STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2012AP002547 - CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.

MICHAEL L CRAMER,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCE ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY HONORABLE KEVIN E. MARTENS, PRESIDING, AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY WAGNER, PRESIDING

REPLY BRIEF

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REPLY BRIEF

I. Counsel was ineffective.

A It was not a reasonable strategy to forgo asking about the possibility of a lucid interval.

Contrary to the state's assertion, not all "strategic choices are 'virtually unchallengeable.'"(State's brief at 15) ***Strickland v. Washington***,466 U.S. 668,690-91. (1984) holds,

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."

Roe v. Flores-Ortega, 528 U.S. 470, 481 (2000), points out "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."

It has long been settled that counsel's strategizing is tested by whether it was rationally based on the facts of the case and the law, e.g., ***State v. Felton***, 110 Wis. 2d 485, 502-503, 329 N.W.2d 161 (1983). Compare, ***United States ex rel. Hampton v. Leibach***, 347 F.3d 219, 246 (7th Cir. 2003) ("an attorney's decisions are not immune from examination simply because they are deemed tactical"; question is whether the tactic "was objectively reasonable")

It was objectively unreasonable to fail to even ask the state's experts and his own expert whether, assuming the child received a traumatic brain injury, the time of injury could be determine with precision. This particularly true, since the evidence at trial shows that Cramer had not even been present in the house the two days before Matthew collapsed.(63:141-142).

1.There is an abundance of

medical and legal recognition of the fact that a child can experience a lucid period.

There are reports on the medical literature of such lucid periods being asymptomatic and lasting up to three day. Denton and Mileusnic describe a three-day lucid interval in a nine-month-old infant who fell from a bed, suffered an asymptomatic skull fracture, and died secondary to cerebral edema.

> In this area of debate, we present a case of delayed death from a witnessed fall backwards off a bed in a 9-month-old black male child who struck his head on a concrete floor and was independently witnessed as "healthy" postfall for 72 hours until he was discovered dead in bed." [and] "Although this seems to be a rare phenomenon, a delayed, seemingly symptom-free interval can occur between a clinically apparent mild head injury and accidental death in a young child.

Denton S, Mileusnic D. *Delayed sudden death in an infant following an accidental fall*. Am J Forens Med Pathol 2003;4:371-376 at 371.

Dr. Robert Huntington has published an account of a case he handled in which a child experienced a confirmed lucid interval, while under medical supervision, of at least 16 hours. Robert Huntington, Letter, *Symptoms Following Head Injury*, 23 Am. J. Forensic Med. & Pathology 105 (2002).

Arbogast, Margulies and Christian, found that

very young children were more likely to have lucid periods. Their study showed,

> ...[I]n those <24 months old, children who died as a result of inflicted injury were >10 times more likely to have a GCS score of >7 than those who died as a result of a MVC [Motor Vehicle Accident].
>
> ***
>
> Although infrequent, young victims of fatal head trauma may present as lucid(GCS score: >12) before death**.**...This effect is amplified in the youngest children (<24 months old): those with inflicted injury were 10 times more likely to present with moderate GCS scores than those in MVCs. In addition, this youngest age group seems to be overrepresented in those who present as lucid (GCS score: >12 [5 of 6]).

Arbogast, K et al, *Initial Neurologic Presentation in Young Children Sustaining Inflicted and Unintentional Fatal Head Injuries* 116 PEDIATRICS 180 (2005).[1]

Law Journals also have begun discussing the validity of lucid intervals.

> And then we have the evidence that lucid intervals are a distinct reality: Research shows lucid intervals of up to seventy-two hours or more. The State's pathologist, Dr.

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[1] It should be noted that the Plunkett article the state refers to(State's brief 21 and 22), was written before the Denton, Abogast and Huntington articles. Plunkett's article involved only 18 children ages between 12 months and 13 years who experienced fatal falls. The article does not purport to be the final word on validity of the "lucid interval" concept. However, Dr. Plunkett's report (43: 30), reflects that he is familiar with current literature on the subject.

> Robert Huntington, who did the autopsy in the ***Edmunds*** case, admitted that he had been wrong when he testified at trial that collapse had to follow fairly quickly after injury. In his postconviction testimony, he acknowledged that, based on further research and his own subsequent experience with a case involving an extended lucid interval, he now knows that lucid intervals are real, and that pathologists can't time the infliction of injury in such cases to any individual at all. In the ***Edmunds*** postconviction proceedings he testified, "The lucid interval is a distinct discomforting but real possibility." He added that "this case more and more convinces me that us pathologists can know *what*. *When* gives us problems. *Who* we almost never can say."And courts are starting to take notice.

Findley, K et al, *Examining Shaken Baby Syndrome Convictions in Light of New Medical Scientific Research***,** 37 Okla City U . L.R. 219, 229. (footnotes omitted). See also Tuerkheimer, D , *The Next Innocence Project: Shaken Baby Syndrome And The Criminal Courts*, 87 Wash U L Rev 1(2009)

Indeed, courts have taken notice. This court in ***State v. Edmunds****,* 2008 WI App 33,¶ 15, 746 N. W, 590, noted that there is a legitimate debate in the medical community whether an infant may experience head trauma and yet experience a significant lucid interval prior to death. See also ***Aleman v. Hanover Park***, 662 F.3d 898, 902(7th Cir 2001)(Judge Posner cites some of the evidence for lucid intervals). This court also affirmed the trial court's grant of a new trial in the interest of justice, noting in part the fact that the jury had heard testimony about the possibility of a lucid interval. See ***State v. Quentin J. Louis***, Appeal No. 2009AP2502-CR,¶19 (attached).

B. Cramer was prejudiced by the failure to present any evidence of the possibility of a lucid interval.

As pointed out above, there is at least one case of an infant being asymptomatic after a fall for 72 hours. It was not Mr. Cramer's burden to show that Matthew necessarily had a lucid interval. However, where Counsel failed to cast a reasonable doubt on the state's theory that the last person with Matthew was guilty- if the jury were inclined to accept the state's claim that Matthew had been abused - Cramer was prejudiced. If Matthew had experienced a lucid interval, then the jury could not have pinpointed the time when Matthew was injured. If they could not pinpoint the time of injury, they could not have concluded that Michael Cramer was necessarily responsible for causing the injury.

As Dr. Huntington said in ***Edmunds***,

> "The lucid interval is a distinct discomforting but real possibility." He added that "this case more and more convinces me that us pathologists can know *what*. *When* gives us problems. *Who* we almost never can say."

This court has recognized that problem in both ***Edmunds*** and ***Louis***. It should recognize here as well.

C. Counsel's performance was defective in challenging Drs.Valvano and Tlomak's misleading statements.

Counsel did not present to the jury evidence showing that many of Dr. Valvano and Dr. Tlomak's statement were misleading.

The state claims that Valvano's testimony was accurate implying that Counsel could not have challenged more than he did. But that is not true.

The state cites articles supporting Valvano's testimony that the presence of retinal hemorrhages indicate abuse because defendants have confessed to abuse in some such cases.(State's brief at 26). Leaving aside the accuracy of those admissions,[2] other research shows that retinal hemorrhages occur in other situations.

For example, Lantz found subdural hematoma and retinal hemorrhages can be caused by low height falls - a finding Dr. Valano claimed could not happen. (64:74,75,76).

> "We describe an infant with an acute subdural hematoma, a fatal head injury, and severe hemorrhagic retinopathy caused by a stairway fall. His cerebral and

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[2]

Other studies purporting to support the validity of the **SBS** diagnosis relied on "confessions" to establish the mechanism of injury. Here, too, a number of problems undermined the validity of the research. Putting aside momentarily the possibility that a suspected abuser would be less than candid with doctors and investigators, the classification of an account as a confession in these studies was **highly** problematic from amethodological perspective: where caretakers said that they shook the baby, it was never detailed how much they shook the baby, how long theyshook the baby, and did the baby's symptoms precede the shaking or didthey follow the shaking.

Tuerkheimer, D , *The Next Innocence Project: Shaken Baby Syndrome And The Criminal Courts*, 87 Wash U L Rev at 13-14(cites and quotes omitted).

> ocular findings are considered diagnostic of abusive head trauma by many authors. Our literature search of serious injuries or fatalities from stairway or low-height falls involving young children yielded 19 articles of primary data. These articles are discrepant, making the classification of a young child's death following a reported short fall problematic. This case report contradicts the prevalent belief of many physicians dealing with suspected child abuse that low-height falls by young children are without exception benign occurrences and cannot cause fatal intracranial injuries and severe retinal hemorrhages. The irreparable harm to a caregiver facing an erroneous allegation of child abuse requires physicians to thoroughly investigate and correctly classify pediatric accidental head injuries."

Lantz PE, Couture DE. *Fatal acute intracranial injury, subdural hematoma, and retinal hemorrhages caused by stairway fall*. J Forens Sci 2011;56:at 1648)

Further, rather than vitreous traction claimed by Dr. Valvano (64:20-25), several studies show that intercranial pressure has been found to cause retinal hemorrhaging. See Smith DC, Kearns TP, Sayre GP. *Preretinal and optic nerve-sheath hemorrhage: pathologic and experimental aspects in subarachnoid hemorrhage*. Trans Am Acad Ophthalmol Otolaryngol 1957; 61:201-211., and Muller PJ, Deck JHN. *Intraocular and optic nerve sheath hemorrhage in cases of sudden intracranial hypertension.* J Neurosurg 1974;41:160-6. And more recently,Watts P, Obi E. *Retinal folds and retinoschisis in accidental and non-accidental head injury*. Eye (London) 2008;22:1514-6.

Dr. Valvano said that only defense witnesses claim there is a controversy about Shaken Baby Syndorm.(64:91).

That is not true. As pointed out in Dr. Plunkett's report,

> The thinking of other doctors has undergone a radical change. Patrick Barnes, a pediatric radiologist at Stanford University, was a key prosecution witness in what is arguably the most famous shaken-baby case of all, the trial of Louise Woodward. Woodward was a 19-year-old nanny charged in 1997 with shaking an 8-month-old baby to death, hitting his head and causing fatal bleeding. With Barnes' help, the jury found Woodward guilty of second-degree murder. (She was ultimately released after serving less than a year in prison, when a judge reduced her charge to manslaughter.)
>
> Barnes said he wouldn't give the same testimony today. There's been a 'revolution' in the understanding of head injuries in the past decade, in part due to advances in MRI brain scanning technology, he said. 'We started realizing there were a number of medical conditions that can affect a baby's brain and look like the findings that we used to attribute to shaken baby syndrome or child abuse,' Barnes said."

(43:36-38)(Quoting Thompson AC, Shapiro J, Bartlett S, Lee C. The child cases: Guilty until proven innocent. Available at http://www.npr.org/ 2011/06/28/ 137454415/the-child-cases-guilty-until-proven-innocent (Last accessioned August 13, 2012).

Further, Dr. Plunkett's report makes clear why Dr. Valvano's theory that Matthew might have been hit against a cushion, could not be an explanation for Matthew's brain injuries without external head injuries. (43:36)[3]

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[3] Dr. Valvano's claim that Matthew's head injury could have been caused by an impact against a cushion like a mattress or a sofa or a chair cushion without leaving external evidence of injury is wrong. While it is true that impact against a soft surface may not leave evidence for a bruise, however, the soft surface increases the distance and/or the time over which the head accelerates during impact, decreasing the force by as much as one or two orders of magnitude, resulting in no scalp bruise as well as no brain injury.

Mr. Cramer's postconviction motion and Dr. Plunkett's report extensively set out areas where Dr. Valvano's claims are disputed in the medical literature. Trial Counsel failed to inform the jury about many of those disputes.

D. Cramer was prejudiced.

The evidence against Mr. Cramer was not overwhelming. Indeed, other than the testimony of Drs. Valvano and Tlomak was no evidence that anyone had inflicted brain injuries on Matthew.

Had Valvano and Tlomak been challenged on their many unequivocal statements, that are, at the very least, disputed in the medical literature, the jury would have been less likely to believe their opinion that Matthew had been the victim of abusive trauma.

III. This court should grant a new trial in the interest of justice.

The new trial in the interest of justice is not as narrow as the state would have this court believe.

For example, if a caretaker is carrying a 3-month-old infant and trips and drops the baby, and the infant's head is 4 feet above a hardwood floor when he/she is dropped, the infant's head will strike the floor at 16 feet/seconds. If the duration of the impact (the time it takes to go from 16 feet/second to zero) is 10 msec (typical for an impact against a non-yielding surface), the average acceleration during the impact is 1600 ft/sec^2 (50 *g*) and the peak acceleration is approximately 3200 ft/sec^2 (100 *g*). This acceleration is well above established injury thresholds. In contrast, if the child is dropped onto a bed or couch where the duration of the impact is 100 msec (1/10 second, typical for an impact against a "soft" surface), the average acceleration during the impact will be 5 g and the peak acceleration 10 g, well below any established threshold for brain injury.

As pointed out above, this court has affirmed a trial court's granting of a new trial in the interest of justice in part on the ground that the jury did not hear about the possibility of a lucid interval. ***State v. Quentin J. Louis***, Appeal No. 2009AP2502-CR,¶19

Our supreme court has emphasized that where important evidence is not presented to the jury, the real controversy has not been fully tried and the conviction must be reversed

In ***State v Hicks***, 220 Wis. 2d 150, 549 N.W.2d 435(1996), the defendant was accused of entering the victims apartment and sexually assaulting her. The sole issue in the case was identification: whether the defendant was the man that entered the victim's apartment and assaulted her, *Id* at 163. Hairs were found at the scene which the State's expert testified were consistent with the defendant's hair. In its closing argument , the State acknowledged that the hair comparisons were not as strong as fingerprint comparisons but highlighted the fact that the hairs were consistent with the defendant. *Id* at 168.

However the jury did not have the opportunity to hear evidence of DNA testing which excluded the defendant as the source of one of the four pubic hairs found at the scene. *Id* at 163. The court reversed the defendant's conviction and remanded for a new trial, holding that without the DNA evidence, the real controversy had not been fully tried. *Id* at 152-153.

The court reasoned that because the remaining physical and scientific evidence was inconclusive, "the DNA test result could have been a crucial, material piece of evidence." *Id* at 164. The court concluded that the jury was not given the opportunity to hear relevant exculpatory evidence that went directly to the issue of

identification. *Id*. The determinative factor in the case was the fact that the State assertively and repetitively used the hair evidence as affirmative proof of the defendant's guilt. *Id* . Therefore, the court could not say with any degree of certainty that the hair evidence used by the State during trial played little or no part in the jury's verdict *Id* at 172.

Here the centerpiece of the State's case suggesting that Matthew had been abused at all was the testimony that Matthew had "extensive diffuse brain injury, this particular pattern of retinal hemorrhages, these bilateral subdural hemorrhages."(64:70).[4] Although, Dr. Volvano claimed that Matthew could have been the victim of shaking with impact on a cushion(64:89), there was absolutely no evidence of any impact on the child's body. The jury should have been alerted to the possibility of a lucid interval and to the medical literature that disputes many of Dr. Valvano and Dr. Tlomak's assertions.

The jury did not hear important and relevant evidence. This court should grant Mr. Cramer a new trial in the interest of justice.

IV. Mr. Cramer is entitled to a new trial because the State presented false evidence.

In ***Giglio v. United States***, 405 U.S. 150, 154 (1972), the Court held that a new trial is required when prosecutors relied on testimony that they later learn to be

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[4] "Shaken Baby Syndrome (SBS) is, in essence, a medical diagnosis of murder, one based solely on the presence of a diagnostic triad. retinal bleeding, bleeding in the protective layer of the brain, and brain swelling." Tuerkheimer, D , *The Next Innocence Project: Shaken Baby Syndrome And The Criminal Courts*, 87 Wash U L Rev 1(2009).

false if, "the false testimony could ... in any reasonable likelihood have affected the judgment of the jury." Wisconsin followed this principle in ***State v. Nerison***, 136 Wis. 2d 37, 401 N.W.2d 1 (1987).

The Court made it very clear in ***Giglio*** that deliberate deception of a court and jurors by the presentation of false evidence is incompatible with rudimentary demands of justice. Id. at 153. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Id. This is irrespective of the good faith or bad faith of the prosecutor. Id.

Applying the ruling in ***State v. Haywood***, 2009 WI App. 178, ¶ 15, 322 Wis 2d. 691, 777 N.W. 2d 92, (holding that a defendant who failed to object to a prosecutor's misstatement at sentencing waived his claim and, thus, the claim could only be raised by means of ineffective assistance of counsel), would be contrary to the holding of ***Giglio.*** A conviction ought not stand where it is based on evidence incompatible with the rudimentary demands of justice.

CONCLUSION

For the reasons stated above and in his brief-in-chief, Michael L. Cramer, asks this court to reverse his conviction and order a new trial or in the alternative to remand to the trial court for a hearing on Mr. Cramer's postconviction motion..

Dated: June 17, 2013

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CERTIFICATIONS

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text,11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of the brief is 3711 words.

_____
Patricia A.FitzGerald

I hereby certify that with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19 (2)(a) and that contains at a minimum : (1) a table of contents; (2) the findings or opinion of the trial court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a

circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, an final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Patricia A. FitzGerald

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stats. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date .A copy of the certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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Patricia A. FitzGerald