ORIGINAL

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

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

Supreme Court No. 149479
Court of Appeals No. 318303
Lower Court No. 2011-003642-FC

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PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

149479

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES: **PAGES:**

INDEX OF AUTHORITIES
(Continued)

CASES: **PAGES:**

STATUTES: **PAGES:**

COURT RULES: **PAGES:**

COUNTER-STATEMENT OF APPELLATE JURISDICTION

Defendant applies for leave to appeal from the April 22, 2014, unpublished opinion of the Michigan Court of Appeals reversing the trial court's grant of a new trial. See Appendix A: *People v Ackley*, unpublished opinion dated April 22, 2014 (Docket No. 318303); MCR 7.301(A)(2). Plaintiff submits Defendant has not set forth sufficient grounds in his application, pursuant to MCR 7.302(B), to show that the decision of the Michigan Court of Appeals is clearly erroneous or that the decision conflicts with the decisions of the Michigan Court of Appeals, or this Court. Therefore, Defendant's application for leave to appeal should be denied in its entirety.

STATEMENT OF QUESTIONS

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED DEFENDANT A NEW TRIAL BASED ON A FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL?

The Court of Appeals, "Yes."

Plaintiff-Appellee answers, "Yes."

Defendant-Appellant answers, "No."

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Leo Duane Ackley (Defendant) was convicted by jury of first-degree child abuse, contrary to MCL 750.136b(2), and felony murder, contrary to MCL 750.316(1)(b), for the infliction of blunt force trauma upon three-year-old Baylee Stenman (Baylee) causing her death. See Judgment of Sentence, dated May 7, 2012; TVI[1] at 888. The trial court sentenced Defendant to a statutory term of life imprisonment for his felony murder conviction, and a term of 120 to 180 months' imprisonment for the first-degree child abuse conviction. ST[2] at 13-14.

Appellate History:

On direct appeal, Defendant filed a motion to remand requesting a *Ginther*[3] hearing. Defendant argued—among other things—that defense counsel, Kenneth Marks (Marks), was ineffective in failing to request additional funds from the trial court so that he may consult a second expert to dispute the prosecution's case after the first expert he consulted was unable to testify in favor of Defendant. See Defendant's Motion to Remand, Court of Appeals Docket No. 310350. The Court of Appeals remanded the matter for an evidentiary hearing so Defendant may move for a new trial based on his claim of ineffective assistance of counsel. See Appendix B: *People v Ackley,* unpublished order of the Court of Appeals, dated May 24, 2013 (Docket No. 310350). The trial court determined: (1) that Marks' actions were deficient; and (2) that Defendant was prejudiced as a result of this deficient performance. GIV[4] at 60.

On direct appeal, the People argued that Marks' actions were not deficient and—more

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[1] Trial Transcript, Volume 6 of 6, dated April 18, 2012, referred to as TVI.

[2] Sentence Transcript, dated May 7, 2012, referred to as ST.

[3] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

[4] Continued *Ginther* Evidentiary Hearing, dated September 6, 2013, referred to as GIV.

importantly—that Defendant was not prejudiced as a result of Marks' trial strategy. The Court of Appeals agreed and vacated the trial court's decision granting a new trial. Appendix A, *Ackley* passim. Due to the issues, a thorough and somewhat exhaustive review of the facts supporting the jury's verdict were presented to the Court of Appeals, and are again presented here to the this Court as the People demonstrate that the trial court abused its discretion in granting Defendant's motion for new trial, that the trial court erred in applying the prejudice prong of *Strickland*,[5] and that the Court of Appeals did not err in vacating the trial court's granting of a new trial.

Background Information:

Erica Stenman (Erica) testified that she had two children during the summer of 2011: (1) Brandee Stenman-Milcher (Brandee); and (2) Baylee Stenman (Baylee). Brandee was six years old at the time of the incident while Baylee was just three-and-a-half years old. TI[6] at 233. According to Erica, Baylee was beautiful, smart, listened and obeyed well, and loved her family very much. TI at 234. Although Brandee was older than Baylee, only a few pounds separated the two as Brandee was "very small" for her age. TI at 235. Erica testified that she had a close relationship with both girls, but more so with Baylee since her father was not around. TI at 234. Erica shared joint custody of Brandee with her father, Brandon Milcher (Brandon), who stayed with Erica for two days at a time then two days with Brandon. TI at 233, 236.

Erica worked as a home health care aide for LifeSpan traveling to the homes of those who needed minor patient care in their homes. TI at 237, 240. She usually worked from 9:00 a.m. until 11:00 a.m. at her morning client's home in Harper Creek, then from 11:30 a.m. until 2:30 p.m. at her afternoon client's home, which was just down the road from Erica's bi-level apartment. TI at 237,

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[5] *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[6] Trial Transcript, Volume 1 of 6, dated April 10, 2012, referred to as TI.

240. On a typical day, Brandee would go to school and Erica would take Baylee to the Altrusa Daycare Center while she worked. TI at 237.

In early March of 2011 Erica and Defendant began dating. They had known each other for approximately three years; however, they did not start dating until March. TI at 236. Within a matter of weeks, Erica allowed Defendant to move into her apartment at 88 Laura Lane. TI at 235-37. Erica explained that Defendant was collecting unemployment and occasionally "scrapped" for extra money, but he did not pay rent. TII at 326-27.

When Defendant first moved in, Baylee was still on the bottle (despite being over three years old), she was still wearing a Pull-Up all day, and she slept in the same bed as Erica at night. TII at 304-05. Defendant did not believe these behaviors were appropriate for a three year old; therefore, after telling Erica that he thought the behaviors needed to change, Defendant took it upon himself to completely change Baylee's habits regarding the bottle, potty training and sleeping. TII at 333. Baylee struggled a little bit with the potty training. TI at 238. Erica explained that Baylee would typically have one or two accidents a day, but that she made the transition into "big girl panties" by the end of March or early April. TI at 238. Erica testified that all of the changes were very hard on Baylee because Defendant was taking everything away from Baylee all at once. TII at 333-34. He even prevented Baylee from carrying her favorite blanket. Despite the struggles between Baylee and Defendant, Erica believed she was in a good relationship with Defendant; she trusted him and she believed she was happy. TI at 237.

As the end of the school year approached, Erica and Defendant decided to remove Baylee from daycare and let Defendant watch Baylee and Brandee while she was at work. TI at 238. The decision was made partly because Erica could not afford to pay daycare for both Brandee and Baylee during the summertime, and Defendant was still not working so he was at home most of the time.

TI at 238. Although Baylee seemed to have fun at daycare, Erica believed she would be happier at home with Defendant. TI at 238. Therefore, some time around April or May, Erica began keeping Baylee at home with Defendant a couple of days a week so that she could get used to staying with Defendant. TI at 243-44; TII at 299-300. Once school was out in early June, Baylee was completely removed from daycare and began staying home with Defendant when Erica went to work. TI at 243-44. Erica then explained a typical day for her and Baylee once Defendant became Baylee's care provider. TI at 239-41.

Erica would wake up, get ready for work, then leave Defendant alone at the apartment to wake up with Baylee and Brandee (on the days that Brandee was there). TI at 239. Erica explained that her morning client lived approximately 15 to 20 minutes away, depending on the route and traffic, so she usually left her home by 8:30 a.m. TI at 241. She then remained at that client's home until 11:00 a.m. TI at 241. After leaving her morning client's home, Erica would drive back to her home, quickly prepare herself a lunch, check on the girls, then leave to go to her afternoon client's home. TI at 241. She remained at this client's home from 11:30 a.m. until 2:30 p.m. TI at 241.

After Erica left the apartment to go to her afternoon client's home, Defendant would get the girls ready and take them to his mother's home. TI at 239. Erica testified that Defendant has to drive pass her afternoon client's home in order to get to his mother's home at 44 Baughman Court. TI at 242. He would usually honk his horn as they drove by. TI at 243. Once Defendant arrived at his mother's home, his sister, Brittany Lake (Brittany), or his mom would watch the girls if he had plans. TI at 239. If he did not have any plans, then he would stay at his mother's house with the girls until Erica got off work. TI at 239. Erica testified that the girls seemed fine whenever she went to meet with Defendant at his mother's home. TI at 239.

A couple of weeks after removing Baylee from daycare and placing her into the care of Defendant, Erica became concerned with Baylee's health. TI at 244. She noticed patches of hair missing from Baylee's scalp along the back of her neck and behind her ears. TI at 244. The follicle area appeared reddish and Baylee's hair was thinning on the top of her scalp. TI at 244. Baylee also experienced a loss of appetite and seemed to regress on potty training. TI at 244-45. Before the change in care providers, Baylee would have one or two accidents a day. TI at 245. Afterward, Baylee's accidents increased to more than four times a day. TI at 245. However, Erica stated that Baylee's accidents occurred less when she was home because she would physically walk her upstairs to the bathroom. TI at 250.

Erica also testified that Baylee seemed to bruise more easily during this time. TI at 246. Baylee sudden began getting bruises along her legs and arms. TI at 246, 339-40. Erica believed the sudden bruising was caused by a number of things such as: (1) Baylee's adventurous spirit; (2) her new bike; (3) it was summertime so Baylee was playing outside more; and (4) because Baylee was a picky eater and ate very little meat. TI at 246, 339-40. Due to her concerns for Baylee's health, Erica took Baylee to her family physician. TI at 247. The doctor ran a few tests and ordered blood work on Baylee. TI at 247. It was later determined that Baylee had a scalp infection so the doctor prescribed an antibiotic. TI at 248. Baylee's thyroid was also functioning at a lower than normal rate, but the doctor could not find a cause for Baylee's symptoms bruising, hair loss, and loss of appetite. TI at 248; TII at 320.

Defendant testified that Baylee was shy, quiet, barely spoke to anyone, and hardly did anything wrong. TV at 747, 753. However, when he did discipline Baylee, he claimed that he followed Erica's form of discipline by utilizing timeouts and making Baylee sit on the couch. TV at 753. He added that he would also send Baylee and Brandee to their room "until they were done

crying." TV at 753. Defendant did not elaborate on how long it would usually take for Baylee to finish crying before she could come back out of her bedroom.

Before Defendant testified regarding the incident that took place on July 28, 2011 he detailed a typical day babysitting Baylee. TV at 755. Defendant would usually wake up and "maybe lay on the couch until Erica c[a]me home" for lunch. TV at 755. Baylee usually just watched cartoons while he laid on the couch or played on the computer. TV at 756. After Erica left the house to go to her afternoon client's home, Defendant would go to his mother's home and drop off Baylee with his sister so he could go do "other activities." TV at 755-56. However, Defendant proclaimed that he did not always drop the girls off and that he would sometimes stay with the girls. TV at 756.

The Evening Before the Incident:

Erica testified that she left work on July 27, 2011 and went to the home of Defendant's mother to meet up with Baylee and Defendant. TI at 261. They stayed at his mother's home for some time before returning to their apartment. TI at 261. Erica stayed with Baylee the entire night on the 27th of July. TI at 263. Erica testified that Baylee did not hit her head at all that night. TI at 263. Baylee was walking, talking, playing and behaving like a normal child. TI at 263. However, Baylee told Erica that her tummy hurt and Erica noted that Baylee was warm to the touch. TI at 264. Erica recalled that Baylee had "thrown up" some of her food at the dinner table that evening. TII at 308. Though Erica explained that Baylee was a very picky eater and that she would often "throw up" or "spit out" her food if she began crying too hard, which usually happened when Defendant attempted to force Baylee to eat more food. TII at 308, 330.

Erica explained that the apartment did not have air conditioning and it was the middle of the summer, which meant that the upstairs was very hot on that particular night. TI at 262. Thus, some time around 11:00 to 11:30 p.m., Defendant, Brandee (who had been dropped off at Erica's home

later in the evening on the 27th) and Baylee all slept in the living room of Erica's apartment where it was a bit cooler. TI at 262. Defendant slept on the couch while Brandee and Baylee slept in separate chairs. TI at 262-63. Before laying Baylee down in the chair for the night, Erica may have given her Tylenol but she could not recall. TI at 265. Since there was no room left for Erica in the living room, she retired to her upstairs bedroom leaving Defendant alone with Brandee and Baylee in the living room. TI at 263.

The Day of the Incident:

On the morning of July 28, 2011 Erica's alarm did not go off on time so she woke up a little after 8:00 a.m. and began rushing around to get ready for work. TI at 266. Erica walked halfway down the stairs, peeked over the stairwell wall and checked on the girls who were still asleep in the living room. TII at 309. She did not have time for a shower that morning, so she began getting dressed. TI at 266. Just as she finished putting her clothes on, Baylee came into her bedroom and crawled up on the bed. TI at 267. Erica testified that she was in a hurry and running late so she did not pay much attention to Baylee at that point. TI at 267-68. Though Erica testified that Baylee was behaving normally that morning; talking and walking just fine. TI at 267. Erica then left for work around 8:30 a.m. while Defendant was in the bathroom with Baylee. TI at 267-68. This was the last time that Erica ever spoke with Baylee. TI at 268.

Defendant testified that on the morning of July 28, 2011 he awoke to find Baylee standing next to Brandee, who was awake but still in her chair. TV at 760. "She was just standing there looking at [Defendant]" so he told Baylee to go upstairs and use the bathroom. TV at 760. Defendant asked Brandee if Erica was still home, then he went upstairs and found Baylee laying on the bed that he shared with Erica. TV at 760. Defendant asked Baylee if she has used the potty yet, which she had not, so he told her to get off the bed and go use the potty. TV at 761. That is when

Erica noticed that Baylee had an accident. TV at 761. Defendant testified that he did not know if Baylee urinated on herself before she went upstairs, or if she sat there and urinated on their bed. TV at 761. Defendant claims that he assisted Baylee in using the bathroom, changed her into clean clothes, then told her "to get in her room and lay down" as a form of discipline for her potty accident. TV at 762-63. Baylee chose to lay in Brandee's bed. TV at 762.

Defendant claims that Brandee watched the Stuart Little movie over and over while Baylee continued to lay in bed all day after Erica left for work. TV at 763-64. Brandee would occasionally go upstairs to use the bathroom stating that Baylee was still asleep. TV at 764. Defendant played on the computer that entire morning, only seeing the back of Baylee—who supposedly laid in bed all morning without making a fuss—when he went upstairs to use the bathroom. TV at 764. He claims that he never entered the girls' bedroom to check on Baylee that morning—or even spoke to her—after she went into the girls' bedroom shortly after 8:30 a.m. That morning. TV at 764-65. He also claims that he never heard any noises or loud thumping sounds coming from upstairs that would have indicated Baylee was jumping on the bed or playing in her room. TV at 789.

Erica testified that she left her morning client's home between 10:58 and 11:00 a.m. TI at 269. When she arrived home for lunch, Brandee opened the door and greeted Erica telling her that Baylee was upstairs taking a nap. TI at 269. It was unusual for Baylee to take a nap at all, let alone so early, but Erica thought she may have laid down because of the upset tummy she had experienced at dinnertime the night before. TI at 270. Defendant acted normal as he continued to sit on the couch and play on the laptop the entire time that Erica was home for lunch. TI at 269-70.

Erica prepared her lunch and ate in the living room while she shared her food with Brandee. TI at 269. After she finished eating, Erica looked at her phone and noticed that she only had a couple of minutes left before she had to leave to get to her afternoon client's home so she quickly ran

upstairs to use the bathroom. TI at 270-71. Once upstairs, Erica peeked into the girls' bedroom to check on Baylee. TI at 271. There were two beds in the room: one smaller toddler bed for Baylee and a twin size bed for Brandee.[7] TI at 249.

Erica noticed Baylee laying on top of a towel that had been placed on the twin bed due to potty accidents. TI at 271-72. Baylee was facing the wall with her head near the footboard and a blanket over her head. TI at 271. Erica explained that Baylee normally slept with a blanket covering her head and that she moved around frequently while she slept. TI at 272. She also snored on occasion. TII at 313. Baylee appeared to be moving around when Erica checked on her, but she was not snoring. TI at 272. Erica used the bathroom, went downstairs, kissed Brandee and Defendant goodbye, grabbed her cell phone and left for work in time to arrive at her afternoon client's home by 11:30 a.m. TI at 274. This left Defendant at the apartment with no phone. TI at 275.

Defendant testified that he took a shower and got dressed some time after Erica ate lunch and left the apartment. TV at 766. After his shower, he went downstairs and sat on the couch in the living room for a few minutes before he decided to go back upstairs to wake up Baylee. TV at 766, 768. He claims this is when he discovered Baylee laying **face down** on the floor between the two beds with her head near the footboard. TV at 768. Baylee was unresponsive, her eyes were partially open, and her body was limp when he picked her up off the floor. TV at 768-69. Defendant believed Baylee must have been dehydrated because she was hot and sweaty so Defendant took off Baylee's shirt, put her limp body into the bathtub and poured cool water across her forehead three times. TV at 768-69. Yet Baylee remained unresponsive. TV at 769.

Defendant claims that he then ran downstairs and instructed Brandee to get ready while he continued to hold Baylee in his arms. TV at 770. Defendant put on his shoes and ran out the door.

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[7] See Appendix C; please review PX 9 through PX 23 in the "Apartment" subfolder.

TV at 770. He placed Baylee in the passenger side of his Dodge Ram pickup truck while Brandee sat in the middle. TV at 771. Defendant claims the apartment door was still open, so he ran back to lock the door. TV at 771. While inside of the apartment, Defendant made sure to grab the new puppy so it would not leave a mess in the house while they were gone. TV at 771.

Defendant claims that the entire parking lot of the apartment complex was empty—not o one vehicle was present—when he ran outside. He also claims that no one was outside despite the fact that it was the middle of summer and the middle of the day. TV at 771-72. Because the entire parking lot and apartment complex was supposedly empty, Defendant did not bother with asking a neighbor to use their phone to call for emergency medical assistance. TV at 771-72.

Contrary to Defendant's recollection, a neighbor testified that she lives very close to Erica's townhouse and that numerous people were outside that day. TII at 398-99. She testified that children were playing, tenants had their front doors and windows open since there was no air conditioning available at those townhouses and it was a beautiful day outside. TII at 398-99. Although there were approximately 15 people outside at that time, Defendant did not ask anyone to use their phone. TII at 401. However, the neighbor testified she saw Defendant carry Baylee to his vehicle then he messed with his truck for approximately five minutes before leaving. TV 399, 403.

Despite the neighbor's testimony, Defendant claimed that he immediately left the apartment complex after placing Baylee in the truck and locking the front door. He then drove down M-37 toward Bronson Hospital of Battle Creek. TV at 772. In doing so, he passed the home where Erica—a trained medical professional—was taking care of her afternoon client with access to a phone that could have called for medical assistance. TI at 242, 274. As Defendant approached Morgan Road—where he should have turned right to drive Baylee to the hospital—he saw two or three cars in the right turn lane so he chose to drive straight through the light, taking Baylee further

away from the hospital so that he could go to his mother's home. TV at 772. Defendant suggests that he made this decision because he believed his mother could help Baylee faster than if he had driven all of the way down Morgan Road to take her to the hospital. TV at 773. However, he admitted that his mother has no medical training or experience. TV at 773.

Defendant's sister, Brittany, was at their mother's home when Defendant burst into the home yelling for his mother. TI at 194. Brittany went out to the living room to find Defendant holding Baylee's limp body. TI at 194. Defendant told Brittany that Baylee must have fallen off the bed.[8] TI at 206. Defendant stated that he did not know what to do, but that he was scared. TI at 194. Defendant laid Baylee on a nearby bed, but Brittany took one look at Baylee and knew that she needed emergency medical assistance immediately. TI at 194, 209. Brittany testified that Baylee had drool on her face, her eyes were closed, she was unresponsive and barely breathing; only making a snoring-type of sound. TI at 195.

Brittany grabbed her mother's cell phone from the counter top, picked up Baylee's body from the bed, and ran to her mother's car while dialing 9-1-1 to report the incident.[9] TI at 211. While she spoke to the 9-1-1 operator, Brittany placed Baylee and Brandee in the backseat of her mother's car and began driving toward Bronson of Battle Creek in the hopes of meeting up with the ambulance. TI at 194, 212. Defendant followed behind Brittany in his truck rather than riding in the same vehicle with Baylee. TI at 196.

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[8] It is important to note that Defendant immediately surmised that Baylee must have sustained a head injury at this point when medical personnel noted that there were no visible injuries to Baylee's head at that time.

[9] See Appendix C; please review PX 8 located in the "9-1-1 Call" subfolder to hear the recorded 9-1-1 call played for the jury.

Shortly after leaving her house Brittany realized that she could not drive because she was too upset, so she told the operator that she was going to pull her vehicle over near the driveway to Rolling Hills Mobile Park of Morgan Road. TI at 197, 212. At some point, Brittany told the 9-1-1 operator that Baylee may have had a seizure. TI at 206. However, Baylee was not jerking at all, only her mouth was clenched closed. TI at 206. After pulling off the road, Brittany got out of her car, put the phone on speaker and gave the phone to Defendant so that he could talk to the operator. TI at 212-213. Brittany removed Baylee from the backseat of the car and laid her body in the grass. TI at 198, 213. Brittany checked Baylee for a pulse and checked to see if she was breathing. TI at 198. By that time, Baylee had stopped breathing and other vehicles were beginning to stop nearby. TI at 198.

Alan Jordan (Alan) was the property manager for Rolling Hills, which is located on Morgan Road where Brittany had pulled off the road. TII at 382. Alan had previously been employed as a law enforcement officer, firefighter, and was trained as an emergency medical technician to provide first responder medical assistance. TII at 383. Alan was leaving Rolling Hills when he noticed two females bent over in the grass that appeared to be working on something, so Alan stopped his vehicle. TII at 383. At that time, Alan observed a small girl on the grass. TII at 383.

It appeared as though the two women were attempting to perform CPR on the small child. TII at 384. One of the women, Marilyn Stoddard (Marilyn), was a retired nurse and resident of Rolling Hills. TII at 384. The other woman, Brittany, was not performing CPR effectively because she was so upset. TI at 384. Brittany appeared completely out of it, shaken up, crying and not keeping a continuous rhythm for CPR. TIII at 385, 389. Defendant was walking around the parking lot while he talked on a cell phone. TII at 384. He was "by no means" standing near Baylee, or even trying to assist in the matter. TII at 384.

Alan asked Brittany to step back then he and Marilyn began working on Baylee. TII at 385. It was obvious to Alan that Baylee was not having a seizure. TII at 388. In fact, she was not breathing at all and she did not have a pulse. TII at 388. Alan and Marilyn later established a pulse and Baylee regained breathing, though it was very labored. TII at 385-86. As he continued to monitor Baylee and awaited medical assistance, Alan asked what happened to Baylee and who her parents were. TII at 386. Defendant was still on the cell phone when he replied that "she has no fuckin' father." TII at 387. Alan testified that Defendant appeared agitated and not focused on the problem at hand. TII at 387. While monitoring Baylee, Alan observed what appeared to be a thumb print bruise on the side of her neck. TII at 387.

Ambulance Arrival and Initial Police Response:

On July 28, 2011 Battle Creek Police Department (BCPD) Officer Christopher Rabbitt was dispatched to Rolling Hills in regards to medical emergency involving a three year old. TI at 140-41. Officer Rabbitt was the first officer on the scene and the ambulance had not arrived yet. TI at 141-42. Officer Rabbitt observed several cars parked near the entrance to Rolling Hills and individuals standing in a grassy area surrounding a small child lying in the grass. TI at 142. Officer Rabbitt exited his vehicle, walked toward the group and asked everyone to back away from Baylee. TI at 142. Marilyn identified herself as a nurse so Officer Rabbitt allowed her and Alan to continue working on Baylee. TI at 142. Officer Rabbitt noted that Baylee appeared to have a bruise along her jaw line on the left side of her neck. TI at 142, 157.

Officer Rabbitt began gathering information from the crowd where he came in contact with Brittany, who identified herself as the 9-1-1 caller. TI at 143. She stated that Baylee was with her when Officer Rabbitt asked who the child belonged to; however, Brittany she was unable to provide Officer Rabbitt with any pertinent information regarding Baylee or the incident. TI at 143, 154. She

finally stated that Baylee was not her daughter, but the daughter of her brother's girlfriend. TI at 143. She then pointed to Defendant who was standing away from the crowd. TI at 143. Defendant did not attempt to speak up until after Brittany identified him to Officer Rabbitt. TI at 154. When asked what happened to Baylee, Defendant stated that she was taking a nap in her bedroom, that he found Baylee laying on the floor next to her bed, and that he could not wake her up. TI at 144-45.

Paramedics arrived on scene shortly after Officer Rabbitt responded. TI at 145. A paramedic testified that Baylee was lying in the grass and unresponsive. TII at 408. Although a number of people were standing around, no one was really telling the paramedics what had happened to Baylee. TII at 408. Baylee's breathing remained shallow even after the paramedics provided her with oxygen. TII at 411. One of the paramedics also testified that he observed bruises on both sides of Baylee's neck, though one side appeared to be slightly larger than the other. TII at 412. Baylee was then loaded into the ambulance and transported to Bronson of Battle Creek. TII at 412. Officer Rabbitt testified that Brittany and Brandee left the scene and followed the ambulance. TI at 146. Defendant then left the scene in his truck and appeared to follow the ambulance as well. TI at 147.

BCPD Officer Todd Elliott testified that medical personnel were already on scene when he arrived at Rolling Hills. TI at 168. Paramedics quickly stabilized and loaded Baylee into the ambulance. TI at 169. Officer Elliott escorted the ambulance to the hospital, though no one was directly following his vehicle or the ambulance. TI at 169-70. However, he noted it would have been difficult for others to keep up with them. TI at 170. Once they arrived at Bronson of Battle Creek, Officer Elliott remained with Baylee as she received treatment. TI at 170-71.

Erica testified that Defendant called her from his mother's cell phone at approximately 12:50 p.m. TI at 276. Defendant was upset and believed that Baylee was having a seizure. TI at 276. Erica could hear the ambulance in the background as she spoke with Defendant. TI at 276.

Erica then instructed Defendant to stay with Baylee while she called her employer to inform them of the emergency. TI at 277. However, a relative of her client that lived nearby arrived at that time so Erica left immediately. TI at 277. Erica then called her mother, Terrese, to inform her of Baylee's situation. TI at 277. Terrese asked Erica to stop and pick her up first before she went to the hospital. TI at 277. However, when Erica arrived at Terrese's home she was already gone. TI at 277. Therefore, Erica left and drove to the hospital. TI at 278.

When Erica arrived at Bronson of Battle Creek, she observed Defendant sitting outside of the emergency room entrance holding their puppy. TI at 278. The puppy was not allowed inside of the hospital so Defendant chose to stay outside with the puppy rather than going inside the hospital to stay with Baylee. TI at 278-79. Defendant did not say anything to Erica, though he appeared to be upset as Erica instructed him to take the dog to Terrese's home and put it in the backyard. TI at 279. Defendant then left and Erica ran inside of the hospital to be with Baylee. TI at 279-80. Erica was allowed to stand outside of the door while medical personnel provided assistance to Baylee. TI at 280. Once inside of this area, Erica observed that Terrese was already at hospital with a police officer nearby. TI at 280. Defendant would later testify that he ignored Erica's wishes that he remain with Baylee so that he could continue on with his plans to pick up Terrese and take her to work; however, Terrese wanted to go to the hospital with Baylee instead.[10] TV at 780.

Bronson of Battle Creek:

On July 28, 2011 Dr. Douglas McDonnell was working in the emergency room of Bronson

[10] It is important to note that Defendant attempted to distance himself from Baylee at least five times at this point when he: (1) drove pass the home where Erica could have provided medical assistance to Baylee; (2) drove to his mother's home instead of the hospital; (3) stood back and failed to identify himself to police at Rolling Hills; (4) drove to Terrese's home instead of following the ambulance and remaining with Baylee; and (5) stayed outside of the hospital with the puppy instead of going inside with Baylee to explain what happened so that medical personnel could provide better care for her.

when Baylee came in on a backboard with a cervical collar in place. TIII at 534. She was unresponsive and not making any purposeful movements. TI at 534. Baylee did not even respond to pain stimuli. TIII at 534. Dr. McDonnell testified that Baylee's breathing was abnormal and she occasionally stopped breathing for up to 20 seconds before taking another breath. TIII at 534-35. He also testified that Baylee had bruises on opposite sides of her neck. TIII at 538. Dr. McDonnell called for anesthesia as a Foley catheter and intravenous line were placed. TIII at 535. He then intubated Baylee. TIII at 535. Dr. McDonnell determined that Baylee appeared to be suffering from intra cranial issues that were most likely caused by trauma. TIII at 537. As such, he made the decision to have Baylee transported to Bronson of Kalamazoo. TIII at 537.

Officer Elliott remained outside of the room where Dr. McDonnell and his staff were providing medical assistance to Baylee. TI at 171. After examining Baylee, Dr. McDonnell spoke with Officer Elliott and asked if Child Protective Services (CPS) had been contacted yet. TI at 172. Officer Elliott replied that dispatch was in the process of contacting CPS. TI at 172. He was then informed that Baylee was going to be transported to Bronson of Kalamazoo. TI at 172. Officer Elliott testified that Erica rode with Baylee in the back of the ambulance while he followed behind the ambulance in his patrol car. TI at 172-73.

Bronson of Kalamazoo:

Attending trauma surgeon Dr. John Walsh was working at Bronson of Kalamazoo when he received information on an incoming patient, Baylee. TII at 362-63. Dr. Walsh testified that he was told Baylee was severely injured, but the mechanism of injury was unclear. TII at 363. He was only informed that individuals claims that Baylee may have fallen. TII at 363. Due to her age, Dr. Walsh activated the Pediatric Critical Care Intensive specialists, which was led by Dr. Michelle Halley. TII at 365; TIV 602.

Dr. Walsh and Dr. Halley examined Baylee from head to toe. TII at 365; TIV 605. Dr. Walsh and Dr. Halley testified that Baylee was unresponsive, her limbs were stiff and difficult to bend, and she was posturing, which is abnormal movement of her arms and legs. TII at 366; TIV 605. It was also noted during this initial examination that Baylee had suffered retinal shearing. TIV at 632. This was later confirmed with an opthamologist on July 29, 2011. TIV at 629. Both doctors testified that it was clear from the start that Baylee had suffered a severe brain injury. TII at 366; TIV 605-06.

A CT scan was performed on Baylee at 2:56m p.m. on the 28th of July which revealed that Baylee had a subdural hematoma (a collection of blood located beneath the dura layer that covers the brain) to the left front parietal region, a fissure between the two hemispheres of the brain, though no skull fractures were noted. TII at 367; TIV 606-07, 617. In addition, some diffused (i.e., not localized) bleeding was present to the left front portion of Baylee's brain, as well as the back of her brain. TII at 373. Baylee's initial CT scan also showed spaced within the brain, which meant that significant swelling had not taken place at that time. TIV at 619. However, a CT scan the following day showed that Baylee was suffering diffused (all over) swelling of her brain. TII at 377.

Dr. Walsh testified that they had never seen this type of severe injury in a child that had fallen out of bed, though it was possible depending on the height of the bed and the surface on which the child fell. TII at 369, 374. However, Dr. Walsh noted that you would expect to observe some form of external injury such a bruise or abrasion; neither of which were present on Baylee. TII at 374. Additionally, a fall off the bed "would not have that degree of a brain injury that we initially saw on Baylee who was completely unconscious and having abnormal movement. That's a much more severe brain injury." TII at 379. Dr. Walsh also testified that some outside mechanism caused Baylee's brain to impact the inside of her skull, or caused her brain to move in such a fashion that

it caused the small veins to tear. TII at 369. He further stated this would have to be a fairly forceful act, yet he saw no signs of trauma to the outside of Baylee's head. TII at 369. In his opinion, the injuries that he initially observed on Baylee were consistent with shaking type of injury. TII at 370.

Regarding the subdural hematoma, Dr. Halley testified that no pre-existing condition, virus, or illness could have caused the hematoma. TIV at 607. In addition, Dr. Halley testified that they had never seen this type of severe injury in a child that had fallen out of bed. TIV at 609. Dr. Halley further testified that she had not seen this type of injury in a child that had been jumping on the bed and fallen off, nor had she seen this type of injury in a child that was jumping on the bed and struck her head on something as she fell. TIV at 609-10. In her opinion, Baylee suffered from a forceful shaking injury. TIV at 608.

To support her theory, Dr. Halley testified that "the reason this is considered a shaking injury is the constellation of both the subdural [hematoma] as well as the retinal hemorrhages because there are bridging veins that get sheared when someone is shaken and that's what causes the subdural [hematoma], it also causes bleeding in the back of the eyes." TIV at 618. Dr. Halley stated that, "the constellation of findings that she had, the subdural hematoma, the retinal hemorrhages and then she had a very global injury to her brain from not enough oxygen or blood flow, what we call hypoxic ischemic injury, is consistent with a shaking injury." TIV at 610. In addition, Dr. Halley testified that the type of CPR Baylee received could not have caused the retinal shearing, nor was it caused by the later herniation of Baylee's brain as that occurred long after the retinal shearing was first noted. TIV at 618, 627.

After doctors completed their initial treatment of Baylee, Officer Elliott had the opportunity to observe Baylee for the first time. TI at 175. At this point, he observed bruising on Baylee's neck. TI at 175. Each bruise appeared on opposite sides of Baylee's neck and were somewhat circular.

TI at 175. Baylee also had an elongated bruise to her lower right buttock, and a bruise on her back near her shoulder. TI at 175. Officer Elliott happened to have a camera with him at that time, so he took pictures of the bruises along Baylee's neck, back and buttocks.[11] TI at 175-76.

On August 1, 2011, Dr. Tammy Drew diagnosed Baylee as "brain dead." TII at 351. Dr. Drew explained that Baylee had suffered a severe brain injury, which caused hemorrhaging and multiple diffused brain injuries as a result of a great force. TII at 348-49. This caused the brain to swell and swell until there was no room left to swell within Baylee's skull. TII at 349. As a result, Baylee's brain swelled through the skull into the spinal canal eventually cutting off blood supply to her brain. TII at 349. This phenomenon is known as the herniation of the brain. TII at 349. Dr. Drew informed the family of her diagnosis and contacted Gift of Life due to the family's wishes to have Baylee's organs harvested for donation. TII at 351-353.

After Baylee was taken into surgery so that her organs could be harvested, Erica and Defendant left Bronson of Kalamazoo and drove to her home in Battle Creek. TI at 285. Erica testified that the ride was rather quiet and Defendant did not speak at all during the drive. TI at 286. Once they arrived at Defendant's mother's home in Battle Creek, they parked the car. TI at 286. At that point, Defendant stated he was going to jail for murder. TI at 286. When asked why he would say that, Defendant replied that it was because the police think he killed Baylee. TI at 286.

Police Investigation:

Officer Rabbitt testified that he drove to Erica's townhouse at 88 Laura Lane after the ambulance left the scene at Rolling Hills so that he could secure the scene where the incident apparently occurred until detectives and crime lab technicians could arrive. TI at 146. Contrary to Defendant's testimony, Officer Rabbitt testified that he observed several people outside, including

[11] See Appendix C; please review PX 1 through PX 7 in the "Hospital" subfolder.

children riding their bikes, playing, and etcetera; it was a typical summer afternoon. TI at 147-48. Officer Rabbitt then secured the scene and briefed other officers and detectives as they arrived at the scene. TI at 149.

Detective Randy Reinstein testified that was asked to respond to 88 Laura Lane at approximately 1:30 p.m. on July 28, 2011. TIII at 569-70. Defendant had left the hospital and met with officers at the scene. TIII at 571. Det. Reinstein was briefed, received consent fro Defendant to search the premises, then made contact with Defendant inside of the apartment. TII at 571-72. Detective Reinstein testified that Defendant seemed cooperative as he explained what happened that afternoon. TIII at 572. Initially, Defendant stated that Baylee fell out of bed but he later stated that he did not see her fall. TIII at 572. During the conversation, Defendant disclosed that he found Baylee face down between the twin bed and the toddler bed on the carpeted floor. TIII at 580, 582.

Unaware of the severity of Baylee's injuries or her diagnosis at that time, Detective Reinstein asked Defendant if he would go the BCPD station to provide a comprehensive time line of the days events. TIII at 573. Defendant agreed then rode to the station with Detective Reinstein. TIII at 573. During the interview[12], Defendant discusses Baylee's eating habits, hair loss, and possible thyroid and anemia issues. TIII at 576. However, Detective Reinstein testified that Defendant predominantly discussed Baylee's potty training issues. TIII at 577. Defendant continually referenced Baylee "shitting her pants," "pissing her pants," and an occasion where she "shit on [Defendant's] leg" while he was sleeping. TIII at 577. He also discussed an event that occurred two days before the incident where he discovered Baylee standing in urine on her bed in the middle of the night. TIII at 577. After the interview concluded, Detective Reinstein drove Defendant back to his truck. TIII at 589. Though he spoke with Defendant on one other occasion, Defendant's story

[12] See Appendix D: Police Interview of Defendant (PX 37).

remained substantially the same. TIII at 589. However, Defendant's story was not consistent with the autopsy findings and medical records. TII at 485.

Autopsy Findings:

Dr. Joyce DeJong, Forensic Pathologist and Medical Director of Forensic Pathology for Sparrow Hospital, testified that she performed an autopsy on Baylee on August 3, 2011. TV at 645-47. Detective Reinstein and Detective Scott Silverman were present during the autopsy. TV at 648. An external examination of Baylee revealed that she had numerous bruises on her body: two bruises were present on opposite sides of her neck; one bruise on the top of her left shoulder; two bruises on Baylee's back with one near her top right shoulder and the other closer to her side; one bruise was locate in the middle region of Baylee's left forearm; one bruise to the right buttock; and one bruise to her left buttock.[13] TV at 651-52.

The bruising on Baylee's neck concerned Dr. DeJong because with children of this age group "bruises are most commonly on the extremities, you may occasionally see a bruise on the head, the neck, the torso, but if you see multiple bruises in those areas that's - - they're extremely concerning for abusive type injuries inflicted by others." TV at 655. Regarding the bruising to Baylee's torso, Dr. DeJong stated, "[a]gain, it's an injury that's on the torso in an area that is not - - these are not generally accidental injuries, these are non-accidental." TV at 655-56. Dr. DeJong noted that "[i]t's unusual to see injuries on these parts of the body" and that "these are not normal places for children to have bruises from tripping and falling and normal childhood activity," especially when you

[13] See Appendix C; a review of PX 25 through PX 32 located in the "Autopsy" subfolder reveal the external bruises located on Baylee at the time of autopsy.

consider the bruising on Baylee's forearms, torso and buttocks together as a whole.[14] TV at 656-57. This was "[t]rauma caused by another person." TV at 657.

Upon internal examination of Baylee, Dr. DeJong noted that Baylee's liver and kidneys were taken for donation. TV at 658. She also explained that this did not cause her any concern and that it would not affect the cause of death as harvest doctors only take healthy functioning organs. TV at 658. There was no evidence of internal injury below Baylee's neck. TV at 659. However, Baylee had a significant injury to the rear occipital area at the base of her skull.[15] TV at 659-60. Though the subdural hemorrhaging and swelling would not typically present on a CT scan, Dr. DeJong stated that this type of injury would not generally show up on a CT scan. TV at 661, 667. This could explain why the emergency physicians believed Baylee had suffered from Shaken Baby Syndrome. TV at 668-69.

Regarding the topic of Shaken Baby Syndrome, Dr. DeJong stated:

> "Well, what I'm seeing here clearly there is blunt force injury. There certainly may be been shaking. The other thing that I guess we haven't touched on yet was that there was hemorrhages in the eyes which has been associated with shaking type injuries and we're talking about a violent shaking of the head back and forth that certainly has been described as causing brain trauma. There's some debate whether shaking alone can cause death but in this case it certainly - - it is - - if there is shaking it was not shaking alone because there's evidence that the head struck an object or something struck the head." [TV at 668-69.]

She then explained that Baylee could have suffered from both in this case; however, the cause of death was the blunt force trauma to the occipital region of Baylee's brain. TV at 669, 671.

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[14] It is important to note the difference in the bruises when comparing the photographs taken of Baylee upon her admission at Bronson of Kalamazoo (PX 1-7) and the photographs of those bruises at autopsy (PX 25-32) more than three days later. The difference is remarkable. The same inference can be made regarding Baylee's head injuries (PX 34-35).

[15] See Appendix C; review PX 34 and PX 35 located in the "Autopsy" subfolder.

A few small contusions were also observed on both the left and right parietal regions of Baylee's scalp. TV at 660. Each were approximately 1/4 inch.[16] TV at 660. These contusions also would not show on a CT scan. TV at 661. Bleeding was observed on the top of Baylee's brain. TV at 660. Dr. DeJong noted that this injury was serious in and of itself. TV at 660. Subdural hemorrhaging was also present on both sides of Baylee's brain. TV at 663. In addition to those injuries, Baylee's brain was bleeding all over and her entire brain had experienced diffused swelling. TV at 663. Dr. DeJong explained that diffuse brain injury is "a trauma that's affecting the entire brain and you can have damage to the brain itself in certain types of injuries away from where just a blow occurred. So we know by looking at the scalp here, I know that her - that the occipital area where there's a significant amount of hemorrhage that something struck her head in that area or her head struck something in that region but when that occurs you can also have brain damage that goes through the entire brain from front to back because of the shock waves that go through it there's damage to multiple areas of the brain . . . " TV at 664-65. This eventually led to Baylee's brain herniating through the foramen magnum (the bottom opening of the skull). TV at 660.

Lastly, retinal hemorrhaging was observed at autopsy in both of Baylee's eyes. TV at 669. Dr. DeJong stated that:

> [retinal hemorrhages] are located "in the back of the eye, the retina, and in the vast majority of cases of infants or in children with retinal hemorrhage these are associated with inflicted trauma. They are - it's extraordinarily rare to see them in any type of other injury. So if a child dies in a car accident, for example, and has severe head trauma from that it's almost unheard of to see that they have retinal hemorrhages. So it's, again, a marker of what is seen in inflicted head trauma. TV at 669-70.

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[16] See Appendix C; review PX 34. Contusions visible as small circular reddish spots. Again, it is important to note that these contusions had three days to heal before the autopsy was performed.

The following colloquy then took place regarding the amount of force needed to inflict the type of blunt force trauma that Dr. DeJong observed to the occipital region of Baylee's head:

A: If shaking causes brain injury it would require violent shaking. Minor shakings don't cause that.

Q: Blunt force trauma, would a minor blow cause the damage that killed Baylee?

A: No.

Q: Would the blow that caused the damage to Baylee's head have to be violent as well?

A: It would be a significant force. A significant force that would cause this and violent would be a good word to apply to that.

Q: Could that injury have been caused by a child falling out of a regular twin sized bed onto a carpeted floor?

A: No.

Q: Could that injury have been caused by a child jumping on a bed and falling and hitting a bed rail?

A: No.

Q: Could that injury have been caused by another child of approximately the same size?

A: Striking her?

Q: Striking her or pushing her?

A: No.

Q: Not enough force?

A: No. There is not enough force.

Q: Could that injury have been caused by an adult slamming a child on the floor?

A: Yes.

Q: Could that have been caused by an adult slamming a child on the edge of a bathtub?

A: Yes.

Q: Slamming a child on the foot of a bed?

A: Yes.

Q: It would need to be a slamming or a significant force, is that correct?

A: It's a violent force, yes.

Q: Not an accidental fall?

A: No, not from a short height. TV at 670-71.

In Dr. DeJong's opinion, it would take some force to inflict the smaller contusions present on Baylee's scalp in addition to the major injury she had suffered to the rear occipital region that would have required a significant force. TV at 661-62. Additionally, Baylee's head was likely struck against a broad flat surface with an "extreme violent force." TV at 683. Dr. DeJong also testified the lack of any lacerations to the external layer of Baylee's scalp could be explained by the fact that small children tend not to lacerate easily due to the high elasticity of their skin. TV at 682.

Before making her final determination in this case, Dr. DeJong sent an investigator to gather additional information. TV at 650. She also consulted with a neuropathologist regarding her findings of abusive blunt force head trauma. TV at 673. That neuropathologist's opinion was consistent with Dr. DeJong's. TV 673-74. As a result of her findings, Dr. DeJong ruled that Baylee's was caused by blunt force trauma and the manner of death was homicide. TV 672.

Testimony Regarding Evidence of Ongoing Child Abuse:

Brandee's father, Brandon, testified that he had the opportunity to interact with Baylee often due to the custody arrangement he had with Erica. TIII at 543. This also meant that he and Erica

got along well with one another and spoke on a regular basis about the care of Brandee. TIII at 543. They even exchanged small talk during the custody exchanges. TIII at 544. In April of 2011 this began to change as Brandon became aware that Erica was dating Defendant. TIII at 544. Eventually, if Defendant was present, Brandee would just get out of the car by herself and Erica would leave without taking to Brandon. TIII at 544-45.

In June of 2011 Brandee began voicing concerns regarding Defendant. TIII at 545-46. Brandon also began seeing bruises on Brandee. TIII at 546. Brandon recalled seeing three distinct bruises on Brandee's right thigh in the area from her hip to her kneecap. TIII at 546. He also observed a bruise on Brandee's arm. TIII at 546. The bruises concerned Brandon so he discussed it with Erica. TIII at 546. Although the bruises on Brandee's arm resembled a hand mark, Brandon did not notify CPS of the suspected abuse. TIII at 555.

Dr. Roderick Guertin, Director of the Pediatric Intensive Care Unit, Medical Director of Sparrow Children's Center, and member of the Child Safety Program, was qualified as an expert in child abuse at this trial. TII at 419-22. Dr. Guertin testified that he was contacted by BCPD in reference to this case. TII at 423. He then reviewed police reports, medical records (including the photographs of the bruises discovered on Baylee at Bronson of Kalamazoo), CT scans and autopsy photographs.. TII at 423-24. After reviewing all of the documentation, when taken as a whole, it was the opinion of Dr. Guertin that Baylee suffered from child abuse. TII at 424.

Dr. Guertin stated that Baylee was exhibiting developmental signs of abuse. TII at 424. For example, Baylee regressed on her potty training during a time when a new person (i.e., Defendant) became her new care provider. TII at 424. He also explained that regression can also be a sign of extreme stress, discomfort, or bad things happening at home as well; however, when taken into

consideration with all of the other evidence, it was his opinion that Baylee likely regressed as a result of child abuse. TII at 424.

In addition, Dr. Guertin explained that Baylee's refusal to eat could be he result of stress; however, here it was more than likely a "war of the wills" because "[c]hildren don't have that many things that they can fight you with and eating is one of them and so if there's a war or if there's a war of wills sometimes it will center around eating." TII at 425. In other words, it was one way Baylee could fight back against her abuser. TII at 425.

Dr. Guertin further opined that the bruising of Baylee was additional evidence of abuse. TII at 425. "That was another thing is that sort of coincident with that or during that same time period, a child who previously had had no history of easy bruising, frequent bruising or frequent injury suddenly presents with complaints of easy bruising. . . . The key there is that she suddenly is bruising a lot and that's a real change for her and that certainly could also imply or go along with a change in her circumstances in which abuse was part of what was going on." TII at 425.

Dr. Guertin then referenced the two bruises located on each side of Baylee's neck noting "that's especially suspicious because what it implies is grabbing the child here by the neck and they were large bruises, they were both in almost the exact same location on either side of the voice box just under the chin." TII at 427. Dr. Guertin then explained that the bruises were not likely caused by an accident since they were located in an area that you would not typically find accidental injury. TII at 428, 430-31. In his opinion, these bruises were the result of someone placing their hand or hands around Baylee's neck and squeezing with a significant amount of force. TII at 430.

Baylee had two parallel bruises along the lower edge of her buttock . This was especially "suspicious because the buttock is a targeted organ in both discipline and in abusive discipline." TII at 427. Dr. Guertin stated that these bruises could have been the result of someone's fingers;

however, the more likely scenario was that Baylee had been struck with an oblong object at least two times. TII at 431. Baylee also had what appeared to be defensive bruising on her forearm and bruising lower on her arm that indicated Baylee had been "gripped" at some time. TII at 427.

At autopsy, it was also apparent that Baylee had bruising to both sides of her buttock in addition to the parallel lines. TII at 427. Dr. Guertin also observed that Baylee had suffered numerous blows to her head; however, the large injury to the back of Baylee's skull was in "an especially dangerous area." TII at 437-38. When questioned about the number of blows to Baylee's head and whether or not the injuries could have been the result of a "short fall" accident, the following colloquy took place:

Q: The impact sites that you saw on her skull, besides the large one in the back, why are those of concern to you?

A: They are of concern because it means that some - in some way something was impacting her head, even the top of her head and the top of your head is not an area that you would expect accidental injury to occur.

Q: Would those impacts, aside from the one on the back of her head, in and of themselves have caused the symptoms that caused Baylee's death?

A: Any of them could and when you have an impact it tremendously increases a phenomenon that we call rotational acceleration where not only is the brain moving inside the skull but the brain itself is moving within itself and that phenomenon is dramatically increased if there's a blow.

Q: In your opinion, there were a number of blows to this child, is that correct?

A: I believe so.

Q: Okay. What about the one to the back of her head? Was that different or more significant than the others?

A: First of all, it's in an especially dangerous area as we just talked about. Secondly, it was a very large bruise. I mean, there - the blood had spread along the covering of the skull for some distance. But the main thing is the location. It's a very dangerous area to get hit in the head.

Q: Is that the type of injury that you would see from a child falling off a bed?

A: You could see it if the child hits something hard on the way down or hits something really hard when it landed, but it would have to land in that spot. The issue here though is you have a very short distance fall, somewhere in the two foot range and even more important is not the distance the child potentially fell, if that's how it happened, but it's what the child hit. So as soon as there's carpeting it dramatically reduces the possibility of a severe injury impact threshold being reached. What I'm trying to say is you could fall two feet on a naked concrete and it could really do you harm, but as soon as you cover it with carpet it almost never could cause harm, a fall of two feet. This was a fall in theory of two feet unto (sic) a carpeted surface and I believe ***in this case people describe the child being face down but the terrible injury is in the back of the child's head.*** [TII at 438 (emphasis added).]

Additionally, Dr. Guertin testified that "whenever this injury occurred it had to have occurred after the child was seen looking perfectly fine in the morning. It is more likely that the injury occurred literally from the time it is recognized that the child is clearly not right, where the child is not breathing well, the child is limp, you can't wake the child up, that's how this kind of child would have acted from the time of the injury." TII at 441-42. In other words, the effects of Baylee's head trauma would have been immediate. TII at 441.

Regarding whether or not Baylee suffered from "Shaken Baby Syndrome," Dr. Guertin testified that "[s]haking a baby hard enough could make a baby stop breathing but in this case you have impact as well, so the better term would just be abusive head injury." TII at 439-40. However, it was possible that Baylee died as a result of both shaking and abusive head trauma. TII at 440. In addition, Dr. Guertin explained why Baylee's retinal hemorrhaging was so telling in this case:

> There are two things that are significant about it. The first is the extremely strong association between retinal hemorrhaging, subdural hemorrhage, and death from child abuse. So in fatal cases of child abuse abusive head injury, anywhere from 65 to 95 percent of the cases will have retinal hemorrhages.
>
> The second thing that's important about these retinal hemorrhages is the diffuse nature of them. Accidents can cause retinal hemorrhages. CPR could even cause

retinal hemorrhages, but abusive head injury causes diffuse retinal hemorrhages and this child had diffuse retinal hemorrhages. [TII at 440.]

Taking all of this information together as a whole, it was Dr. Guertin's opinion that Baylee exhibited pattern bruises that were typical target areas for child abuse, and that Baylee suffered ongoing abuse at the hands of her abuser on more than one occasion. TII at 429, 442.

Prosecution's Closing Argument:

Baylee was a happy and well-adjusted child until the time that Defendant moved into her home. She was not the type of child that Defendant wanted so he had to change her behaviors. He began beating her, choking her, throttling her and etcetera to get her to conform to his belief of how a three year old should behave. This is why he took her bottle away, forced her to stop wearing diapers and begin potty training, and he would not allow her to sleep in Erica's bed any longer. However, Defendant made too many changes in Baylee's life all at once so Baylee began to push back. She did this during mealtime by refusing to eat what Defendant attempted to force feed her.

Shortly after Defendant became Baylee's daycare provider she began losing her hair, regressed on potty training and Erica noticed that she was bruising more often. Doctors were unable to explain these events as there was no underlying illness to cause all of these issues. However, Dr. Guertin testified that all of these issues—and the additional issues surround mealtime—along with the location of Baylee's bruises indicate that she was the victim of child abuse.

Although Baylee referred to Defendant as "daddy", he cared more about the dog during the incident than he did about staying with Baylee or assisting with providing Baylee emergency medical care. He was also more worried about driving Erica's mother to work than he was about taking Baylee to the hospital because he knew he had inflicted the wounds to Baylee's head. This is also evident when you take into consideration Defendant's statement that he was going to prison because

the police think he murdered Baylee, a statement that was made before Baylee's autopsy and before her death was ruled a homicide.

Statements by Defendant, Erica and Brittany all confirm that Defendant had care of custody of Baylee; he voluntarily accept that role. It's also not disputed that the injury occurred while Baylee was in Defendant's care. That is the first element of First-Degree Child Abuse. The second element is that Defendant knowingly and/or intentionally caused serious physical harm to Baylee on July 28, 2011. The autopsy records shows that Baylee suffered multiple blows to her head, that she was throttled/choked, that she had a defensive bruise on her forearm, and that she had multiple bruises on her back and buttocks. The People argued that when you add all of this together it shows that Defendant intentionally abused Baylee and that he intentionally inflicted the injury to Baylee's head that caused her death.

In fact, all of the doctors and experts agreed that Baylee's brain injury was caused by another individual; it could not have been the result of an accidental fall or injury. Here, it was impossible to exert the amount of force needed to inflict these injuries without also possessing the intent to injure and/or kill Baylee. This was an intentional punishment that Defendant inflicted upon Baylee to show her that he was the boss in that house. He was not interested in being a father or a daycare provider. He laid on the couch all day or played on the computer ignoring the needs of Baylee and Brandee, leaving them to fend for themselves.

Defense's Theory:

The defense argued that Defendant reacted poorly when he discovered Baylee then drove to his mother's home rather than taking Baylee directly to the hospital or stopping at Erica's afternoon client's home to call for an ambulance. However, by Erica's own testimony she was alone with

Baylee upstairs shortly before 11:30 a.m. According to Erica, despite the fact that Baylee was not feeling well the night before, she never checked on her during her lunch break.

Defense counsel then argues that the bruises found on Baylee were 18 to 48 hours old. That meant Defendant was not the only person that could have inflicted those injuries upon Baylee. In addition, Erica claims that Brandee is smart and attentive yet she fails to tell Erica that any abuse is occurring. More importantly, Dr. Guertin is a "hired gun" for the prosecution so his views would be slanted. However, all of the doctors agreed that there was no way of knowing exactly how much force would be needed to inflict the injuries that Baylee suffered yet they all claim that it must have been significant. He then insinuates that if the medical profession cannot figure it out, how can Dr. DeJong and Dr. Guertin be so certain that it was caused by a violent force?

Additional facts will be set forth below as they relate to the case at bar.

INTRODUCTION TO ARGUMENT

Defendant tries, but fails, to show that the Court of Appeals decision was clearly erroneous, or that it was in conflict with precedent from this Court or previous decisions of the Court of Appeals. MCR 7.302(B)(5). The Court of Appeals decision reversing the trial court's grant of a new trial for ineffective assistance of counsel was not clearly erroneous. The trial court abused its discretion, and the Court of Appeals corrected the lower court's mistake. The lower court's abuse of discretion is discussed in more detail *infra*.

Similarly, the Court of Appeals ruling in this case was based on the line of case law dating from this Court's decision in *People v Pickens*[17] and developed by the Court of Appeals in cases such as *People v Matuszak*.[18] Recently this line of precedent was continued in *People v Eliason*, 300 Mich App 293; 833 NW2d 357 (2013) (leave granted on other grounds, *People v Eliason*, 495 Mich 891; 839 NW2d 193 (2013)). The ineffective assistance of counsel analysis in *Eliason* was squarely on point with the facts of this present case. *Id.* at 300-01.

Defendant offers, as contrary authority, *People v Campbell*. See Appendix E: *People v Campbell*,[19] unpublished per curiam opinion of the Court of Appeals, dated January 27, 2005 (Docket No. 245263, 254807). Setting aside *Campbell*'s lack of precedential value, the essential fact of that case is easily distinguishable from the issue here: "Campbell's trial counsel testified that there was no strategic reason for failing to investigate and hire an expert." *Id.* at 3. Defendant's trial counsel in the instant case, consulted a well-respected expert and learned that the scientific evidence

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[17] *People v Pickens*, 446 Mich 298, 309; 521 NW 2d 797 (1994).

[18] *People v Matuszak*, 263 Mich App 42, 61; 687 NW 2d 342 (2004).

[19] The People attach this appendix for ease of reference for this Court as it is an unpublished opinion and was not attached to Defendant's application.

was against his client. He then made a strategic decision not to continue searching until he found an expert who would offer whatever testimony was wanted. See Appendix A, *Ackley* at 4.

The Court of Appeals decision in this case made extensive reference to the evidence presented in both the trial and the several *Ginther* hearings. It used those facts to determine that trial counsel's decision not to consult a second expert witness "constituted trial strategy" and was not ineffective. Appendix A, *Ackley* at 4. The facts also led the Court of Appeals to decide that, assuming trial counsel's strategic decision rose to the level of constitutional error, Defendant was not prejudiced thereby. *Id.* at 5. The Court of Appeals applied the proposed testimony of Dr. Spitz to the evidence actually produced at trial and concluded that his testimony would not have made any difference to the eventual verdict. *Id.* at 5-6. Defendant also asserts that a handful of the facts the Court of Appeals mentioned in its recitation of the evidence were erroneous, mostly because the affidavit of Dr. Spitz contradicted the testimony produced at trial. See Defendant's Application at 25-28. In order to make that argument, however, he ignores all of the trial testimony the Court of Appeals opinion was based on, and that served as the basis for the multiple experts who provided evidence. Defendant does not, and indeed cannot, refute the vast weight of the evidence which established his guilt.

Defendant also fails to show that this case involves legal principles of major significance to the state's jurisprudence. MCR 7.302(B)(3). This case involves a fairly ordinary ineffective assistance of counsel claim that was resolved by the Court of Appeals using long-standing precedent. No new jurisprudential ground was broken.

In addition, Defendant asks this Court to consider a number of other arguments in his application. Defendant's Application for Leave, Section III at 28-37. However, these issues were waived by Defendant because he accepted the trial court's ruling, based only on this one narrow

ineffective assistance theory when he dismissed his appeal of right following the trial court's grant of a new trial. See Appendix F: *People v Ackley*, unpublished order of the Court of Appeals, dated September 23, 2013 (Docket No. 310350) (Court order granting Defendant's motion to dismiss his appeal). As a result, he is not entitled to appellate review by this Court. Barring waiver, Defendant also forfeited those arguments when he failed to raise them on cross appeal. See Appendix A, *Ackley* at 6; *In re McLeodUSA Telecom Services, Inc.*, 277 Mich App 602, 621 n8; 751 NW2d 508 (2008) ("An appellee is limited to the issues raised by the appellant unless it cross-appeals as provided in MCR 7.207.")

In short, Defendant has demonstrated no errors or issues under MCR 7.302(B) worthy of this Court's attention. Accordingly, the People request that his application for leave to appeal be denied.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED DEFENDANT A NEW TRIAL BASED ON A FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL. NEITHER PRONG OF THE *STRICKLAND* TEST WAS PROVED AT THE *GINTHER* HEARING.

Standard of Review:

This Court reviews a trial court's granting of a motion for relief from judgment for an abuse of discretion, and its findings of fact for clear error. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). An abuse of discretion occurs when "the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). An abuse of discretion also occurs when the trial court makes an error of law. *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006). The court reviews the interpretation of the court rules in the same manner as a statute and as a question of law, de novo. *People v Clark*, 274 Mich App 248, 251-52; 732 NW2d 605 (2007) (internal citation omitted).

A. The Trial Court Abused Its Discretion When It Found Trial Counsel's Representation Fell Below an Objective Standard of Reasonableness.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must first prove that his attorney's performance was deficient, that it fell below an objective standard of reasonableness. *Strickland*, 466 US at 668; *People v Pickens*, 446 Mich 298, 309; 521 NW 2d 797 (1994). If a defendant can make that initial showing, then he must also show that counsel's errors, "so prejudiced him as to deprive him of a fair trial." *Pickens*, *supra* at 309. Defendant bears the burden of proof to show both prongs of ineffective assistance. *People v Hopson*, 178 Mich App 406, 412; 444 NW 2d 167 (1989). That burden is difficult to overcome. *People v Rockey*, 237 Mich App 74, 76; 601 NW 2d 887 (1999).

Just as important, a defendant is entitled to *a defense*, not the perfect defense that guarantees an acquittal. "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *Matuszak*, 263 Mich App at 61(internal cite omitted). Trial counsel is assumed to be using a viable strategy, and a reviewing court cannot substitute its judgment for that of counsel in matters of trial strategy. *Rockey*, *supra* at 76. This Court will not review counsel's decisions with the benefit of hindsight. *Strickland*, *supra* at 689; *People v Grant*, 470 Mich 477, 485; 684 NW 2d 686 (2004).

(1) Defense Counsel Developed a Trial Strategy and Pursued It. The Trial Strategy Was Reasonable Under the Circumstances.

No one, including the trial judge, questions the fact that defense counsel had a trial strategy—to show that Baylee's death was attributable to accident—and that he pursued that strategy at trial. GI[20] at 6, 27-28; GIV at 49 (Judge Kingsley acknowledging Marks' trial strategy). Further, there is no dispute that Marks pursued this strategy after consulting with his client and with an expert witness he retained for that purpose. Marks testified he discussed the trial strategy options with Defendant, including the possibility of shifting blame to Baylee's mother, Erica. GIV at 10. He also explored the possibility of Baylee having a blood disorder that might explain the People's evidence. GI at 10.

Having decided that he needed an expert witness to review the prosecution's evidence, Marks asked the court to provide him with funds, which the court did. Marks consulted with Dr. Hunter, who has been recognized as an expert in pathology and forensic pathology on many occasions in Michigan courts. GIII[21] at 4-5. Marks gave Dr. Hunter all the data that he had, and asked him to

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[20] *Ginther* hearing transcript, dated June 24, 2013, referred to as GI.

[21] *Ginther* hearing transcript, dated August 8, 2013, referred to as GIII.

review the case. GI at 13. After review of the data, Dr. Hunter's conclusion was that the scientific evidence showed that Baylee's death was the result of child abuse.[22] GIII at 15; GIV at 49 (trial court finding that, "Dr. Hunter . . . indicated that he did not believe an accidental fall was the cause of death, that it was homicide."). Marks did not abandon using his expert, however, simply because Dr. Hunter's conclusion was unfavorable; he continued to consult with Dr. Hunter to flesh out his trial strategy. Marks discussed the case with Dr. Hunter four or five times. GIII at 17. He worked with Dr. Hunter to improve his cross examination of the People's experts. GI at 17 (developing a line of cross examination for Dr. DeJong); see also GIII at 16-17.

Defendant told Marks that he had not killed Baylee and that he was not present when her injuries occurred, but rather that he found her in an unresponsive state. See, e.g., TV at 768-70 (Defendant's testimony about finding Baylee). That made a defense of accidental death—or at least, "It wasn't me"—a reasonable option, even without expert testimony, especially as the cross examination of the People's experts would be developed by Marks' consultation with Dr. Hunter. It is important to note, in this regard, that the trial court found Marks had cross examined the People's experts "vigorously." GIV at 61. Clearly, Marks received good value from retaining Dr. Hunter. Marks furthered his trial strategy by calling Defendant to the stand and allowing him to put his version of events to the jury; if the jury had believed Defendant, then their verdict would necessarily have been not guilty. Nor did Marks put his client on the stand in a vacuum; he bolstered Defendant's credibility and his character for being good around children generally—and Baylee, in

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[22] Defendant attempts to make an issue of potential additional information that Marks might not have made available to Dr. Hunter when Hunter formed his opinion Baylee's death. See, e.g., GIII at 18 (information about Baylee jumping on a trampoline). Dr. Hunter's trial preparation with Marks included dealing with events such as that, even though he did not specifically know about a trampoline. GIII at 20. Furthermore, Dr. Hunter testified that the trampoline incident did not change his opinion of how Baylee died. GIII at 40-41.

particular—with the testimony of other witnesses. See, e.g., the testimony of Matthew Lynn and Miroslav Tomanovic. TV at 720 and 730, respectively. Having consulted a recognized expert in the field of forensic pathology, and having received an analysis of the evidence in the case, Marks made the strategic decision not to consult any further experts. That decision was objectively reasonable.

(2) Counsel Is Entitled to Rely on the Expert Witness That He Retains. He Need Not Continue Consulting Experts Until He Finds One Willing to Say What He Wants to Hear.

The trial court adopted Defendant's theory that Marks was deficient in his representation because he did not contact other experts mentioned to him by Dr. Hunter. The trial court seems to have reached the conclusion that, when Dr. Hunter told Mr Marks, "I'm not your guy," what he really meant was that Marks needed to consult different experts—Shulman or Spitz—in order to receive a thorough analysis of the evidence. This conclusion likely came from Dr. Hunter's testimony, in which he remembered having told Marks early in their consultation that the details of Baylee's death did not add up for him, and suggesting that Marks talk to Dr. Shulman. GIII at 6-14.

Regardless of Dr. Hunter's testimony at the *Ginther* hearing, Marks most emphatically did not understand him to be saying that Marks needed to consult a different expert for a full understanding and analysis of the facts. See, e.g., GI at 56-57. It is true that Dr. Hunter mentioned at least one other name to Marks during their pre-trial conversations about the case; depending on which parts of the testimony one chooses to credit, that name was either Dr. Spitz or Dr. Shulman.[23]

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[23] There is confusion over which name Dr. Hunter gave to counsel at which time. Marks recalled that Dr. Hunter mentioned Dr. Spitz to him before the trial, in the context of someone to reach out to if he wanted testimony, and only mentioned Dr. Shulman when the two of them talked about the case after the trial. GIV at 14. Dr. Hunter believed that he only gave the name of Dr. Shulman. GIII at 24. When, and in which order, the names were given is not especially important to this analysis because they were not given to Marks as other experts who needed to be consulted for a full picture of what the evidence meant.

Dr. Hunter told Marks that, if he felt that expert testimony was necessary at trial, Marks should find another witness because of the conclusions Dr. Hunter reached after looking at the evidence; putting Dr. Hunter on the stand would be an enormous risk. He gave Marks the name of Dr. Spitz as a possible option. GI at 13; GIV at 13. Marks was clear throughout the two separate days of his *Ginther* testimony that Dr. Hunter gave him the alternative name (or names) in case Marks decided to offer expert testimony, and *not* because Hunter thought that Marks needed to consult a different expert for a full analysis of the evidence. Marks highlighted this when he testified, "[Dr. Spitz] was in case there was a need for testimony, not for determining whether or not it was accidental or not." GI at 15; GIV at 13, GI at 57.

This is a very important point, because it goes to the reasonableness of Marks' decision not to investigate further. Having learned from the forensic pathologist he retained that Baylee's death was the result of abuse, Marks made the strategic decision not to consult further experts. "But once I got [Dr. Hunter's] report back, well, there was no need to call Dr. Spitz." GIV at 13. The court pressed Marks on whether he made that decision as a matter of strategy, and he reiterated that he had. GIV at 13-14. Counsel did not make that decision frivolously, or without having consulted with an expert to increase his own understanding of what the evidence meant.

Mr. Marks accepted the conclusion reached by the expert forensic pathologist he had retained, and developed his trial strategy based around that obvious difficulty. He has a duty to his client to investigate possible avenues of defense, but is allowed to cut off avenues of investigation when—in his judgment—they are no longer reasonably likely to bear fruit. *Strickland*, 466 US at 691 (finding that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). His strategic decision is owed considerable deference by appellate courts. *Id.*

An attorney's decision not to further investigate a particular theory or witness, however, may be unreasonable if it precludes him from presenting a substantial defense on his client's behalf. *Hopson*, 178 Mich App at 412. That is not the case here. The trial court summed up Dr. Spitz's affidavit as follows, "In my expert opinion . . . Baylee Stenman's death was accidental, and not due to any abuse." GIV at 59. That is also a reasonable summary of the trial strategy Marks pursued, even without consulting Dr. Spitz. Marks' strategic choice did not deprive Defendant of a substantial defense.

The trial court's ruling—boiled down to its essence—is that Marks needed to continue consulting additional experts until he found one who would contradict the People's experts; anything less than that would be ineffective assistance in the trial court's view. This is an insidious proposition, and it goes well beyond the *Strickland* standard. Michigan does not afford a defendant claiming ineffective assistance any additional rights beyond those granted by the federal constitution. *Pickens*, 446 Mich at 302. In addition to the obvious issues of expense and delay, the trial court's grant of a new trial in this case raises the notion that any attorney who goes to trial without a favorable expert is risking a finding of ineffective assistance. Here, Marks consulted a recognized expert in the field of forensic pathology and was told that the evidence did not line up in Defendant's favor. How many more experts did he need to consult before he could say "enough?"

(3) The trial court's analysis is based on a hindsight review of counsel's strategic decisions.

A reviewing court cannot judge an attorney's effectiveness in the light of hindsight. *Strickland*, 466 US at 690-91. Unfortunately, that is exactly what the trial court did.[24] Counsel knew

[24] The trial court's ruling was based on what it characterized as the failure of Marks to consult with additional experts. During the *Ginther* process, Defendant, through his appellate counsel, advanced several other alleged failures at various times. Those other theories were not relied on by the trial court. They also require the use of hindsight. For example, Defendant

that he needed to consult an expert to review the evidence to hopefully contradict the People's case. He therefore asked the court for money to retain an expert. When the court granted his request he contacted Dr. Hunter. Then Dr. Hunter told him that the People's interpretation of the evidence was correct. See, e.g., GIV at 61 (trial court summarizing Dr. Hunter's advice to Marks as, "It's homicide."). At that point the trial court decided Marks should have known what Dr. Spitz or Dr. Shulman would have opined had he consulted one of them after hearing Dr. Hunter's opinion.

First, as was discussed in Section I.A.2, *supra*, Marks understood Dr. Hunter to be telling him that Dr. Spitz (or Dr. Shulman, depending) was a better choice *if* Marks wanted to put on expert testimony. He did not understand Dr. Hunter to be recommending another expert for a better analysis of the evidence. Nor was Dr. Hunter doing so; it is clear from his testimony at the *Ginther* hearing that he still believes his analysis of the evidence to be correct. See, e.g., GIV at 39-43. Based on the advice Marks received from his retained expert, he had no expectation that either Dr. Spitz or Dr. Shulman would reach a different conclusion from that of Dr. Hunter. Yet the trial court relied on Dr. Spitz's affidavit, created long after the trial, to stand for the notion that Marks had knowledge not just of another potential expert, but of what that expert would have said if Marks had asked the court for additional funds to consult a second or even third expert. That is clearly using the benefit of hindsight to analyze counsel's performance.

The second way in which the trial court brings hindsight to the analysis of counsel's decision not to consult Dr. Spitz is the decision whether to ask the court for more funds. Of course, as the trial court noted, Marks knew that he had the *right* to ask for more money. GIV at 59. That does not mean Marks had any reason to think that his request would be entertained. *Id.* In order for an

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asked Marks whether he could have used different language to stipulate to the expertise of Dr. DeJong, GI at 22-24, or used learned treatises in his cross examination of her. GI at 25-26.

indigent defendant to receive funds from a court to consult with experts the defendant must show a connection between the facts and the need for the expert. MCL 775.15. If he can do so, then the court may grant the requested funds. *People v Carnicom*, 272 Mich App 614, 617; 727 NW 2d 399 (2006). "It is not enough for the defendant to show a mere possibility of assistance from the requested expert." *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003). However, Marks had no basis on which to ask the court for more funds to consult an additional expert.

The judge hearing the motion for new trial relied on an email exchange between himself and the original trial judge[25] as proof that Marks should have known that the trial court would grant him extra money to retain a second expert. GIV at 24-26. That exchange occurred long after the trial, during the *Ginther* hearing process, and did not involve the parties. There is no way Marks could have known what was in Judge Garbrecht's mind while he was preparing for trial. In fact, law and common sense would have led him to the conclusion that further funds were unlikely to be forthcoming, and that he could not reasonably rely on the court to give him more money. His request to the trial court for more money would essentially have been: "The well-respected expert I consulted told me that the victim's death was a homicide, but I want more money to keep talking to other experts until I find one that will say what I want to hear." It is well-settled that an attorney will not be found ineffective for failing to raise futile or meritless arguments. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). The trial judge's finding of ineffective assistance is therefore predicated on hindsight: the post-trial email from Judge Garbrecht to Judge Kingsley was taken as proof that Marks should have known more money would have been his for the asking. Basing a

[25] The trial, and the pretrial process, was overseen by Judge Garbrecht. Judge Garbrecht retired in June of 2013. This motion was presided over by Judge Kingsley beginning with the June 24, 2013, portion of *Ginther* hearing.

ruling on the wrong standard—i.e., hindsight—is a *per se* abuse of discretion. *Giovannini*, 271 Mich App at 417. The trial court's grant of a new trial should be overturned.

B. Even Assuming That Defendant's Trial Counsel Was Ineffective, the Trial Court Abused Its Discretion When It Found That Defendant Was Prejudiced by Counsel's Allegedly Ineffective Representation.

Let us assume, for the sake of argument, the trial court correctly judged Marks to have been ineffective in his representation of Defendant. Defendant is still not entitled to a new trial until he demonstrates that he was prejudiced by counsel's deficiencies. In these circumstances, prejudice means that—with the additional testimony of Dr. Spitz—there is a reasonable probability that the jury would not have convicted Defendant. *Snider*, 239 Mich App 423-24. If Marks had applied for more funds, retained Dr. Spitz, and received a report from him that was substantially similar to the affidavit he provided for the *Ginther* hearing, at best he would have created a would create a battle of the experts. It would not rise to the level of prejudice.

(1) The Trial Court Did Not Properly Address the Prejudice Prong in Its Ruling. The Judge Only Made a Cursory Statement That He Found the Outcome of the Trial Would Have Been Different.

The trial court spent very little time analyzing the prejudice prong of the *Strickland* test in its ruling. The judge summarized the potential testimony of Dr. Spitz, and noted that he would have testified that Baylee's death was accidental. GIV at 58-59. The trial court is correct that this does represent a contradiction of the opinions of the People's experts. "[A]nd especially when you look at Dr. Spitz's opinion it is directly contrary to the prosecutor's theory and the evidence presented." GIV at 60. However, that sentence is the sum of the trial court's discussion of prejudice. The trial court simply said, "[T]here is a plausible option of probability that a different verdict would be achieved." GIV at 60. But that is simply a conclusory statement, a mere reciting of the rule, unsupported by reference to the evidence. As a practical matter, it is clear that the trial court did not

make any deep consideration of the prejudice prong. The trial court abused its discretion by failing to consider one of the two prongs of the *Strickland* analysis in making its decision; the grant of a new trial should be overturned.

(2) Even If the Court Made a Finding on Prejudice, Defendant Was Not Actually Prejudiced.

Simply adding an expert to the witness list is not enough to get a different outcome. Dr. Spitz would have contradicted the People's experts, but only to the extent of creating a so-called "battle of the experts." He could have testified to a split within the scientific community over abusive head trauma, and that he did not think the evidence added up to homicide. See GIV at 58-59 (trial court summarizing Dr. Spitz's affidavit). He could not have proven the People's experts wrong, or proven that the methods and theories they relied upon were flawed; the most he could have done would be to assert a different conclusion based on the evidence of the case. And he would have been subject to the same sort of vigorous cross examination that the People's experts were. His testimony would have been more evidence to support the theory of the case—that Baylee's death was accidental—that Marks was already presenting, rather than a new, substantive theory of the case. Without more, there is no reason to think that the jury would likely have reached a different verdict.

In fact, the reverse is true. Defendant testified, bolstered by other witnesses, that he had a good relationship with Baylee, was not angry with her for her habit of wetting herself, that he never physically disciplined her, and not only did he not kill her, but he sought help for her when he found her in her room, unresponsive. See, generally, TV at 744-789 (direct examination of Defendant). The jury, presented with Defendant's complete denial of the People's case, did not believe him. They found him guilty. Because there is no evidence to make this Court believe that the result would

have been any different with the testimony of Dr. Spitz, the grant of a new trial was an abuse of discretion.

C. The Trial Court Incorrectly Analyzed the Cases Underpinning Its Grant of a New Trial.

The trial court cited a number of cases to provide the legal underpinnings of its ruling granting a new trial. See GIV 43-57 (trial court summarizing case law). Those cases do not support the trial court's ruling, and in several instances the cases cited are not precedential authority. Nor did the trial court do much more than recite the facts of the cases mentioned; there is little analysis or application of the cases to the present facts.

When one applies the Michigan cases cited by the trial court to the circumstances before us in this case, it becomes clear that the cases do not support the grant of a new trial on these facts. In *Hopson*, and *Julian*[26] the Court of Appeals found the respective attorneys' representation to be effective and upheld the convictions. The *Hopson* Court ruled that it was not ineffective assistance for counsel to have only cross examined one of the People's witnesses. *Hopson*, 178 Mich App 412-13. In *Julian*, the Court of Appeals held that ineffective assistance can only be established where the strategy chosen by counsel deprives his client of a substantial defense, and that the decision to call (or not call) witnesses is a matter of trial strategy. *Julian*, 171 Mich App at 159. These are both points relied upon by the People to show that Marks was providing constitutionally valid representation to Defendant when he made his strategic choices.

In *People v Bass* this Court did uphold the grant of a new trial for ineffective assistance, but defense counsel's performance was shockingly bad. *People v Bass*, 247 Mich App 385; 636 NW2d 781 (2001). Counsel for the defendant did not investigate the potential testimony of her client's co-

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[26] *People v Julian*, 171 Mich App 153; 429 NW2d 615 (1988).

defendants . . . even after the defendant testified at their trials, and they were acquitted. Worse, she actually represented the defendant during his testimony in those trials, and so certainly should have known of their existence. *Id.* at 388. At the *Ginther* hearing, counsel could not remember what her theory of the case had been. *Id.*, at 389. The *Bass* Court found that there was no indication that she had a trial strategy at all. *Id.*, at 392. Contrast counsel's performance in *Bass* with that of Marks in the present case: Marks obtained funds to consult an expert; used the expert to develop his cross examination of the People's expert witnesses; and pursued a trial strategy based on his review of the evidence and his discussions with his client. Marks even paid a portion of Dr. Hunter's fee out of his own pocket. GIV at 20. The contrast between the two representations could not be more profound.

The two cases most discussed by the trial court were *Gersten v Senkowski*[27] and *Couch v Booker*,[28] from the Second Circuit and the Sixth Circuit respectively. While they might have persuasive value, they are not precedential for either the trial or appellate courts. Regardless of the value given them, these cases do not support the trial court's ruling. *Gersten* involved the defendant's alleged sexual penetration of his daughter. The Second Circuit made clear that, while expert testimony is often critical in cases involving the sexual abuse of children, there is no *per se* rule requiring an effective attorney to consult one. *Gersten*, 426 F3d at 608-09. The attorney in *Gersten* was ineffective not because he failed to consult an expert, but because he had no reasoned basis to conclude that consulting an expert would be fruitless. *Id.* at 609-10. Those facts present a significant contrast to the present case in which Marks did consult with an expert, but did not continue to consult further experts when the first one did not give the desired opinion.

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[27] *Gersten v Senkowski*, 426 F3d 588 (CA 2, 2005).

[28] *Couch v Booker*, 632 F3d 241 (CA 6, 2011).

Similarly, in *Couch*, the Sixth Circuit made clear that, while any limitations on the defenses counsel chooses to investigate must be supported by a reasonable and professional judgment, counsel need not look into every possible defense. *Couch*, 632 F3d at 246 (citing *Strickland).* The Sixth Circuit also pointed out that, as happened in the instant case, "Trial counsel may rely on an expert's opinion on a matter within his expertise when counsel is formulating a trial strategy." *Id.* at 246. Nor does the Sixth Amendment allow "Monday morning quarterbacking" of defense counsel's strategic decisions. *Id.* The problem in *Couch* was that defense counsel knew of easily obtained evidence that would have given his client a different substantive defense than the one he relied upon, and counsel did not present that information to the expert he retained. Worse still, the prosecution's expert, in his testimony at the post-trial evidentiary hearing, backed away from his trial testimony after he reviewed the easily-obtained evidence. *Id.* at 248-49. Again, that is a very different situation than the one presented by the facts in this case.

Conclusion:

The trial court's ruling granting Defendant a new trial fails both prongs of the *Strickland* test. Mr. Mark developed a strategy for his client's defense, and he pursued it vigorously. He chose his strategy in consultation with Defendant, after reviewing the People's evidence with an expert witness he retained for the purpose. Defendant is not entitled to a new trial simply because the strategy chosen did not succeed, and now he has a potential new witness that he wishes—in hindsight—he had used the first time. This Court should find that Marks gave Defendant constitutionally effective representation based on the specific facts of this case.

Just as important, there is no evidence of prejudice to Defendant stemming from the strategic choices Marks made while representing him. The trial court only gave this prong of the *Strickland* test a cursory treatment, and did not establish any likelihood that the outcome of the trial would have

been different if Marks had: (1) asked the trial court for more funds for an additional expert witness; (2) been granted those funds; and (3) Dr. Spitz had testified at the trial. In fact, since Dr. Spitz would have given essentially cumulative evidence for Marks' trial theory, that Baylee's death was accidental, there is little probability that the verdict would have changed.

In short, the trial court abused its discretion when it ruled that Defendant was entitled to a new trial due to ineffective assistance of counsel. The Court of Appeal correctly reversed that ruling. There is no clear error committed by the Court of Appeals, and—as a result—nothing that this Court need review. Defendant's application for leave to appeal should be denied.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Appellee the People of the State of Michigan, respectfully request this Honorable Court deny Defendant-Appellant's application for leave to appeal, as it raises no issues or errors meriting this Court's attention.

Respectfully submitted,

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DATED: July 8, 2014

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