STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2017AP000837-CR

DAKOTA R. BLACK,

Defendant-Appellant.

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On Notice of Appeal from the Judgment of Conviction and
from an Order Denying Post-Conviction Relief Entered
in the Circuit Court for Dane County,
The Honorable Stephen E. Ehlke, Presiding

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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## ISSUES PRESENTED

(1) Did the trial court err in excluding Defense evidence?

The trial court ruled that the evidence was inadmissible.

(2) Should the State's expert evidence have been excluded under Wis. Stat. § 907.02 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)?

The trial court ruled that the evidence was admissible.

(3) Should the State have been allowed to call Dr. Frasier as a rebuttal witness?

The trial court ruled that she was a proper rebuttal witness.

(4) Is Dakota Black entitled to a new trial because of ineffective assistance of counsel?

The trial court held that there was no ineffective assistance of counsel and also denied the request for an evidentiary hearing.

(5) Is Dakota Black entitled to a new trial in the interest of justice?

The trial court held that he was not so entitled.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant believes that the Court can decide the issues based on the briefs, but welcomes the opportunity for oral argument if the Court has questions not resolved by the briefs. Publication is warranted pursuant to Wis. Stat. § 809.23, because of the unique Constitutional issues and because the decision will be of substantial and continuing public interest.

## STATEMENT OF THE CASE

This is an appeal from a judgment of conviction entered on December 11, 2015 in Dane County, The Honorable Stephen E. Ehlke presiding, following a jury trial and guilty verdict by the jury on September 24, 2015. (R.147.) This appeal is also from the Order Denying Defendant's Post-Conviction Motion that the trial court decided orally on April 17, 2016 and by written order entered on April 25, 2016. (R.172; A-App. 101.)

By a criminal complaint filed on November 13, 2013, the State charged Dakota Black with one count of First Degree Reckless Homicide in violation of Wis. Stat. § 940.02(1), a Class B Felony. (R.1.) The case was tried to a jury on September 14-18 and 21-24, 2015. (R.185, 187, 189-195.) The jury returned a guilty verdict on September 24, 2015. (R.195:134; R.147.)

Mr. Black timely filed a Notice of Intent to Pursue Post-Conviction Relief on December 11, 2015. (R.156.) On February 13, 2017, Mr. Black filed a post-conviction motion pursuant to Wis. Stat. § 809.30 to vacate the judgment and for a new trial. (R.166.) The trial court denied Mr. Black's request for an evidentiary hearing and instead heard argument on April 17, 2017[1] at which time it orally denied the post-conviction motion. (R.197:16-17; A-App. 118-19.) It then

[1] This Court granted a motion to extend the deadline for the Circuit Court to decide the post-conviction motion. (R.89.)

entered a written order denying the motion on April 25, 2017. (R.172, A-App. 101.) Mr. Black timely filed his notice of appeal in this case on May 4, 2017. (R.174.)

## STATEMENT OF FACTS

This case arises out of the tragic death of five-year old BAT after he was found unresponsive in his home in Sun Prairie on October 22, 2013. (R.1:2.) BAT lived there with his mother ST, her boyfriend Defendant Dakota Black, and their baby son K. (R.189:20.) All four of them lived in the finished basement of Sam and Patricia Garwo—Patricia was ST's cousin. (R.189:20, 50-51.) Sam and Patricia had three other children living there. Dakota and his family had been living there about a month or less. (Id.)

On October 22, 2013, BAT came home from school on the school bus, along with a neighbor and his cousins. (R.189:160.) Patricia picked them up at the bus stop and then drove everyone home. (R.189:160.) Several witnesses testified that he looked sad on the bus. (See, e.g., R.189:61; R.190:22-23.) Patricia asked BAT if something was wrong, but he said nothing was wrong. (R.189:61-62.) Patricia then went to pick up ST from work and run an errand. (R.189:62.) She took her children, but left BAT at home with Dakota and his younger brother. (R.189:62-64.) Initially BAT went to a friend's house to see if he could play, but he was not home and so BAT returned to the house. (R.190:14-15.)

Patricia and ST returned about an hour after Patricia left. (R.189:67-68.) ST went to the basement to use the bathroom and noticed that BAT was having trouble breathing; she thought he might be having a seizure because seizures ran in the family. (R.189:68-70, 143-147.) Dakota and Patricia tried to call 911, but there were problems with reception in the basement. (R.189:72.) Eventually they got through, an ambulance came and they took BAT initially to Sun Prairie St. Mary's Hospital Emergency Department. (R.115:6.) He was then transported by med-flight to UW Children's

Hospital. (Id.) The doctors at UW performed surgery to try and lessen the pressure on the brain, but the injuries were non-reversible and he died on October 24, 2013. (R.115:8.) An autopsy found the cause of death to be blunt impact head injuries. (R.115:16.) It concluded the injuries and death were non-accidental and due to abuse. (Id.)

1. Pretrial Motions and Rulings.

The trial court made several pretrial rulings that are pertinent to this appeal.

a. Playground Fall

BAT's cousin, NG, said that she saw BAT on school playground equipment and that he fell. (R.78:3-6, R.167:57-58.) She made these statements in a recorded interview on October 25, 2013 (the day after BAT's death) when she said that she thought he fell off of the monkey bars or the swing and got a scrape. (R.167:57-58.) In addition, defense counsel's investigator interviewed NG on October 26, 2014 and she told the investigator that BAT fell off the monkey bars twice on the day that he went to the hospital. (R.78:5.)

The Circuit Court excluded this testimony as too speculative. (R.182:42-47, A-App. 122-27.) On a motion for re-consideration, the court again excluded the evidence ruling that there was no factual predicate. It also referenced the rule for a defendant to claim that a third party was the perpetrator. (R.183:8-9, A-App. 144-45.) The court also denied defendant's request to introduce the evidence as impeachment after playground supervisor's from BAT's school testified that he was not on any playground equipment. (R.189: 3-7, A-App. 148-52.)

b. Dr. Plunkett Video

The trial court precluded defense expert Dr. Plunkett from showing a video of a young child falling from

playground equipment. (R.190:28-33, A-App. 154-59.) The evidence was demonstrative of a short fall causing injuries which was part of the basis for the defense and for Dr. Plunkett's opinions.

c. *Daubert* Motions

Defense filed pretrial motions to exclude certain of the State's expert testimony under Wis. Stat. § 907.02. (R.70, 72.) In part, defense sought to exclude any State witness from opining on the cause of the death or timing of BAT's injuries unless qualified as an expert in pathology or forensic pathology on the grounds that admission would violated Rule 907.02 and *Daubert*. Defendant further sought to exclude testimony that BAT suffered from abusive head trauma on the grounds that that testimony is in essence a legal analysis and none of the State's witnesses were so qualified. (R.70:2.) In short, the defense moved to limit the State's witnesses to testifying solely about medical diagnoses on which they were qualified to opine. (Id.) One of the motions specifically sought to prohibit Dr. Knox (a pediatrician) from offering testimony about whether BAT's head injury would have been immediately debilitating. (Id. at 4.) The defense further requested that a hearing be held outside the presence of the jury to determine if an expert is qualified to offer testimony on what type of blunt force trauma would have caused BAT's injury and death. (Id.) None of the State's witnesses were credentialed or qualified in what types of forces could have caused BAT's injuries. (R.72:2-3.)

At the hearing on motions in limine, the trial court denied two of the motions simply stating that the rules of foundation would apply. (R.182:60, A-App. 133.) On the motion to prohibit Dr. Knox from testifying about areas for which she has no qualification, the court simply outright denied the motion with little comment. (R.182:62, A-App. 135.) At no time did the court hold an evidentiary hearing regarding the experts' proposed testimony.

2. Trial.

Many of the facts and details of the trial are not pertinent for this appeal. In short, the trial rested on the experts for both sides. Fact witnesses testified that they had not previously seen any abuse of BAT by Dakota Black. (R.189:43.) Instead, the issues revolved around when and how BAT suffered his head injury.

The State's experts characterized the case as one of "abusive head trauma." (R.187:97.) Contrary to the defense experts, the State's experts (Dr. Knox and Dr. Smith) testified that a short fall could not have caused BAT's injuries and deaths. (R.187:97; R.192:25.) They also testified that BAT would have been unconscious in a matter of minutes. (R.187:99; R192:25.) Regarding causation, Dr. Knox testified that if an adult forcibly threw a child onto a mattress that it could account for the head injuries. (R187:100-101.) Dr. Smith testified that the injuries somehow were the equivalent of a 35-40 mph unrestrained vehicular accident. (R.192:37.) He also testified that due to the difference in body mass that if an adult threw a child onto a mattress it could have caused the injuries. (R.192:42-43.)

The defense witnesses on the other hand testified that there was insufficient evidence to conclude that the injuries were caused by abuse as opposed to accidental causes. (R.192:176-77; R.194:106-07.) Dr. Plunkett testified extensively about short falls being able to cause this type of head trauma in a child. (R.192:127-30.) Significantly, Dr. Plunkett testified that with the hardwood floor at the base of the basement stairs, that a short fall down the stairs could have caused the injuries. (Id. at 148, 176.) He also testified that Dr. Knox was incorrect in saying that lucid intervals (where the accident is a significant period prior to the symptoms) are rare in children because it was contradicted by a half dozen studies. (Id. at 149.)

Unlike the State, the defense called as an expert witness a biomedical engineer, Dr. Chris Van Ee. (R.193:71.) Dr. Van Ee has a Ph.D. in biomedical engineering with a focus on impact and orthopedic biomechanics. (Id. at 73.) He also opined that it was possible for BAT to have suffered a fatal head injury from a fall down the stairs. (Id. at 89-90.)

Dr. Jan Leestma also testified for the defense. (R.194:32.) Dr. Leestma is a physician, pathologist, and neuropathologist. (R.194:33.) Among other things, he testified to there being old scarring in BAT's brain (Id. at 72); refuted Dr. Knox's testimony that BAT must have been immediately symptomatic (Id. at 92-96); and that the manner of death is undetermined (Id. at 106).

3. Post-Conviction Motion.

Defendant filed a post-conviction motion alleging ineffective assistance of counsel and also requesting a new trial in the interest of justice based on the trial court's prior rulings. (R.166.) The primary basis for the ineffective assistance was that counsel failed to file a notice of learned treatises with sufficient treatises for both direct and cross-examination. (R.167:3-6.) Counsel's notice of learned treatises included only five articles going to the issue of "lucid interval." (R.28.) When conducting the direct examination of defense expert Chris Van Ee the trial court sustained the State's objection when counsel attempted to get additional treatises into evidence. (R.193:103-04.) Defendant also argued that related to the lack of learned treatises counsel failed to adequately attack the State's witnesses in part because he did not have sufficient ammunition through learned treatises and in not pushing the *Daubert* issue further. (R.167:6-8.)

Defendant also alleged that trial counsel was ineffective for failing to impeach Patricia Garwo. In her first statement to the police on the evening of the incident, October 22, 2013, Patricia Garwo told Officer Waldera that she went

downstairs after BAT's mother yelled up to her that she needed Patricia. Patricia said that when she went downstairs, BAT was on the floor. (R.167:51.) In a second interview on October 29, 2013, Ms. Garwo told Detective Hendrickson that BAT was "laying on the bed with his head near the pillow and that [ST] was either sitting or somewhat kneeling over the side of the bed attending to him." (R.167:53.) At trial, however, she testified for the first time that upon coming downstairs she saw BAT on the bed tucked in with a blanket. (R.189:70-71.) This also was inconsistent with BAT's mother's testimony upon coming down the stairs she saw him on his back and not covered with a blanket. (R.189:146.)

Defendant raised in his motion that counsel was ineffective for failing to impeach Patricia Garwo on her suddenly new testimony that BAT was tucked in a blanket, because it undermined a potential defense theory. One of the defense theories for the possible cause of death was that BAT fell down the stairs. Yet, if he fell down the stairs and was alone, it would have been impossible (or at least highly unrealistic) that he could have then laid down on the bed and tucked himself in with the blanket.

Defendant also moved for a new trial in the interest of justice based on a number of the trial court's rulings both pre-trial and at trial: (1) the exclusion of the playground fall testimony; (2) Dr. Plunkett's video of the short fall; (3) denial of the *Daubert* motion; (4) allowing rebuttal witness Dr. Lori Frasier. (R.167:11-14.)

At the hearing on April 17, 2017, the trial court denied defendant's request for an evidentiary *Machner* hearing on the grounds that defendant did not allege sufficient facts to establish the basis for an evidentiary hearing. (R.197:16-17, A-App. 118-19.) The court went through the alleged ineffective assistance and found that there was no deficiency that was prejudicial. (R.197:7-14, A-App. 109-16.) Regarding the learned treatises, the court held that many were not relevant and that even if deficient there was no prejudice

because the defense was able to put in its theory. (R.197:7-8, A-App. 109-11.) Regarding *Daubert* issues, the court thought it was just a difference of opinion among experts. (R.197:9-10, A-App. 110-11.) The court also stated that in preparation for the hearing, it had gone back over all of its prior rulings at issue and would not reach a different conclusion. The court therefore found no basis for a new trial in the interest of justice and that the case was fully and fairly tried. (R.197:15, A-App. 117.)

## ARGUMENT

### I. INTRODUCTION.

This case involves the tragic death of five-year old BAT. There were no witnesses to any trauma, no past history of abuse against him by the defendant or any other household member, and no true evidence of what caused BAT's injuries. The entire case rose and fell on expert testimony. There was no dispute that BAT suffered a traumatic head injury that caused his death. However, the jury received a one-sided presentation. The jury was presented with speculation by the State's so-called expert witnesses as to causation. Without any solid medical basis, the State's experts speculated that BAT's death was due to abusive head trauma by Dakota Black. On the other hand, the trial court prevented the defense from putting on a full defense and offering alternative theories for BAT's head injury.

In addition to the errors by the trial court in preventing Dakota Black from presenting a full defense, trial counsel erred in failing to file all necessary learned treatises. This failure hamstrung him both in direct examination of the Defense witnesses and in cross-examining the State's experts. Counsel's ineffective impeachment of Patricia Garwo also undermined the Defense. These deficiencies, together with the trial court's errors, resulted in an unfair trial and this Court should vacate the conviction.

## II. STANDARD OF REVIEW.

This Court reviews conclusions of law *de novo* and is not bound by a trial court's conclusions. *City of Muskego v. Godec*, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992). Normally, the appellate court does not upset the trial court's findings of fact unless they are against "the great weight and clear preponderance of the evidence," except when there are questions of constitutional fact. *State v. Turner*, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987). Questions of constitutional fact are "subject to independent review and require an independent application of the constitutional principles involved to the facts as found by the trial court." *Id.* at 344. Whether a deprivation of constitutional rights has occurred is also a question which this Court reviews *de novo. State v. Fawcett*, 145 Wis. 2d 244, 250, 425 N.W.2d 91 (Ct. App. 1988). Whether the defendant was denied his right to present a defense is a question of constitutional fact that this Court determines independently of the Circuit Court. *State v. Shomberg*, 2006 WI 9, ¶26, 288 Wis. 2d 1, 709 N.W.2d 370.

This Court will find an erroneous exercise of discretion by a trial court if it "'failed to exercise its discretion, the facts fail to support the trial court's decision, or this court finds that the trial court applied the wrong legal standard.'" *State v. Black*, 2001WI 31, ¶ 9, 242 Wis. 2d 126, 624 N.W.2d 363 (citation omitted).

An ineffective assistance of counsel claim presents a mixed question of fact and law for an appellate court. *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. On the one hand, this Court will uphold the trial court's findings of fact "unless they are clearly erroneous." *Id.* On the other hand, whether or not trial counsel's performance met the constitutional standards for effective assistance of counsel is a question of law that the appellate courts review de novo. *Id.*

When a circuit court denies a post-conviction motion without an evidentiary hearing as happened here, this Court

reviews the decision under the *de novo* standard and independently determines whether the facts alleged, if true, would establish the denial of defendant's constitutional rights. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

## III. THE COURT ERRED IN EXCLUDING DEFENSE EVIDENCE.

A defendant has a constitutional right under the Compulsory Process Clause to present a defense. Const. Am. vi; Wisconsin Constitution Art. I, Sec. 7. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). *See also Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) ("the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") This includes the right to present the testimony of favorable witnesses. *See State v. Pulizzano*, 155 Wis. 2d 633, 645-46, 456 N.W.2d 325 (1990). As one commentator has stated: "A defendant has the right to introduce material evidence in his favor whatever its character, unless the state can demonstrate that the jury is incapable of determining its weight and credibility and that the only way to ensure the integrity of the trial is to exclude the evidence altogether." Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 159 (1974). The trial court's rulings violated Mr. Black's constitutional right to present a defense.

The issue regarding BAT's death was whether it was abusive head trauma as claimed by the State or whether it was accidental. Without any witnesses to the precipitating event, past history of abuse, or any evidence that Dakota Black actually abused or injured BAT, the State's expert witnesses concluded from the brain injuries that it must have been abusive head trauma. Without any scientific basis in biomedical engineering, they offered testimony about the amount of force necessary and speculated on ways the

injuries could have occurred. Nonetheless, when it came to the Defense attempting to put in evidence of an alternative accidental cause, the trial court excluded the evidence. NG made statements that BAT fell on playground equipment. The State's witnesses from the school even testified that BAT was never on the playground equipment. Nevertheless, the trial court refused to allow NG's testimony even to impeach the school playground supervisors. By doing so, the trial court usurped the jury's role and prevented Dakota Black from presenting a full defense.

The only thing anyone really knows is that about an hour after coming home from school, BAT's mother found him lying on his bed in the basement struggling to breath. No one who testified truly knows if something happened in that intervening hour that caused the subsequent findings of a traumatic brain injury. Nor does anyone truly know if some earlier incident could have caused the injuries. The trial court allowed the State to present its theory of what occurred, but it prevented the Defense from doing likewise.

Moreover, the trial court precluded defense expert Dr. Plunkett from showing a video demonstrating that a short fall could cause brain injury and death in a child. After the trial court excluded evidence of a playground fall, the Defense was left only with an alternative accidental fall down the stairs. Dr. Plunkett's video would have demonstrated via video how his testimony about short fall potentially causing a fatal injury. Yet, once again, the trial court denied the defendant's constitutional right under the compulsory process clause to put on a full defense. The State could speculate all it wanted to about how BAT might have suffered injuries, but when it came to allowing Dakota Black his constitutional rights, the trial court erred on the wrong side. The court should have allowed the evidence in and let the jury perform its job of weighing the evidence and deciding the facts. There was nothing about any of this evidence that would have prevented the jury from determining its weight and credibility. Therefore, Mr. Black is entitled to a new trial.

## IV. THE TRIAL COURT SHOULD HAVE EXCLUDED THE STATE'S EXPERT EVIDENCE.

The admissibility of expert testimony in Wisconsin is governed by Wis. Stat. § 907.02. *See Seifert v. Balink*, 2017 WI 2, ¶ 50, 372 Wis. 2d 525, 888 N.W.2d 816; *State v. Giese*, 2014 WI App 92, ¶17, 356 Wis. 2d 796, 854 N.W.2d 687. The legislature amended § 907.02 in 2011 to codify the standard from *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) and subsequent cases. *Seifert*, at ¶ 51. Under amended § 907.02 and *Daubert*, the trial court serves as a gatekeeper. "This gatekeeper obligation 'assign[s] to the trial court the task of ensuring that a scientific expert is qualified' and that his or her 'testimony both rests on a reliable foundation and is relevant to the task at hand." *Id*. at ¶ 57, *quoting Daubert*, 509 U.S. at 597. This gate-keeper role is a change from the prior standard looking only at whether "the witness is qualified to testify and the testimony would help the trier of fact understand the evidence or determine a fact at issue." *Giese*, 2014 WI App 92, at ¶17, quoting *State v. Kandutsch*, 2011 WI 78, ¶26, 336 Wis. 2d 478, 799 N.W.2d 865.

In determining whether expert testimony meets the new standards, the trial court should focus on the expert's principles and methodology, not the conclusion. *Giese*, 2014 WI App 92, at ¶18. Yet, with the State's experts it was merely a conclusion without any methodology. There is not an exhaustive list of factors, but the courts have stated: "Relevant factors include whether the scientific approach can be objectively tested, whether it has been subject to peer review and publication, and whether it is generally accepted in the scientific community." *Id*., quoting *Daubert*, 509 U.S. at 593-94. According to Justice Ziegler, the best practice for a trial court "is to create a detailed, complete record regarding why any particular expert's testimony meets the heightened scrutiny due under § 907.02." *Seifert*, 2017 WI 2 at ¶ 189 (J. Ziegler concurring). The circuit court in *Siefert* held a pretrial

hearing on the admissibility of the expert's proposed testimony. Id., ¶ 208. The trial court here held no such hearing.

The prosecution and its experts characterized this case as one of "abusive head trauma" (See for example Dr. Knox Testimony, R.187:97). "Acceleration-deceleration injury,"' "inertial brain injury," and "Abusive Head Trauma ("AHT")" are terms that are often used interchangeably with "Shaken Baby Syndrome (SBS)" or "Shaken Impact Syndrome." Press Release, American Academy of Pediatrics, Abusive Head Trauma: A New Name for Shaken Baby Syndrome, available at http://www.aap.org/en-us/about-the-aap/aap-press-room/pages/Abusive-Head-Trauma-A-New-Name-f'or-Shaken-Baby-Syndrome.aspx. Rather than a classic medical diagnosis, SBS/AHT is a determination about medical causation and criminality, often when no information about causation is available and many possible causes are present. SBS/AHT cases are problematic because they are based on the flawed assumption that it is possible for a physician to view certain medical findings and reliably diagnose abuse. The medical findings often attributed to abuse are also present in many non-abusive scenarios. Scientific literature, however, does not support a categorical conclusion regarding causation of these injuries.

Both Dr. Knox and Dr. Smith, who testified for the State, testified that there was no possibility of a lucid interval here; that BAT would have been unconscious in a matter of minutes at best. (R.187:99; R.192:25.) Both Dr. Knox and Dr. Smith also denied that a short fall could have caused the injuries and death here. (R.187:97; R.192:25.) Scientific evidence exists to refute these conclusions.

The opinion that short falls cannot cause injuries like BAT's was outdated and disfavored at the time of trial. In 2001, the National Association of Medical Examiners (NAME) published a paper that argued that subdural hemorrhages, retinal hemorrhages, and brain swelling were

caused by "acceleration/deceleration," which appeared to view as a proxy for shaking. This paper did not pass editorial peer review at the time of its publication, and was officially withdrawn in 2006, never to reappear. Moran, David A., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting it Right*, K.A. Findley, P.D. Barnes, and W. Squier, co-authors, Hous. J. Health L. & Pol'y 12, no. 2 (2012): pp. 232-33, 240. Similarly, in 2001, the American Academy of Pediatrics (AAP) published a position statement informing their members that pediatricians should presume abuse when a child younger than one-year-old has intracranial injuries. See American Academy of Pediatrics, Committee on Child Abuse and Neglect, *Shaken Baby Syndrome: Rotational Cranial Injuries-Technical Report*, 108 Pediatrics 206 (2001). Its now outdated position in 2001 was that, "the constellation of these injuries does not occur with short falls." *Id*.

By 2009, however, the AAP revised its official position, which now states that "controversy is fueled because the mechanisms and resultant injuries of accidental and abusive head injury overlap," and removed the language from its official position regarding both the impossibility such injuries resulting from a short fall and the presumption of abuse in such cases. Cindy Christian, et al, *Abusive Head Trauma in Infants and Children*, 123 Pediatrics 1409 (2009). Recently a court in New York rejected the claims similar to those made by the prosecution's experts in this case, relying on expert testimony supported by the same body of scientific and medical literature cited here. *People v. Bailey*, Case No. 2001-0490 (Monroe County Ct., N.Y., Dec. 16, 2014) (R.167:22). In *Bailey*, a toddler fell from an 18" chair and died. At trial, the prosecution relied on shaken baby/shaken impact theory to claim that the described short fall would not account for the findings which, as in this case, included brain swelling (edema). Experts on both sides agreed that the trial testimony that short falls cannot kill was false. See *Bailey*, at 12. The court agreed that "even falls of just a few feet generate levels of force and velocity that exceed known

thresholds for brain injury" and claims to the contrary, like those in this case have "been proven to be false."

The State's experts also, without any scientific basis, testified about the amount of force necessary to have caused BAT's head injuries. Dr. Knox speculated without objection that if an adult forcibly threw a child onto a mattress that it could account for the head injuries. (R.187:100-101.) Dr. Smith went so far as to testify that the injuries were the equivalent of a 35-40 mph unrestrained vehicular accident. (R.192:37.) He also testified that due to the difference in body mass between an adult and a child a throw on the mattress could have caused the injures. (Id. at 42-43.) All of this testimony came in despite Rule 907.02 and the speculative nature and lack of foundation for the opinions. Neither witness is a biomechanical engineer who would have the expertise to discuss the amount of force necessary to cause injuries. Moreover, studies have shown that the severity of the brain injury does not indicate the amount or type of force that caused the injuries. *See, e.g.*, P. Steinbok, et al., *Early hypodensity on computed tomographic scan of the brain in an accidental pediatric head injury*, 60 Neurosurgery 689 (2007).

The trial court's failure to properly exercise its gatekeeper role and exclude the State's expert witnesses allowed the jury to hear speculative testimony. Therefore, this Court should vacate defendant's conviction and remand for a new trial.

## V. THE TRIAL COURT ERRED IN ALLOWING DR. FRASIER AS A REBUTTAL WITNESS.

The State called two rebuttal witnesses, Dr. Vincent Tranchida and Dr. Lori Frasier. While Dr. Tranchida arguably was in rebuttal to testimony of Defendant's experts, Dr. Frasier's testimony about spanking was not truly rebuttal and defense counsel objected. (R.194:252-254, A-App. 161-63.) The trial court overruled the objection and found it to be

fair rebuttal. (R.194: 254, A-App. 163.) This, however, was not fair rebuttal, but rather merely an attempt by the State to get in case-in-chief evidence after Defense rested. Wisconsin allows "bona fide rebuttal evidence" where the evidence was not necessary for the State's case-in-chief and it became necessary due to the defense case. *State v. Novy*, 2013 WI 23, ¶34, 346 Wis. 2d 289, 827 N.W.2d 610, *citing Lunde v. State*, 85 Wis. 2d 80, 91, 270 N.W.2d 180 (1978). Dr. Frasier's testimony was not bona fide rebuttal evidence that became necessary due to the defense case.

The issue of bruising from spanking was brought up by the State in its case-in-chief in the testimony of Dr. Knox in attempting to disprove accidental injuries. (R.187:119-121.) The State claimed that it was necessary rebuttal because of the cross-examination of Dr. Roman (R.194: 252-253, A-App. 161-62), but Dr. Roman testified in the State's case-in-chief. In fact, Dr. Roman testified on the same day and prior to Dr. Knox testifying. (R.187:5-76.) Thus, not only should the State have presented Dr. Frasier's testimony in its case-in-chief, but it was not in reaction to any evidence from the Defense case. Therefore, the trial court should not have allowed it as rebuttal. Instead the trial court allowed the State to put on an extra witness after the defense rested to do nothing but underscore the State's theory, furthering the one-sided nature of the trial.

## VI. DEFENSE COUNSEL WAS INEFFCTIVE.

The Sixth Amendment's guarantee of a right to counsel is the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052 (1984). The purpose is to ensure the fair trial to which every defendant is entitled. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. A defendant must meet two requirements to prove ineffective assistance of counsel: (1)

that counsel's conduct was deficient; and (2) that the deficient performance prejudiced the defense. Id. at 687. *See also State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305.

The Supreme Court stated that there are no exhaustive lists of what constitutes deficient performance by counsel, but did give some guidance stressing that there must be a reliable adversarial process.

> From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing processing.

*Strickland*, 466 U.S. at 688. The inquiry is "whether counsel's assistance was reasonable considering all the circumstances." *Id*. "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." *Thiel*, ¶ 19.

The second prong to show ineffective assistance of counsel is prejudice. Prejudice is based on reasonable probability. The defendant does not need to show that but for the deficient performance it was more likely than not that the outcome would have been different. *Strickland*, 466 U.S. at 693. Instead, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694 (emphasis added). The defendant, however, need not prove that each deficiency alone was prejudicial. Rather, the Wisconsin Supreme Court in cases of multiple deficiencies adopted the

standard "that prejudice should be assessed based on the cumulative effect of counsel's deficiencies." *Thiel*, ¶ 59.

Mr. Black was denied effective assistance of counsel for the failure to effectively attack the State's expert medical testimony. There were no witnesses to whatever caused BAT's head injury. Thus, the case turned on the expert medical testimony.

Counsel filed a notice of learned treatises with a minimum number of treatises—only five treatises that counsel stated went to the issue of "lucid interval." (R.28.) This case rested on the defense disproving the State's theory that BAT died as a result of abusive head trauma (AHT). As noted above, however, the prosecution witnesses' theory is the subject of great debate and an argument exists that the studies supporting it are not scientifically valid. Among others, Professor Keith Findley of UW Law School has written extensively on the subject. *See, e.g.*, Moran, David A., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting it Right*, K.A. Findley, P.D. Barnes, and W. Squier, co-authors, Hous. J. Health L. & Pol'y 12, no. 2 (2012): 209-312. A review of this article on its own would have generated numerous other learned treatises that defense counsel should have cited both to refute the prosecution theory and to support the defense theory. Consultation with defense experts also should have generated additional articles.

This lack of learned treatises was a problem when in the direct testimony of defense expert Dr. Chris Van Ee, the Circuit Court sustained the State's objection to counsel trying to admit learned treatises for which he did not give notice. (R.193:103-104.) Counsel should have listed all of those treatises in his notice of learned treatises. At the very least counsel should have consulted with his experts to make sure that the correct treatises were filed. Indeed, counsel should have included at least one of Dr. Van Ee's papers: Chris Van Ee, et al., *Child ATD Reconstruction of a Fatal Pediatric*

*Fall*, Proc. ASME (2009). By not listing these treatises, he then was precluded by the court from using them on direct examination of the defense experts. This lessened the effect of the defense experts' testimony.

Moreover, and perhaps even more importantly, by not filing sufficient learned treatises, counsel was lacking ammunition to attack the State's witnesses. This case was not a straight forward homicide case (to the extent that there is such a thing). There were no witnesses to an alleged crime. No DNA evidence. No murder weapon with the defendant's finger prints on it. Instead we have the tragic death of a five-year old and the cause of that death rested solely on expert testimony. It was nearly impossible to confront the State's expert witnesses and refute their theories without sufficient learned treatises on which to cross-examine them.

In sum, counsel failed to effectively attack the State's experts and their theories. Furthermore, as noted above, counsel undermined the defense theory by failing to impeach Patricia Garwo on her changed testimony about how she first saw BAT. These failures prejudiced Mr. Black and undermine the confidence in the jury's ultimate verdict.

In addition, although the trial court ruled that an evidentiary hearing was not necessary, defendant raised sufficient issues for the court to have held an evidentiary hearing pursuant to *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Our Supreme Court has held that to be entitled to an evidentiary hearing on a post-conviction motion, "the motion must include facts that 'allow the reviewing court to meaningfully assess [the defendant's] claim.'" *State v. Allen*, 2004 WI 106, ¶ 21, 274 Wis. 2d 568, 682 N.W.2d 433. These facts must be facts that are material to the claim. *Id*. ¶ 22. The Court went on further to suggest that it include "who, what, where, when, why, and how." *Id*. ¶ 23. Defendant met these standards.

First, Defendant identified numerous other learned treatises for which counsel could have provided proper notice. (R.167:20.) Indeed it was the State that raised this issue at trial and objected to counsel introducing treatises for which he did not file proper notice. This then limited his examination of Dr. Van Ee. Contrary to the State's implication it its response to Defendant's post-conviction motion, Defendant did not try to pass off as a learned treatise the article co-authored by Professor Findley. Rather, Defendant cited to it and said that a review of that article alone would have generated numerous other learned treatises. (R.167:4.)

This case revolved around the cause of the traumatic brain injury suffered by BAT that led to his death. The State's witnesses opined that it was not accidental, that it was caused by abusive head trauma. (See, e.g., Dr. Knox testimony, R.187:97.) Defendant argued and cited authorities substantiating that these issues are a matter of great debate in the medical field. By not including all relevant treatises which both to use on direct and to cross the State's witnesses, the defense case was hampered. This was defective performance and prejudicial to Mr. Black. Although Defendant believes that there would be no strategic reasons for not filing sufficient learned treatises, by not holding an evidentiary *Machner* hearing, the trial court did give trial counsel an opportunity to explain his reasoning.

The standard for ineffective assistance of counsel is not that "but for" the omissions or errors by counsel that the result would have been different. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The errors and omissions raised by Defendant are specific and material to the determination of whether confidence in the outcome is

undermined. Counsel's weak attack on the State's experts, including the lack of ammunition in the form of learned treatises, undermines confidence in the jury's verdict.

Moreover, Mr. Black does not need to prove that each deficiency alone was prejudicial. Rather, the Wisconsin Supreme Court in cases of multiple deficiencies adopted the standard "that prejudice should be assessed based on the cumulative effect of counsel's deficiencies." *State v. Thiel*, 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305. The alleged inefficiencies raised by Defendant in his post-conviction motion and brief were both sufficient to justify a hearing and for a finding of ineffectiveness of counsel to justify a new trial.

## VII. THIS COURT SHOULD VACATE THE CONVICTION AND REVERSE THIS MATTER FOR A NEW TRIAL IN THE INTERESTS OF JUSTICE.

This Court may order a new trial in the interest of justice in two situations: (1) when the real controversy has not been fully tried; or (2) if it is probable that for any reason justice has miscarried. *State v. Wyss*, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985). This Court also can exercise its discretional authority to reverse under Wis. Stat. § 752.35 when it concludes that the real controversy has not been tried, even if it does not find a probability of a different result. *See, e.g., State v. Jeffrey A. W.* 2010 WI App 29, ¶¶13-14, 323 Wis. 2d 541, 780 N.W.2d 231; *State v. Cuyler*, 110 Wis. 2d 133, 142-43, 327 N.W.2d 662 (1983); *Garcia v. State*, 73 Wis. 2d 651, 245 N.W.2d 654 (1976).

There are two factually distinct ways in which the real controversy might not have been fully tried. First, when the jury erroneously was not given the opportunity to hear important testimony. Second, when evidence before the jury was not properly admitted so that it so clouded a crucial issue

that the real controversy was not tried. *Wyss*, 124 Wis. 2d at 735.

> In either of these situations, the court is not confined to apply the mechanistic formula articulated in *Lock v. State*, 31 Wis. 2d 110, 142 N.W.2d 183 (1966), which required it to find a substantial probability of a different result on retrial…. Thus, the court must have the liberty in such situations to consider the totality of the circumstances and determine whether a new trial is required to accomplish the ends of justice because the real controversy has not been fully tried.

*Id*. at 735-36 (citations omitted).

Each issue ruled on by the trial court is independently sufficient to justify this Court vacating the conviction. Taken together, they weigh even more heavily in favor of such. The trial court's rulings hampered Dakota Black's ability to present a defense and left the jury with a one-sided and speculative picture. Therefore, together with counsel's ineffectiveness, the real controversy was never tried. "The administration of justice is and should be a search for the truth." *Garcia*, at 655. The search for the truth did not occur. The jury only had one side of the story—the State's side. Thus, in the interests of justice this Court should order a new trial.

## CONCLUSION

For the above reasons, Defendant respectfully requests that this Court reverse the trial court, vacate the judgment of conviction, and remand this matter to the Circuit Court for a new trial.

Dated this 21st day of July, 2017.

Respectfully submitted,

_____

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# CERTIFICATION AS TO FORM/LENGTH

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, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6818 words.

Dated this 21st day of July, 2017.

Signed:

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# CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of July, 2017.

Signed:

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# CERTIFICATION AS TO APPENDIX

I hereby certify that filed 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 circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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, and 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 one or more initials or other appropriate pseudonym or designation 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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# APPENDIX

# INDEX TO APPENDIX