

STATE OF MICHIGAN  
IN THE MICHIGAN SUPREME COURT  
Michigan Supreme Court  
Hall of Justice  
PO Box 30052  
Lansing, MI 48909

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PEOPLE OF THE STATE OF MICHIGAN

v

Supreme Court No. \_\_\_\_\_

ANTHONY RAY McFARLANE, JR.  
Defendant/Appellant

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Court of Appeals No. 336187

Lower Court No. 14-018862-FC

Jonathan K. Blair (P71908)  
Allegan County Prosecuting Attorney's Office  
113 Chestnut Street  
Allegan, Michigan 49010  
269-673-0280

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DEFENDANT/APPELLANT'S  
APPLICATION FOR  
LEAVE TO APPEAL

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ORAL ARGUMENT REQUESTED

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People v Duncan, 494 Mich 713, 723 (2013).

People v Roper, 286 Mich App 77, 83 (2009).

People v Bynum, 495 Mich 713, 723 (2013).

People v Shafier, 483 Mich 205, 211 (2009).

People v Hardy, 494 Mich 430, 442-443 (2013).

### Michigan Rules of Evidence

MRE 401

MRE 402

MRE 403

MRE 404(b)

### Statutes

MCL 750.136(b)(1)(f)

MCL 750.136(b)(2)

MCL 750.136(b)(1)(f)

MCL 777.33(1)(c)

**JURISDICTIONAL STATEMENT**

**RULE 7.303 JURISDICTION OF THE SUPREME COURT**

(B) Discretionary Review. The Supreme Court may

(1) review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals (see MCR 7.305);

**STATEMENT OF QUESTIONS PRESENTED**

- I. WERE MR. MCFARLANE'S DUE PROCESS RIGHTS VIOLATED WHEN HE WAS CONVICTED OF FIRST-DEGREE CHILD ABUSE WITHOUT SUFFICIENT EVIDENCE TO PROVE THE OFFENSE BEYOND A REASONABLE DOUBT?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court and appellate court say "no."

- II. DID THE PROSECUTOR'S EXPERT WITNESS VIOLATE MR. MCFARLANE'S DUE PROCESS RIGHTS BY TESTIFYING THAT KAYDENCE WAS ABUSED, EFFECTIVELY OPINING THAT MR. MCFARLANE WAS GUILTY OF CHILD ABUSE; ALTERNATIVELY, WAS DEFENSE TRIAL COUNSEL INEFFECTIVE IN FAILING TO OBJECT ON THAT BASIS?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court and appellate court say "no."

- III. WAS MR. MCFARLANE DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE PROSECUTION, WITHOUT PROVIDING PROPER NOTICE, WAS ALLOWED TO ADMIT EVIDENCE OF AN ALLEGED TIBIA FRACTURE WITHOUT OBJECTION WHEN SUCH ALLEGED FRACTURE WAS DISPUTED AND COULD NOT BE ATTRIBUTABLE TO MR. MCFARLANE?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court and appellate court say "no."

- IV. WAS MR. MCFARLANE DENIED HIS RIGHT TO DUE PROCESS OF LAW WHERE HE WAS SENTENCED ON THE BASIS OF INACCURATELY SCORED GUIDELINES AND HE MUST BE RESENTENCED?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court says "no."

The appellate court says “yes.”

**NEW ISSUES PRESENTED TO THE SUPREME COURT  
NOT RAISED IN THE COURT OF APPEALS**

1. WAS MR. MCFARLANE DENIED HIS RIGHT TO DUE PROCESS OF LAW BY VIRTUE OF THE CUMULATIVE EFFECTS OF ERRORS OF THE TRIAL COURT AND OF TRIAL COUNSEL?

Defendant-Appellant says “yes.”

Plaintiff-Appellee says “no.”

The trial court and appellate courts say “no.”

- II. WAS MR. MCFARLANE DENIED HIS RIGHT TO DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL DID NOT DEMAND A DAUBERT HEARING BASED UPON THE FACT THAT THE ALLEGED VICTIM HAD A SEVERELY MALFORMED BRAIN DUE TO IN UTERO STROKES AND THERE WAS NO DIFFERENTIAL DIAGNOSIS TO APPLY SHAKEN BABY SYNDROME TO A CHILD SUFFERING FROM A BRAIN ABNORMALITY?

Defendant-Appellant says “yes.”

Plaintiff-Appellee says “no.”

The trial court and appellate courts say “no.”

## STATEMENT OF FACTS

Defendant was charged with first-degree child abuse. It is alleged that Defendant shook a nine-week old infant, KM, with the infant suffering physical damage based on a theory of Shaken Baby Syndrome. At trial, KM's sister, KD, testified that she saw Defendant shake KM, even though she had not testified to seeing the event in previous testimony.

The Prosecution brought forth testimony from Dr. Sarah J. Brown, who was admitted as an expert in child abuse pediatrics. Dr. Brown testified that the case involved a “definite case of abusive head trauma” and that the injuries to KM were “caused by definite pediatric physical abuse.” Her statements, according to the Court of Appeals, “strongly suggested that it was her opinion that whoever inflicted the injuries on KM did so with a culpable state of mind, which requires a defendant to “knowingly or intentionally” cause serious physical harm to a child. MCL 750.136b(2).

The Court of Appeals found that the testimony of Dr. Brown as to her belief that the Defendant's actions were abusive or amounted to child abuse were irrelevant and inadmissible as a matter of law. The Court of Appeals opined that the trial court plainly erred to the extent that it allowed Dr. Brown to use the phrase “abusive head trauma” to label her diagnosis and that the trial court erred by allowing her to testify that KM's injuries amounted to “child abuse.” The Court of Appeals found that the errors by the trial court were “unlikely that the error affected the outcome of the trial.”

At trial, Dr. Brown also was allowed to testify, without defense counsel objection, to her opinion that KM has suffered a prior broken tibia. The Court of Appeals found that in the absence of any evidence connecting the Defendant to the fracture, the opinion of the Doctor did not have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401.

The Court of Appeals found that the testimony regarding the alleged fracture was not relevant to

prove conduct in conformity with character and was thus inadmissible under MRE 404(b). The Court of Appeals opined that the evidence was “likely inadmissible under MRE 403 because it invited speculation by the jury, and the danger of unfair prejudice outweighed whatever marginal relevance the evidence might have had for purposes of the diagnosis. MRE 403. Nevertheless, the Court of Appeals determined that defense counsel had a legitimate strategic reason for not objection to testimony about the fracture.

The Court of Appeals did grant Defendant relief in scoring of the offense variables. The Court of Appeals remanded Defendant's case with directions to the trial court not to score 25 points for OV 13. The Court of Appeals rejected Defendant/Appellant's other claims of scoring improprieties. Mr. McFarlane was convicted of First-Degree Child Abuse and was sentenced to serve 15-25 years in prison.

### STANDARDS OF REVIEW

The Court conducts de novo reviews on issues of the application of rules of evidence. People v Duncan, 494 Mich 713, 723 (2013). A court's decision to allow testimony is reviewed for an abuse of discretion. People v Roper, 286 Mich App 77, 83 (2009). It is an abuse of discretion to allow testimony that is inadmissible as a matter of law. People v Bynum, 495 Mich 713, 723 (2013). The court reviews constitutional questions on a de novo basis. People v Shafier, 483 Mich 205, 211 (2009).

### ISSUES RAISED IN COURT OF APPEALS

- I. WERE MR. MCFARLANE'S DUE PROCESS RIGHTS VIOLATED WHEN HE WAS CONVICTED OF FIRST-DEGREE CHILD ABUSE WITHOUT SUFFICIENT EVIDENCE TO PROVE THE OFFENSE BEYOND A REASONABLE DOUBT?

Defendant-Appellant says “yes.”

Plaintiff-Appellee says “no.”

The trial court and appellate court say “no.”

The Court should review this decision of the Court of Appeals because the decision of the Court of Appeals is clearly wrong and will cause material injustice to Mr. McFarlane and because this issue raises a legal principle that is very important to Michigan law.

Issues: The Court of Appeals confirmed that KD, who was five at the time of the alleged offense, offered testimony about the timing of the incidents that was “not entirely clear.” The Court of Appeals also noted that KD had failed to disclose the shaking incident prior to the trial. Dakota Chitwood, the mother of KM (the alleged victim) had testified that KM was already showing signs of fussiness and pain on Friday night, so that an event that occurred on Saturday morning would have post dated KM's injuries. KD testified that the shaking could have occurred on Friday night (Dec 6, 2013) or Saturday morning (Dec. 7 , 2013).

Moreover, the expert testimony of Sarah Brown, D.O. according to the Court of Appeals, bolstered the testimony of KD. Dr. Brown testified that KM had bleeding on both sides of her brain, that she had a suspected tibia fracture, and that an ophthalmologist observed bleeding in the back of KM's eye. Dr. Brown did acknowledge that KM had suffered a prenatal stroke that caused the left hemisphere of KM's brain to shrink substantially, but she believed that the subdural hematomas and retinal hemorrhages were not attributable to the stroke. The Court of Appeals tied KM's testimony to Dr. Brown's testimony to conclude that a “reasonable jury could infer that Defendant violently shook KM and that his acts caused her to suffer the identified injuries.”

However, in reviewing Dr. Brown's testimony in the portion of the Appellate opinion regarding Dr. Brown's testimony invading the province of the jury, the Court of Appeals noted that is it an “abuse of discretion to allow testimony that is inadmissible as a matter of law.” The Court of Appeals went on to note that where a jury has been confronted with one of society's most heinous offenses, [in that case Criminal Sexual Conduct] there is a significant danger that the jury will give extra weight to an expert's

testimony.” The Court noted that an “expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang it's hat.” That is precisely what happened in this case.

The Court of Appeals noted that “because there was no external evidence of injury, her [KM's] injuries involved a classic diagnosis of shaken baby syndrome or abusive head trauma.” The Court of Appeals concluded that “in cases involving allegations of abuse, an expert goes too far when he or she diagnoses the injury as “abusive head trauma” or opines that the inflicted trauma amounted to child abuse.” The Court noted that an expert may not offer an opinion on the intent or criminal responsibility of the accused.

Dr. Brown testified that this case involved a “definite case of abusive head trauma.” She repeatedly told the jury that KM's injuries were “caused by definite pediatric physical abuse” and stated that “we know that abusive head trauma” causes these injuries because people confess to hospital staff and investigators or other family members after inflicting the injuries. She also testified that KM suffered previous abuse even though she was only nine weeks old. She concluded that the case involved “child abuse.”

The Court of Appeals correctly adduced that Dr. Brown's belief that the defendant's actions were abusive or amounted to child abuse **were irrelevant and inadmissible as a matter of law.** (emphasis added). The Court noted that the trial court plainly erred to the extent that it allowed Brown to use the phrase “abusive head trauma” to label her diagnosis and the court erred by allowing her to agree that KM's injuries amounted to “child abuse.” The Court of Appeals concludes that plain error will not warrant relief unless the defendant demonstrates that the error affected the outcome of the lower court proceedings.

The Court of Appeals simply announced that they found it “unlikely that the error affected the outcome of the trial.” The Court of Appeals also concluded that “[a]ny prejudice occasioned by her

characterization of the acts was minimal.” It is hard to imagine a scenario that the error wouldn't have affected the outcome of the trial. The People had one expert witness. That witness was allowed to invade the province of the jury in a crime that is one of society's most heinous offenses, child abuse and shaken baby syndrome. The expert was allowed to inject “irrelevant and inadmissible” statements to the jury labeling the injuries to KM as “abusive head trauma” and “child abuse.” The doctor was even able to testify about KM’s alleged broken tibia. The Court of Appeals acknowledges that the information about the tibia was highly prejudicial and should not have been allowed but for the fact that Defendant’s attorney failed to object. The doctor’s testimony about the alleged broken tibia was another piece of evidence that wrongfully was placed in front of the jury.

The evidence of the expert's impact on the jury can be seen by the fact that three defense experts testified for the Defendant, but the jury completely disregarded their testimony. A trial court cannot remedy the admission of irrelevant and inadmissible evidence by simply allowing other experts to testify contrary to the irrelevant and inadmissible testimony of the first expert. The remedy for the admission of irrelevant and inadmissible statements in this case, is to vacate the Defendant's convictions and remand the issue for a new trial

**II. DID THE PROSECUTOR'S EXPERT WITNESS VIOLATE MR. MCFARLANE'S DUE PROCESS RIGHTS BY TESTIFYING THAT KAYDENCE WAS ABUSED, EFFECTIVELY OPINING THAT MR. MCFARLANE WAS GUILTY OF CHILD ABUSE; ALTERNATIVELY, WAS DEFENSE TRIAL COUNSEL INEFFECTIVE IN FAILING TO OBJECT ON THAT BASIS?**

Defendant-Appellant says “yes.”

Plaintiff-Appellee says “no.”

The trial court and appellate court say “no.”

The Court should review this decision of the Court of Appeals because the decision of the Court of Appeals is clearly wrong and will cause material injustice to Mr. McFarlane and because this issue raises a legal principle that is very important to Michigan law. The Court of Appeals noted that our

Supreme Court has not considered any limits on an expert's ability to diagnose abusive head trauma. Therefore, a review of this heretofore unconsidered topic is both timely and an important legal issue.

The Court of Appeals has done most of the heavy lifting for this appeal. The Court of Appeals is correct in the portion of the Appellate opinion regarding Dr. Brown's testimony invading the province of the jury. There, the Court of Appeals noted that is it an **"abuse of discretion to allow testimony that is inadmissible as a matter of law."** (emphasis added) The Court of Appeals went on to note that where a jury has been confronted with one of society's most heinous offenses, [in that case Criminal Sexual Conduct] there is a significant danger that the jury will give extra weight to an expert's testimony." The Court noted than an "expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang it's hat." That is precisely what happened in this case.

The Court of Appeals noted that "because there was no external evidence of injury, her [KM's] injuries involved a classic diagnosis of shaken baby syndrome or abusive head trauma." **The Court of Appeals concluded that "in cases involving allegations of abuse, an expert goes too far when he or she diagnoses the injury as "abusive head trauma" or opines that the inflicted trauma amounted to child abuse."** (emphasis added) The Court noted that an expert may not offer an opinion on the intent or criminal responsibility of the accused.

Dr. Brown testified that this case involved a "definite case of abusive head trauma." She repeatedly told the jury that KM's injuries were "caused by definite pediatric physical abuse" and stated that "we know that abusive head trauma" causes these injuries because people confess to hospital staff and investigators or other family members after inflicting the injuries. She also testified that KM suffered previous abuse even though she was only nine weeks old. She was allowed to testify about an alleged broken tibia of KM, which clearly and impermissibly raised the specter of the jury seeing the Defendant/Appellant as a bad actor. She was allowed to conclude that the case involved "child abuse."

The Court of Appeals correctly adduced that Dr. Brown's belief that the defendant's actions were abusive or amounted to child abuse **were irrelevant and inadmissible as a matter of law.** (emphasis added). The Court noted that the trial court plainly erred to the extent that it allowed Brown to use the phrase "abusive head trauma" to label her diagnosis and the court erred by allowing her to testify that KM's injuries amounted to "child abuse." The Court of Appeals concluded that plain error will not warrant relief unless the defendant demonstrates that the error affected the outcome of the lower court proceedings.

The Court of Appeals simply announced that they found it "unlikely that the error affected the outcome of the trial." The Court of Appeals also concluded that "[a]ny prejudice occasioned by her characterization of the acts was minimal." Such a conclusion is completely unwarranted.

It is hard to imagine a scenario that the errors wouldn't have affected the outcome of the trial. The People had one expert witness. That expert was a pediatrician. The expert was allowed to testify as to alleged broken bones, abusive head trauma and child abuse. That witness was allowed to invade the province of the jury in a crime that is one of society's most heinous offenses, child abuse and shaken baby syndrome. The expert was allowed to inject "irrelevant and inadmissible" statements to the jury labeling the injuries to KM as "abusive head trauma" and "child abuse." The doctor was even able to testify about KM's alleged broken tibia, which implies that the Defendant had committed bad acts against the child in the past. The Court of Appeals acknowledges that the information about the tibia was highly prejudicial and should not have been allowed but for the fact that Defendant's attorney failed to object. The doctor's testimony about the alleged broken tibia was another piece of evidence that wrongfully was placed in front of the jury.

The Court of Appeals acknowledges that the testimony of Dr. Brown that the Defendant's actions amounted to child abuse and that she was allowed to use the phrase abusive head trauma were irrelevant and inadmissible as a matter of law. The effect of the testimony of Dr. Brown had to have

been highly persuasive to the jury because three experts aligned against Dr. Brown were unsuccessful in swaying the jury. The testimony of abusive head trauma, child abuse, and the insinuation that Anthony McFarlane was responsible for breaking KM's leg is the lynchpin of the prosecution's case. To say that such testimony unlikely affected the outcome of the trial and that such testimony caused minimal prejudice flies in the face of the fact that the jury believed Dr. Brown despite the testimony of three defense expert witnesses. The Court of Appeals bent over backwards to affirm the conviction, but the entire opinion actually reads like a case that should have had the guilty verdict overturned and remanded to the trial court for retrial.

III. WAS MR. MCFARLANE DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE PROSECUTION, WITHOUT PROVIDING PROPER NOTICE, WAS ALLOWED TO ADMIT EVIDENCE OF AN ALLEGED TIBIA FRACTURE WITHOUT OBJECTION WHEN SUCH ALLEGED FRACTURE WAS DISPUTED AND COULD NOT BE ATTRIBUTABLE TO MR. MCFARLANE?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court and appellate court say "no."

The Court should review this decision of the Court of Appeals because the decision of the Court of Appeals is clearly wrong and will cause material injustice to Mr. McFarlane.

Here again, the Court of Appeals is searching for something to hang their hat on to affirm the conviction of Mr. McFarlane. Although counsel does have a wide discretion in matters of trial strategy, this case presents evidence that Mr. McFarlane's attorney fell far below an objective standard of reasonableness under prevailing professional norms.

Not only did trial counsel fail to object to Dr. Brown's use of the terms "abusive head trauma" and "child abuse" and "pediatric child abuse," trial counsel also allowed Dr. Brown to testify that KM had suffered a broken tibia in the past without objection. The evidence of an alleged broken tibia can only be seen as a successful attempt to throw Mr. McFarlane's character and propensity for bad acts in

front of the jury using irrelevant and inadmissible evidence!

Even if counsel “might reasonably have refrained from objecting to Brown's diagnosis of abusive head trauma and her reference to abuse because her claim that she could diagnose child abuse furthered his argument that she was partial and not worthy of credibility,” such a strategy falls far below the standard of reasonableness. This is especially true when Dr. Brown is allowed to testify about a previous injury of a broken tibia. Why would an attorney specifically chose to allow inadmissible, irrelevant and prejudicial evidence into a trial for the express purpose of attempting to challenge the expert's credibility when that very testimony does far more to challenge the credibility of the Defendant than the expert.

If indeed it was the trial counsel's strategy to allow inadmissible, irrelevant and prejudicial testimony of the opposition's expert in hopes of bolstering his argument that the expert was partial and not credible, such a trial strategy is highly ineffective, especially in light of the extremely serious nature of the charges and the highly prejudicial impact of Dr. Brown's testimony. The jury in this matter found that the People's “expert” in this case represented a seemingly objective source and her testimony offered the jury a much sought-after hook on which to hang it's hat and to convict Defendant.

**IV. WAS MR. MCFARLANE DENIED HIS RIGHT TO DUE PROCESS OF LAW WHERE HE WAS SENTENCED ON THE BASIS OF INACCURATELY SCORED GUIDELINES AND HE MUST BE RESENTENCED?**

Defendant-Appellant says “yes.”

Plaintiff-Appellee says “no.”

The trial court says “no.”

The appellate court says “yes.”

The Court should review this decision of the Court of Appeals because the decision of the Court of Appeals is clearly wrong and will cause material injustice to Mr. McFarlane.

The Court of Appeals partially agreed with Defendant-Appellant and remanded the case for resentencing based upon their finding that OV 13 was improperly scored because there was not a pattern of felonious criminal activity involving 3 or more crimes against a person.

However, the Court of Appeals erred in affirming the award of 50 points under OV 7 by finding that a “victim was treated with sadism, torture, excessive brutality or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” In scoring OV 7, there has to be a showing that the violence in the case “exceeded the brutality that normally encompasses first-degree child abuse. People v Hardy, 494 Mich 430, 442-443 (2013).

Again, the Court of Appeals notes that the trial court “clearly erred to the extent that it relied on the evidence of a leg fracture” in scoring of this issue. The Court of Appeals incorrectly affirmed that because there was disputed evidence that the Defendant had to have violently shaken or thrown KM to cause the subdural hematomas and other injuries, the severity of the injuries supported a finding that KM was treated with brutality in excess of that which necessarily accompanies the commission of first degree child abuse.

However, MCL 750.136(b)(2) provides that the defendant must knowingly or intentionally cause(d) serious physical.....harm. MCL 750.136(b)(1)(f) provides, in pertinent part, that serious physical harm means any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to.....subdural hemorrhage or hematoma..... Defendant was scored 50 points on OV 7. The Court of Appeals found that the level of brutality in this case “exceeded the brutality that normally encompasses first-degree child abuse.

The statute anticipates “serious” physical harm and specifically includes the serious harm of a subdural hematoma, which is what was found in this case. KM suffered serious physical harm, but there is no evidence that the Defendant's alleged actions demonstrated a brutality in excess of that required under MCL 750.136(b)(1)(f). The trial court erred in scoring 50 points for OV 7 and the Court

of Appeals erred in affirming that the Defendant's alleged actions exceeded the brutality that normally encompasses first-degree child abuse. If the logic of the Court of Appeals is correct, then all shaken baby cases will result in a scoring of 50 points for every defendant because of excessive brutality. No points should have been assessed under OV 7

The Court of Appeals also affirmed the scoring of 25 points under OV 3. Such scoring occurs with the court finds "life threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). The Court of Appeals opined that the trial court clearly erred to the extent that it found that the defendant's actions caused a permanent incapacitating injury to KM. However, the Court of Appeals affirmed the scoring based upon its belief that the injuries were life threatening simply because KM was airlifted to a larger hospital for treatment. There was no testimony produced at court that indicated that KM's life was in peril due to the alleged trauma. Consequently, OV 3 sentencing should have been "0".

As a result of scoring issues, Defendant should be entitled to a resentencing based upon proper scoring of the Offense Variables.

**NEW ISSUES PRESENTED TO THE SUPREME COURT  
NOT RAISED IN THE COURT OF APPEALS**

The court should review this issue because the failure to consider the issue will cause a material injustice to Mr. McFarlane and because this issue raises a legal principle that is very important to Michigan Law.

1. **WAS MR. MCFARLANE DENIED HIS RIGHT TO DUE PROCESS OF LAW BY VIRTUE OF THE CUMULATIVE EFFECTS OF ERRORS OF THE TRIAL COURT AND OF TRIAL COUNSEL?**

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court and appellate courts say "no."

The Court of Appeals found numerous errors were committed by the trial court. It also found that Defendant's attorney also committed serious errors in his defense. The following is a list of errors committed by the trial court and defense counsel according to the Michigan Court of Appeals:

a. It is an abuse of discretion to allow testimony that is inadmissible as a matter of law. The trial court allowed Dr. Brown to testify despite three clear errors:

1. Dr. Brown testified that there was "definite pediatric abuse,"
2. Dr. Brown testified that there was abusive head trauma in the case, and
3. Dr. Brown testified that KM had been previously abused in regards to a broken tibia, which the prosecutor used to make the argument that Defendant.

Testimony regarding the broken tibia was not admissible under MRE 401, 402, 403 or 404(b). The Court of Appeals indicated that the testimony "invited speculation by the jury, and the danger of unfair prejudice outweighed whatever marginal relevance the evidence might have had. The Court of Appeals then attempted to "affirmatively entertain the range of possible reasons that the Defendant's attorney did not object to the testimony." The Court of Appeals then defied logic by finding that Defendant's attorney had a "legitimate strategic reason" for not objecting to the testimony of the fracture. Evidence of the tibia fracture was inadmissible because of the unfairly prejudicial nature of the evidence which would outweigh any marginal relevance of the injury. So, despite the fact that the evidence was not admissible under MRE 401, 402, 403 or 404(b), the failure to object to this highly prejudicial evidence by defense counsel was a "strategic" choice, at least according to the Court of Appeals.

The Court of Appeals also concluded that Dr. Brown's testimony that KM's injuries were a "definite case of abusive head trauma" and were caused by "definite pediatric child abuse," were **irrelevant and inadmissible as a matter of law**. (emphasis added) The Court of Appeals also indicated that the "trial court plainly erred" to the extent that it allowed Dr. Brown to use such testimony. The prosecutor even mentioned in her closing that Dr. Brown characterized KM's symptoms as being caused by abuse.

The Court of Appeals found that the jury was “well aware of the limits on Brown's opinion” and “any prejudice occasioned by her characterization of the acts was minimal.” The Court of Appeals further noted that because of the “strength of the evidence” they found it “unlikely that the error affected the outcome of the trial.”

Please remember that the Court of Appeals said that the evidence of a tibia fracture was “weak,” that the testimony about the timing of the shaken baby event from KD's was “not entirely clear,” (p2), and that the prosecution could rely on “minimal circumstantial evidence” to prove the Defendant's requisite intent.” Moreover, the Court of Appeals noted that there was expert opinion to the contrary regarding Defendant's intent. Thus, what the Court of Appeals determined to be strong evidence, was really not strong.

Next, the Court of Appeals applied the same stretched logic to say that somehow, the Defendant's attorney was making a strategic choice to allow inadmissible evidence and testimony into the case. According to their logic, the defendant's attorney was simply making strategic choices to allow prejudicial and inadmissible evidence into the trial for the express purpose of attacking the credibility of the very person who made the prejudicial and inadmissible statements. The Court of Appeals simply overlooked or made excuses for trial counsel's behavior and by judicial fiat proclaimed that the errors of defense counsel did not constitute ineffective assistance of counsel.

The parade of errors that the Court of Appeals found in this matter cumulatively acted to deprive the Defendant of due process and entitles Defendant to have his conviction vacated and a new trial ordered.

**FAILURE TO APPLY DAUBERT AND  
INEFFECTIVE ASSISTANCE OF COUNSEL**

The court should review this issue because the failure to consider the issue will cause a material injustice to Mr. McFarlane and because this issue raises a legal principle that is very important to Michigan Law.

II. WAS MR. MCFARLANE DENIED HIS RIGHT TO DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL DID NOT DEMAND A DAUBERT HEARING BASED UPON THE FACT THAT THE ALLEGED VICTIM HAD A SEVERELY MALFORMED BRAIN DUE TO IN UTERO STROKES AND THERE WAS NO DIFFERENTIAL DIAGNOSIS TO APPLY SHAKEN BABY SYNDROME TO A CHILD SUFFERING FROM A BRAIN ABNORMALITY?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court and appellate courts say "no."

There is no consensus view on Shaken Baby Syndrome. Furthermore, even if there was a "consensus" view, there have been no studies done on children whose brains were defective from birth. In the present case, the left half of KM's brain was only one third the size of the right half of her brain. Even if Shaken Baby Syndrome can survive a Daubert review, the trial court should have required the prosecution to apply Daubert to a case where prenatal strokes had permanently disabled the child and significantly affected the development of the brain of the child. There are many reasons that blood might be found in a baby's brain when one-half of his or her brain was deformed. In addition, trial counsel was ineffective in failing to raise a Daubert challenge both to Shaken Baby Syndrome and, more specifically, as to whether the requirements of a "differential diagnosis" to show Shaken Baby Syndrome in an otherwise normally developed child would be the same in a child whose brain was irrevocably damaged prior to birth.

In the preliminary examination, the following exchange took place:

Q: [by KOCH] Doctor, I just have a couple of--of additional questions then, if you would. Doctor, is there any way to determine the amount of damage, long term, that Kady--I'm sorry--the amount of developmental problems that Kady, long term, would have, based solely on the stroke that she had in utero, as opposed to the amount of damage that she might--developmental damage-- she might suffer,

long term, from the injuries that you've discussed regarding the December 6th incident? Is there a way to separate those two?

A: [Dr. BROWN] That's a really good question, and something that, no, we would never be able to sort out. I could give you statistics about what we would expect for a child who had had a stroke like Kady's, in utero. But again, those are only statistics. It's hard to know if she would have been one of the lucky ones that would have had nothing, or barely anything, as a result of that stroke. And again, with the abusive head trauma, it's difficult to know if that caused severe brain problems that will last forever, or if that--if she was fortunate enough to be able to completely recover, or nearly completely recover. (Preliminary Examination Transcript, April 21, 2014, p. 59)

At the preliminary examination, Defendant's attorney was Patrick J. Crowley. Trial counsel in this matter was attorney Robert Champion. In her preliminary examination testimony, Dr. Brown admits that it is impossible to determine the amount of long term damage that was attributable to her in utero stroke versus damage that she might suffer from the alleged shaken baby event. Defendant's attorneys should then have challenged the shaken baby syndrome diagnosis based upon the fact that KM's in utero brain damage most certainly would have affected how a doctor should go about determining shaken baby syndrome in light of a child with significant brain damage from before birth.

The failure to raise this specific Daubert issue, especially in regards to a child who suffered prenatal strokes and who had one half of her brain severely deformed, amounts to ineffective assistance of counsel and should entitle Defendant to a new trial.

### CONCLUSION

In conclusion, the Court of Appeals erred in not vacating the Defendant/Appellant's conviction. Defendant, because of the cumulative effect of numerous errors made by the trial court and by his counsel at the trial level, did not receive a fair and impartial trial. The Court of Appeals found that numerous errors occurred in this trial, yet stopped short of awarding any relief for those errors.

**REQUEST FOR RELIEF**

Defendant/Appellant prays that this Honorable Court reverse the Opinion of the Michigan Court of Appeals, vacate the Defendant/Appellant's conviction, and remand the case for a new trial.

Dated: August 16, 2018



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Michael Villar, Attorney for Defendant/Appellant