

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Donald S. Owens, P.J., Christopher M. Murray and Michael J. Riordan, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff -Appellee,

v.

LEO DUWAYNE ACKLEY, a/k/a LEO DUANE
ACKLEY, JR. and LEO DUWAYNE ACKLEY II,
Defendant-Appellant.

SC No. _____
COA No. 318303
LC No. 2011-003642-FC

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**BRIEF IN SUPPORT OF
DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL
TO THE SUPREME COURT**

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FILED
JUN 13 2014
LARRY S. ROYSTER
CLERK
MICHIGAN SUPREME COURT

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I. Defendant is entitled to a new trial because the cumulative effect of trial counsel’s pattern of ineffectiveness in regards to “Shaken Baby Syndrome” and its progeny “Abusive Head Trauma,” as well as trial counsel’s failure to call a witness to the possible cause of Baylee Stenman’s injuries, and coupled the faulty jury instruction prejudiced defendant to the extent that he was denied a fair trial. 37

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STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction pursuant to MCR 7.301(2).

QUESTIONS PRESENTED

I. Did the trial court abuse its discretion when it granted Defendant-Appellant, Leo Ackley, a new trial based upon a finding that his trial counsel was ineffective for his failure to properly investigate a substantial causation defense and that there was a reasonable probability that a different result was possible?

Defendant-Appellant Answer – No.

Plaintiff-Appellee Answer – Yes.

Trial Court Answer – No.

Court of Appeals Answer – Yes.

II. Did the Court of Appeals commit error when it incorrectly interpreted the issue presented, incorrectly stated facts not supported by the record as the basis for its reasoning, and issued an opinion directly contrary to its current opinions and the opinions of various United States Circuit Courts of Appeals, including the Sixth Circuit?

Defendant-Appellant Answer – Yes.

Plaintiff-Appellee Answer – No.

Trial Court Answer – Yes.

Court of Appeals Answer – No.

III. Did the Court of Appeals commit error when it refused to address the remaining issues presented in support of Defendant-Appellant's motion for a new trial, which showed at a minimum the totality of trial counsel's ineffectiveness and which were not addressed by the trial court?

Defendant-Appellant's Answer – Yes.

Plaintiff-Appellee's Answer – No.

Trial Court's Answer – Unknown.

Court of Appeals Answer – No.

PROCEEDINGS BELOW

On April 18, 2012 Leo Ackley was convicted by jury of Felony Murder and Aggravated Child Abuse in the death of Baylee Stenman, the 3 1/2 year old child of his live in girlfriend. On May 7, 2012, he was sentenced to serve a term of life without the possibility of parole. Leo appealed as of right raising the issue, among other things, ineffective assistance of counsel. (Docket No. 310350). On May 24, 2013, the Court of Appeals remanded the matter to the trial court and ordered that a *Ginther* Hearing be conducted. (Order for Remand attached as Appendix 3a). In its order to remand it ordered the trial court to make rulings of fact, law, and determine whether Leo was entitled to a new trial. On September 6, 2013, the trial court found defense counsel was ineffective and granted Leo's motion for a new trial. (Opinion and Order attached as Appendix 2a). On September 23, 2013, COA Docket No. 310350 was dismissed by stipulation. (Stipulation and order attached as Appendix 7a). The prosecution appealed the final order of the trial court and the case was assigned Docket No. 318303. Then, on April 22, 2014, the Michigan Court of Appeals reversed the decision of the trial court. The court held that the trial court abused its discretion when it granted Leo a new trial. (Opinion Attached as Appendix 1a).

STATEMENT OF FACTS

The Prosecution's case against Leo revolved on their assertion that Leo was a "monster" who made drastic changes in the victim's life, extensively abused the victim, and that ultimately the abuse caused the victim's death. *See* Trial Transcript (herein after Trans.) 828:16 – 838:24 (April 18, 2012) (People's Closing Argument). The prosecution's theory of the case was that Baylee died from traumatic brain injury, which was the result of blunt force trauma after being "throttled" backwards into a hard surface. Trans. 828:16 – 838:24. Nobody witnessed this alleged incident, and nobody testified that they ever witnessed Leo abuse Baylee. *See* Trans. However, trial counsel was aware that there was one witness that saw Baylee fall off a trampoline and hit her head several days earlier. *Ginther* Hearing

Transcript from June 24, 2013 (hereinafter GI) 31:13 – 32:8 (Affidavit of Linda Byrd attached to Defendant’s original Motion for Ginther Hearing in case no. 310350 attached as Appendix 4a).

At the status conference both the prosecution and defense agreed that expert testimony was going to be important. *Ginther* Hearing Transcript from September 6th, 2013 (hereinafter GIV) 50:4-50:6. To support the prosecution’s theory, the prosecution called several experts, including Dr. Guertin and Dr. DeJong. Dr. DeJong testified that Baylee died as a result of blunt force trauma to the back of her head, which resulted in a subdural hemorrhage, retinal hemorrhage, and a swelling of her brain. *See* Trans. 659:18 – 673:11 (April 17, 2012). She also testified that no child could sustain this type of injury with just a accidental fall, but rather that it would require a “throttling” or slamming to create this type of injury. *Id.* When the people moved to admit Dr. DeJong as an expert, trial counsel did more than just not object or merely stipulate to her admittance as an expert. Trial counsel stated “I’ve – over the years of practice of 20 years I’ve cross-examined Dr. DeJong many of times so I know she has been qualified as an expert in different Courts be it here in the 37th or 30th District – or 30th Circuit in Ingham County.” Trans. 646:19-24 (April 17, 2012). Further, the only questions trial counsel asked Dr. DeJong regarding “Shaken Baby Syndrome” (SBS) or “Abusive Head Trauma” (AHT) and whether accidental falls could cause this type of injury was whether the medical community was in complete agreement about whether shaking alone or a accidental fall could cause death. Trans. 683:18 – 685:1 (April 17, 2012). However, trial counsel never called an expert to testify regarding the medical controversy, or used any learned treatises to impeach Drs. Guertin and DeJong that in their medical experience an accidental fall cannot cause death. *See* Trans.

In its closing argument, the prosecution argued:

“The other way you can look at intent, the other person who can tell you the intent was are [sic] the doctors who looked at those injuries. Specifically, Dr. DeJong. What did she say would cause this injury? A slip in the tub? No. A fall on the ground? No. What she said was this was an extreme violent force inflicted by someone upon that child. This is not an accident. This is nothing that could happen in the course of this child’s normal childhood” Trans. 833:9-833:19 (April 18, 2012).

Leo's trial attorney, Mr. Marks, argued that Baylee died as a result of an accidental fall, possibly onto the foot-board of her sister's sleigh bed or onto the carpeted floor. *See Trans.* Leo took the stand and testified in his own defense. *Trans.* 744:1 – 821:24 (April 17, 2012). He claimed that he never struck or "throttled" Baylee, and that they had a close relationship. *Id.* Trial counsel failed to call a witness who he knew had seen Baylee fall and hit her head less than a week before the incident. Trial counsel testified he was aware of Linda Bryd's testimony prior to trial. *GI* 32:8. He also failed to point out to the jury that two other people were in the house that day, and either of them could just as likely be the perpetrator. *Ginther* Hearing Transcript from August 8, 2013 (hereinafter *GIII*) 35:7-35:8. Further, trial counsel failed to call the pediatrician as a witness. *GI* 36:24-41:6. At the *Ginther* hearing, the court asked trial counsel to clarify what his trial strategy was in not calling Baylee's pediatrician.

The Court:

"Excuse me if I may. I'm going to ask the question a little bit differently than it has been posed, and I think this is fairly direct. Why didn't you call the pediatrician? What was your thought process in not calling that witness?" *GI* 40:23-41:2.

Mr. Marks:

"My thought process was simply that I was dealing with as far as the cause of death was that being blunt force trauma and that is what I had to defend, that incident [sic]." *GI* 41:3-41:6.

If trial counsel had called the pediatrician it would have only furthered the case.

To support the defense's theory, trial counsel contacted one expert witness in preparation for trial, a Dr. Brian Hunter. *GI* 12:5. In the first conversation between the two, Dr. Hunter told trial counsel three things of importance. First, Dr. Hunter told trial counsel that the first phone call would be free. *GIII* 6:7-6:9. This meant that at the end of the call trial counsel had not yet spent any of the \$1,500.00 allocated to him by the court for an expert witness. *GIV* 20:12. Second, Dr. Hunter told trial counsel that he should seek out a different expert, because "I don't think I'm the best person for you." *GIII* 7:19-7:20. Finally, Dr. Hunter referred trial counsel to either Dr. Shuman or Dr. Spitz for a better evaluation of the case. *GIII* 7:20-7:21 (Trial counsel recalled being given the names of both Drs.

Shuman and Spitz. Dr. Hunter only recalled giving the name of Dr. Shuman). Trial counsel—rather than even attempting to contact either of these other experts and *against Dr. Hunter's own expert's advice*—continued to rely on the opinions of Dr. Hunter, and used up the entirety of the \$1,500.00 allocated to him by the court consulting an expert who clearly believed he was not the correct expert for the case. GIV 20:12. Dr. Hunter referred trial counsel to at least one other doctor for expert witness testimony. Trial counsel failed to contact any expert other than Dr. Hunter even though Dr. Hunter advised him that it would most likely support the defense's theory of a accidental fall.

Dr. Hunter informed trial counsel, and later informed the trial court at the *Ginther* Hearing, that in the medical community, theories on SBS and AHT are "like a religion." GIII 23:19. (Dr. Hunter's testimony attached as Appendix 6a). Findley, et al., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting it Right*, 12 Hous J Health L & Pol'y 209, 300 (2012) ("people can maintain an unshakeable faith in any proposition, however absurd, when they are sustained by a community of like-minded individuals"). Dr. Hunter testified that "every pathologist - forensic pathologist has to do their own sole [sic] searching" about the various issues surrounding these diagnoses. GIII 10:9-10:11. Dr. Hunter explained to trial counsel the necessity of hiring an expert that believes in the defense's theory being pursued by trial counsel. GIII 10:21-11:6. One issue that the medical community disagrees on is the minimum height that a child can fall and still suffer traumatic brain injuries. GIII 10:11-10:13. Dr. Hunter referred trial counsel to an expert who had researched and believed that accidental falls can cause traumatic brain injury. GIII 9:17-10:1. Trial counsel never contacted this expert. GI 13:9. Trial counsel could not have made a reasoned judgment whether or not to retain one of the known expert witnesses without contacting them and evaluating the benefit of their opinion.

Another area of controversy is exactly how much force it takes to cause traumatic brain injury. GIII. 20:14 - 21:2. Dr. Hunter testified that experts simply do not know how much force is necessary to cause these injuries. *Id.* Again, the expert recommended by Dr. Hunter was someone who has "dug into

the proposed models, a lot of the formulas that people have used to try and calculate the forces." GIII 9:21-9:22. Trial counsel never contacted this expert.

There is also controversy in the medical community over the association between retinal hemorrhages, SBS, and intracranial pressure. GIII 21:3-22:17. Prosecution experts testified that retinal hemorrhages are symptomatic of SBS, however Dr. Hunter testified that they are wrong. *Id.* Dr. Hunter pointed out that retinal hemorrhages are symptomatic of brain herniation resulting from increased intracranial pressure. *Id.* When the victim was diagnosed with retinal hemorrhage, she had already been displaying evidence of brain herniation. *Id.* Trial counsel never called Dr. Hunter to testify to this. *See* Trans.

A fourth area of controversy in the medical community is the concept of a lucid interval. GIII 35:16-35:17; Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash U L Rev 1 (2009). Dr. Hunter testified that the injury could have occurred at least as early as the night before. GIII 35:13-35:14. He also testified that some scientists believe a much earlier injury could re-bleed and cause symptoms that mimic AHT, which could cause the window for a "lucid interval" to be longer. GIII 36:16-37:10. Prosecution experts testified that the symptoms experienced by the victim would occur immediately after the injury, and therefore, since Leo was the only adult in the house at the time, he must have caused the injury. Dr. Hunter, however, testified that due to a potential lucid interval, "you can't just . . . exclude one adult or the other as far as a person who could inflict these injuries." GIII 35:7-35:8.

Trial counsel knew that the theories put forward by prosecution's medical experts were controversial in the medical community. GI 8:17-8:18. However, trial counsel did no independent investigation on this issue. GI Trans. 9:2. He did not read any medical treatises or law review articles on the issue. GI 9:5-9:8. He did not ask for a *Daubert* hearing to address this controversial area of medical testimony. GI 11:23. And most importantly, he failed to contact either of the experts he was referred to, nor any other expert in forensic pathology.

Trial counsel repeatedly contacted Dr. Hunter, who repeatedly told trial counsel he was not the best expert, recommended that trial counsel consult a different expert and gave him at least one other name. GI 12:5; GIII 7:19-7:20. After Dr. Hunter informed trial counsel that he did not support the defense's theory, trial counsel asked him for advice on how to attack the case. GIII 7:12-7:15. Dr. Hunter verbally advised trial counsel but did not prepare a work product for him and trial counsel did not request one. GI 15:21-15:25.

At the *Ginther* Hearing Trial Counsel Testified:

"For me to have – For me to request a written statement from him stating that he – that he didn't believe that it was accident would have to be turned over to the people [sic]."
GI 16:2-5.

Trial counsel did not know he was not required to turn over the work product of his expert if he did not intend to call him as a witness. GI 16:2-16:12. At trial, the only witnesses who were qualified to present and interpret the medical evidence to the jury were prosecution experts. The jury, all throughout the trial, only heard from the prosecution's expert's how each and every bruise, scrape and symptom exhibited by the victim could be associated with child abuse. *See* Trans. They never got to hear from Baylee's pediatrician how much better she was doing since Leo came into her life. GI 37:21. The jury never got to hear about any other potential causes for the injuries, such as the trampoline fall. *See* Trans. The jury was never informed that there is significant disagreement in the medical community about the weakness of the correlation between each of the victims' symptoms and child abuse and the significant flaws in the research supporting a diagnosis of Abusive Head Trauma. *See* Trans. And most importantly, the jury never got to hear from a medical expert from the defense who could have refuted every assertion made by the prosecutions experts. All of these issues were highly relevant to whether or not a short accidental fall injury caused Baylee's death, and directly challenged the prosecution's theory that Baylee's injuries were indicative of abuse, which they used to show intent. The significance of this medical evidence to the jury's determination of Leo's guilt or innocence made an expert necessary in this case. If the defense had offered testimony from Dr. Spitz or a similar

expert the jury would have been presented with a competing medical opinion. The jury would have been required to weigh the opinion of each qualified expert.

At the *Ginther* Hearing the trial court acknowledged that Mr. Marks decided the only plausible theory was accidental fall and the expert witnesses for the prosecution denied it was an accidental fall. The case boiled down to the theory of the defense and was directly contrary testimony the prosecution's expert witnesses presented.

At the *Ginther* Hearing the court stated:

"But the point of it is not contacting Dr. Schulman, [sic] not contacting Dr. Spitz, and especially when you look at Dr. Spitz's opinion it is directly contrary to the prosecutor's theory and the evidence presented. So based upon all of the facts and the law in this case I find that the representation by Mr. Marks was deficient and there would – there is a plausible option of probability that a different verdict would be achieved." GIV 60:8-60:21.

However, the Court of Appeals incorrectly limited the issue in its unpublished opinion. The court stated that the trial court limited the issue to whether defense counsel was ineffective for failing to ask the court for additional funds, to explore a second witness. *People v. Ackley*, unpublished opinion per curiam of the Court of Appeals, (Docket No. 318303); WL 1618356 (Mich. Ct. App. Apr. 22, (2014).

At the *Ginther* hearing, "causation defense" became the operative phrase used by the court. GIV 45:20. The trial court clearly narrowed the issue to whether counsel was ineffective by failing to investigate causation defense. Trial counsel knew several facts that made causation defense a plausible option.

The court:

"Dr. Hunter, I'm talking as a forensic pathologist. What, if anything, could you have done in your view regarding this investigation of plausible options for a causation defense? What could you have done other than recommend that he talk to Dr. Shuman?"

Dr. Hunter:

"Knowing not it would have cost as much to call me as a defense expert as it would if you just got Dr. Shuman at least. . . . So knowing that, again I go back to you – you are going to spend the money to get the defense expert you want, why not go with the guy who I clearly say is the better guy than with me. . . . After having reviewed the entire case folder, I'm coming to the same conclusions that I did then."

The court:

“You’re still not his guy?”

Dr. Hunter:

“Still not his guy.” GIII 46:16-48:4.

The issue about whether or not Mr. Marks could seek out additional court funds for additional experts was only relevant to show that had he decided to seek out another expert, additional money would have been appropriated to him.

The Court of Appeals also focused heavily on what they considered overwhelming evidence of physical abuse and signs of abuse. In its opinion the court relied partially on hearsay testimony from Brandon Milcher the biological father of Brandy, Baylee’s half-sister. The court incorrectly stated “the child’s sister expressed concerns to her biological father about spending time with defendant.” *Ackley, supra*. Brandy Milchner-Stenman did not testify at trial; her father Brandon Milchner testified. Mr. Milchner did not say that his daughter expressed concerns to him about Leo.

Q. Did Brandy express any concerns to you about Leo?

A. Sometimes yes. She’s – she did start stating that she didn’t want to go to her-

Mr. Marks: Objection, Your Honor. Hearsay.

Ms. Lincoln: Not what she said, just what- did she-

The court: Sustained. [Trans. 545:17-23 (April 12, 2012).]

The testimony regarding the conversation between Brandon Milcher and his daughter was hearsay and it was objected to at trial. The Court of Appeals should not have even considered this testimony in their opinion.

Further, the Court of Appeals incorrectly stated facts regarding Baylee’s health in its opinion. Baylee’s hair loss was an issue before Leo moved in. Her daycare provider testified Baylee’s hair began to thin in March of 2011. Trans. 564:1-564:9 (April 12, 2012). Erica and Leo began dating in March of 2011, he moved in a few weeks later. Trans. 237:1-237:5 (April 10, 2012). Dr. Spitz’s

affidavit, which was submitted by stipulation at the *Ginther* Hearing, also stated there are multiple reasons for a child's thinning of hair and that it is not solely indicative of abuse.

In his affidavit Dr. Spitz stated:

"Thinning of the hair can arise from a variety of causes, such as hair bands, undiagnosed medical conditions, and stress, where the child pulls his or her own hair out for a variety of reasons." (Affidavit of Dr. Spitz attached as Appendix 5a).

Baylee actually was diagnosed with a hair follicle infection that she was prescribed antibiotics for.

At Trial Erica Stenman testified:

Erica Stenman:

A. "She had some red/greenish kind of color on the tips of her hair follicle to her scalp and then patches of her hair was missing along the back of her neck and around her ear". . . .

Ms. Lincoln:

Q. "Did he give you any prescriptions?"

Erica Stenman:

A. "Yes. We had a prescription for the hair follicle infection." Trans. 244:10-244:13, 248:2-248:4 (April 11, 2012).

Finally, the court of appeals incorrectly stated that Baylee regressed in her toilet training after Leo moved in. Erica testified that Baylee's toilet training improved after Leo moved in. Trans. 304:15-25, 305:1 (April 11, 2012). This information was also corroborated in Baylee's medical report from Dr. Ptacin, Baylee's pediatrician when trial counsel was questioned at the *Ginther* hearing.

Mr. Rodenhouse:

"In the report did you notice that the doctor - - the attending physician had said that about Baylee on June 7 of 2011 that she's now off a bottle, is sleeping in her own bed, speaking better, mom has a new boyfriend and is stricter re bottle in bed - - regarding bottle in bed. And child is in a higher class at day care too. Regarding her speech and babysitter talks to the point more and that they were essentially attributing to Leo. Do you recall seeing that in the report?" GI 37:18-38:1.

Mr. Marks:

"I recall reading information such as that." GI 38:3

The prosecution's theory of the case was that Baylee died from traumatic brain injury, which was the result of blunt force trauma after being "throttled" backwards into a hard surface. Trans. 828:16 – 838:24. The Court of Appeals overlooked that nobody witnessed this alleged incident, and nobody testified that they ever witnessed Leo abuse Baylee. GI 42:18-42:21. Dr. Guertin testified that he reviewed the autopsy photographs of Baylee (which were admitted into evidence without objection by trial counsel) and concluded that she was abused. Trans. 426:16-20 (April 11, 2012). However, he never physically inspected Baylee personally. He based his conclusions on photographed bruises on her body, which he testified were "pattern" bruises caused by someone repeatedly striking Baylee. Trans. 426:21-429:8 (April 11, 2012). However, this also would have been directly refuted by Dr. Spitz's affidavit.

In his affidavit Dr. Spitz stated:

"These bruises are not abuse-type injuries, patterned bruises, or choking or throttling-type injuries. Further, attributing a single bruise on the buttock "almost certainly" to hitting or spanking is unfounded. . . . Finally, "Shaken Baby Syndrome" (SBS) and its progeny "Abusive Head Trauma" (AHT) are not applicable to this case and Baylee Stenman's death cannot be attributed to either of these theories." (Dr. Spitz Affidavit).

The trial court held that the Strickland two-prong test was met. Trial counsel was ineffective and that it prejudiced the outcome of the trial because but for the ineffective assistance the verdict might have been different. Throughout the trial and sentencing, and even to this day, Leo maintains his innocence. Sentencing Trans. 4:22-5:2 (May 7, 2012).

STANDARD OF REVIEW

A hearing to determine whether a defendant received ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v. Armstrong*, 490 Mich 281, 289; 806 NW2d 676, 680 (2011). The trial court must first find the facts, and then determine whether those facts constitute a violation of constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A reviewing court reviews a lower court's findings of fact for clear error, and reviews de novo questions of constitutional law. *Armstrong, supra*. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made." *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859, 867, *amended* 481 Mich 1201 (2008).

Defendant-Appellant believes that the clear error standard is the appropriate standard of review in this case. The trial court was ordered by the Court of Appeals in Docket No. 310350 to expand the record and determine whether Defendant-Appellant was denied effective assistance of counsel, and if so, order a new trial. The trial court did, in fact, expand the record. The trial court found that Defendant-Appellant was denied effective assistance of counsel, and therefore ordered a new trial. Each step conformed with the order of the Court of Appeals, and therefore the trial court had no discretion to abuse. Therefore a clear error standard should be appropriate for this review. The clear error standard provides that factual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake. *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706, 714 (2007). "This is particularly true given the 'great deference' generally afforded to trial courts, which are in a better position to examine the facts." *Id.*

However, for the purposes of this application for leave to appeal, Defendant-Appellant will

address each issue using the abuse of discretion standard applied by the Court of Appeals. Defendant-Appellant believes he still prevails under this standard.

ARGUMENT

I. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT GRANTED DEFENDANT-APPELLANT LEO ACKLEY A NEW TRIAL BASED UPON A FINDING THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILURE TO PROPERLY INVESTIGATE A SUBSTANTIAL CAUSATION DEFENSE AND THAT THERE WAS A REASONABLE PROBABILITY THAT A DIFFERENT RESULT WAS POSSIBLE.**

Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the effective assistance of counsel for his or her defense. Const. 1963, art. 1, § 20; U.S. Const., Am. VI. In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) that but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. *People v. Armstrong*, 490 Mich 281, 289; 806 NW2d 676, 680 (2011); *People v. Pickens*, 446 Mich. 298; 521 N.W.2d 797 (1994) (adopting the federal constitutional standard for an ineffective-assistance-of-counsel claim as set forth in *Strickland*):

In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy. *Strickland v. Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Yet a court cannot insulate the review of counsel's performance by calling it trial strategy. Initially, a court must determine whether the "strategic choices [were] made after less than complete investigation and any choice is "reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–691. Counsel always retains the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* The proper standard requires the defendant to show that but for counsel's unprofessional errors there is a reasonable probability that the result of the proceeding

would have been different. *Id.* at 668.

- A. The trial court did not abuse its discretion when it found that trial counsel's representation fell below an objective standard of reasonableness because it was not reasonable trial strategy for defense counsel to disregard Dr. Hunter's advice and not seek an alternate expert.**

Trial counsel discussed his theory of defense with his client, Leo Ackley, and concluded the only plausible theory of defense was that Baylee Stenman's death was caused by an accidental fall. Had this theory been fortified by adequate investigation, it would have shown the weakness in the prosecutor's case, and it could have made a difference in the verdict. Even if there is only one plausible line of defense, counsel must conduct a "reasonably substantial investigation" into that line of defense. The same duty exists if there are other available defenses but trial counsel relies solely on one at trial. The investigation is not required to be exhaustive but it must include an "independent examination of the facts, circumstances, pleadings and laws involved." *Strickland*, 466 U.S. at 668, 680-81, 104 S Ct 2052.

In the case at hand, trial counsel knew the central issue was a medical issue, whether or not Baylee Stenman died from an accidental fall, and that expert testimony would be valuable. Trial counsel's theory was that Baylee Stenman died from an accidental fall. In preparation for trial he sought out an expert witness and found Dr. Hunter, a specialist in the field of forensic pathology. In the first conversation between the two, Dr. Hunter told trial counsel three things of importance. First, Dr. Hunter told trial counsel that the first phone call would be free. At the end of this call, trial counsel had not yet spent any of the \$1,500.00 allocated to him by the court for an expert witness. Second, Dr. Hunter told trial counsel that trial counsel should talk to a different expert, because "I don't think I'm the best person for you." At the *Ginther* Hearing Dr. Hunter testified that he reviewed the information that defense counsel sent him and really tried to help but still declined to testify as an expert witness. Dr. Hunter testified:

"I don't think it's ethical for me to sign on as an expert for defense if I really don't think I can help them. I told him during this - - the first conversation and the second

conversation which he gave me two hundred dollars out of his own pocket. . . . Again I said to him, you don't want me as your defense expert because for this one simple reason, if you call me as your defense expert and prosecution looks at me and says Dr. Hunter if you were the medical examiner in this case given the information you have, what would be the ruling in far as cause and manner o death? I said well this is a case of abusive head injuries would be the cause of death and the manner of death would be homicide. You don't want me on the stand saying that. He said I agree I don't want you on the stand saying that, so we concluded that was the case. GIII 15:5-15:22.

So I was giving him angles to defend his client but again even after having said all of that I said you still don't want me as your defense expert. . . . *You really want a defense expert who in – it's almost like a religion. In his or her religion believes this could be a shortfall death because that's going to be your best defense expert and you want someone who is credible. That's why I was steering him Dr. Shuman as opposed to me.*" GIII 23:4-24:2. [Emphasis Added]

Finally, Dr. Hunter referred trial counsel to either Dr. Shuman or Dr. Spitz for a better evaluation of the case. (There was a difference of opinion at the *Ginther* hearing between Mr. Marks and Dr. Hunter as to who Mr. Marks was referred. In any event, Mr. Marks testified that he was referred to both Dr. Shuman and Dr. Spitz).

However, against Dr. Hunter's own advice, and without even attempting to contact either Dr. Spitz or Dr. Schuman or any other expert on accidental falls, trial counsel continued to rely on Dr. Hunter and used up the entirety of the \$1,500:00 allocated to him by the court. Trial counsel then proceeded to prepare for trial with Dr. Hunter knowing Dr. Hunter would not provide expert testimony at trial to support the theory that Baylee's death was caused by an accidental fall. Simply, it is not reasonable to infer that a decision is trial strategy when the decision on its face is irrational and for which no justification has ever been produced.

"To make a reasoned judgment about whether favorable expert testimony is worth presenting at trial, one must know what it says. . . . An attorney cannot hire an expert, give him whatever evidence he happens to have on hand and accept the report without further discussion." *Couch v. Booker*, 632 F3d 241, 246 (CA 6, 2011)

Competent trial counsel would have realized that their client had everything to gain and nothing to lose by contacting an additional expert who supported the defense's theory. This is why at the *Ginther* hearing the trial court brought up trial counsel's failure to seek additional funds, simply to determine

how easily those funds could have been obtained had trial counsel requested them.

The trial court addressed whether failure to contact a different expert would amount to the failure to investigate a causation defense with Dr. Hunter in the following exchange:

“THE COURT: One of the cases cited by the Defendant is Couch v Booker. It is a Sixth Circuit Court of Appeals. It's a federal decision. The Defendant was convicted of second-degree murder and the deceased had been severely beaten and it was essentially head trauma. The prosecutor's theory according to the case was the man drowned in his own blood. In the opinion, the Sixth Circuit Court of Appeals focuses on ineffective assistance by failing to investigate causation defense. Causation defense becomes the operative word. In explaining that theory, the court stated as follows: Couchs, the Defendant's counsel, knew several facts that made causation defense a plausible option, plausible option. That the victim had a heart condition, that his blood showed high levels of alcohol, marijuana and cocaine. That the medics had to restrain him.

The Court further states an attorney cannot hire an expert give him whatever evidence he happens to have on hand and accept the report without further discussion. This common sense principle does not give trial counsel a free ride when it comes to the obligation to undertake a thorough investigation of law and facts relevant to plausible options for defense.

Now, you've indicated here this morning that you did discuss with Mr. Marks gray areas. You talked about trial strategy. Particularly as it relates to establishing reasonable doubt. What if anything and I'm not talking legally now, Dr. Hunter, I'm talking as a forensic pathologist. What, if anything, could you have done in your view regarding this investigation of plausible options for a causation defense? What could you have done other than recommend that he talk to Dr. Shuman?

MR: HUNTER: Well, looking at the entire case folder, meaning law enforcement reports, etcetera, would have been the next step that I could have done. . . . Knowing now it would have cost as much to call me as a defense expert as it would if you just got Dr. Shuman at least. I feel fairly confident knowing - having reviewed everything.

So knowing that, again I go back to - you are going to spend the money to get the defense expert you want, why not go with the guy who I clearly say is the better guy than with me. But other than reviewing the police reports and reviewing the entire case folder, I don't think there is anything else that I could have or would have done to act as a defense expert in this case. . . . After having reviewed the entire case folder, I'm coming to the same conclusions that I did then.

THE COURT: You're still not his guy?

MR. HUNTER: Still not his guy.

...

“THE COURT: And as you indicated, it's kind of like a religion which theory do you advance in terms of your experience. Here, you told Mr. Marks I'm not your guy. Call Shuman he's the guy you really want to talk too.

MR. HUNTER: Right.

THE COURT: *From the standpoint of a forensic pathologist is that the option to establish a plausible option for a causation defense?* [Emphasis added]

MR. HUNTER: Yes.”

Dr. Hunter believed that in order to raise an effective causation defense, trial counsel should have consulted an expert who believed in the correct “religion.”

The unpublished Michigan Court of Appeals opinion, *People v Campbell*, is not only instructive but directly contrary to the opinion of the Court of Appeals in this case on the need for an expert opinion when it comes to this type of injury. *People v Campbell*, No. 245263, 2005 WL 182703 (Mich Ct App January 27, 2005); cert den, 472 Mich 942, (2005).

The trial court convicted Anthony Scott Campbell of second-degree murder in the death of Paige Anderson, the ten-month-old daughter of Campbell's live-in girlfriend, Teri Anderson. The Michigan Court of Appeals granted Campbell's motion to remand for an evidentiary hearing. The trial court granted Campbell a new trial and the Michigan Court of Appeals affirmed the trial court's decision.

In *Campbell*, the child was brought to the emergency room at the Community Health Center in Coldwater, Michigan and found to be in critical condition. She was not breathing, her eyes were fixed and dilated, and she had bruises in various stages of healing across her forehead, on her left leg, below her clavicle, and on the side of her neck. The sclera of the child's right eye was bleeding and both eyes exhibited retinal hemorrhaging. The cause of death was determined to be a severe craniocerebral trauma caused by a significant blow to the back of her head, which caused a *skull fracture* and swelling of the brain. Campbell was in exclusive control of the child at the time she sustained her fatal head injury. He testified that, after two mishaps in the bathtub on the evening of January 5, 2001, he put the child to bed. He later received a call from Teri Anderson, who was ill and wanted to be picked up from work. According to Campbell, when he rushed out of his apartment, he was holding the child on his right side. As he stepped onto the second step of the stairs, his foot went out from underneath him and the child shot out of his arms. She landed on the back of her head on the fourth or fifth step. She continued moving, feet first, onto the landing where she rolled up to the railing and came to rest.

Campbell testified that it appeared that the child banged her head against the wall during the fall, and her right lower back or stomach hit the railing.

The prosecution presented evidence that Campbell's version of the alleged fall had evolved over time. For example, Campbell initially informed the police that the child had fallen face- and chest-first onto the steps. Later, he indicated that she landed on the back of her head. More importantly, the prosecution presented evidence from several treating physicians, all of whom were qualified as experts at trial, and from the medical examiner, who performed the victim's autopsy. Their unrefuted testimony was that the child's injuries were inconsistent with a fall on the stairs. The medical experts agreed that the child's skull fracture was caused by an impact on a hard, flat surface. Some of the physicians testified that retinal hemorrhaging is indicative of abuse until proven otherwise. Although Campbell's trial counsel was aware that there were *nine* physicians testifying for the prosecution, he believed he could adequately cast doubt on their testimony through cross-examination. He testified that he was specifically aware of Dr. Uscinski and had previously heard Dr. Uscinski testify. At the evidentiary hearing, Campbell presented testimony from Dr. Uscinski, a clinical neurosurgeon, which undermined the theory that the injuries were caused by intentional behavior. Dr. Uscinski testified that medical science cannot distinguish between an intentional slamming of the head and an accidental drop on the head. He disagreed that retinal hemorrhaging is indicative of intentional abuse. The verdict was primarily based on the unchallenged medical testimony and Dr. Uscinski's testimony would have directly refuted the prosecution's conclusions. The Court of Appeals concluded that the failure to call this witness constituted ineffective assistance of counsel, because it deprived Campbell of a substantial defense.

While the rulings of the Court of Appeals are divergent, the facts in *Campbell* are nearly identical to the facts in the case at hand. On the day in question Baylee was in Leo's care while her mother, Erica Stenman was at work. Baylee's injury included a subdural hematoma; there was also evidence of retinal hemorrhages and optic sheath hemorrhages. Baylee also had bruising on her neck

and a single bruise on the buttock. However, Baylee did not have a skull fracture. The central issue was whether Baylee Stenman died from an accidental fall and the only expert testimony presented to the jury was that of the prosecution's expert witnesses. At trial the prosecution presented five expert witnesses to support its theory, comparable to the nine expert witnesses in *Campbell*. The prosecution's experts opined that Baylee had been abused and she died from blunt force trauma to the back of the head, which could only have been intentionally inflicted by a "throttling" of Baylee by Leo. Defense counsel, in spite of the pre-trial knowledge of this testimony, contacted one expert witness who told him "I'm not your guy." And in spite of being referred to at least one other medical expert, proceeded to trial without an expert witness to testify that the injury could have been accidental to support of the theory of the defense. The expert medical testimony presented at trial was unrefuted with the exception of defense counsel's cross-examination during which Dr. DeJong admitted to him she did not know how much force was required to cause the injuries that the child sustained. When defense counsel was asked to explain his trial strategy he stated his concern was defending the blunt force trauma; he could not substantiate the failure to call an expert witness. Similarly, in *Campbell*, Campbell's defense counsel testified that there was no strategic reason for failing to investigate and hire an expert. The same is true here. Leo's defense counsel denied Leo a substantial causation defense, falling below an objective standard of reasonableness. Because the jury never got to hear from such an expert, Leo was prejudiced by defense counsel's conduct.

B. The Trial Court Did Not Abuse Its Discretion When It Found That Defendant Was Prejudiced by Counsel's Ineffective Representation.

The second prong of the test requires the defendant to show prejudice. *Strickland*, 466 U.S. at 692, 104 S Ct 2052. Under this prong, it is not enough that the defendant showed that the act or omission "had some conceivable effect on the outcome of the proceeding." *Id.* at 693, 104 S Ct 2052. Rather, the defendant must show that "there is a reasonable probability" that the outcome would have been different in the absence of the deficient performance. *Id.* at 694, 104 S Ct 2052. "A reasonable

probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Further, this determination must be made in consideration of the “totality of the evidence” presented to the jury and keeping in mind that some “errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture.” *Id.* at 695–696, 104 S Ct 2052.

In its opinion, the Court of Appeals directly contradicted *People v Campbell, supra*, and *People v Mardlin*, Docket No. 279699, 2012 WL 205794 (Mich Ct App January 24, 2012) when it concluded that even if Marks should have consulted an additional expert, failure to do so did not deprive Leo of a substantial defense. The court held that it wasn’t necessary for trial counsel to call an expert witness even though the prosecution called five expert witnesses. This directly contradicts *Campbell* where defense counsel was ineffective for failure to call an expert witness to refute the prosecution’s nine expert witnesses. This also contradicts the court’s opinion in *Mardlin* where it found the trial court had abused its discretion when the trial court held an additional expert was not necessary. In *Mardlin*, the Michigan Court of Appeals reversed the conviction of the defendant because there was a reasonable probability that testimony from the expert witness (Statler) who was not called, would have potentially altered the outcome of the trial. The expert witness addressed the issue the prosecution’s experts had relied on and stated that in his opinion it was not conclusive. The defendant obtained an additional expert opinion from Trenkle who opined that further testing was necessary. The defendant presented testimony from him that directly challenged the tests and procedures of the prosecution’s experts. Statler’s testimony combined with the additional expert could have provided evidence to the jury in support of the defense’s theory. The jury would then have had the opportunity to fully assess the credibility of each theory. *Mardlin, supra*. The court also gave an opposing view on trial strategy in its opinion compared to *Campbell, supra*. In *Campbell* the court concluded counsel was ineffective regardless of the fact that defense counsel avidly cross examined the nine expert witnesses and believed he could adequately cast doubt on their testimony. The court held in *Campbell* that the defendant’s verdict was primarily based on the unchallenged medical testimony due to counsel’s failure to call a

known expert witness. In Leo's case, the Court of Appeals incorrectly concluded that defense counsel vigorously cross-examined the prosecution's experts and declined to second-guess defense counsel's strategy to rebut the prosecution's evidence by cross-examining the witnesses and presenting character evidence rather than calling an expert witness.

C. The Trial Court Did Not Abuse Its Discretion Because It Correctly Analyzed the Cases Underpinning Its Grant of a New Trial.

The Court of Appeals stated that although the trial court acknowledged that Marks vigorously cross-examined the prosecution's expert witnesses, its ultimate decision seemed to imply that it did not feel this was enough. The Court of Appeals went on to state the trial court did not commit clear error in its findings of fact but on those facts it erred by finding that the decision not to consult an additional expert rose to the level of a constitutional violation. Once again the Court of Appeals incorrectly interpreted what the trial court concluded. The trial court based its decision on trial counsel's failure to investigate a substantial causation defense when counsel failed to consult an additional expert. The court reiterated this point with its thorough case law analysis.

The trial court analyzed Court of Appeals decision in *People v. Hopson*, 178 Mich. App 406; 444 NW2d 167 (1989) (holding that trial counsel was not deficient because he cross examined witnesses). *Hopson* is distinguishable from the present case because in *Hopson* the court held that mere failure to cross-examine certain witnesses was a trial strategy and not a substantial defense. This case has nothing to do with a failure to cross-examine witnesses. The failure here was trial counsel not consulting and calling expert witnesses in order to refute the medical underpinnings of Prosecution's case when those experts were available and known to trial counsel.

The trial court also analyzed the Court of Appeal's holding in *People v. Julian*, 171 Mich App 153; 429 NW2d 615 (1988). In this case, the trial attorney made the strategic decision to not follow through on a planned defense, because that defense was "flimsy." The Court of Appeals agreed and held that not to be grounds for a finding of ineffective assistance of counsel. In the present case,

however, the defense not pursued by trial counsel was substantial. It involved medical testimony directly adverse to the medical testimony relied on by the prosecution.

The trial court relied upon the Court of Appeals opinion in *People v. Bass*, 247 Mich App 385; 636 NW2d 781 (2001). In *Bass*, the Court held that trial counsel's failure to investigate the potential testimony of her client's co-defendants amounted to ineffective assistance of counsel. Defense counsel could not offer any strategic reason for the decision not to call the witnesses to testify. Defense counsel's failure to call two known supporting witnesses was prejudicial to the defendant. Trial counsel did hire an expert witness and did use that witness to develop his cross-examination of opposing witnesses. However, trial counsel only did that after being informed by that expert witness, that the witness did not support trial counsel's theory of the case. The expert witness further referred trial counsel to other potential experts that were better suited to supporting his theory of the case.

The Court of Appeals opinion here is in direct contrast to *Gersten v. Senkowksi*, 426 F3d 588 (CA 2, 2005), which the trial court relied upon. The trial court did not abuse its discretion when it analyzed *Gersten* in support of its decision to grant Leo a new trial. Where federal questions are involved, the Court of Appeals is bound to follow the prevailing opinions of the United States Supreme Court. *Betty v Brooks & Perkins*, 446 Mich. 270, 276; 521 N.W.2d 518 (1994). Moreover, Michigan adheres to the rule that a state court is bound by the authoritative holdings of federal courts regarding federal questions when there is no conflict. *Young v Young*, 211 Mich App 446, 450; 536 N.W.2d 254 (1995); *Kocsis v. Pierce*, 192 Mich App 92, 98; 480 N.W.2d 598 (1991). However, where an issue has divided the circuits of the federal court of appeals, this Court is free to choose the most appropriate view. *Young, supra*. Michigan does not afford a defendant any additional rights beyond those granted by the federal constitution. *Pickens, supra* at 302. The issue in this case regards the interpretation of a federal constitutional right, and as there is no conflict between circuits regarding the holding in *Gersten* that case is binding on Michigan courts.

Gersten involved a trial attorney that failed to reasonably investigate the prosecution's expert

medical opinions. The Second Circuit Court of Appeals found this to be a violation of the defendant's Sixth Amendment right to counsel. The court summarized its holding as follows:

“[W]e judge the reasonableness of the purported “strategic decision” on the part of defense counsel “in terms of the adequacy of the investigations supporting” it. Appellee's argument fails because defense counsel decided that it would be futile to challenge the medical and psychological evidence without having reasonably investigated whether that was in fact the case, and lacked sufficient information reasonably to determine that such an investigation was unnecessary. Thus, this is not a case where counsel made a reasonable decision to cease further investigation as a result of having “discovered... evidence ... to suggest that” challenging the prosecution's medical or psychological evidence “would have been counterproductive, or that further investigation would have been fruitless.” Nor is this a case of “diligent counsel ... draw[ing] a line when they have good reason to think further investigation would be a waste.” Rather, counsel here never discovered any evidence to suggest one way or another whether such challenges would be counterproductive or such investigation fruitless, nor did counsel have any reasonable basis to conclude that such investigation would be wasteful. This was because counsel settled on a defense theory and cut off further investigation of other theories without having first conducted any investigation whatsoever into the possibility of challenging the prosecution's medical or psychological evidence. Because counsel never investigated that alternative approach at all, counsel did not have any reasoned basis to conclude that such an approach would be fruitless—and, in fact, subsequent counsel have found it quite fruitful.” *Gersten*, supra at 609-1 [internal citations omitted].

□ In the current case, trial counsel, even before spending any of the \$1,500.00 allotted to him by the trial court for expert consultations, actually discovered evidence to suggest that challenging the prosecution experts could very well be fruitful and productive. Dr. Hunter informed trial counsel that there was at least one available and highly qualified expert who could “create reasonable doubt or turn things into defenses [sic] favor.” GIII 11:5 - 11:6. Trial counsel, however, failed to investigate this or any other experts, and instead stuck with the one who was “not [his] guy.” GIV 52:14. The Court of Appeals stated that defense counsel did not know whether or not Dr. Spitz would be able to provide favorable testimony and concluded his decision to forgo contacting an alternate expert was reasonable trial strategy. This directly contradicts *Gersten*. Defense counsel had no basis to make a reasonable strategic decision that contacting an alternate expert was not necessary based on the fact defense counsel was not already aware of what that expert might say, that is the exact reason *Gersten* held why counsel should further the investigation.

The Court of Appeals opinion is also directly contrary to *Couch v. Booker*, 632 F.3d 241 (CA6, 2011), and it should be noted that the trial court relied heavily upon it as at least persuasive precedent. Thus far, the precedential value of this case has been understated. "Trial counsel may rely on an expert's opinion on a matter within his expertise when counsel is formulating a trial strategy but this common-sense principle does not give trial counsel a free ride when it comes to the obligation to undertake a 'thorough investigation of law and facts relevant to plausible options' for a defense." *Couch, supra* at 246. (citing *Strickland*). In the present case, as in *Couch*, trial counsel did not undertake a thorough investigation of the relevant law and facts. Trial counsel did not review any of the medical or law review literature on Abusive Head Trauma, Shaken Baby Syndrome, or accidental fall injury in children. Trial counsel did not consult any alternate experts. Instead, trial counsel continued to rely on Dr. Hunter, but disregard Dr. Hunter's advise to seek another expert. Trial counsel's failure to investigate a substantial causation defense fell below the objective standard of reasonableness and counsel's failure to investigate causation defense prejudiced the verdict.

Therefore, because the cases cited by the trial court are binding precedent, or at least at the very least incredibly instructive to any lower court, the trial court cannot abuse its discretion by choosing to follow them.

II. THE COURT OF APPEALS ERRED WHEN IT REVIEWED THE TRIAL COURT'S DECISION AND INCORECTLLY INTERPRETED THE ISSUE, INCORRECTLY STATED FACTS NOT SUPPORTED BY THE RECORD, AND DIRECTLY CONRADICTED ITS OWN OPINIONS AND THE OPINIONS OF THE UNITED STATES CIRCUIT COURTS.

A. The Court Of Appeals Incorrectly Interpreted the Issue Before The Trial Court In This Case.

The Court of Appeals incorrectly interpreted the issue in this case when it stated the trial court limited the issue to "whether defense counsel was ineffective for failing to ask the court for additional funds to explore a second witness." The trial court clearly limited the issue to whether defense counsel

was ineffective for failing to investigate a causation defense. The trial court stated “[C]ausation defense becomes the operative word.” GIII 45:20.

At the *Ginther* Hearing the court Asked Dr. Hunter:

“THE COURT: And as you indicated, it’s kind of like a religion which theory do you advance in terms of your experience. Here, you told Mr. Marks I’m not your guy. Call Shuman he’s the guy you really want to talk too[sic].

Mr. HUNTER: Right.

THE COURT: From the standpoint of a forensic pathologist is that the option to establish a plausible option for a causation defense?

MR HUNTER: Yes.” GIII 48:9-48:17.

...

“THE COURT: But the point of it is not contacting Dr. Schulman[sic], not contacting Dr. Spitz, and especially when you look at Dr. Spitz’s opinion it is directly contrary to the prosecutor’s theory and the evidence presented. So based upon all of the facts and the law in this case I find that the representation by Mr. Marks was deficient and there would - - There is a plausible option of probability that a different verdict would be achieved.” GIV 60:12-60:21.

The Court of Appeals stated that the trial court determined that the evidence was clear that Dr. Hunter told Marks that he did not believe the injuries were accidental and that he did not feel comfortable testifying. The court acknowledged that Dr. Hunter told Marks “I’m not your guy” and referred him to Dr. Spitz or Dr. Schuman. The Court of Appeals failed to acknowledge the extent of Dr. Hunter’s position.

At the *Ginther* Hearing the court asked Dr. Hunter:

“THE COURT: Why is it that you referred Mr. Marks to Dr. Scuman then?

MR. HUNTER: Because Mr. Shuman is someone who has dug into the physics models and their proposed models. . . .now if I were going to find a pathologist because I think every – both prosecution, defense are entitled to the best type of expert they can find, in my opinion, Dr. Shuman is the best defense expert in these types of situations. GIII 9:15-10:22.

...

MR. HUNTER: I don’t think it’s ethical for me to sign on as an expert for the defense if I really don’t think I can help them. GIII 15:5-15:6.

Simply, Dr. Hunter's position was that he was not in the correct “religious” camp to be of much benefit to Leo's defense.

Further, as stated previously, the issue of whether or not trial counsel sought out additional court funds was not the issue before the trial court. The question of whether or not trial counsel sought out additional funds was only relevant to the extent that it showed that funds would have been available had he decided to investigate a substantial causation defense.

B. The Court of Appeals Incorrectly Supported Its Decision With Facts Not In The Record, Misconstrued Baylee's Medical Health, Leo's Action On That Day, and gave much weight to the Prosecution's Experts, while minimizing the testimony of Dr. Spitz.

The Court of Appeals relied heavily on specific details from the prosecutions expert witnesses. The court acknowledged the five expert witnesses agreed Baylee's injuries were too severe to have been caused from a fall from the bed and specifically quoted Dr. Guertin, Dr. DeJong and Dr. Halley. The Court of Appeals mentioned that Dr. Spitz opined that Baylee's bruises were not the product of abuse and that attempted medical treatment or CPR could have caused them. The court also mentioned that Dr. Spitz further averred that in his opinion Baylee's death could not be attributed to Shaken Baby Syndrome or Abusive Head Trauma. The court failed to mention that Dr. Spitz's affidavit listed a contrary expert medical opinion to every piece of testimonial evidence the court quoted from the prosecution's experts.

For Example:

Court of Appeals Opinion:

"The defendant allegedly found the child face down, which Dr. Guertin determined was suspect due to severe injury in the back of the child's head."

Dr. Spitz Affidavit:

"Baylee Stenman may have fallen at home, striking an object on the floor. She remained there until found unconscious and taken to the hospital."

Court of Appeals Opinion:

"For instance, Dr. Guertin observed large bruises on the child's neck that suggested she had been choked."

Dr. Spitz Affidavit:

"The coloring of bruises in the skin and elsewhere support the time frame from injury to death. . . . The location of the bruises is entirely consistent with position of the body on its back during CPR on rough terrain. . . . The bruises on the neck are of the same age as

the other bruises on the body and indicate unsuccessful, attempted intubation. . . . These bruises are not abuse-type injuries, patterned bruises, or choking or throttling-type injuries. Further, attributing a single bruise on the buttock “almost certainly” to hitting or spanking is unfounded. “

Court of Appeals Opinion:

“Dr. Michelle Halley testified that it was rare for children to suffer retinal hemorrhaging in accidents of any kind.”

Dr. Spitz Affidavit:

“When the impact occurs, the brain and eyes move, causing the optic nerves to rub against the bony channels. This trauma causes the injury around the nerves and the retina.”

As previously stated, the Court of Appeals incorrectly concluded the evidence was overwhelming that Baylee showed signs of abuse after Leo moved into the home.

The Court of Appeals stated in its opinion:

“These five experts agreed that the injuries were too severe to have been caused from a fall from the bed. Rather, they opined that they were the result of blunt force trauma or shaking.

Although Dr. Spitz would have testified that the child’s injuries were the result of a “mild impact” and her death was accidental, five other experts testified that the injuries were very severe and could not have been caused by a fall. There was also overwhelming evidence that the child suffered from physical abuse, and begun displaying signs of abuse shortly after defendant moved into the home. The child was also under defendant’s care. Thus, on this record, we cannot conclude that defense counsel’s failure to consult an additional expert would have changed the outcome, as to deprive defendant of a substantial defense. . . .”

People v. Ackley, unpublished opinion per curiam of the Court of Appeals, (Docket No. 318303); WL 1618356 (Mich. Ct. App. Apr. 22, (2014).

This evidence remained unrefuted until the *Ginther* Hearing. Defense counsel failed to call Baylee’s pediatrician or submit Baylee’s medical report otherwise the jury would have heard testimony that Leo had a positive influence in Baylee’s life. The report stated that after Leo moved into the home Baylee’s speech improved, she stopped using a bottle, she slept in her own bed, and she was in a higher class at daycare. All of this was essentially attributed to Leo. GI 37:18-37:25. In his affidavit, Dr. Spitz also disagreed with the prosecution’s expert witnesses that Baylee suffered from physical abuse and would have testified to that fact.

In Dr. Spitz's affidavit he stated:

"h. The bruises on the neck are of the same age as the other bruises on the body and indicate unsuccessful, attempted intubation.

i. These bruises are not abuse-type injuries, patterned bruises, or choking or throttling-type injuries. . . .

u. In this case, there is a lack of tearing of scalp, laceration, and fracturing of the skull. The absence of these indicates a relatively mild impact." (Dr. Spitz Affidavit)

Further, the court relied on testimony from Brandon Milcher regarding his daughter, Baylee's half-sister. The Court of Appeals incorrectly stated "Additionally, the child's sister expressed concerns to her biological father about spending time with defendant." His daughter did not testify at trial and any conversation he might have had with her were hearsay and this testimony was objected to and sustained at trial. The Court of Appeals should not have considered nor relied on the testimony at all.

At trial the Prosecution questioned Brandon Milcher:

Q. "Did Brandy express any concerns to you about Leo?"

A. Sometimes yes. She's – she did start stating that she didn't want to go to her-

Mr. Marks: Objection, Your Honor. Hearsay.

Ms. Lincoln: Not what she said, just what- did she-

The Court: Sustained." (Trans. 545:17-23 (April 12, 2012)).

The Court of Appeals stated Baylee's mother became concerned for Baylee's health after Leo moved into the home and specifically mentioned Baylee's hair loss. However the court failed to acknowledge that Baylee's hair loss was an issue before Leo moved in. Her daycare provider testified Baylee's hair began to thin in March of 2011. Trans. 564:1-564:9 (April 12, 2012). Erica and Leo began dating in March of 2011, he moved in a few weeks later. Trans. 237:1-237:5 (April 10, 2012). Dr. Spitz's affidavit also stated in his affidavit there are multiple reasons for a child's thinning of hair. It is not solely indicative of abuse.

In his affidavit Dr. Spitz stated:

"Thinning of the hair can arise from a variety of causes, such as hair bands, undiagnosed medical conditions, and stress, where the child pulls his or her own hair out for a variety

of reasons.” (Dr. Spitz affidavit).

The court also failed to acknowledge that Baylee was diagnosed with a hair follicle infection that she was prescribed antibiotics for.

At Trial Erica Stenman testified:

Erica Stenman:

A. “She had some red/greenish kind of color on the tips of her hair follicle to her scalp and then patches of her hair was missing along the back of her neck and around her ear”.

...

Ms. Lincoln:

Q. “Did he give you any prescriptions?”

Erica Stenman:

A. “Yes. We had a prescription for the hair follicle infection.” Trans. 244:10-244:13, 248:2-248:4 (April 11, 2012).

The Court of Appeals also incorrectly stated that Baylee regressed in her toilet training after Leo moved in. Baylee’s mother testified that Baylee’s toilet training improved after Leo moved in. Trans. 304:15-25, 305:1 (April 11, 2012):

Finally, the Court of Appeals opines that Leo's actions after he found Baylee unconscious were “peculiar” and lists out several things they found to be strange. However, this begs the question: What actions could Leo have done that would have demonstrated his innocence?

III. EVEN IF THIS HONORABLE COURT AGREES THAT THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED DEFENDANT-APPELLANT A NEW TRIAL, THERE ARE NUMEROUS OTHER GROUNDS FOR FINDING THAT DEFENDANT'S TRIAL ATTORNEY WAS INEFFECTIVE.

If this Honorable Court finds that the trial court abused its discretion in granting Defendant-Appellee's motion for a new trial on the basis of ineffective assistance of counsel there are additional reasons for this Court to affirm the trial court's grant of a new trial. The cumulative effect of a number

of errors may amount to error requiring reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). If the cumulative effect of counsel's errors undermines the confidence in the reliability of the verdict, a new trial is warranted. *LeBlanc*, supra at 591. Furthermore, regardless of the issue presented, the Court will not reverse where a trial court reaches the correct result, even if for a wrong reason. *People v Boulder*, 269 Mich App 174, 187 712 NW2d 506 (2005); *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998); *Tipton v William Beaumont Hosp*, 266 Mich App 27, 37-38; 697 NW2d 552 (2005).

A. The Court of Appeals failed to address the additional issues raised by Defendant-Appellant in its opinion stating that Defendant-Appellant failed to properly preserve them by way of cross-appeal.

Defendant-Appellant did not rely solely on defense counsel's failure to investigate a substantial causation defense by trial counsel. Defendant-Appellant also raised additional issues in his direct appeal in COA No. 310350. The Court of Appeal's order in that case remanded to the trial court to address all the issues related to trial counsel's failings. However, the trial court never made any determination on those issues as it quickly focused in on the investigation of a causation defense. Because the trial court never addressed those issues, and did not need to because it held that Leo was entitled to a new trial, Defendant-Appellant had no findings of fact or conclusions of law to appeal, and therefore made no cross-appeal because there was nothing to appeal. Those issues are raised now, not only to show that cumulative effect of trial counsel's poor performance, but because the trial court still reached the correct conclusion, albeit for the wrong reason. Those issues are addressed below.

B. Trial counsel was ineffective when he vouched for the expertise of the People's expert witness when the People moved to admit Dr. DeJong as an expert witness at Defendant's trial. Such conduct fell below an objective standard of reasonableness and prejudiced the Defendant by undermining defense's argument of accidental death.

Trial counsel was ineffective when he bolstered the expertise of People's expert witness, Dr. DeJong, when the People moved to admit her as an expert at Defendant's trial. To qualify as an expert, a witness must normally testify to his or her knowledge, experience, skill, training, or education. MRE

702; *People v Kowalski*, 492 Mich 106, 131; 821 NW2d 14 (2012). "When a case turns on the testimony of one expert compared with that of another, the credibility of each expert is relevant to the disposition of the case." *Wischmeyer v. Schanz*, 449 Mich 469, 475; 536 NW2d 760 (1995). Further, the prosecution may not vouch for its own experts' credibility on a matter. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Allowing a defense attorney to vouch for the expertise of the People's witnesses, where the defense attorney makes no objection or attempt to rebut, defies logic, and would appear to be a matter of first impression before this court.

Trial counsel vouched for the expertise of Dr. Joyce DeJong, the forensic pathologist. While stipulating to the credentials of an expert is trial strategy, trial counsel's actions went beyond that. When the testimony of one witness is so important, vouching for the expertise of that witness's testimony cannot be considered a trial strategy. In doing so, he bolstered the expertise of Dr. DeJong's testimony in the eyes of the jury. Dr. DeJong testified that the only cause of death possible was blunt force trauma and that it was impossible for this injury to be caused by an accidental fall. The prosecution even argued this in its closing argument. Trial counsel's action, not merely failing to object to a witness, but actively vouching for her expertise when the only proffered defense was accidental death, constituted ineffective assistance of counsel. In effect, trial counsel asserted that he agreed with her findings. Also, trial counsel failed to impeach Dr. DeJong's expertise on SBS or AHT through the use of scholarly articles on the subject. Such actions denied Leo a defense, causing him prejudice because the controversy over what Dr. DeJong testified to was never introduced to the jury.

C. Trial counsel was ineffective when he failed to call a witness that observed Baylee Stenman strike the back of her head on at least one occasion in the week leading up to her death. Such conduct fell below an objective standard of reasonableness and prejudiced the Defendant by undermining defense's claim of accidental death.

Trial counsel was ineffective when he failed to call a witness that observed Baylee strike the back of her head on at least one occasion in the week leading up to her death. A defendant's trial counsel makes the decision to call witnesses or not. *Payne. supra*. As mentioned above, "[t]he failure to

call a witness can constitute ineffective assistance of counsel when it deprives the defendant of a substantial defense." *Id.*

The defense asserted at trial was accidental death. A witness who could testify that an accidental falling on the head did occur is crucial to such a proposition; indeed, it constitutes the entire defense. Linda Byrd, if called as a witness for the defense would have testified that she witnessed Baylee jump from a trampoline to a kiddie pool and observed her strike her head on the ground when her feet slipped out from under her. Byrd Aff. Trial counsel knew about this witness and her potential testimony before trial. GI 31:13 – 32:8. When trial counsel failed to call such a witness, Leo was denied effective assistance of counsel; falling below an objectively reasonable standard. Therefore, Leo was prejudiced not only because his defense was cut short by lack of a witness, but also because the jury never got to hear that the crux of the defense theory actually occurred.

D. Trial counsel was ineffective when he failed to object to the admission of the autopsy photos of the victim.

During the course of the trial, various autopsy photographs were submitted into evidence. These photographs were never objected to by trial counsel. The admission of photographs may be objected too because they are: 1) not material to any point in issue, see *People v Becker*, 300 Mich. 562; 2 NW2d 503 (1942); 2) because they do not adequately represent the person, place or thing photographed, see *People v Herrell*, 1 Mich App 666; 137 NW2d 755 (1965); or 3) because they are calculated to inflame the minds of the jurors, see *People v Burns*, 109 Cal App 2d 524; 241 P2d 308, (1952). □ In the case of *People v. Turner*, 17 Mich App 123, 131-32; 169 NW2d 330, 334-35 (1969), the Michigan Court of Appeals dealt with similar autopsy photos of a child victim who died from blunt force head injury. The court held that:

“Since the cause of death was undisputed, the only material points in issue were the severity of the skull fracture and the amount of force necessary to inflict such a wound. Both matters were the subject of clear and cogent testimony of Dr. Zawadski on the witness stand. Although an autopsy was required for him to ascertain the nature and extent of the injury a photograph was not required for him to adequately and effectively

describe his findings to the jury. The photograph of the skull was not of such essential evidentiary value that its need clearly outweighed the likelihood that it would inflame the minds and passions of the jurors. The trial court abused its discretion by admitting it into evidence.” *Id.* at 132 [internal citations omitted]. □

In this case, however, trial counsel failed to even object to these prejudicial autopsy

photographs. GI 46:15. The photographs in *Turner* were objectionable because they showed

“laboratory pan, the surgical instruments, the open chest cavity, the tangled mass of bloody hair or the

bloody scalp. These were all totally irrelevant and highly inflammatory.” *Id.* at 133. In this case, the

autopsy photographs were equally gruesome due to the autopsy procedures that had already occurred.

See Autopsy Photos attached to Plaintiff-Appellee’s Brief as Appendix D. Just as in *Turner*, the

ultimate cause of death in this case was undisputed—subdural hematoma and brain swelling. At issue

was the amount of force necessary to cause the injury, whether that force resulted from an accidental

fall, and if not, who caused the injury. While the ultimate determination of the admissibility of the

autopsy photographs was at the discretion of the trial court, trial counsel's failure to object to these

photographs unfairly prejudiced Leo.

E. Trial counsel was ineffective when he failed to present any evidence that someone other than defendant may have caused Baylee's death.

The Prosecution's case against Leo revolved on their assertion that Leo was a "monster" who made drastic changes in the victim's life, extensively abused the victim, and that ultimately the abuse caused the victim's death. Trans. 829-833. Trial counsel had access to the victim's pediatric file, in which her doctor, Dr. Ptacin, documented how much better the victim was doing, both developmentally and emotionally, since "mom has a new boyfriend." GI 37:21. Trial counsel read this file, but never contacted the doctor or considered calling him as a witness. *Id.* at 38. Examination of trial counsel at the trial court shows how thoroughly trial counsel failed in this regard:

“Q. And did you receive during discovery the medical reports of Baylee's pediatrician?

A. Yes. That would be from day one?

Q. Yes.

A. Yes.

Q. Bear with me one moment, Mr. Marks. Just trying to get a name of the attending physician. Dr. Ptacin, a report from Dr. Ptacin, did you receive that report?

A. Yes.

Q. You reviewed it, correct?

A. Correct.

Q. In the report did you notice that the doctor -- the attending physician had said that about Baylee on June 7 of 2011 that she's now off a bottle, is sleeping in her own bed, speaking better, mom has a new boyfriend and is stricter re bottle in bed -- regarding bottle in bed. And child is in a higher class at day care too. Regarding her speech and babysitter talks to the point more and that they were essentially attributing to Leo. Do you recall seeing that in the report? Would you like to read it again to refresh your memory?

A. I recall reading information such as that.

Q. This doctor was available to you to call in your case in chief, was he not?

A. Correct.

Q. Did you have any conversation with the doctor prior to the day of trial or during the trial?

A. No.

Q. Did you ever contact the doctor, talk to the doctor?

A. No.

Q. Again going back, Dr. Guertin testified that was clear that the child was abused, right?

A. That was his testimony, correct.

Q. Wasn't it also true the theory of the case Leo -- theory of the prosecutor's case Leo was the one who abused the child, right?

A. Yes, sir.

Q. He was charged with the crime, right?

A. Where, in reference to the date in question?

Q. Right...Correct?

A. Correct.

Q. Okay. And so when you have a report from the child's pediatrician that stated the child's doing much better with the new boyfriend, please explain to the Court your trial strategy in not calling the pediatrician to testify in your case in chief?

A. Trial strategy would have been as far as my concern was that of the blunt force trauma and defending that.

Q. So please explain that answer more fully. How is not calling this witness concerning the blunt force trauma when Dr. Guertin testified as the child was abused.

A. With the fact Mr. Ackley was charged with child abuse first and the fact that part of child abuse first is referencing head injury, and with the fact of there being a death in this situation as far as my concern -- as far as where I had to try to bring the jury was that -- whatever cause or the blunt force trauma that was the cause of death, was accidental.

Q. How does not calling the pediatrician further your case?

A. It doesn't.

Q. You did hear Ms. Lincoln make statements regarding that Leo was a monster and lived in the home, was the one that took her off the bottle and abused her, right? You did hear them say that in her opening statement, correct?

A. Correct.

Q. So you knew that that was the prosecutor's theory of the case, right?

A. Correct.

Q. That there was a systematic abuse the day that Leo moved in, right? You did hear that, right?

A. Yes.

Q. You knew that they were alleging the day Leo moved in Bailey's life changed, it was systematic abuse, right?

A. Right. Okay.

Q. Yet you have a report from the attending pediatrician that states -- cites the contrary, so I'm again asking you how does it further your case to not call him?

A. All right. There was also testimony -- as far as me not calling him there was also testimony as far as when -- as far as the problems to which Baylee started to have when did that occur, I believe there was a conversation -- I believe the teacher testified and at that point it was on cross-examination whatever Baylee was going through was before Leo got there.

The court: Excuse me if I may. I'm going to ask the question a little bit differently than it has been posed, and I think this is fairly direct. Why didn't you call the pediatrician? What was your thought process in not calling that witness?

The witness: My thought process was simply that what I was dealing with as far as the cause of death was that being blunt force trauma and that is what I had to defend, that incident." GI 36:24 – 41:6.

Trial counsel knew that two other people were in the apartment that morning, namely the victim's

mother, Erika Stenman, and the victim's older sister, Brandy Stenman-Melchor, but never considered pointing the finger at either of them because he "never got the impression that anything did occur."

GIV 4:23 – 4:24. In short, trial counsel was ineffective by completely failing to investigate whether or not his client was the true "monster" in the house. Further, had he called the expert that he did consult with, Dr. Hunter, he would have been able to not only present the nature of the controversy surrounding SBS and AHT, Dr. Hunter would have helped him point the finger at another adult in Baylee's life.

F. Trial counsel was ineffective when he failed to object to the final jury instructions, which instructed the jury to convict if it found "... [t]hat Baylee Stenman died as a result of traumatic brain injury. . . .", rather than the act of child abuse itself. Such conduct fell below the objective standard of reasonableness and prejudiced the Defendant by allowing the jury to disregard the claim of accidental death raised by the defense.

Trial counsel was ineffective when he failed to object to the final jury instructions, which instructed the jury to convict if it found "... [t]hat Baylee Stenman died as a result of traumatic brain injury. . . .", rather than the act of child abuse itself. Generally, objections are matters of trial strategy.

A defendant's trial counsel need not make futile objections. *People v Milstead*, 250 Mich App 391, 401;

648 NW2d 648 (2002). The model jury instruction reads:

"(1) The defendant is charged with first-degree felony murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant caused the death of the [*name deceased*], that is, that [*name deceased*] died as a result of [*state alleged act causing death*].

(3) Second, that the defendant had one of these three states of mind: [he / she] intended to kill, or [he / she] intended to do great bodily harm to [*name deceased*], or he/she knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of [his/her] actions.

(4) Third, that when [he/she] did the act that caused death of [named deceased], the defendant was committing [(or) attempting to commit / (or) helping someone else commit] the crime of [*state felony*]. For the crime of [*state felony*], the prosecutor must prove each of the following elements beyond a reasonable doubt: [*state elements of felony*].

(5) Fourth that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime.]" MI CJI2d 16.4

While trial counsel would not have needed to object to the jury instruction if there had been no reason to object, the jury instruction in question was both flawed and confusing. A "traumatic brain injury" is a medical condition, and not the necessary *actus reus* of child abuse. The jury instruction substituted the required *actus reus* of the crime with the effect of a medical condition. As previously mentioned, trial counsel's argument in Leo's defense was accidental death. His failure to object to a jury instruction that removed the need for the jury to find an act on the part of Leo to convict could not have been trial strategy. In failing to object, trial counsel's conduct fell below an objectively reasonable standard. Leo lost the opportunity for the jury to decide whether the death was a result of his actions or not, and therefore, was prejudiced by trial counsel's failure.

G. The trial court committed clear error when it gave the final jury instructions, which instructed the jury to convict if it found "... [t]hat Baylee Stenman died as a result of traumatic brain injury. . . .", rather than the act of child abuse itself. Clear errors arise when a trial court abuses its discretion. This error prejudiced the Defendant by undermining the defenses claim of accidental death.

The jury instruction given: "... [t]hat Baylee Stenman died as a result of traumatic brain injury. . . ." did not adequately instruct the jury on the law to be applied. While jury instructions must be viewed as a whole, they must also adequately convey the law to the jurors and protect the rights of the

defendant. *People v Aldrich*, 246 Mich App 101, 124-25; 631 NW 2d 67 (2001). When instructing a jury, a trial judge must present the case to the jury fully, fairly, and "in an understandable manner." *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). Where the jury instructions, taken as a whole, do not fairly present the issues to the jury or do not adequately protect a defendant's rights, the case must be remanded for a new trial. *People v Dumas*, 454 Mich 390, 411; 563 NW2d 31 (1997).

Here, the jury instruction failed to adequately explain the law to the jury. As instructed by the trial court, the jury would find whether or not Baylee Stenman died from a result of a condition—but not as part of the *actus reus* of a person. Also, the judge did not correct the instruction after giving it. This instruction would have the jurors convict based on the result of a controversial medical condition, and not Leo's actions. This jury instruction did not adequately protect Leo's rights and caused Leo prejudice. Therefore, Leo is entitled to a new trial.

H. Defendant is entitled to a new trial because the newly discovered non-cumulative evidence of the causes of the bruising on Baylee Stenman's body and the questionable status of "Shaken Baby Syndrome" and its progeny "Abusive Head Trauma" in the scientific community coupled with the Defendant's claim of actual innocence, make it more likely than not that no reasonable juror could find the Defendant guilty beyond a reasonable doubt.

Defendant is entitled to a new trial because the cumulative evidence of the causes of the bruising on Baylee Stenman's body and the questionable status of SBS and AHT in the scientific community, coupled with the Defendant's claim of actual innocence, make it more likely than not that no reasonable juror could find the Defendant guilty beyond a reasonable doubt. "For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was 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, 182 (2003).

In this case, the evidence of the probable causes of the bruising on Baylee Stenman's body and

of the head trauma, attested to by Dr. Werner Spitz, is both new and newly discovered. This evidence is not cumulative, as it was never presented to the jury. Leo could not have discovered this evidence before trial. This new evidence has been the subject of several recent law review articles, as it relates to criminal prosecutions. See *Findley, Shaken Baby Syndrome*; *Tuerkheimer, The Next Innocence Project*. Whether or not trial counsel could have discovered this evidence is arguable; however, in light of trial counsel's other failures, it is questionable. Given trial counsel's theory of accidental death and that Dr. Spitz will testify to Baylee's death as accidental, coupled with Ms. Byrd's statement that she witnessed Baylee strike her head on the ground, a different outcome would be probable. Leo was found guilty beyond a reasonable doubt, but this new evidence is of such a nature that no reasonable juror could so find. Therefore, Leo is entitled to a new trial.

I. Defendant is entitled to a new trial because the cumulative effect of trial counsel's pattern of ineffectiveness in regards to "Shaken Baby Syndrome" and its progeny "Abusive Head Trauma," as well as trial counsel's failure to call a witness to the possible cause of Baylee Stenman's injuries, and coupled the faulty jury instruction prejudiced defendant to the extent that he was denied a fair trial.

Defendant is entitled to a new trial because the cumulative effect of trial counsel's pattern of ineffectiveness in regards to the validity SBS and AHT, as well as trial counsel's failure to call a witness on the possible cause of Baylee Stenman's injuries, and coupled with the faulty jury instruction prejudiced defendant to the extent he was denied a fair trial. Cumulative errors must be looked at as a whole to see if the combination of errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387-88; 624 NW2d 227 (2001). To find defendant was denied a fair trial, the errors at issue must be found to have been seriously prejudicial. *Id.*

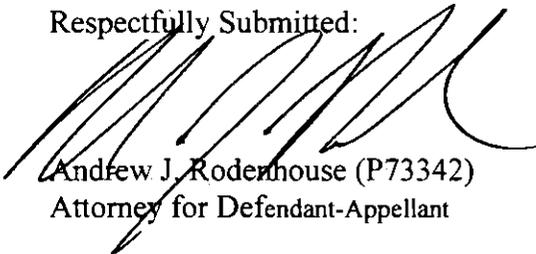
As discussed above, trial counsel's conduct fell below an objective standard of reasonableness, and that failure prejudiced Leo, to the point of effectively negating trial counsel's only presented defense—accidental death. Trial counsel never brought up the controversy over SBS or AHT to the jury. He failed to call an expert to explain the controversy to the jury. He failed to call a witness that

observed Baylee strike her head on the ground in the days prior to her death. He failed to object to the jury instruction. And he bolstered the expertise of the prosecution's key expert witness. Further, the flawed jury instruction restricted the jury from actually deciding whether or not Baylee Stenman's death was from an action taken by Leo. As a result of these compounding, prejudicial errors, Leo was denied a fair trial.

PRAYER FOR RELIEF

Therefore, for the reasons above, Defendant-Appellant, Leo Ackley, prays this Honorable Court grant his application for leave to appeal, uphold the decision of the trial court granting him a new trial, remand to the trial court for further proceedings, or any other relief this Honorable Court deems just and appropriate.

Respectfully Submitted:



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Dated: June 13, 2014