was based on incorrect interpretation of state law, not a strategic calculation); *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (defense counsel deficient where decision to forgo pretrial discovery "was not based on 'strategy,' but on counsel's mistaken belie[f] that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense"); *French v. Warden, Wilcox State Prison*, 790 F.3d 1259, 1268 (11th Cir. 2015) (defense counsel's "unreasonable determination of the facts" and failure "to follow the clearly-established state law procedures" to proffer evidence of a previous false kidnapping charge was objectively unreasonable).

Where defense counsel knows that expert testimony will be vital to the defendant's case, defense counsel has an obligation to investigate the laws and facts that govern the ability to secure such testimony. *Hinton v. Alabama* is directly on point. *See* 134 S. Ct. at 1088. In *Hinton*, defense counsel mistakenly believed that funding for an expert was limited to $1,000 when, under Alabama state law, defense counsel was entitled to "any expenses reasonably incurred" in defending his client. *Id.* at 1085. As a result of this mistake, counsel did not retain any of the qualified experts who were available to testify in support of the defendant's case but would cost more than $1,000, and instead retained an expert he knew to be unsuitable. *Id*. 1088. Had defense counsel made even a cursory investigation into the matter he would have uncovered the state law and secured the funds necessary to hire an effective expert. *Id.* at 1088-89.[3] The U.S. Supreme Court found his failure in this regard to be objectively unreasonable, concluding "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his

[3] Other Courts have found trial counsel to be ineffective when they have failed to request funds from the Court for an expert witness. *See Canales v. Stephens*, 765 F.3d 551 (5th Cir. 2014) (counsel was ineffective for failing to perform a mitigation investigation because he thought he could not receive any additional funding to pursue such claims); *Cox v. Cockrell*, 62 F. App'x 557 (5th Cir. 2003) (trial counsel should have filed a motion to the Court to receive funds for an appropriately qualified expert); *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980) (held that the trial court's refusal to provide state funds to develop expert testimony deprived defendant of the effective assistance of counsel because the South Carolina statute expressly allowed such assistance).

failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Id.*[4]

Similarly, the Michigan Supreme Court, in applying *Hinton* to a conviction based solely on one-sided expert testimony regarding the presence of the SBS/AHT triad, held that failure to secure available expert testimony is manifestly unreasonable and prejudicial, and therefore constitutes ineffective assistance of counsel. *People v. Ackley*, 497 Mich. 381, 383 (2015) ("defense counsel's failure to attempt to engage a single expert witness to rebut the prosecution's expert testimony or to attempt to consult an expert with the scientific training to support the defendant's theory of the case, fell below an objective standard of reasonableness and created a reasonable probability that this error affected the outcome of the defendant's trial.").

The same is true here. Ceasor's trial counsel knew that an effective defense required expert testimony due to the complexity of the medical science at issue but

[4] Further, Courts have consistently overturned convictions on the grounds that a trial counsel's failure to present other expert testimony in scientific-laden cases constituted ineffective assistance of counsel. *See Showers v. Beard*, 635 F.3d 625 (3rd Cir. 2011) (trial counsel was ineffective for failing to present rebuttal expert testimony from an available forensic pathologist in a murder trial on whether the deceased could have ingested Roxanol himself and failing to investigate readily available key evidence in support of defense's suicide theory); *Paine v. Massie*, 339 F.3d 1194 (10th Cir. 2003) (trial counsel was ineffective for failing to present expert testimony on battered woman syndrome in support of the defense's self-defense claims).

nevertheless failed to make a reasonable investigation into whether he could secure funds for an expert witness. Failing that, he mistakenly concluded that funds were not available. Thus, as in *Hinton*, counsel's decision to forgo an expert was not based on a well-reasoned trial strategy, but rather a mistake about the availability of funds to hire an expert. Had he performed any investigation into the matter he would have discovered that Michigan state law permits indigent criminal defendants to petition the court for funds to secure witnesses on their behalf. *See* MICH. COMP. LAWS § 775.15 (1927). Therefore, this Court should find that trial counsel's failure to conduct such an investigation violated the duty to investigate imposed under *Strickland* and was, therefore, objectively unreasonable.

B. Failure Of Defense Counsel To Elicit Expert Testimony In A Case Involving SBS/AHT Diagnoses With No Direct Evidence of Abuse Is Objectively Unreasonable

There are certain criminal cases where utilizing an expert is the only reasonable course of action. *Harrington v. Richter*, 131 S. Ct. 770, 789 (2011) (emphasis added). For example, many courts, including this Court, have recognized that effective assistance requires defense counsel to elicit expert testimony "where there is substantial contradiction in a given area of expertise." *Richey v. Mitchell*, 395 F.3d 660, 685 (6th Cir. 2005) (quoting *Knott v. Mabry*, 671 F.2d 1208, 1213 (8th Cir. 1982)). Moreover, expert testimony on behalf of the defense is also required when there is no direct evidence of the defendant's alleged

crime, and where the prosecution's case relies heavily on the testimony of its own experts. *Ackley*, 497 Mich. at 397.

There exists a "substantial contradiction" within the medical and scientific communities regarding SBS/AHT diagnoses. *See, supra,* § I.A. Courts have pointed to "a shift in mainstream medical opinion," beginning in the late 1990s, that has resulted in "a legitimate and significant dispute" as to when certain injuries are the result of SBS/AHT, or some other cause. *State v. Edmunds*, 746 N.W.2d 590, 598-599 (Wis. Ct. App. 2008). One court asserted that "a claim of shaken baby syndrome is more an article of faith than a proposition of science." *Del Prete v. Thompson*, 10 F. Supp. 3d 907, 957 n. 10 (N.D. Ill. 2014); *see also Ackley*, 497 Mich. at 385 (one expert described the divide around SBS/AHT as "like a religion" with experts on both sides holding deeply held beliefs).

Further, because alleged SBS/AHT cases often involve no direct evidence of abuse, the prosecution relies heavily on medical experts to testify that the victims' injuries were caused by SBS/AHT. Therefore, due to the conflicting opinions regarding SBS/AHT diagnoses, combined with the prosecution's reliance on expert testimony, effective assistance requires defense counsel to elicit expert testimony on the defendant's behalf. As shown by the following cases, when defense counsel fails to do so, courts have found such failure objectively unreasonable and have overturned convictions on ineffective-assistance grounds.

People v. Ackley

A recent Michigan Supreme Court case, *People v. Ackley*, bears striking resemblance to this case. In *Ackley*, the defendant was watching his girlfriend's child and found her unresponsive on the floor next to the bed where she had been napping. 497 Mich. at 384. There was no direct evidence of abuse. At trial, the prosecution presented the testimony of five expert witnesses who all testified that based solely on the injuries, the child must have died from SBS/AHT. *Id*. The defense called no witnesses to support its theory that the child was injured when she fell from the bed, despite the availability of court funds for the purpose. *Id*. The defendant appealed his conviction arguing that his counsel's failure to secure an expert constituted ineffective assistance of counsel. *Id*. at 384-385.

In an affidavit admitted at a post-conviction hearing, an expert stated that he would have testified in support of the defense that the child's injuries were likely the result of an accidental fall, not SBS/AHT. *Id*. at 387. The Michigan Supreme Court, considering the defendant's motion for post-conviction relief, held that "[g]iven the centrality of expert testimony to the prosecution's proofs and the highly contested nature of the underlying medical issue," the defense counsel's failure to call an expert witness was not objectively reasonable. *Id*. at 389. The Court reversed the Court of Appeals decision and granted the defendant a new trial. *Id*. at 397-398.

People v. Baumer

In 2009, a Michigan Circuit Court reversed a defendant's conviction for first-degree child abuse, finding that "trial counsel was ineffective for failing to retain experts to challenge plaintiff's experts." *See* Addendum A, *People v. Baumer*, Case No. 2004-2096-FH (Macomb County Cir. Ct., Nov. 20, 2009). At trial, the prosecution's experts testified that the injuries were caused by shaking. *Id*. at 7. At a subsequent post-conviction hearing trial counsel testified that "he was fully aware that an expert radiologist was necessary to contest plaintiff's expert radiologist's findings of nonaccidental trauma." *Id*. at 8. Nevertheless, trial counsel presented only the testimony of a pediatric forensic pathologist, "who simply testified that she disagreed with the interpretation of the CT scans and MRIs, but that she was not qualified to provide an expert alternative interpretation." *Id*.

During post-conviction proceedings, the defendant presented "substantial evidence that experts were available at the time of trial to challenge the testimony of plaintiff's experts" and to establish alternative mechanisms for the injuries. *Id*. The trial court found that defense counsel's performance was deficient and "deprived defendant of a substantive defense" causing the defendant to suffer actual prejudice. *Id*. at 9.

Del Prete v. Thompson

In *Del Prete v. Thompson*, the defendant was convicted of first-degree murder of a three-month-old who was in her care. 10 F. Supp. 3d 907, 909 (N.D. Ill. 2014). The conviction was based entirely on expert testimony presented by the State that the injuries sustained by the victim could only be caused by violent shaking. *Id.* at 916. The experts testified that in the absence of major trauma, "you have to assume that it was a child abuse or baby shaking." *Id*. at 913.

In a 2013 post-conviction hearing, the evidence was significantly different. Witnesses for the State conceded that there were many non-abusive explanations for the injuries sustained by the victim and that experts who testified differently at trial were incorrect. *Id*. at 932-955. Witnesses for the defense provided copious additional evidence that established that the victim's injuries could be caused by accidents, disease or any number of other non-abusive scenarios.

In granting the defendant a new trial, federal district Judge Matthew Kennelly held that new evidence of the changing science regarding SBS/AHT made it likely that no juror would find the defendant guilty beyond a reasonable doubt. *Id*. The Court found that the evidence offered by the defendant pointed to a cause of death "unrelated to any abuse by anyone." *Id*. at 957.

Similarly, Courts have overturned convictions on the grounds that new evidence was presented following trial that contradicted the SBS/AHT diagnosis

provided by the prosecution's experts at trial. *See Edmunds*, 746 N.W.2d at 599 (ordering a new trial where newly discovered evidence and testimony related to SBS/AHT "establishes that there is a reasonable probability that a jury, looking at both the new medical testimony and the old medical testimony, would have a reasonable doubt as to the defendant's guilt); *Del Prete*, 10 F. Supp. 3d at 957 (granting a defendant's habeas petition where new evidence related to SBS/AHT diagnoses established that no reasonable juror considering both the old and new evidence could have found the defendant guilty beyond a reasonable doubt); *People v. Bailey*, 999 N.Y.S.2d 713 (N.Y. County Ct., 2014) (ordering a new trial where advances in medical and scientific research related to SBS/AHT "presents an alternate theory for the source of [the] injuries, and such evidence differs in substance and quality from the defense evidence at Trial" and "is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.").

C. Failure Of Defense Counsel To Present Expert Testimony In A Case Involving An SBS/AHT Diagnosis And No Direct Evidence of Abuse Is Prejudicial To The Defendant

Having established objective unreasonableness, a defendant must also show actual prejudice to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 694 (prejudice is a "reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different . . . reasonable probability is a probability sufficient to undermine confidence in the outcome.").

In the case of SBS/AHT conviction, expert testimony often forms the entirety of a prosecutor's case. Tuerkheimer, *Innocence*, *supra*, 5. Convictions based wholly on one-sided testimony that establishes an exclusive mechanism of death, identifies the perpetrator by mere proximity, establishes intent through testimony regarding the degree of force, and fails to acknowledge the divisions within the medical and scientific community, is so overwhelming that testimony contradicting these propositions would necessarily undermine our confidence and almost certainly result in a different outcome. These cases are uniquely susceptible to prejudice because of their exclusive reliance on expert testimony.

The failure of defense counsel to present expert testimony in an SBS/AHT case with no direct evidence of abuse—as occurred with Ceasor's ineffective counsel–undermines the basis for conviction and produces actual prejudice to the defendant in and of itself. *See*, *e.g.*, *Ackley*, 497 Mich. at 397 (where there is "no victim who can provide an account, no eyewitness, no corroborative physical evidence, and no apparent motive to kill," failure to present expert testimony sufficiently undermines confidence in the outcome of a case to create actual prejudice). When the prosecution's case relies entirely on experts to establish every element of the crime, expert testimony is "integral to the defendant's ability to

counter that narrative and supply his own." *Id*. Counsel's failure to present such evidence on Ceasor's behalf actually prejudiced Ceasor and led to his conviction.

CONCLUSION

For all the above-stated reasons, the Network respectfully requests that this Court hold that in a case such as SBS/AHT, where the evidence presented by the prosecution relies almost exclusively on expert testimony, it is objectively unreasonable and prejudicial to the defendant for trial counsel to fail to present a qualified expert witness, and such conduct constitutes ineffective assistance of counsel.

Respectfully submitted,

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Dated: November 10, 2015

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this Brief contains no more than 7,000 words. Excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), there are a total of 5,085 words.
2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface, using Word 2010, in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on November 10, 2015, the foregoing document was served on all parties or their counsel of record through the CM/ECF system as counsel of record are all registered users. The persons served via CM/ECF are as follows:

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ADDENDUM

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. Case No. 2004-2096-FH

JULIE CHRISTINE LAEL BAUMER,

Defendant.

_____/

OPINION AND ORDER

Defendant has filed a motion for relief from judgment pursuant to MCR 6.501 *et seq*.

On September 29, 2005, defendant was convicted following a jury trial of child abuse in the first degree contrary to MCL 750.136b(2). She was sentenced on November 9, 2005 to 10 to 15 years with 41 days of jail credit. Defendant appealed as of right to the Court of Appeals, but on April 12, 2007, relief was denied on all grounds. *People v Baumer*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2007 (Docket No. 267373). In addition, defendant applied to the Michigan Supreme Court for review, but leave to appeal was denied on September 10, 2007. *People v Baumer*, 480 Mich 856; 737 NW2d 729 (2007). Defendant now seeks relief from judgment in this Court under the provisions of MCR 6.501 *et seq*.

Once a defendant has exhausted the appellate process, the only remaining manner in which to successfully challenge the conviction is by satisfying the requirements of MCR 6.501 *et seq*. *People v Watroba*, 193 Mich App 124, 126; 483 NW2d 441 (1992). The defendant has the burden of establishing entitlement to the relief requested. MCR 6.508(D). Relief may not be granted if the motion alleges grounds for relief, other than jurisdictional defects, which could

have been raised on appeal from the conviction and sentence, unless the defendant demonstrates two factors: (1) good cause for failing to previously raise such grounds on appeal or in a prior motion and (2) actual prejudice from the alleged irregularities that support the claim for relief. MCR 6.508(D)(3)(a) and (b).

"Good cause" may be established by proving the ineffective assistance of trial and appellate counsel. *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995). "Good cause" requires the showing of some impediment external to the petitioner. *People v Carpentier*, 446 Mich 19, 44; 521 NW2d 195 (1994). A trial court may waive the good cause requirement if it concludes that there is a significant possibility that the defendant is innocent of the crime. MCR 6.508(D)(3).

For purposes of challenging a conviction following a trial, the court rule defines "actual prejudice" as a situation where "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal" or "the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case[.]" MCR 6.508(D)(3)(b)(i) and (iii).

When reviewing a motion for relief from judgment, the Court initially examines the motion together with all the files, records, transcripts and correspondence relating to the judgment under attack. MCR 6.504(B)(1). If it plainly appears from the face of the materials presented that defendant is not entitled to relief, the court shall deny the motion without directing further proceedings. MCR 6.504(B)(2). Such an order must include a concise statement of the reasons for denial. MCR 6.504(B)(2). If the entire motion is not dismissed under subrule (B)(2), the Court shall order the prosecuting attorney to file a response as provided in MCR 6.506, and shall conduct further proceedings as provided in MCR 6.505-6.508. MCR 6.504(B)(4).

In an Opinion and Order dated December 12, 2008, the Court ordered plaintiff to respond and permitted defendant to file a supplemental brief. The parties filed additional briefs. Evidentiary hearings were held on August 4, 2009, September 3, 2009, and September 18, 2009, where testimony was taken and arguments were heard. The Court took this matter under advisement to issue a written opinion.

In her motion for relief from judgment, defendant argues she was not provided effective assistance of counsel at trial or on appeal due to deficient investigation and mischaracterization of the medical evidence. Defendant also alleges that appellate counsel was ineffective for not raising trial counsel's ineffectiveness in failing to retain an expert radiologist or to thoroughly investigate alternative causations for the apparent injuries suffered by the alleged infant victim, Philipp Baumer (defendant's nephew). Specifically, defendant claims that both trial and appellate counsel failed to investigate, offer evidence and testimony, and argue that Philipp was actually suffering from venous sinus thrombosis (VST), or infant stroke, a medical condition unrelated to the accusation of child abuse in this case. Defendant further contends her conviction was based on insufficient evidence to constitute proof beyond a reasonable doubt. Finally, defendant claims newly discovered evidence and evidence not presented at trial regarding VST prove her actual innocence. Therefore, defendant claims she is now entitled to relief from judgment.

In response, plaintiff argues defendant has failed to meet her burden for relief. Plaintiff maintains defendant is barred from asserting "sufficiency of evidence" at this time because the Court of Appeals previously reviewed and denied this same claim. Plaintiff also argues defendant's evidence of venous sinus thrombosis is not newly discovered, since it was an established medical condition before the time of trial that was known to defense counsel. In

addition, plaintiff contends defendant was not denied the effective assistance of trial or appellate counsel, and that appellate counsel is not required to raise every issue on appeal. Finally, plaintiff argues defendant has failed to establish actual prejudice, but has merely set forth additional theories that fall short of providing a reasonably likely chance of acquittal.

First, the Court will address defendant's claim of insufficient evidence. Defendant previously raised this argument on appeal and the Court of Appeals found the evidence presented at trial was sufficient to sustain her conviction. See *People v Baumer*, unpublished opinion per curiam of the Court of Appeals, issued April 12, 2007 (Docket Number 267373). Under MCR 6.508(D)(2) a defendant is not entitled to relief if her motion "alleges grounds for relief which were decided against the defendant in a prior appeal or under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision." In this matter, defendant does not set forth any retroactive change in law that would undermine the appellate court's decision that the evidence at trial was sufficient. Accordingly, defendant is not entitled to relief from judgment based upon a claim that the evidence at trial was insufficient.

Next, defendant argues newly discovered evidence and evidence not presented at trial show her actual innocence. In order to grant a new trial "on the basis of newly discovered evidence, a defendant must show that: (1) 'the evidence itself, not merely its materiality, is newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996) and citing MCR 6.508(D). Defendant asserts that the recent evidentiary hearing testimony of two proposed defense experts is newly discovered and shows that a proper review of the CT

scans and MRIs confirms the diagnosis that Philipp actually suffered from VST, rather than child abuse or nonaccidental trauma.

However, notwithstanding the accuracy of the diagnosis, defendant has failed to satisfy the first *Cress* factor: that the evidence itself, not merely its materiality, is newly discovered. During the recent evidentiary hearings, trial counsel Elias Muawad testified that he received pretrial information from Dr. Patrick Barnes, a pediatric neuroradiologist, that the diagnosis of venous sinus thrombosis was a possible explanation for the medical conditions observed in suspected child abuse cases like Philipp's.[1] Defendant's instant motion cites medical articles discussing the diagnosis of VST, which were published before the trial.[2] Moreover, this information known or available to trial counsel shows that defendant has failed to satisfy the "reasonable diligence" requirement under the third *Cress* factor. That is, trial counsel should have discovered and produced the venous sinus thrombosis evidence at trial. Trial counsel was referred to Dr. Barnes before trial, but believed he was unable to afford the expert's assistance.[3] Dr. Barnes' affidavit indicates Philipp's radiology findings were caused by VST, and he would have given the same opinion if asked to review the radiology in 2003 or 2005.[4] Accordingly, the Court finds defendant's evidence fails to meet the factors set forth in *Cress, supra,* and defendant is not entitled to relief based on newly discovered evidence.

Finally, defendant asserts she was not provided effective assistance of counsel at trial or on appeal. Effective assistance of counsel is presumed and, therefore, the defendant carries a high burden of successfully proving otherwise. *People v Solmonson,* 261 Mich App 657, 663; 683 NW2d 761 (2004). The Court will not substitute its own judgment for defense counsel's

[1] August 4, 2009 Evidentiary Hearing Transcript at 21, 30.
[2] Defendant's Motion for Relief from Judgment, Exhibit 5.
[3] August 4, 2009 Evidentiary Hearing Transcript at 21.
[4] September 3, 2009 Evidentiary Hearing, Exhibit A.

trial strategy and will not use the benefit of hindsight to determine counsel's effectiveness. *People v Matuszak*, 262 Mich App 42, 58; 687 NW2d 342 (2004). Appellate counsel is entitled to this same form of deference. *People v Hurst*, 205 Mich App 634, 641, 517 NW2d 858 (1994).

Ineffective assistance of trial and appellate counsel may constitute good cause under MCR 6.508(D)(3). *People v Reed, supra* at 375, 378-379. To sufficiently establish the "good cause" prong of MCR 6.508 (D)(3), a defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 384, quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To excuse the double failure of trial counsel and appellate counsel to challenge plaintiff's experts and pursue the VST defense, defendant must show that both trial and appellate counsels' performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive her of a fair trial. *Reed, supra* at 390. See also *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

Here, defendant asserts that her trial counsel should have obtained an expert radiologist to refute plaintiff's interpretation of the radiology evidence. The court defers to trial counsel's judgment regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Decisions regarding what evidence or defenses to present are presumed to be matters of trial strategy, and defendant bears the burden of overcoming the strong presumption. *Id.*; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). The decision to call an expert witness is also a matter of trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). "[T]he failure to call a witness constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a

difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

In this matter, defendant has established that her trial counsel's performance was deficient. Before trial, defense counsel knew that an expert radiologist was needed to challenge plaintiff's experts and to testify regarding the interpretation of the CT scans and MRIs, but defense counsel admitted he never requested an expert radiology witness to testify on behalf of the defense due to financial constraints.[5] Defense counsel conceded he was unaware at the time of trial that he could request the Court to appoint an expert due to defendant's inability to afford an expert pursuant to MCL 775.15.[6]

Plaintiff presented an expert radiologist, Dr. Kristie Becker, who testified at trial regarding the interpretation of the CT scans and MRIs.[7] Solely based on the CT scans and MRIs, Dr. Becker concluded Philipp's soft tissue injuries of the brain were caused by intentional repetitive shaking and likely occurred within 24-48 hours of the images.[8] Dr. Becker further indicated that Philipp's skull fracture was due to striking a flat or large surface, but could not designate a time frame for this injury.[9] Plaintiff also presented Dr. Steven Ham, an expert in neurosurgery and one of Philipp's treating physicians, who discussed and relied upon the CT scans and MRIs.[10] Dr. Ham testified Philipp's injuries were caused by a nonaccidental trauma within 12-24 hours of the images.[11] Based on the CT scans and MRIs, Dr. Ham concluded that an intentional and very significant blunt force trauma caused Philipp's injuries.[12]

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[5] August 4, 2009 Evidentiary Hearing Transcript at 14, 20-23.
[6] August 4, 2009 Evidentiary Hearing Transcript at 25-26.
[7] September 23, 2005 Trial Transcript.
[8] September 23, 2005 Trial Transcript at 87, 93, 95, 100, 109.
[9] September 23, 2005 Trial Transcript at 78-79, 117.
[10] September 20, 2005 Trial Transcript at 17, 25-29.
[11] September 20, 2005 Trial Transcript at 32, 45-47, 59.
[12] September 20, 2005 Trial Transcript at 47, 53.

Defense trial counsel was fully aware that an expert radiologist was necessary to contest plaintiff's expert radiologist's findings of nonaccidental trauma.[13] Nevertheless, defense counsel only presented Dr. Janice Ophoven, a pediatric forensic pathologist, who simply testified that she disagreed with the interpretation of the CT scans and MRIs, but that she was not qualified to provide an expert alternative interpretation.[14]

Since plaintiff's case relied heavily upon the expert radiologist's interpretation of the CT scans and MRIs, expert testimony for the defense would have been crucial to refute plaintiff's claims and assert the VST defense. There was no strategic reason for defense counsel's failure to investigate and hire an expert. Instead, counsel's decision was based solely on financial concerns. Accordingly, the Court finds defense counsel's performance fell below an objective standard of reasonableness and was constitutionally deficient.

Defendant has submitted substantial evidence that experts were available at the time of trial to challenge the testimony of plaintiff's experts and establish the VST defense. In his affidavit, Dr. Barnes states Philipp's radiology findings were caused by VST, as opposed to the alleged child abuse, and he would have expressed the same opinion if asked to review the radiology records in 2003 or 2005.[15] Dr. Michael Krasnokutsky presented his opinion that the medical and radiology records did not indicate any abuse or traumatic injury, and that Philipp's apparent injuries were clearly and solely due to VST.[16] Dr. Krasnokutsky also stated the VST, or infant stroke, was misinterpreted by plaintiff's experts as a hemorrhage. In addition, Dr. James A.J. Ferris offered testimony consistent with the findings of Dr. Barnes and Dr. Krasnokutsky. Dr. Ferris also testified retina hemorrhage can occur as a result of birth and is diagnostic of

[13] August 4, 2009 Evidentiary Hearing Transcript at 14, 20-23.
[14] September 27, 2005 Trial Transcript at 10-11, 22, 41, 44, 85.
[15] September 3, 2009 Evidentiary Hearing, Exhibit A.
[16] Defendant's Motion for Relief from Judgment, Exhibit 2; September 3, 2009 Evidentiary Hearing.

VST.[17] In light of this evidence, defendant has met her burden of proving the factual predicate for her claim that trial counsel was ineffective for failing to retain experts to challenge plaintiff's experts and to establish the VST defense, and appellate counsel was ineffective for failing to claim trial counsel was ineffective on this basis. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant has also established that she suffered actual prejudice. Defense counsel offered no defense to refute the key portion of plaintiff's case, i.e. expert interpretation of the CT scans and MRIs confirms child abuse or other nonaccidental trauma. The expert testimony now presented by defendant would have directly refuted these conclusions at trial. Here, the failure to call an expert witness not only constituted ineffective assistance of counsel, it also deprived defendant of a substantial defense. *Dixon, supra* at 398; *Kelly, supra* at 526. Considering there was very little remaining evidence presented by plaintiff to demonstrate defendant abused the child, defendant has established a reasonable probability that the result would have been different if defense counsel had presented expert witness testimony of a radiologist. *Hoag, supra* at 6.

As a result, the Court finds defendant's trial counsel was ineffective due to his failure to obtain a necessary expert witness, i.e. an expert radiologist. This failure deprived defendant of a substantial defense and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.

Next, defendant contends appellate counsel was ineffective for failing to raise ineffective assistance of trial counsel based on his failure to present an expert radiologist. Appointed appellate counsel appealed five issues to the Michigan Court of Appeals: erroneous admission of statements made during a polygraph examination; erroneous qualification of Drs. Ham and Becker as experts on the issue of brain injury timing; insufficiency of the evidence; erroneous

[17] Defendant's Motion for Relief from Judgment, Exhibit 1; September 3, 2009 Evidentiary Hearing.

upward departure from the sentencing guidelines; and ineffective assistance of counsel based on failure to properly investigate a birth trauma defense.

The test for ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel. See *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Therefore, defendant must show that her appellate counsel's decision not to raise this claim of ineffective assistance of trial counsel fell below an objective standard of reasonableness and prejudiced her appeal. *People v Uphaus*, 278 Mich App 174, 186; 748 NW2d 899 (2008). The test is not whether, in hindsight, appellate counsel failed to raise all arguable or colorable claims. *Reed, supra* at 382. Such a test would "undermine the strategic and discretionary decisions that are the essence of skillful lawyering." *Id.* at 386-387. To establish ineffective assistance of appellate counsel, the defendant must rebut the presumption that "appellate counsel's decision regarding which claims to pursue was sound appellate strategy." *Hurst, supra* at 642.

As discussed above, defendant has set forth a meritorious claim of ineffective assistance of trial counsel. Although appellate counsel raised the claim of ineffective assistance of trial counsel on appeal, the issue of defense counsel's failure to obtain an expert radiologist was not raised. The principal contested issue in this case was whether Philipp's injuries could have been caused by something other than abuse or nonaccidental traumatic injury. Plaintiff's evidence presented at trial was substantially based on the medical records, specifically interpretations of the CT scans and MRIs, which indicated Philipp's injuries were caused by nonaccidental trauma or abuse. As a result, the Court finds appellate counsel's failure to raise this significant error by defense counsel fell below an objective standard of reasonableness and prejudiced her appeal since it would have provided defendant with a substantial defense.

Further, under MCR 6.508(D)(3), defendant has also established actual prejudice in order to obtain relief from judgment. Defendant has demonstrated a substantial defense that defense counsel failed to present and appellate counsel failed to raise on appeal. Defendant would have had a reasonably likely chance of acquittal had defense counsel been effective and hired an expert radiologist to refute the crux of plaintiff's case.

"MCR 6.508 protects unremedied manifest injustice, preserves professional independence, conserves judicial resources, and enhances the finality of judgments." *Reed, supra* at 378-379. Furthermore, "[n]either the guarantee of a fair trial nor a direct appeal entitles a defendant to as many attacks on a final conviction as ingenuity may devise." *Id.* at 389-390. Both "good cause" and "actual prejudice" are required for post-judgment relief under the court rule. Therefore, it is proper for the Court to grant defendant's motion for relief from judgment since she met her burden of satisfying the requirements in MCR 6.508.

The record demonstrates trial counsel was sufficiently ineffective, and, as a result, appellate counsel was ineffective for failing to raise these issues of trial counsel's ineffectiveness on appeal. In addition, appellate counsel was ineffective for failing to pursue those claims that trial counsel overlooked, such as the VST defense. Defendant has overcome the presumption that her trial and appellate counsel were effective and, therefore, the Court finds "good cause" for defendant's failure to raise her claims of ineffective assistance of counsel in her direct appeal and "actual prejudice" to defendant as a result of defense counsels' failures. The Court concludes defendant's motion for relief from judgment should be granted, her conviction set aside, and a new trial granted.

Defendant's motion for relief from judgment raises additional issues, including "actual innocence." Defendant argues that the Court should waive the "good cause" requirement of

MCR 6.508(D)(3)(a) because there is a significant possibility that defendant is innocent of the crime. During the recent evidentiary hearings, the Court heard the expert medical testimony offered in support of the defense theory that Philipp's apparent injuries were, in fact, caused by VST, a medical condition unrelated to the accusation of child abuse in this case. Dr. Patrick Barnes is a renowned pediatric neuroradiologist, board certified in diagnostic radiology and neuroradiology, a Professor of Radiology at Standford University Medical Center, Chief of Pediatric Neuroradiology, Medical Director of the MRI/CT Center at Lucile Salter Packard Children's Hospital, and a member of various child abuse task forces.[18] Dr. Barnes averred the radiology findings establish that Philipp's medical conditions were caused by VST, a form of childhood stroke that is most often associated with illness and dehydration, and Philipp's medical history indicates an ongoing process.[19] In addition, Dr. Barnes opined the absence of external bruising, significant tissue swelling or hemorrhage in the area of the right parietal fracture suggest that it was an earlier fracture, possibly from birth.[20] Dr. Michael Krasnokutsky, a board certified radiologist with certification in neuroradiology and Chief of Neuroradiology at Madigan Army Medical Center, and Dr. James A.J. Ferris, a forensic pathologist and Professor Emeritus of Forensic Pathology at the University of British Columbia, concur with Dr. Barnes' findings and opinions regarding the cause of Philipp Baumer's injuries.[21] Although the Court found this testimony to be compelling, and it may well cause a jury to conclude that defendant is actually innocent, the Court need not decide this issue given that defendant's motion has been granted on other grounds. Likewise, the Court need not decide the remaining issues raised by defendant.

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[18] Declaration of Dr. Patrick Barnes, dated August 30, 2009.
[19] *Id.*
[20] *Id.*
[21] Defendant's Motion for Relief from Judgment, Exhibits 1 and 2.

Based upon the reasons set forth above, defendant's motion for relief from judgment is GRANTED. Defendant's conviction is SET ASIDE and a new trial is GRANTED. In compliance with MCR 2.602(A)(3), the Court states this matter is REOPENED.

IT IS SO ORDERED.

JAMES M. BIERNAT, Circuit Judge

JMB/kmv

DATED: NOV 2 0 2009

cc: Robert Berlin, Chief Appellate Attorney
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