STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

BRIAN KEITH ROBERTS,

Defendant-Appellee.
_____/

Supreme Court No. 156223

Court of Appeals No. 327296

Circuit Court No. 14-0714 FC

KALAMAZOO COUNTY PROSECUTOR
Attorneys for Plaintiff-Appellant

STATE APPELLATE DEFENDER OFFICE
Attorneys for Defendant-Appellee

Defendant-Appellee's Supplemental Brief in Opposition to the Prosecution's Application for Leave to Appeal

STATE APPELLATE DEFENDER OFFICE

BY: ERIN VAN CAMPEN (P76587)
MICHAEL R. WALDO (P72342)
Assistant Defenders
3300 Penobscot Building
645 Griswold St.
Detroit, Michigan 48226
(313) 256-9833

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Statement of Question Presented

I. **I. Did the Court of Appeals properly determine that Mr. Roberts was deprived of his state and federal rights to the effective assistance of counsel where his attorney failed to independently investigate the medical evidence underlying the prosecution's case? As a result, did trial counsel fail to consult and present independent expert witnesses who would have provided objective support for the defense, thereby prejudicing Mr. Roberts?**

Trial Court answers, "No."

Court of Appeals answers, "Yes."

Plaintiff-Appellant answers, "No."

Defendant-Appellee answers, "Yes."

Argument Summary

Mr. Roberts' convictions for first-degree child abuse and first-degree felony murder required the prosecution to prove beyond a reasonable doubt that he knowingly or intentionally caused serious physical harm to his son; and that he either intended to kill his son, cause great bodily harm to his son, or acted in wanton and willful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. To that end, the prosecution presented three medical experts with different sub-specialties, who each opined that the child's injuries could only have been caused by forces of the highest magnitude, comparable to a car accident.

To combat these powerful expert opinions, Mr. Roberts' trial attorney formulated an accident defense. He consulted with a pediatrician for his opinion about the cause and manner of death and interviewed the state's medical examiner, who told him she did not think his accident theory was viable. Trial counsel also conducted online research, which he did not find useful. At trial, counsel employed a strategy of seeking concessions from the prosecution expert witnesses. At the time of trial, counsel was unaware that there were experts who would testify that the child's injuries were consistent with Mr. Roberts' innocent explanation. Ultimately, trial counsel did not get any meaningful concessions from the prosecution's experts at trial; they all maintained that Nehemiah's injuries were caused by significant force.

At a post-conviction evidentiary hearing, Mr. Roberts presented testimony from two expert witnesses who each opined Mr. Roberts' innocent explanation for Nehemiah's injuries was consistent with the medical evidence, and injuries such as those sustained by Mr. Roberts' son can occur following short falls. These experts further explained that, because of a pre-existing medical condition, the child may have been more susceptible to catastrophic injury with minimal force than an average two-year-old child.

The Court of Appeals properly conducted a straightforward *Strickland* analysis, consistent with federal and state precedent, and held Mr. Roberts was deprived of his Sixth Amendment right to the effective assistance of counsel. Mr. Roberts established his trial attorney did not conduct a reasonable investigation into the medical evidence, which served as the cornerstone to the prosecution's case, and he was prejudiced by counsel's failure, where the jury never learned that eminently qualified experts in the same sub-specialty fields as the prosecution's experts believed the medical evidence was consistent with an accident.

The prosecution has not shown any reason for this Honorable Court to grant leave. Accordingly, this Court should deny leave to appeal and/or issue an opinion affirming the decision below.

Statement of Facts

Mr. Roberts incorporates the statement of facts from his previously filed Answer. Additional facts are discussed as necessary throughout the argument.

Argument

I. The Court of Appeals correctly held that trial counsel was constitutionally ineffective for failing to independently investigate the state's medical evidence, which was the cornerstone of its case. As a result, counsel failed to consult appropriate, independent experts to prepare his defense, failed to effectively cross-examine the state's experts, and failed to present available expert testimony supporting the defense.

Mr. Roberts incorporates the arguments from his previously filed Answer. He supplements them as follows:

Issue Preservation and Standard of Review

A trial court's ruling on a motion for new trial is reviewed for an abuse of discretion. *People v Johnson*, 245 Mich App 243, 250; 631 NW2d 1 (2001). A trial court abuses its discretion when it relies upon a legal error or errors in its analysis. *People v Duncan*, 494 Mich 713, 730; 835 NW2d 399 (2013).

A claim of ineffective assistance of counsel presents a mixed question of law and fact. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). Any findings of fact are reviewed for clear error, while the legal issue is reviewed de novo. *Id.*

This Court must decide a claim of ineffective assistance of counsel based upon the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Williams*, 223 Mich App 409, 414; 566 NW 2d 649 (1997). In this case, the record includes post-conviction testimony by trial counsel and two defense experts.

A. The Sixth Amendment requires trial counsel to undertake an independent investigation into the state's evidence *before* settling on a strategy for trial.

The right to the effective assistance of counsel is well established in Michigan and federal jurisprudence. US Const, Ams VI, XIV; *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); Const 1963, art 1, § 20; *People v Pickens*, 446 Mich 298, 310-311; 521 NW2d 797 (1994). To prevail on a claim of ineffective assistance of counsel, a criminal defendant must first

show that "counsel's performance fell below an objective standard of reasonableness," and that the defendant was prejudiced as a result. *Wiggins v Smith*, 539 US 510, 521; 123 S Ct 2527; 156 L Ed 2d 471 (2003); *Armstrong*, 490 Mich at 289-290.

To establish prejudice, the "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." *Strickland*, 466 US at 694. A defendant need not show that counsel's error more likely than not affected the outcome. *Id.* The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. A reasonable probability is simply a probability sufficient to undermine confidence in the outcome. *Id.*

There is a presumption that counsel's assistance constituted sound trial strategy. *Armstrong*, 490 Mich at 289-290. However, counsel's performance is not insulated from review "by calling it trial strategy," rather "[c]ounsel always retains the 'duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *People v Trakhtenberg*, 493 Mich 38, 51-52; 826 NW2d 136 (2012), citing *Strickland*, 466 US at 690-691. A court must determine whether "strategic choices were made after less than complete investigation." *Id.*

Trial counsel "is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). Counsel's performance may be constitutionally deficient where counsel fails to undertake investigations relevant to the defense. *Trakhtenberg*, 493 Mich at 51-52. Examples of such investigations include, identifying the factual predicate of all charges, failing to consult or interview key witnesses who would have revealed weaknesses of the prosecution's case, and failing to sufficiently develop the defense presented at trial. *Id.* at 53-54.

Another way an attorney can fail to meet his duties is by failing to consult with and call an expert when an expert's assistance *or* testimony would be critical to the defense. *Harrington v Richter*, 562 US 86, 106; 131 S Ct 770; 178 L Ed 2d 624 (2011) ("criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both"); see also, e.g., *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990).

As the use of scientific evidence in courtrooms has increased, so have the expectations that defense counsel understand and prepare appropriate challenges to such evidence when presented by the state. This Court and the United States Supreme Court have expressly recognized the need for defense counsel to consult experts about scientific evidence.

In *Hinton v Alabama*, the Supreme Court found defense counsel's performance constitutionally deficient where he failed to seek additional funds to replace an inadequate expert related to forensic evidence. *Hinton v Alabama*, 571 US 263; 134 S Ct 1081, 1088-1089; 188 L Ed 2d 1 (2014). When analyzing prejudice, the Court noted:

> That the State presented testimony from two experienced expert witnesses that tended to inculpate Hinton does not, taken alone, demonstrate that Hinton is guilty. Prosecution experts, of course, can sometimes make mistakes...**This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law.**

Hinton, 134 S Ct at 1090 (citations omitted) (emphasis added). As the Supreme Court recognized, scientific evidence can be subjective and unreliable.

Similarly, in *People v Ackley*, this Court determined that defense counsel performed deficiently by failing to investigate and secure an expert witness who could testify in support of the defendant's theory. *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858 (2015). Not only that, but counsel was

ineffective for failing to secure an expert witness who could "prepare counsel to counter the prosecution's expert medical testimony." *Id.*

B. Trial counsel performed deficiently when he failed to conduct an independent investigation into the prosecution's medical evidence and then failed to adequately challenge the prosecution experts' testimony.

As scientific evidence is used more frequently in criminal prosecutions, it is increasingly important for defense counsel to understand the science underlying the state's case. In order for counsel "[t]o make a reasoned judgment about whether evidence is worth presenting, one must know what it says." *Couch v Booker*, 632 F3d 241, 246 (CA 6 2011). In this case, trial counsel was not equipped to make any reasonable strategic decisions as to how best to counter the prosecution experts' opinions because counsel failed to take the preliminary steps of investigating and developing his understanding of the complex and controversial science underlying those opinions.

1. Trial counsel had a duty to investigate the complex medical evidence underlying the prosecution experts' opinions that Nehemiah's injuries were necessarily caused by a violent or extreme force.

"Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 US at 691. "In any ineffectiveness case," therefore, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances," *id.,* taking into account "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins,* 539 US at 527.

The issue in *Wiggins,* as in this case, was whether defense counsel's investigation was constitutionally deficient. The claim in *Wiggins* stemmed from "counsel's decision to limit the scope of their investigation into potential mitigating evidence" for use at sentencing. *Wiggins,* 539 US at

521. Although Wiggins' attorneys conducted some investigation into mitigation, they failed to look further into the circumstances of the defendant's life by retaining a forensic social worker to prepare a social history report. Had they done so, counsel would have discovered "evidence of the severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents." *Id.* at 516. While the lower courts concluded that counsel's failure to present such evidence was strategic, the Supreme Court reversed, holding that counsel's investigative performance was deficient and that the deficient performance was prejudicial.

On the question of deficient investigative performance, the *Wiggins* Court explained that its "principal concern in deciding whether [counsel] exercised reasonable professional judgment is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background **was itself reasonable**." *Wiggins*, 539 US at 522–23 (emphasis in original) (internal quotations and citations omitted).

Similarly, in *Trakhtenberg*, this Court explained, "defense counsel's error was the failure to exercise reasonable professional judgment when deciding not to conduct an investigation in the first instance." *Trakhtenberg,* 493 Mich at 53. "A sound defense strategy cannot follow an incomplete investigation of the case when the decision to forego further investigation was not supported by reasonable professional judgment." *Id.* at 55.

2. The Court of Appeals properly reversed the trial court's ruling on deficient performance because counsel failed to investigate the controversial medical opinions provided by the prosecution experts, and failed to present available expert testimony that would have refuted the prosecution experts' opinions and established that Mr. Roberts' version of events was consistent with the medical evidence.

Like in *Wiggins*, this Court's duty in evaluating counsel's performance in this case is not focused on the reasonableness of the strategy counsel ultimately pursued at Mr. Roberts' trial, but "the reasonableness of the investigation said to support that strategy." *Wiggins*, 539 US at 527. In this case, counsel's investigation was unreasonable where he failed to conduct an adequate, independent investigation of the controversial medical opinions about abusive head trauma, which were the primary evidence of malice. Because of his unreasonable investigation and his lack of experience with abusive head trauma, trial counsel was unaware of the controversy underlying these opinions and the jury never heard available expert testimony that would have supported the defense trial counsel presented and established reasonable doubt.

In order to convict Mr. Roberts of first-degree child abuse, the prosecution had to prove that he "knowingly or intentionally caused seriously physical… harm to [Nehemiah]." MCL 750.136b(2). In order to sustain a conviction for first-degree felony murder, in addition to the predicate felony, the prosecution had to prove that Mr. Roberts intended to kill Nehemiah, intended to cause great bodily harm to Nehemiah, or acted in "wanton and willful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm." MCL 750.316(1)(b); Appendix, 274a, citing *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980).

In order to meet this burden, the prosecution required expert testimony that established (1) Nehemiah's injuries were caused by a force so great that it could only have been done with malice; and (2) Nehemiah had no underlying medical issues that made him more susceptible than an average two-year-old to catastrophic injury with minimal force. To that end, the prosecution presented three

medical experts – Dr. Beck, Dr. Shattuck, and Dr. Castellani – who each opined Nehemiah's injuries were caused by an extreme force, comparable to a car accident. Dr. Shattuck, as well as radiologist Dr. Duhn, further opined that Nehemiah's CT scan on 9/11/13, just weeks before Mr. Roberts took custody, showed no signs of a subdural hemorrhage, meaning Nehemiah was a healthy child at the time Mr. Roberts began to care for him. Appendix, 277b-278b, 337b.

This medical opinion testimony, and the assumptions underlying it were the cornerstone of the prosecution's case. E.g. Appendix, 258a ("...[the other evidence of malice] may not have risen to the level of beyond a reasonable doubt absent the medical evidence..."). However, this Court recognized in *Ackley*, there is a "prominent medical controversy within the medical community regarding the reliability of SBS/AHT diagnoses." *Ackley*, 497 Mich at 391-392; see also *Commonwealth v Millien*, 474 Mass 417, 418; 50 NE3d 417 (2016) ("[t]here is a heated debate in the medical community as to whether a violent shaking of a baby alone can generate enough force to cause the triad of symptoms of traumatic brain injury, and as to whether these symptoms can sometimes be caused by a short accidental fall.")

a. Prior to this case, trial counsel never worked on a case involving abusive head trauma and appeared to be unaware that the state's expert opinion testimony was controversial within the medical field.

When trial counsel was appointed to represent Mr. Roberts in this case, he had many years of experience working as a defense attorney and a prosecutor, but had never worked on a case involving the controversial diagnosis of abusive head trauma. As discussed below, counsel failed to take the steps necessary to familiarize himself with the medical issue and related controversy in order to formulate and support the defense he ultimately presented at trial: Nehemiah died as the result of an accidental fall unintentionally caused by Mr. Roberts.

When appellate counsel spoke to trial counsel in an effort to investigate this appeal, he told appellate counsel that he was not familiar with a controversy involving abusive head trauma. Appendix, 631b-632b.[1] At the *Ginther* hearing, trial counsel testified he presented a theory at trial that Nehemiah's death resulted from an accident. Appendix, 635b. Then, he was asked about his familiarity with the controversy involving abusive head trauma:

> Q At the time of Mr. Roberts' trial, were you aware of the medical controversy surrounding abusive head trauma?
>
> A So I was asked that question by your co-counsel and I had indicated to her that I was not, but I guess I should have clarified my answer, I guess. I did not see that controversy as a viable defense.
>
> Q I'm going to ask you to explain that but I'll do it in two parts. Can you explain what your understanding of the controversy was at that time?
>
> A Well I guess the issue really is whether or not a short fall from a short distance could cause the damage that Nehemiah suffered. Okay. In the 30 years I've been practicing I've never seen a successful short fall defense.
>
> Q Okay. So the controversy, as you see, it is simply whether or not a short fall can cause those injuries?
>
> A Yes, and whether or not it would be accidental.

Appendix, 635b-636b.

As demonstrated above, trial counsel's lack of awareness of the controversy underlying the basis of the prosecution experts' testimony – and the cornerstone of the prosecution's case – is evident not only from the trial record, but also from his testimony at the *Ginther* hearing. Trial counsel appeared wholly unaware that there were available experts who would testify that the

[1] Appellate counsel's affidavit in support of the Motion for Remand filed in the Court of Appeals is referenced here and included in the appendices to provide context to trial counsel's testimony about the conversation at the *Ginther* hearing.

medical evidence was consistent with Mr. Roberts' innocent explanation for Nehemiah's injuries. Appendix, 637b, ("I was not aware of any expert witnesses that would provide that testimony.").

b. Trial counsel failed to undertake the necessary independent investigation into the state's evidence and controversial expert testimony, even though it was central to the state's case.

The Court of Appeals properly evaluated counsel's investigation and reversed the trial court's erroneous legal conclusion that counsel's investigation met constitutional standards. Appendix, 276a. The Court of Appeals determined "[a] reasonable defense lawyer confronted with this scenario would know that evidence concerning the force required to cause the child's head injuries would be imperative to proving defendant's guilt." Appendix, 274a. Though counsel testified that he knew the force necessary to cause Nehemiah's injuries was the pivotal issue at trial, "[counsel] did not attempt to secure an expert witness who could testify that the child's head injuries resulted from a lesser force than that involved in a car accident, or which could be described as something less than 'violent,' or who could otherwise prepare [counsel] to counter the prosecution's expert medical testimony." Appendix, 275a.

Counsel focused his limited internet research on macrocephaly, but some of his research "went from macrocephaly to abusive head trauma." Appendix, 648b. He did not find any of that research useful. Appendix, 648b. It appears counsel did not review any of the countless publically available articles explaining the points of controversy involving abusive head trauma, or that if he did, he did not understand them. See, e.g. *Ackley,* 497 Mich at 392, 397, citing Findley, *et al*., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right,* 12 Hous J L and Policy 209, 212 (2012) and Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash U L Rev 1 (2009).

Almost six months before trial, counsel secured court funds for an expert and consulted with a pediatrician who specialized in child sexual abuse, Dr. Guertin. Appendix, 638b-639b. He asked Dr. Guertin to review the autopsy and related photos to give him an opinion about the "cause and origin" of Nehemiah's injuries. Appendix, 638b. He selected Dr. Guertin as the expert for that opinion because he had worked with him before. Appendix, 640b-641b. At that time, trial counsel knew that Dr. Guertin had some experience as a pediatrician with child abuse, but that the bulk of his experience was with child sexual abuse. Appendix, 638b-639b. In addition, he did not know if Dr. Guertin had ever conducted an autopsy. Appendix, 638b-639b, 642b.

Trial counsel's conversations with Dr. Guertin primarily centered around macrocephaly because trial counsel believed that Nehemiah having a larger than normal head might have caused a more significant injury. Appendix, 638b. They never reviewed the autopsy photos of Nehemiah's brain together. Appendix, 643b. Dr. Guertin never asked for the autopsy slides. Appendix, 643b. Counsel never consulted Dr. Guertin about the specific injuries Nehemiah suffered, including the older subdural hemorrhage or retinal hemorrhage, which were essential pieces of the prosecution theory that Mr. Roberts intentionally caused Nehemiah's injuries. Appendix, 644b-645b.

Like counsel in *Ackley*, Mr. Roberts' attorney "did no consultation at all beyond settling on the very first expert he encountered, despite the importance of expert medical testimony in the case…" *Ackley,* 497 Mich at 392. Knowing that the force necessary to cause Nehemiah's injury was the pivotal issue in the case, any reasonable attorney would have realized the need to consult with an independent forensic pathologist, especially when Dr. Guertin failed to address Nehemiah's specific injuries, including the prior subdural hemorrhage or Nehmiah's retinal hemorrhage. See *Trakhtenberg,* 493 Mich at 54, ("a reasonable attorney would have consulted an expert, such as Okla, to testify regarding the propriety of how the complainant made her allegations. Yet the only expert defense counsel consulted was John Neumann, an expert in sex offender evaluation.")

In addition to his consultation with Dr. Guertin, counsel interviewed the prosecution's medical examiner, Dr. Shattuck, who conducted Nehemiah's autopsy and concluded that Nehemiah's manner of death was homicide. Appendix, 639b. Dr. Shattuck rejected Mr. Roberts' explanation that Nehemiah's injuries resulted from an accident. Appendix, 640b. Contrary to the legally erroneous analysis by the trial court and the prosecution, the fact that counsel interviewed Dr. Shattuck did not satisfy counsel's obligation to conduct an **independent** investigation. See *Peolple v DiMambro,* 318 Mich App 204; 897 NW2d 333 (2016), citing MCL 52.212, ("any and all medical examiners or their deputies may be **required to testify in behalf of the state** in any matter arising as the result of any investigation required under this act, and **shall testify in behalf of the state** and shall receive such actual and necessary expenses as the court will allow,") and *Maiden v Rozwood*, 461 Mich 109, 132; 597 NW2d 817 (1999), ("a county medical examiner's duty is owed to the state."); (emphasis in original).

In *Ceasor v Ocwieja*, 655 Fed Appx 263 (CA 6, 2016),[2] the Sixth Circuit reversed and remanded for an evidentiary hearing on Mr. Ceasor's habeas petition to determine whether he was prejudiced by his appellate attorney's deficient performance, where appellate counsel failed to seek a *Ginther* hearing and present expert testimony pertaining to the controversial medical diagnosis of abusive head trauma.[3] In that case, the prosecution expert testified, "subdural hematomas and retinal hemorrhages, taken together, are symptoms 'diagnostic of child abuse.'" *Id.* at 269. That expert compared the force necessary to cause these injuries to "a fall out of a second story window or a high speed car accident." *Id.* at 269. Trial counsel in that case was well aware of the medical

[2] This is a non-binding, unpublished opinion, cited as an example of how federal courts have dealt with counsel's duty to investigate the controversial science underlying the diagnosis of abusive head trauma in a case where that opinion testimony forms a substantial portion of the prosecution's case. A copy is being concurrently filed with this brief. MCR 7.215(C)(1).

[3] Appellate counsel raised ineffective assistance of counsel based on trial counsel's failure to present expert testimony to counter the prosecution's expert testimony, but did not file a motion to remand to expand the record and present expert testimony.

controversy surrounding those opinions and extensively cross-examined the expert with published literature directly on point. *Id.* at 270. Yet the Sixth Circuit still concluded trial counsel was objectively unreasonable in failing to present expert testimony where counsel knew the prosecution expert would opine the medical evidence precluded his client's version of events. *Id.* at 287-288.

The state's expert testimony in *Ceasor* mirrored the expert testimony presented by the prosecution against Mr. Roberts. However, counsel's cross-examination in *Ceasor* was far more informed than counsel's cross-examination in Mr. Roberts' case. Mr. Ceasor's attorney challenged the prosecution expert with published literature questioning the diagnosis of abusive head trauma based on symptoms like subdural and retinal hemorrhages, and the Sixth Circuit still concluded counsel was deficient in light of the conclusive expert testimony presented by the prosecution. *Id.* at 283. The Sixth Circuit reasoned, "although trial counsel attempted to undermine [the prosecution expert's] credibility by highlighting some of the weaknesses affecting her opinion, he lacked the ability to proffer *evidence* contradicting her opinions, including evidence that Ceasor's version of the facts was consistent with [the child's] injuries." *Id.* at 283.

In this case, confronted with similar evidence by the prosecution, Mr. Roberts' attorney was far less prepared. Not only did counsel fail to present available expert testimony to counter the prosecution expert opinions, he also failed to cross-examine the prosecution experts on the existence of the medical controversy.

c. Trial counsel's decision to cease his investigation after consulting a pediatrician and interviewing the state's medical examiner was objectively unreasonable and was not the result of a reasoned strategic judgment.

The trial court erroneously concluded that counsel exercised reasonable strategic judgment when he decided not to present Dr. Guertin as an expert witness, and therefore was not deficient in his representation. See Appendix, 255a-256a. But counsel's decision regarding Dr. Guertin is not the

issue. Rather counsel's performance was constitutionally deficient because he failed to investigate the medical evidence in the case, aspects of which Dr. Guertin did not address and was not qualified to address, such as Nehemiah's prior subdural hemorrhage and retinal hemorrhage. Counsel's failure to present testimony from experts like Dr. Dragovic and Dr. Mack cannot be construed as reasonable strategy. Indeed, counsel even admitted that he would have called these experts if had he known they existed. Appendix, 679b.

Both the trial court and the prosecution rationalized counsel's failure to investigate by proposing reasons for why his purported trial strategy of not presenting expert testimony to support his accident defense could have been reasonable. Appendix, 255a-256a; Plaintiff-Appellant's Supplemental Brief, 5/11/18, p 17. However, counsel unequivocally testified that if he had been aware of any expert witnesses who would have testified that Nehemiah could have sustained his injuries as Mr. Roberts explained, "[he] would have asked… for their name and address." Appendix, 679b; See *Trakhtenberg,* 493 Mich at 54 ("[i]n fact, counsel admitted that had she discovered the pertinent information, she would have… consulted experts… regarding proper forensic-interviewing protocol.") By his own admission, trial counsel's decision not to present expert testimony was not based on reasoned strategic judgment. If he knew experts existed who disagreed with the prosecution experts, he would have called them.

As the Supreme Court said in *Strickland,* "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," but "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 US at 690–91. Counsel could not make a reasonable strategic decision to forgo presenting expert testimony like that offered by Drs. Dragovic and Mack in this case because of his failure to investigate. Here, trial counsel was not aware that practitioners existed in the medical field who starkly disagreed with the extreme opinions

expressed by Dr. Shattuck, Dr. Beck, and Dr. Castellani. Appendix, 637b. Therefore, counsel was not in a position to determine whether expert testimony was necessary.

In its supplemental argument, the prosecution cited strategic reasons as to why an attorney may forego expert testimony in a case. These reasons are simply not applicable here. Counsel did not strategically decide against presenting testimony from experts such as Dr. Dragovic or Dr. Mack because he wanted to avoid the risk associated with cross-examination, or to avoid presenting witnesses perceived as hired guns, etc.[4] Plaintiff-Appellant's Supplemental Brief, 5/11/18, p 13. Rather, he candidly testified he was not aware of any expert who would contradict the opinions expressed by the prosecution experts. Appendix, 637b.

d. Factual distinctions between this case and *Ackley* do not alter counsel's fundamental duty to investigate the prosecution's evidence and consult appropriate experts who might reveal weaknesses in the prosecution's case.

While the allegations and facts of this case are somewhat similar to those involved in this Court's decision in *Ackley*, the legal analysis is nearly identical because both cases involve a prosecution based upon complex and controversial medical evidence. In both cases, trial counsel attempted to present an accident defense without the support of available expert testimony because they failed to understand the science underlying the prosecution's case. Both the trial court and the prosecution attempted to distinguish this case from *Ackley*, despite its obvious application. Appendix, 250a-254a; Plaintiff-Appellant's Supplemental Brief, 5/11/18, p 12. Though factual disparities between the two cases inevitably exist, both cases came down to the same focal issue: "expert testimony was critical to explain whether the cause of death was intentional or accidental." *Ackley*, 497 Mich at 383.

[4] Dr. Dragovic and Dr. Mack were not compensated in this case and do not accept compensation for their testimony in any cases. Appendix, 726b, 876b.

Ackley itself did not create a new rule or alter the way our appellate courts evaluate ineffective assistance of counsel claims. Rather, *Ackley* involved the straightforward application of *Strickland* in a case resting largely on complex science, with which counsel was unfamiliar. See *Wiggins*, 593 US at 522, quoting *Strickland*, 466 US at 690-691 ("[i]n highlighting counsel's duty to investigate… we applied the same 'clearly established' precedent of *Strickland* we applied today."). *Ackley* applied prior opinions evaluating counsel's duty to undertake an independent investigation of the prosecution's case. See *Hinton*, 134 S Ct at 1087 ("[t]his case calls for a straightforward application of our ineffective assistance of counsel precedents, beginning with *Strickland v Washington.*").

True, Mr. Roberts' attorney was not referred to another forensic pathologist, as was counsel in *Ackley*. *Ackley,* 497 Mich at 385. But that's because that attorney at least had the foresight to consult with an independent forensic pathologist in the first place, as opposed to a pediatrician who specialized in child sex abuse. *Id.;* Appendix, 638b-639b. Further, one's constitutional right to the effective assistance of counsel cannot be so arbitrary as to depend on whether an unqualified expert whom counsel initially contacted referred him to an appropriately qualified expert. Rather, counsel should have sufficiently educated himself about the science underlying the prosecution's case in order to make a reasoned and informed decision about which expert or experts were appropriate to consult. *Trakhtenberg,* 493 Mich at 54-55; *Ackley*, 497 Mich at 390-391.

Mr. Roberts does not assert here, as the trial court and prosecution allege, that failure to present expert testimony in an abusive head trauma case is per se ineffective. Appendix, 256a; Plaintiff-Appellant's Supplemental Brief, 5/11/18, p 14. Whether expert testimony was truly required can only be determined on a case-by-case basis. But in cases involving such complex medical evidence, counsel must be prepared to adequately challenge the prosecution evidence, if not by calling his own expert, then at least through meaningful cross-examination. And any strategic

decision to forgo presenting expert testimony can only be made after a thorough investigation. In a case like this where counsel has never previously worked on a case involving abusive head trauma, that investigation will almost certainly have to include consulting appropriate, qualified, and independent experts.

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" examining the medical evidence "would have been counterproductive, or that further investigation would have been fruitless." *Wiggins,* 539 US at 525. Instead, this is a case in which trial counsel failed to conduct the most basic investigation for his client facing a first-degree felony murder charge – he failed to consult with qualified experts who would have helped him challenge the controversial opinions offered by the prosecution experts, which were critical to the prosecution's case. Under no theory of defense was trial counsel's failure to investigate the prosecution's medical evidence reasonable.

C. Had Mr. Roberts' trial attorney consulted with qualified, independent experts in the same fields as the prosecution's experts, the jury would have learned that Mr. Roberts' version of events was consistent with the medical evidence; there is a reasonable probability counsel's error affected the outcome of Mr. Roberts' trial.

The expert opinions relied upon by the prosecution to prove Mr. Roberts' mens rea are highly controversial within the medical and scientific community. These expert opinions comprise one side of a vigorous debate, which has been described as being like a religious divide. *Ackley*, 497 Mich at 385. Without these expert opinions, the prosecution could not establish guilt beyond a reasonable doubt. See Appendix, 258a.

Ultimately, the prosecution presented three experts who each opined that Nehemiah's head injury was intentionally inflicted with tremendous force, or at minimum, could not have occurred

accidentally as described by Mr. Roberts. These opinions were based upon three critical assumptions:

(1) The force that caused Nehemiah's injuries could be determined from the appearance of the injuries;

(2) The force that caused Nehemiah's injury was significant, akin to an auto collision, and intentionally inflicted; and

(3) Nehemiah was a normal, healthy child when Mr. Roberts began caring for him in late 2013.

Equally qualified experts, who are equally committed to their positions, exist on the other side of this debate. Had counsel conducted a reasonable investigation and consulted with such experts, the jury would have learned, through expert testimony by the defense and adequate cross-examination, that the opinions offered by the prosecution experts were untethered from the medical evidence and that injuries like those sustained by Nehemiah do not require massive force. Appendix, 717b, 806b-807b. Similarly, the jury would have learned that the 9/11/13 CT of Nehemiah's brain did not exclude the presence of a subdural hemorrhage at that time, prior to when Mr. Roberts began caring for Nehemiah. Appendix, 696b, 826b. A preexisting subdural hemorrhage or other conditions, such as venous thrombosis, were not ruled out by the autopsy and could have put Nehemiah at a greater risk of suffering a fatal head injury from a minor fall. Appendix, 750b, 836b-838b.

Trial counsel's failure to consult and present testimony from such experts left the jury with the belief that the prosecution presented a case uniformly supported by experts in the scientific community, while the defense offered a theory that was wholly without scientific support. Under these circumstances, it is reasonably likely that counsel's failures affected the verdict.

Both the trial court and prosecution argued the opposite and made three critical errors in their analysis:

1) Applying an artificially inflated prejudice burden, requiring Mr. Roberts to affirmatively prove a jury would believe the defense experts in order to prevail at trial, see Appendix, 257a-259a; Plaintiff-Appellant's Supplemental Brief, 5/11/18, p 2;

2) Erroneously concluding that the defense expert testimony offered on appeal was cumulative of the minimal concessions trial counsel obtained from the prosecution's experts at trial, see Appendix, 259a; Plaintiff-Appellant's Supplemental Brief, 5/11/18, p 7; and

3) Overstating the strength of the prosecution's other evidence, see Appendix, 257a-258a; Plaintiff-Appellant's Supplemental Brief, 5/11/18, pp 2-6.

In contrast, the Court of Appeals properly applied *Strickland* to conclude that counsel's failures prejudiced Mr. Roberts because there is a reasonable probability they affected the outcome of his trial. Appendix, 276a. Because the question of force was critical to the prosecution's case, presenting available expert testimony to support trial counsel's theory that Nehemiah's injuries were caused accidently and by less force was reasonably likely to have persuaded the jury "that the prosecution failed to prove that defendant had a culpable state of mind when he grabbed his son's ankles and pulled him down." Appendix, 276a.

1. The Court of Appeals properly reversed the trial court's prejudice analysis because the trial court applied a higher prejudice burden than the law allows.

While the Court of Appeals applied the appropriate legal standard to determine whether Mr. Roberts was prejudiced by counsel's deficient performance, the trial court applied a higher standard. Similarly, the prosecution gives lip service to *Strickland* and its requirement that a defendant show a reasonable probability counsel's errors affected the outcome of the trial, but ultimately suggests Mr. Roberts had to meet a far higher burden.

It is well established in our state and federal jurisprudence that a defendant satisfies the prejudice prong of *Strickland* where he shows that, but for counsel's errors, there is a reasonable

probability that the outcome *might* have been different. *Strickland*, 466 US at 693; *Pickens*, 446 Mich at 312-314. In other words, prejudice is established where the errors undermine confidence in the outcome, or where the defendant shows that, absent the errors, there is a reasonable probability that the jury "would have had a reasonable doubt respecting guilt." *Strickland,* 466 US at 694-695. A reasonable probability is *less than* a preponderance of the evidence. *Id.* at 694. The purpose of this requirement is to ensure that convictions are only vacated due to ineffective assistance of counsel where counsel's errors relate to the central legal issues or key evidence presented at trial. *Id.* (discussing the appropriateness of reviewing counsel's claims using the materiality test applied to *Brady* claims) (citations omitted).

In its written opinion, the trial court asserted that the failure to call a particular witness or present certain evidence constitutes ineffective assistance of counsel only when the failure deprived the defendant of a substantial defense. Appendix, 257a-258a, citing *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). That legal standard predates *Strickland* and originally arose in a case where the defense failed to create a sufficient post-conviction record to support the ineffective assistance of counsel claim. See *People v Simmons*, 140 Mich App 681, 685-686; 364 NW 2d 783 (1985), citing *People v Armstrong*, 124 Mich App 766, 771-772; 335 NW 2d 687 (1983).

The trial court applied this language to hold Mr. Roberts to a higher burden than *Strickland* allows, suggesting that so long as trial counsel presented some evidence or argument about Mr. Roberts' innocent explanation for the injuries, that Mr. Roberts could not establish he was prejudiced by counsel's failure to support that theory with available expert testimony. Appendix, 258a-259a. The trial court erroneously framed the "substantial defense" requirement as an additional burden on top of *Strickland*'s prejudice requirement:

> It is important to be reminded that **this prong of the analysis does not ask the court to determine prejudice resulting from the weight of a defense impacted by trial court's errors or omissions**

> **but prejudice which wholly deprives a defendant of a substantial defense**. Defendant was not deprived of a substantial defense simply because his theory and argument were not as convincing as it might have been had he called his own experts.

Appendix, 259a. The trial court's misapplication of the controlling authorities when analyzing prejudice is an error of law that was properly reversed by the Court of Appeals.

Along the same lines, the prosecution suggests that Mr. Roberts can only prevail on appeal if "a reasonable jury would in fact believe that [Mr. Roberts] did not use excessive force toward his [son]." Plaintiff-Appellant's Supplemental Brief, 5/11/18, p 2. Applying this standard would effectively require Mr. Roberts to affirmatively prove his innocence in order to prevail on appeal, a far higher burden than the law allows. Compare *Strickland*, 466 US at 694-695. Controlling state and federal authorities require Mr. Roberts to show only a reasonable probability that a jury *could* believe his experts or, at minimum, that the defense expert testimony might cause a jury to harbor reasonable doubt about his guilt. See e.g. *Ramonez v Berghuis*, 490 F3d 482, 491 (CA 6 2007) (habeas granted because "[e]ven though the jury could have discredited the potential witnesses here based on factors such as bias and inconsistencies in their respective stories, there certainly remained a reasonable probability that the jury would not have."); *Matthews v Abramajtys,* 319 F 3d 780 (CA 6 2018) (emphasizing that a reasonable probability is less than "a certainty, or even a preponderant likelihood of a different outcome, nor even more, that no rational juror could constitutionally find [the defendant] guilty.") (citations omitted).

The United States Supreme Court's more recent cases, including *Harrington v Richter*, do not alter the prejudice analysis. While the Court in *Harrington* emphasized that a defendant must show more than a "conceivable" likelihood of a different result to establish prejudice, it did not purport to change the well-established principle that the reasonable probability standard is lesser than the preponderance of the evidence standard. *Harrington v Richter*, 562 US 82, 111-112; 131 S Ct 770; 178

L Ed 2d 624. In fact, that language appears in a paragraph that simply paraphrases the long-standing prejudice prong of *Strickland*. *Id.* The *Harrington* Court made that observation in the context of a habeas case where the defense on appeal offered no evidence directly challenging key conclusions made by the prosecution's experts at trial. *Id.* at 112. In contrast, this appellate record includes extensive testimony from available experts that would have provided objective support for the accident defense presented at trial, and would have directly contradicted the prosecution's expert testimony about force, which was critical to its case. See discussion and table in section (I)(B)(2) *infra*.

In contrast with the trial court and prosecutor's analysis, the Court of Appeals reviewed trial counsel's errors under the appropriate standard, considering whether there was a reasonable probability the proceedings would have been different had counsel consulted and presented appropriate experts to support his accident theory. Appendix, 273a. It correctly determined that but for trial counsel's failure to understand the weaknesses in the prosecution's expert testimony and his failure to present expert testimony of his own, there was a reasonable likelihood that a jury might have been persuaded that the prosecution failed to prove its case beyond a reasonable doubt. Appendix, 276a. In reaching this conclusion, the Court of Appeals properly emphasized the direct relationship between counsel's errors and the question of force, which was central to the prosecution's case. Appendix, 274a, 276a.

2. The Court of Appeals properly reversed the trial court's prejudice analysis because the trial court erroneously concluded that the expert testimony at the *Ginther* hearing was cumulative of the purported concessions trial counsel obtained from the prosecution experts at trial.

Both the trial court and prosecutor asserted that the testimony from Drs. Dragovic and Mack "provided no more support for his theory of defense than the concessions trial counsel was

able to get from Plaintiff's experts during trial." Appendix, 259a; Plaintiff-Appellant's Supplemental Brief, 5/11/18, p 7. At the same time, both dismissed the expert testimony of Drs. Dragovic and Mack, asserting that these experts merely testified to possibilities as opposed to actual opinions as to how Nehemiah sustained his head injury. Appendix, 259a; Plaintiff-Appellant's Supplemental Brief, 5/11/18, p 7.

In contrast, the Court of Appeals correctly recognized that trial counsel did not obtain any concessions from the prosecution's experts sufficient to support his theory and that presenting experts like Drs. Dragovic and Mack would have provided critical support for the defense. Appendix, 276a. The Court of Appeals correctly recognized that even though trial counsel cross-examined each of the state's experts in an effort to get them to agree Mr. Roberts' account of Nehemiah's fall was consistent with the injuries, he was unsuccessful: "…they all maintained that the injuries could only have occurred if defendant pulled the child down with significant force…[and] strongly suggested that the child's injuries on the day at issue were the result of defendant's intentional abuse." Appendix, 276a.

a. The record shows that trial counsel did not obtain meaningful concessions from the prosecution's experts.

The Court of Appeals properly considered the trial court's assertion that trial counsel obtained concessions from the prosecution's experts tantamount to the available expert testimony he failed to present. The Court of Appeals analyzed the argument based upon a review of trial counsel's cross-examinations and the responses provided by the experts. It correctly found that while the experts appeared to make minor concessions about whether Mr. Roberts' account of the injury was plausible, they all continually asserted that the force Mr. Roberts used must have been great and strongly suggested Mr. Roberts' actions were intentional.

In contrast, when discussing the purported concessions, the trial court and prosecution erroneously rely upon trial counsel's own mistaken belief that he got concessions, rather than looking to the record. Appendix, 256a; Plaintiff-Appellant's Supplemental Brief, 5/11/18, p 17, citing trial counsel's testimony at *Ginther* hearing.

As demonstrated below, trial counsel did not obtain meaningful concessions from the state's experts to support the defense because at the end of the day, the state's experts maintained that Mr. Roberts must have handled Nehemiah with significant force tantamount to an auto accident:

Purported concession:	**Context regarding force:**
Dr. Beck: "Q He's in a standing position and his ankles are grabbed to put him on his butt but he goes all the way back. He's caught off guard. There's a whiplash motion and he strikes his head. Could that have caused this injury? A That could be a mechanism. It's not one that I had entertained...**What it boils down to is the speed and the force** at which the head hits." Appendix, 307b-308b.	"**The amount of force to provoke these injuries would have been significant**. They would have been a very–need to be a very rapid disequilibrium or pulling out with the head going back and hitting with a fairly high amount of angular momentum going down and hitting. This is not the type of injury bouncing on a knee or bumping the doorway as the child runs by, that type of injury. **This is a fairly high impact needed** to get the external bruising and the internal bleeding." Appendix, 310b.
Dr. Shattuck: "Q You had testified that if a child's legs had been held by the ankles and pulled back, he had fell straight back, it could have caused these injuries? A **Depending upon the force** of the pull, yes." Appendix, 351b.	"Q You can't tell us exactly what kind of force. A I can't...But **we're talking car accident level. These are significant forces**." Appendix, 349b. "Q Okay. It could also be accidental without those emotions if you will. A As long as it was a significant force, it wouldn't be a minor pull. It would be a significant force." Appendix, 352b.

In addition, trial counsel did not get any concessions from Dr. Castellani, who asserted and maintained throughout his testimony that, "there's simply no other explanation that's credible, other than an inflicted injury upon the child." Appendix, 379b.

Even trial counsel recalled that the only "concession" he obtained from the prosecution's medical examiner was immediately retracted:

> Q And do you recall actually getting concessions to that fact at trial?
>
> A My recollection is that I did, even though as I said she would backtrack and then, you know, dug in and would do the train wreck or car wreck scenario that they often do.

Appendix, 667b.

Despite counsel and the prosecution's assertions to the contrary, the prosecution experts made no meaningful concessions. They merely agreed Mr. Roberts presented a potential mechanism for Nehemiah's injuries, but qualified that testimony that it had to be done with sufficient force. Appendix, 276a. And they described the force necessary with analogies of the highest magnitude including car collisions, sledge hammers, and multi-story falls. 343b-344b, 305b. In other words, the concessions did not in any way support the defense theory with respect to the issue of force.

b. Available experts would have undermined the prosecution experts' assertions about force and provided other possible explanations for the extent of Nehemiah's injuries, providing far more support for the defense than any concessions obtained by trial counsel.

The Court of Appeals correctly recognized that the presentation of expert testimony to support the defense was reasonably likely to have affected the outcome of the trial because the issue of force was critical to the jury's decision-making. In contrast, the trial court and prosecution both dismiss the expert testimony provided at the *Ginther* hearing as essentially useless to the defense

because the experts appropriately qualified their opinions in terms of possibilities and by disregarding the most critical portions of their testimony.

First, it is generally accepted that scientific and medical experts offered in court will rarely, if ever express opinions as a matter of absolute certainty. See, *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579, 590; 113 S Ct 2786; 125 L Ed 2d 469 (1993) ("Of course, it would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty; arguably, there are no certainties in science.") (citations omitted). The fact that the defense experts here agreed they did not know for certain what caused Nehemiah's injuries in no way undermines their far more significant opinions that the evidence is consistent with Mr. Robert's explanation. If anything, an expert qualifying their opinion as what it is, an opinion, demonstrates the expert's credibility and commitment to scientific methods.

Further, in a case like this where the prosecution presented three experts who asserted unequivocally that Nehemiah's injuries could only have been caused intentionally and forcefully, it was all the more important for the defense to present expert testimony to support its defense. Without the benefit of expert testimony, in the face of the prosecution's many experts, the jury would have no choice but to dismiss the defense theory as baseless. After all, the arguments and questions of counsel are not evidence that can be properly considered by the jury. M Crim JI 3.5(5), ("The lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge. The lawyers' questions to witnesses and my questions to the witnesses are also not evidence. You should consider these questions only as they give meaning to the witnesses' answers.").

The trial court seriously understated the significance of contesting medical evidence in a criminal case:

> While the introduction at trial of testimony similar to Dr. Mack's and Dr. Dragovic's may have lessened the value the jury awarded to the government's experts, what would have remained from a likely battles of the experts when the dust cleared was the same defense obtained; that is, it was no more than a possibility that the injuries were due to unintentional behavior.

Appendix, 259a. What the trial court failed to appreciate is that in the context of a criminal prosecution based upon controversial medical evidence, a "battle of the experts" "would have severely undermined" the prosecution's case and given rise to reasonable doubt. See *Richey v Bradshaw*, 498 F 3d 344, 363-364 (CA 6 2007).

Finally, the trial court and prosecution disregard the most critical portions of Dr. Dragovic and Dr. Mack's testimony, wherein they directly contradict the assertions of the prosecution's experts and provide possible alternative explanations for Nehemiah's injuries. Their testimony lies in sharp contrast with the testimony of the prosecution experts, as shown below:

Testimony of prosecution expert at trial	**Testimony of defense expert at *Ginther* hearing**
"Q So when you say this is indicative of child abuse, **it can also be an accident, couldn't it?** A With the circumstances as I know them, **I don't believe that to be true** because we have the old bleed. Q So you're basically saying because of this old bleed, no way it can be an accident? A Also because the child became immediately unresponsive. And when I say this, it's that there is an older event and he became unresponsive immediately. Most accidental type injuries do not lead to unresponsiveness without waking up. So I'm looking at the totality of the case." Appendix, 356b.	"Q...[I]s the medical evidence from the autopsy consistent with Mr. Roberts' statement that he was sitting on the bottom of the stairs, facing Nehemiah who was fake standing, and that Nehemiah -- he pulled Nehemiah's ankles intending to bring his butt to the ground so that he could change him but instead Nehemiah fell straight back, hit his head, and was immediately unresponsive? A Yes, it is. Q **The medical results are completely consistent with that account**? A **Yes, they are.**" Appendix, 718b.

Testimony of prosecution expert at trial	**Testimony of defense expert at *Ginther* hearing**
Subdural hemorrhage can only be caused by extreme or intentionally inflicted force Appendix, 301b; 334b-335b; 368b-369b.	Subdural hemorrhage can because by various levels of force, including relatively minor impacts; prosecution expert's opinion that extreme force required are nonsense Appendix, 717b-718b.
Retinal hemorrhage is diagnostic of abuse Appendix, 302b.	Retinal hemorrhage can be consistent with abuse or accidental injury Appendix, 722b.
Remote (old) and acute (recent) hemorrhages caused by roughly the same level of force Appendix, 338b.	Chronic subdural makes occurrence of another subdural much greater, even with lesser force Appendix, 721b.
Older, chronic subdural was further evidence of abuse Appendix, 338b.	Impossible to determine how old the older subdural was because an insufficient number of samples were taken during the autopsy Appendix, 696b.
Nehemiah was healthy, normal child Appendix, 277b-278b; 337b.	CT could not conclusively rule out small chronic subdural and excess fluid; autopsy did not rule out possibility of chronic subdural related to other medical condition such as venous thrombosis; CT after fall suggests clotting in venous sinus, which would indicate predisposition to subdurals from minor force Appendix, 826b-827b.

While the prosecution and trial court dismissed the defense experts' testimony as merely suggesting possibilities, a comparison of their testimony with that of the prosecution experts shows the defense experts would have contradicted the prosecution experts on many aspects of their testimony throughout the trial. Dr. Dragovic and Dr. Mack offered medical opinions based upon their review of the medical evidence in this case, far more than mere conjecture, see *Harrington*, 562 US at 104, and far more helpful to the defense than any concessions trial counsel obtained. This is

exactly the sort of testimony that would have undermined the prosecution's key evidence of malice and established reasonable doubt.

3. The Court of Appeals properly reversed the trial court's prejudice analysis because the trial court overstated the strength of the evidence against Mr. Roberts and failed to consider the impact of additional errors on the outcome of the trial.

The prosecution's evidence of malice was entirely circumstantial, with the bulk of that evidence consisting of expert testimony. In concluding that Mr. Roberts could not establish prejudice, the trial court reversibly erred by concluding that other circumstantial evidence, inadmissible evidence, and improper argument constituted overwhelming evidence of guilt. Appendix, 279a-280a. As the Court of Appeals properly recognized, the critical issue at trial was force, Appendix, 274a, and counsel's failures related directly to that very issue. Under these circumstances, the other evidence presented by the prosecution to show malice falls far short of assuring confidence in the outcome of the trial.

a. The trial court and prosecution overstate the strength of the non-expert testimony offered to show malice.

The prosecution argues that variations in Mr. Roberts' statements to law enforcement, his behavior the night of the offense, and the uncorroborated testimony of his ex-girlfriends is sufficient to establish malice, notwithstanding trial counsel's failure to provide available expert testimony to support the defense. While this testimony was arguably relevant and could be considered by the jury as evidence of guilt, much of it lacked credibility and amounted to little more than speculation.

For example, responding officers testified they thought Nehemiah's body appeared staged because he was laying flat on the ground when they arrived, however, Ms. Witherspoon testified that she told Mr. Roberts to lay Nehemiah down in order to perform CPR immediately after Mr. Roberts

caused Nehemiah to fall.[5] Appendix, 131b. In another example, Ms. Jones, an ex-girlfriend of Mr. Roberts, was the only witness who testified she saw Mr. Roberts behave violently towards his son, Appendix, 501b-502b, 504b, but she only made those allegations after observing the bulk of the trial, Appendix, 499b, never previously told the police about the allegations, Appendix, 513b-514b, and suffered from mental illnesses including paranoid schizophrenia, Appendix, 521b.

While the prosecution emphasizes circumstantial and character evidence related to Mr. Roberts' purported failures as a father, none of this conclusively demonstrated that Mr. Roberts used a level of force on the night in question that satisfied the prosecution's burden related to intent. Further, the record shows that the trial prosecutor emphasized the medical evidence throughout the case. A substantial portion of the testimony presented at trial was from medical experts, Appendix, 250b, 268b, 282b, 312b, 360b, and the prosecutor's closing argument focused on the experts supporting its case, even when making inappropriate emotional pleas to the jury:

> Nehemiah Dodd wanted you to know, ladies and gentlemen, what happened to him on December 31 , 2013. He did so by the only way, the only thing that he could do and that was by allowing Dr. Shattuck and Dr. Castellani to perform an autopsy upon his 40 pound, 3 foot body.
>
> …
>
> Nehemiah Dodd could not take the stand and be here throughout this trial. And even if he were alive, he certainly wouldn't have had the capability to articulate to you what happened to him. He is, however, relying upon your good judgment and common sense. But again he didn't leave you helpless. He was trusting that you listened carefully to the doctors' testimony.

Appendix, 552b-553b. At another point, she said:

> You now, ladies and gentlemen, are the eyes, the ears and the heart of Nehemiah Dodd. He hopes that you saw clearly, you listened

[5] As this Court observed in *Ackley*, "Had counsel provided a different lens through which to view his client's behavior, those same 'peculiar' actions by the defendant might have instead been perceived as the missteps of a panicked, but nonetheless innocent, caretaker." *Ackley,* 497 Mich at 395 FN 8.

> attentively, and using all of the tools presented, including the over 88 years of experience by the five different doctors presented.

Appendix, 558b. In other words, the "expert[s] [*are*] the case." *Ackley*, 497 Mich at 397, citing Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts,* 87 Wash U L Rev 1, 27 (2009) (emphasis in original).

The net effect of the non-expert evidence on the jury was a far cry from the devastating impact of the state's expert testimony. Similarly circumstantial evidence related to the defendant's behavior was presented at the *Ackley* trial and was emphasized by the state on appeal. Nonetheless, this Court recognized that where the cornerstone of the prosecution's case is expert testimony about abusive head trauma, counsel's failure to present expert testimony to support the defense theory of accident was reasonably likely to have affected the outcome. As pointed out by this Court, if anything, the presentation of such evidence at trial "might be said to make it even more critical that counsel counter the expert endorsed theory of his client's guilt with an expert endorsed theory of his client's innocence." *Ackley*, 497 Mich at 395 FN 8.

Similarly, the Court of Appeals correctly analyzed counsel's error, taking in to account that expert testimony about force was the cornerstone of the prosecution's case at trial. Appendix, 276a. Under these circumstances, counsel's deficient performance was reasonably likely to have affected the outcome of the trial.

b. The trial court and prosecution ignored the impact of other errors in their prejudice analysis.[6]

A proper prejudice analysis requires the reviewing court to consider the totality of the circumstances, including additional instances of error at trial. *Strickland*, 466 US at 695-696; *People v*

[6] Mr. Roberts is entitled to a new trial on the additional grounds raised in his Brief on Appeal and Motion for New Trial. Appendix, 609b, 617b. Those issues are not discussed at length in this brief because they were not addressed by the Court of Appeals or the prosecution in its Application for Leave to Appeal. Mr. Roberts does not waive or abandon the additional issues raised on appeal.

Leblanc, 465 Mich 575, 591; 640 NW2d 246 (2002). Here, Mr. Roberts asserted several additional instances of error at his trial. See Appendix, 609b, 617b. Mr. Roberts maintains that the trial court reversibly erred by concluding otherwise and the Court of Appeals did not address those issues in its opinion below. While it was appropriate for the Court of Appeals to leave those issues unaddressed after finding reversible error on other grounds, *People v Pinkey*, __NW2d__; 2018 WL 2025819, those additional instances of error are relevant to the prejudice analysis.

In addition to this ineffective assistance of counsel claim, Mr. Roberts asserted that the prosecutor breached her duty to do justice when she transformed the trial from a case about what happened on December 31, 2013, into a case about Mr. Roberts' purported failures as a father and a man. Appendix, 609b. The prosecution informed the jury that Mr. Roberts was a "leech" who was trying to impregnate his girlfriend so he could find a place to live. Appendix, 572b-573b. Not only did the prosecutor's behavior far exceed the scope of appropriate, professional advocacy, but it infected the trial with emotion, sympathy, and unfair prejudice. The prosecutor introduced extensive testimony about Mr. Roberts' employment status, romantic relationships, sexual history, marital status, and the number of women with whom he had children. Appendix, 225b-228b, 247b, 498b-504b. She encouraged the jury to put themselves in Nehemiah's position and repeatedly suggested that the deceased two year old wanted the jury to convict Mr. Roberts. Appendix, 552b-553b, 557b. The result was that Mr. Roberts' trial was so infected with unfairness that his conviction was a deprivation of liberty without due process of law. Mr. Roberts also asserted his trial counsel was constitutionally ineffective for failing to object to the pervasive misconduct.

Next, Mr. Roberts asserted that his trial included numerous inadmissible statements by the investigating officer recounting prejudicial hearsay, expert opinions about the evidence she was not qualified to give, and her opinions and assessments of Mr. Roberts' credibility and guilt. Appendix, 617b. The prosecution's introduction of these inadmissible statements and opinions at trial further

violated Mr. Roberts' state and federal rights to due process and a fair trial. In addition, trial counsel's failure to object was another instance of ineffective assistance of counsel.

These additional instances of error make it all the more likely that counsel's failure to adequately investigate his defense and present available expert testimony to support it affected the outcome of Mr. Roberts' trial.

D. This case involves the straightforward application of well-established authorities and was correctly decided by the Court of Appeals in a unanimous, unpublished opinion; this Court should deny leave to appeal and/or affirm the decision below.

The prosecution's Application for Leave to Appeal and Supplemental Brief fail to identify reversible errors in the opinion below. Nor has the prosecution identified any proper basis for this Honorable Court to grant leave to appeal. See MCR 7.305(B). The Court of Appeals' analysis in this case is not novel, nor does it conflict with any decisions of Michigan's appellate courts. Instead, the decision below involves the straightforward application of *Strickland* and its progeny in an unpublished opinion, unlikely to be of any significance to the state's jurisprudence.

In the unpublished opinion below, the Court of Appeals properly applied well-established ineffective assistance of counsel jurisprudence to the facts of this case, consistent with the trial court's credibility determinations. The unanimous panel reached the right result (a new trial for Mr. Roberts) for the right reasons (because trial counsel failed to undertake the independent investigation necessary for meaningful adversarial testing of the state's controversial evidence). Thus, this Court should deny the prosecution's Application for Leave to Appeal, or in the alternative, affirm the decision below.

Summary and Request for Relief

Defendant-Appellee Brian Roberts asks this Honorable Court to either deny the prosecution's Application for Leave to Appeal, or in the alternative, affirm the decision below.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Erin Van Campen
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ERIN VAN CAMPEN P76587
MICHAEL R. WALDO P72342
Assistant Defenders
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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