RECEIVED by MSC 5/11/2018 4:29:41 PM

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN Plaintiff-Appellant, v BRIAN KEITH ROBERTS Defendant-Appellee.	)	SUPREME COURT NO. 156223 COURT OF APPEALS NO. 327296 CIRCUIT COURT FILE NO. 2014-0714 FC

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

JEFFREY S. GETTING (P43227)
ATTORNEY FOR PLAINTIFF-APPELLANT
227 West Michigan Avenue
Kalamazoo, MI 49007
(269) 383-8900

HEATHER S. BERGMANN (P49029)
ASSISTANT PROSECUTING ATTORNEY

ERIN VAN CAMPEN (P76587)
ATTORNEY FOR DEFENDANT-APPELLEE
3300 Penobscot Building
645 Griswold
Detroit, MI 48226
(313) 256-9833

RECEIVED by MSC 5/11/2018 4:29:41 PM

TABLE OF CONTENTS

PAGE(S)

RECEIVED by MSC 5/11/2018 4:29:41 PM

INDEX TO AUTHORITIES CITED

PAGE(S)

CASES

RECEIVED by MSC 5/11/2018 4:29:41 PM

QUESTION PRESENTED BY COURT

WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL?

Plaintiff-Appellant Answers: The Court of Appeals erred when finding that Defendant was entitled to a new trial on the basis of ineffective assistance of counsel for failure to present an independent defense expert on child abusive head trauma. The lower court considered the issue in a vacuum—without reference to the actual facts of this case—and without giving any deference to the professional judgment of trial counsel. The Court of Appeals also overstated the opinions of the experts proffered by Defendant on remand without consideration of their credibility or the weight a jury would likely give their testimony. An honest review of the record reveals that had the proffered experts been presented as witnesses at trial, there is no reasonable probability that the outcome would have been different.

Defendant-Appellee Answers: The Court of Appeals properly determined that Defendant was deprived of his right to the effective assistance of trial counsel where his attorney failed to investigate the medical evidence underlying the prosecution's case and, as a result, failed to consult and present independent expert witnesses who would have provided a substantial defense (i.e., accident) to the charges filed against him and assisted in effectively cross-examining and discrediting Plaintiff's experts, thereby prejudicing Defendant.

RECEIVED by MSC 5/11/2018 4:29:41 PM

***SUPPLEMENTAL* ARGUMENT**

THE COURT OF APPEALS CLEARLY ERRED WHEN FINDING THAT DEFENDANT WAS ENTITLED TO A NEW TRIAL ON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PRESENT AN INDEPENDENT DEFENSE EXPERT ON CHILD ABUSIVE HEAD TRAUMA.

DEFENDANT FAILED TO SUSTAIN HIS BURDEN; NO REASONABLE PROBABILITY OF A DIFFERENT OUTCOME

Effective assistance of counsel is presumed and Defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To prevail on this claim, Defendant must establish that his trial counsel's performance was objectively unreasonable in light of prevailing professional norms, and that, but for counsel's error, it is reasonably probable that the outcome would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "Unless a defendant makes both showings, it cannot be said that the conviction…resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, *supra*, at 687.

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. [*Id*. at 691-692; internal citations omitted.]

Therefore, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in [any particular] order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id*. at 697.

RECEIVED by MSC 5/11/2018 4:29:41 PM

> In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffective claim is not to grade counsel's performance. If it is easier to dispose of an ineffective assistance claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. [*Id.*; see also *People v Reed*, 449 Mich 375, 400-401; 535 NW2d 496 (1995).]

It is for this reason that Plaintiff begins its analysis with the prejudice prong in this supplemental brief—believing that Defendant has failed to prove that it is *reasonably probable* (or fairly likely) that the outcome of his trial would have been different had the jury heard from the experts proffered on remand and, therefore, the Court of Appeals erred in granting him a new trial.[1]

The post-conviction debate regarding the need of an independent defense expert is premised on the assumption that Defendant had a viable accident defense and presupposes that a reasonable jury would in fact believe that Defendant did not use excessive force toward his two-year-old son and that Nehemiah Dodd did indeed sustain only a "short fall." In other words, it assumes that the jury believed Defendant's final version of what took place on the night in question and disregarded other relevant evidence. An honest review of the record suggests otherwise.

A) DEFENDANT GAVE MULTIPLE EXPLANATIONS FOR CHILD'S INJURIES

First, and most obvious, is the fact that Defendant changed his story multiple times and undoubtedly lacked credibility with the jury. It is often said that lies change, but the truth remains

[1] "In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different. This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.' The likelihood of a different result must be substantial, not just conceivable." [*Harrington v Richter*, 562 US 86, 111-112; 131 S Ct 770; 178 L Ed 2d 624 (2011), internal citations omitted.]

RECEIVED by MSC 5/11/2018 4:29:41 PM

the same. And here, Defendant first claimed that Nehemiah fell down the stairs. He told that to first-responders, to Pamela Clay (Nehemiah's cousin and prior caretaker), and to Detective Kristin Cole during his initial interview (Appendix, 11a-12a, 23a, 32a-34a, 69a-70a). Defendant told one officer at the scene that Nehemiah was about half-way down the stairs when he stepped into the kitchen (Appendix, 32a-33a). He heard a thump and discovered Nehemiah lying at the bottom of the stairs (Appendix, 33a-34a). Defendant assumed that Nehemiah fell down the stairs on his back (Appendix, 34a). He told another officer at the scene that Nehemiah fell backwards from 3 to 4 steps from the floor (Appendix, 37a).

Defendant told Detective Cole that he called Nehemiah down to change his pants and that when Nehemiah was about half way down the stairs (with only two or three steps left to go), he saw him fall backward and hit his head on the base of the stairs (Appendix, 69a).[2] When asked to clarify whether he actually saw Nehemiah fall, Defendant then said that he did not actually see him fall, but only saw him hit the landing at the bottom of the stairs (Appendix, 69a). Defendant later claimed that he only saw Nehemiah falling out of the corner of his eye, and ultimately stated that he was in the kitchen and did not see the fall at all, but only heard the thump (Appendix, 69a-70a).

After Defendant was arrested and taken into custody, he told his girlfriend, Veronica Witherspoon, "what really happened," stating that "he grabbed [Nehemiah] by his ankle so he can slide down the stairs but instead of him sliding on his butt, he had fell back and hit his head" (Appendix, 24a-25a, 30a). Witherspoon testified that she recalled hearing two thumps from the kitchen where she was cooking and told the police the same (Appendix, 22a, 24a-26a, 30a). She

[2] Immediately after sitting down, and "out of the blue"—before any questions were asked of him—Defendant made the comment "he has a large head and a small neck, you know" (Appendix, 65a).

RECEIVED by MSC 5/11/2018 4:29:41 PM

added that as the trial approached, her and Defendant's relationship became more strained because Defendant kept insisting that she misunderstood what he told her (Appendix, 28a-29a). Witherspoon countered that she did not lie and remembered exactly what he told her (Appendix, 29a).

In his third and final interview with Detective Cole, after again insisting that Nehemiah fell down the stairs, Defendant shared for the first time the version of events that was relied on by the defense at trial—that he was sitting on the second or third step from the bottom and Nehemiah was standing in front of him on the landing (Appendix, 74a). Defendant claimed that he grabbed Nehemiah's feet and pulled them out, "intending for him to land on his butt so that [he] could change him out. And instead of him landing on his butt, he went straight back and hit his head on the carpet" (Appendix, 75a). Defendant was "very clear" that Nehemiah hit his head only one time on what Detective Cole described as thickly padded carpet—which, of course, did not explain the three distinct acute bruises on the back of Nehemiah's head (Appendix, 50a, 68a, 76a).

B) EVIDENCE OF INTENT, MALICE, AND/OR STATE OF MIND

Next, there was evidence presented from which a reasonable jury could infer that Defendant was in over his head with the responsibility of caring for a two-year-old child, and that he was upset with Nehemiah and acted aggressively toward him on the night in question.

The record establishes that for the first year of Nehemiah's life Defendant was unaware that he was the child's father and had had no contact with him (Appendix, 2a-4a). He assumed custody of Nehemiah in late September 2013, approximately one month after the child was removed from his mother's care (Appendix, 5a-6a, 8a). Nehemiah was initially placed with his mother's cousin, Pamela Clay (Appendix, 7a). And shortly after Defendant assumed custody, he called Clay and wanted her to take Nehemiah back, explaining that he had no job and no place to

RECEIVED by MSC 5/11/2018 4:29:41 PM

live and it was just "too much" for him to handle—that "he'd bitten off a little bit too much and he don't think he can do it" (Appendix, 9a-10a, 14a). Defendant went back to get Nehemiah four days later (Appendix, 10a). Defendant was living with his mother at the time (Appendix, 79a-80a). He met Veronica Witherspoon in October 2013 and shortly thereafter they began dating (Appendix, 19a-20a). For approximately one month prior to Nehemiah's death, Defendant spent a lot of time at Witherspoon's sister's home where he, Witherspoon, Witherspoon's five children (including a newborn baby), and Nehemiah shared a single bedroom (Appendix, 17a-18a, 21a, 27a). Defendant had several other children, none of which he had in his care (Appendix, 43a).

The record also established that Defendant was frustrated with the potty training process. During the first interview he admitted to Detective Cole (after initially denying it) that he sometimes spanked Nehemiah when he messed his pants, and during the third interview (after confessing that he caused Nehemiah's injuries) he stated that he was "frustrated" that Nehemiah wet his pants (Appendix, 66a-67a, 75a). Detective Cole testified that Defendant insisted that it was a "pure accident" and that he intended for Nehemiah to fall on his bottom, "[b]ut he did admit that he was frustrated when he did it," stating "man, wet again" (Appendix, 75a). Cole continued, "So he said that he was, I believe he used the term, I was kind of pissed. He said Nehemiah was a smart kid. He said he could tell me all these things. He could tell me when he wanted food. Why couldn't he tell me when he needed to go potty?" (Appendix, 75a-76a).

There was also evidence that Defendant was verbally abusive toward Nehemiah in the past and possibly physically abusive as well. Carmesha Lathan (the mother of one of Defendant's children) testified that Defendant called her in November 2013 (Appendix, 40a-41a). She did not take the call and it went into her voicemail (Appendix, 41a). When Lathan listened to the message, Defendant could be heard speaking foul and threatening language to Nehemiah (or "Nemo," as he

RECEIVED by MSC 5/11/2018 4:29:41 PM

called him), telling him to "sit your bitch ass down for you get fucked up. I'm about to beat your ass if you don't sit down" (Appendix, 41a). Lathan stated that she was "so shocked" at what she heard she called her mother to get her advice about what to do (Appendix, 41a-41a). She added that she had never witnessed Defendant do anything to their daughter, but this concerned her (Appendix, 42a). Another woman, Tobie Jones, testified on rebuttal that she and Defendant had a sexual relationship that started in October 2013 and ended in December 2013 (Appendix, 81a-82a, 84a). During that time, Jones witnessed Defendant verbally and physically abuse Nehemiah, specifically noting that Defendant made several comments about the child's "big ass head" and would "hit" or "slam his head down" on the floor when the child was supposed to be going to sleep (Appendix, 82a-83a, 85a).

Finally, the record revealed that at the time of Nehemiah's death, the child had visible, "symmetric" bruises (although they appeared to be old) on both sides of his chest (or upper torso) under his arms (Appendix, 13a, 15a-16a, 49a). When confronted by Detective Cole about the bruises, Defendant acknowledged knowing they were there, but could not provide any explanation regarding how or when they occurred (Appendix, 71a).

There was also evidence of a substantial, chronic (or old) subdural hemorrhage that was not present during the CT scan of Nehemiah's head on September 11, 2013 (Appendix, 51a-52a). Dr. Brandy Shattuck (the deputy medical examiner and forensic pathologist who conducted the autopsy) opined that the old bleed was comparable to the new one, stating that it would have been significant enough to cause Nehemiah to be symptomatic, but not severe enough to cause death (Appendix, 52a-53a). Dr. Rudolph Castellani, a professor and neuropathologist, opined that Nehemiah was likely in a great amount of pain when that prior injury was sustained (Appendix, 60a-61a). Defendant told Detective Cole during his first interview that Nehemiah "never had any

RECEIVED by MSC 5/11/2018 4:29:41 PM

major accidents or incidents since he's had him" and has "not struck his head to [his] knowledge" (Appendix, 72a). During the final interview, after his arrest, Detective Cole mentioned the old brain bleed and Defendant denied having caused it, he again denied that Nehemiah ever had a prior head injury while in his care, and he denied that his son was ever symptomatic (Appendix, 73a). After finally admitting that Nehemiah did not fall down the stairs—and offering another explanation for what happened—Defendant was again confronted with the old brain bleed (Appendix, 76a). He then claimed that Nehemiah ran into things a lot and told of an incident when he hit his head on the car door (Appendix, 77a). There was no bump, however, and no bleeding or unusual behavior that followed (Appendix, 77a-78a).

C) PROFFERED EXPERT TESTIMONY RAISED ONLY *POSSIBILITIES* RATHER THAN *PROBABILITIES*; NO SUBSTANTIAL DEFENSE

The expert testimony Defendant presented on remand provided no more support for his theory of defense than the concessions trial counsel was able to get from Plaintiff's experts during trial. Neither Dr. Ljubisa Dragovic nor Dr. Julie Mack provided a *substantial* defense for Defendant. Both experts testified about "possibilities" rather than probabilities, both conceded that Defendant caused the injuries that ultimately led to Nehemiah's death, and neither one could rule out child abuse.

Although Dr. Dragovic agreed that the medical evidence was "consistent" with the mechanism of injury described by the defense at trial (Appendix, 132a), when asked whether there was anything in the autopsy "that suggests to you that these injuries were necessarily intentionally inflicted?," he stated that "there's one injury that is critical and that injury is the head injury that resulted in bleeding into the subdural space creating the problems with the swelling of the brain, creating the extension of the subdural bleeding in the optic nerve sheaths…creating the diagnosed retinal hemorrhages…." (Appendix, 132a). Dr. Dragovic continued, "So it is one injury. Now,

RECEIVED by MSC 5/11/2018 4:29:41 PM

this kid has two bruises on the back or two merging bruises there and one smaller bruise in the back of the head. It's one impact of the head flying through the air that resulted in this complication and this deadly outcome" (Appendix, 133a). Those comments suggest that Dr. Dragovic was concerned not only with the extent of the injuries from a single impact (as described by Defendant), but also with the fact that Nehemiah had multiple bruises. Dr. Dragovic confirmed that bruising is indicative of impact and that behind each bruise on Nehemiah's head was found a corresponding area of bleeding (Appendix, 128a, 131a, 139a-140a).

Dr. Dragovic was also asked by defense counsel whether there was anything about the medical evidence that "necessarily" proved this was child abuse (Appendix, 133a). Dr. Dragovic responded, "No, of course not," but went on to add, "I mean, I can't exclude that as a possibility because throwing for example or pushing or something like that would be [a] purposeful act. And I cannot exclude that and I wasn't there. However, the scenario that you provided is consistent with occurrence of this type of trauma and these complications" (Appendix, 133a). When later asked about the amount of force that was necessary to create such injuries, Dr. Dragovic stated, "I don't have the opinion about the force because I cannot measure the force because I was not there to observe it" (Appendix, 135a).

On cross-examination, Dr. Dragovic again indicated that the scenario provided here (i.e., Defendant pulling Nehemiah's feet out from underneath him) was "plausible," but that he was not factoring in the amount of force used (Appendix, 152a). Dr. Dragovic added, "I don't know how much force because I was not there. It may be a little force or it may be a lot of force" (Appendix, 152a-153a). He then agreed that he was not saying that it in fact happened as a result of an accident, just that it *could* have happened as described by Defendant (Appendix, 152a-152a; emphasis added). Dr. Dragovic acknowledged that short falls often do *not* result in the type of

RECEIVED by MSC 5/11/2018 4:29:41 PM

injuries present in this case (Appendix, 154a). He also agreed that the majority of the systematic subdural hemorrhaging identified in infants and toddlers is the result of child abuse, and likewise, that "[l]ike subdural hemorrhaging, robust literature supports the association of severe retinal hemorrhaging and abusive head trauma" (Appendix, 165a-166a). Indeed, Dr. Dragovic wrote in "Essential Forensic Neuropathology" that "[r]etinal hemorrhages are common (65% to 95%) in cases of inflicted head injury in infants" and that while "the diagnosis of inflicted head injury cannot rest on the finding of retinal hemorrhage alone, [ ] the finding of severe bilateral retinal hemorrhage with retinal folds or detachments is particularly suggestive of the diagnosis" (see Appendix, 226a).[3] Notable, too, is the fact that Dr. Dragovic conceded that he did not have all the facts in this case—he was unaware of what Defendant told the police or what his girlfriend testified to at trial, he had little to no information regarding the scene or the purported location of impact, and he knew nothing about the reports of the first-responders (Appendix, 158a-159a).

Dr. Mack's primary focus was on the old subdural bleed and whether it occurred before Defendant assumed custody of Nehemiah. She indicated that it was "possible" that the injury was sustained before Nehemiah had a CT scan in September 2013, but immediately thereafter conceded, "we don't know" (Appendix, 168a). She noted that the CT slides showed no prevalent sign of fluid outside of Nehemiah's brain and that *if* the old bleed was there, "it was small" (Appendix, 167a-168a). Dr. Mack agreed that there was no evidence of acute (or recent) blood outside Nehemiah's brain in September 2013 (Appendix, 170a). She also clarified on cross-examination that this case did not involve a spontaneous re-bleed, explaining that the old bleed did

[3] In this case, Dr. Castellani observed bilateral retinal hemorrhaging, as well as hemorrhaging around the optic nerve sheath (Appendix, 62a-63a). And an ophthalmology examination revealed retinal detachment (Appendix, 44a).

RECEIVED by MSC 5/11/2018 4:29:41 PM

not supersede the acute trauma—"The acute trauma caused the collapse in this case" (Appendix, 210a, 212a).

Dr. Mack also presented the possibility that Nehemiah may have had a blood clot in his sagittal sinus and opined that *if* there was a clot that pre-dated the acute injury, "and we don't know that it did, but if it pre-existed the trauma," then the child's brain would have been compromised (Appendix, 173a, 176a-178a, 186a, 188a). Dr. Mack explained that the CT done shortly after Nehemiah was admitted to the hospital revealed denser blood in the sinus, which is indicative of a clot or hemorrhage, but added that she could not confirm the presence of a clot from the CT alone—that was something that had to be confirmed by pathology (Appendix, 173a, 176a-177a). And, if even a clot at all, Dr. Mack admitted during cross-examination that she did not know whether it "occurred with the trauma or pre-dated it or occurred…in the ambulance on the way to the hospital" (Appendix, 200a).

Considering the record as a whole, there is no *reasonable* (or fair) likelihood that had Defendant's trial counsel presented Dr. Dragovic and Dr. Mack as witnesses at trial that the outcome would have been different. Again, both doctors threw out only possibilities—ideas that they themselves could not substantiate—and their testimony was no more compelling than the concessions the defense procured from Plaintiff's experts at trial. In *Ackley*, the proffered expert opined that the child's head injuries were *likely caused by* an accidental, mild impact (see *Ackley*, *supra*, at 387)—that, however, was not the opinion of the experts proffered on remand in this case. Indeed, Dr. Dragovic himself acknowledged that the severe, catastrophic injuries Nehemiah sustained are typically indicative of abuse.

And here, as noted, the jury heard evidence of a dad who was inexperienced, assumed custody (of a child he had not known long) by circumstance rather than by plan, was without a job

RECEIVED by MSC 5/11/2018 4:29:41 PM

and independent housing, in a relationship with a woman who had many children of her own, was verbally abusive (and likely physically abusive as well) toward his son in the past, and was admittedly frustrated or "pissed" when he dealt with Nehemiah on the day in question. Moreover, there was evidence that Defendant was unusually calm, without emotion, and "nonchalant" when first responders arrived at the scene (Appendix, 31a, 35a-36a, 38a). One officer testified that they "had to pry to get things out of him" (Appendix, 39a). And when he did talk, he told lies—changing his account of what exactly took place in that stairwell numerous times. The defense at trial, as well as the opinions offered on remand, were premised on the third and final story Defendant told. The Court of Appeals, too, in granting relief, had to have assumed that the jury believed Defendant's final version of the facts—that Nehemiah did in fact sustain a "short fall." There is simply no basis, however, for such an assumption.

Again, it is not enough that Defendant show that the complained of error had some *conceivable* effect on the outcome of the proceeding. *Harrington*, *supra*, 562 US at 112; *Strickland*, *supra*, 466 US at 693. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Strickland*, *supra*; internal citations omitted. Defendant must show that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 694; *Trakhtenberg*, *supra*, 493 Mich at 51. He failed to sustain his burden. Defendant should have been denied relief on the issue of prejudice alone.

DEFENDANT FAILED TO SUSTAIN HIS BURDEN; NO SHOWING OF INCOMPETENCE; PRESERVING INDEPENDENT PROFESSIONAL JUDGMENT

Something must be said regarding the importance of preserving the independent professional judgment of a licensed, experienced attorney, giving them latitude with discretionary

RECEIVED by MSC 5/11/2018 4:29:41 PM

decision-making and not judging their actions with the benefit of hindsight, in a vacuum, and/or without regard to real life circumstances. Defendant's trial attorney is faulted for failing to investigate Plaintiff's medical evidence, failing to appreciate the "controversy" surrounding the diagnosis of abusive head trauma, and for failing to present an independent expert to support Defendant's accident defense. In granting relief, the Court of Appeals determined that trial counsel's research was insufficient, his consultation with two respected experts was not enough, his assessment of the strengths of his case and how the jury would respond to the evidence was unreasonable, and that his chosen method of presenting a defense rendered him constitutionally ineffective. The lower court's assessment was not fair.

Much goes into the presentation of a case and, particularly, whether to present an expert witness (or any witness for that matter). Counsel must consider, among other things, what the witness will contribute, how he or she will present to the jury, and how the witness will hold up on cross-examination. While there may be a group of experts out there in various fields that are willing to testify that children can sustain deadly head injuries as a result of an accidental short fall, their testimony may not be as relevant, effective, or necessary in some cases as compared to others. As argued, not all cases are like *Ackley*, including this one.

Unlike many of its kind, this case did not involve an unwitnessed injury nor a complete denial of any culpability on behalf of the child's parent or caregiver. To the contrary, as the trial court found, "[w]hile *Ackley* resembles the instant circumstances, there are a number of distinct and important differences worth mentioning. First, there is no factual dispute that Defendant actually triggered Nehemiah's injuries. Defendant confessed to being the only one present when Nehemiah was injured and admitted to conduct which led to the fatal injuries" (Appendix, 252a). Second, "Defendant's veracity was a crucial aspect of the instant matter. Defendant's trial counsel

RECEIVED by MSC 5/11/2018 4:29:41 PM

was acutely aware that he had to address his client's multiple conflicting versions of what transpired….Here, defense counsel had to embrace an equivocal client as part of his overall strategy. Such a factor was nonexistent in *Ackley*, as Mr. Ackley's consistency about the event was not an issue." (Appendix, 252a-253a). And third, Plaintiff's expert witnesses made concessions (particularly regarding the issue of force and the fact that this is by no means an exact science, see Appendix, 45a-48a, 54a-59a, 64a) that supported Defendant's theory of defense—something that did not occur in *Ackley*.

The trial attorney in this case had approximately thirty years of experience that included work both as a prosecutor and a criminal defense attorney (Appendix, 111a). He contacted experts he trusted and with whom he had a working relationship, he explored (and discussed with them) literature on the short fall theory, and he knew before trial that he would get concessions from at least one of Plaintiff's experts that supported his theory of defense (Appendix, 94a-97a, 99a, 101a-102a, 104a-105a, 117a-118a). Counsel then made the strategic decision (considering his case as a whole) to rely on concessions from Plaintiff's expert(s) to argue reasonable doubt rather than calling an independent defense expert and taking the risk that he or she would be discredited during cross-examination or on rebuttal and possibly defeat the whole theory in the eyes of the jury (Appendix, 120a-122a). Certainly one cannot ignore the tendency for jurors to assume that paid experts are biased and to consider their testimony with suspicion. And here, trial counsel was particularly sensitive to not losing credibility with the jury, knowing that he was dealing with a client who made several different statements and admitted to the behavior that ultimately led to his son's death (Appendix, 113a-114a, 125a, 127a). In the end, Defendant's trial counsel got exactly what he wanted from the evidence—and with that, argued not only that Defendant's version of the events was plausible, but that the resulting injuries were accidental and

RECEIVED by MSC 5/11/2018 4:29:41 PM

unforeseeable (see counsel's closing argument at Appendix, 86a-90a). Again, this was not, as Defendant portrays (or the Court of Appeals opines), a one-sided case like *Ackley*.

In short, counsel must be given some latitude regarding what evidence to present and whether to call a particular witness. See *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994); *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). The fact remains that these decisions are matters of trial strategy, and although not arbitrarily shielded from appellate review as such, they do enjoy a *heavy* or *strong* presumption of reasonableness under state and federal law. *Ackley, supra*, at 388-389. *Ackley* should not be read as changing the legal landscape on the subject of expert witnesses by requiring trial counsel to keep looking for experts until finding one to rebut the government's experts. See *People v Eliason*, 300 Mich App 293, 300; 833 NW2d 357 (2013). Moreover, as the United States Supreme Court opined:

> To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates. All that happened here is that counsel pursued a course that conformed to the first option….*Strickland* does not guarantee perfect representation, only a 'reasonably competent attorney.' Representation is constitutionally ineffective only if it 'so undermined the proper functioning of the adversarial process' that the defendant was denied a fair trial….[T]he Court of Appeals held that defense counsel should have offered expert testimony to rebut the evidence from the prosecution. But *Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.
>
> In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. And while in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy. Here [defendant's] attorney represented him with vigor and conducted a

> skillful cross-examination. As noted, defense counsel elicited concessions from the State's experts and was able to draw attention to weaknesses in their conclusions….[*Harrington, supra*, at 109-111; internal citations omitted.]

The instant case is no different. For these reasons, the Court of Appeals clearly erred in finding Defendant's trial counsel's representation objectively unreasonable and constitutionally deficient.

RECEIVED by MSC 5/11/2018 4:29:41 PM

RECEIVED by MSC 5/11/2018 4:29:41 PM

RELIEF

WHEREFORE, the People of the State of Michigan, Plaintiff-Appellant herein, respectfully request that this Honorable Court reverse the Court of Appeals' June 6, 2017 opinion based on the arguments presented herein.

Respectfully submitted,

JEFFREY S. GETTING
PROSECUTING ATTORNEY

/s/ Heather S. Bergmann

Heather S. Bergmann
Assistant Prosecuting Attorney
227 West Michigan Avenue
Kalamazoo, MI 49007
(269) 383-8900

DATED: 05/11/2018