STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2021AP000155

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JENNIFER HANCOCK,

Defendant-Appellant.

ON APPEAL FROM A DECISION AND ORDER DENYING A MOTION FOR A NEW TRIAL ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE DANIEL T. DILLON, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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BRIEF OF DEFENDANT-APPELLANT

INTRODUCTION

Jennifer Hancock has spent the last twelve years in prison based on a trial that would be fundamentally different if it occurred today.

In 2009, Ms. Hancock was convicted in the death of infant L.W.—and received a twenty-year sentence—based on an entirely circumstantial case brought by the State. The key issue at trial was the cause of L.W.'s death. The State presented the medical examiner who conducted L.W.'s autopsy and four other

medical witnesses who testified that L.W.'s injuries could only have been caused by abuse. Much of the science relied upon by the State's experts at trial was already controversial in the medical field, but Ms. Hancock's trial attorney failed to present evidence of that controversy to the jury, leaving the testimony of the State's experts virtually unchallenged. Without hearing such testimony, the jury could only conclude that Ms. Hancock had abused L.W. and caused his death.

The medical evidence at Ms. Hancock's trial would be fundamentally different if the trial occurred today because (1) the medical examiner has renounced critical causation conclusions he drew at trial based on his additional decade of experience and (2) there is now twelve more years' worth of research and medical experience further calling into question, and shifting the consensus regarding, the diagnoses of abuse the State offered at trial.

The State's medical examiner—the only trial witness who both testified about L.W.'s cause of death and examined L.W.—has recanted his testimony that L.W. died from abuse and would now testify that the cause of L.W.'s injuries and ultimate death cannot be determined to a reasonable degree of medical certainty. Multiple additional medical experts have testified that they agree with the medical examiner's new opinions, and that they do not believe the medical evidence supports the State's theory that L.W. was abused. In addition, other expert testimony central to the State's case at trial—including statements that there was a 95% likelihood L.W. died from abusive head trauma and that L.W. had a femur injury that was uniquely diagnostic of abuse—was based on theories that have since been rejected or seriously questioned by the medical community and could no longer be relied upon by the State. In all likelihood, if Ms. Hancock were tried today, a jury would have

reasonable doubt as to whether L.W. died from abuse at Ms. Hancock's hands.

When given the opportunity to correct this injustice and grant Ms. Hancock a new trial, the circuit court misapplied Wisconsin law and incorrectly found that the medical examiner's recantation did not qualify as "newly discovered evidence" and would not have created a reasonable probability that a jury would find reasonable doubt. The trial court also declined to grant Ms. Hancock a new trial in the interest of justice. Ms. Hancock now appeals.

ISSUES PRESENTED

1. Did the circuit court err in denying a new trial based on newly discovered evidence:

   a. By applying an erroneous legal standard to determine whether the medical examiner's new cause-of-death opinion was "new evidence";

   b. By applying an erroneous standard for corroboration of new medical opinions; and

   c. By applying an erroneous legal standard and undervaluing Ms. Hancock's new evidence in evaluating whether there was a reasonable probability of a different result at trial, had Ms. Hancock's jury heard the new evidence?

The circuit court denied a new trial based upon newly discovered evidence.

2. Should this Court exercise its independent discretionary authority to grant Ms. Hancock a new trial in the interest of justice, in light of the medical examiner's new opinion, the new medical evidence presented at the post-conviction hearing, and the

record showing that the validity of the State's theory of abuse was never fully tried due to her counsel's errors?

The circuit court declined to order a new trial in the interest of justice.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Ms. Hancock requests oral argument. This is an unusually complex case, involving both a lengthy trial record and a lengthy post-conviction hearing that included five days of testimony from seven different medical professionals. While Ms. Hancock has tried to be as complete and clear as possible, the briefing format simply does not allow full exploration of all facts and issues in the case. Oral argument should aid in a full understanding of the case.

Ms. Hancock does not request publication because the issues in this case can be resolved by applying established legal principles to the facts.

STATEMENT OF THE CASE AND FACTS

A. Background Facts

L.W. had a complicated medical history; both his birth and early development were atypical. (169; 170; 518:188-192; 519:205-218.) L.W. was born one month premature by an unscheduled, complicated caesarian section that required manipulation of his body. (169:1-2; 518:188-190.) He was quiet when born, prompting the application of "suctioning [and] vigorous stim[ulation]" to activate breathing, and had a "low" vital sign analysis score, indicating that he was "somewhat depressed" at birth. (169:2; 518:188-190.) L.W.'s family medical history included Sudden Infant Death Syndrome ("SIDS")—his cousin suffered an

inexplicable, SIDS-related death during infancy. (171:2.)

In August 2007, Ms. Hancock, a state-certified home-daycare provider, began caring for three-month-old L.W. (507:10-35.) In the days leading up to his collapse, L.W. showed symptoms of a continued health decline, including projectile vomiting, decreased appetite, and irritability. (170:2.)

On September 7, 2007, Ms. Hancock opened her daycare as usual and welcomed L.W. and three other children. (507:56-59.) L.W. was notably fussy when he arrived. (507:97-98.) After spending part of the morning in the backyard with the children, Ms. Hancock brought them into the playroom and changed L.W.'s diaper. (507:62-65.) She briefly stepped away to throw away his diaper, and when she returned saw a toddler lifting herself off of L.W., who was "crying really hard." (507:65-67.) Ms. Hancock immediately picked L.W. up to console him, and after twenty minutes he settled down and took a fifteen-minute nap. (507:67-69.)

After L.W. woke from his nap, Ms. Hancock fed him, held him for about twenty minutes until he fell asleep, and laid him on his mat with a pacifier. (507:69, 73-75.) A few minutes later, Ms. Hancock checked on L.W. and noticed his pacifier had fallen out of his mouth. (507:76.) When she picked him up, L.W. was limp. (507:77-78.) Ms. Hancock immediately called 9-1-1 and performed CPR. (570:78-81.) Police arrived two minutes after the call, followed several minutes later by emergency medical services who transported L.W. to the hospital. (173:6; 174.)

On September 11, 2007, four days after his hospital admission, doctors took L.W. off life support and he passed away. (495:205-206.)

After L.W.'s collapse, Ms. Hancock cooperated with the police. (173:6-7, 32-39.) She consistently recounted the events of the morning of September 7, 2007, and repeatedly stated that she had never harmed L.W. (173:6-7, 32-39.) The State, however, eventually charged her with First-Degree Reckless Homicide.[1] (1:1.)

B. The Trial & Direct Appeal

The key disputed issue at Ms. Hancock's trial was L.W.'s cause of death. The State's case was entirely circumstantial—the police investigation revealed no evidence regarding how, when, or even if a crime had occurred. As a result, the State's case rested on medical testimony that L.W.'s death was caused by an unspecified mechanism of non-accidental (i.e., abusive) head trauma.

Dr. Stier, the medical examiner who conducted L.W.'s autopsy in 2007, was the only medical witness to examine L.W.'s body. He was thus the only person with first-hand knowledge of the evidence who could give an opinion on L.W.'s cause of death. This made Dr. Stier one of the State's principal witnesses and his testimony critical to the resulting verdict; without Dr. Stier's testimony, the State would have had no testimony from anyone who examined L.W. first-hand that L.W. died from abuse.

Dr. Stier found no external signs of trauma during L.W.'s autopsy—no "acute hemorrhage or discoloration" of the scalp or visible trauma to the head, neck, or body. (274:5-6.) Dr. Stier's final autopsy diagnosed L.W. as having: (i) a heart virus of undetermined significance; (ii) a bilateral, thin subdural hemorrhage (i.e., brain bleeding) of varying

[1] The State also charged Ms. Hancock with two counts of Physical Abuse of a Child, which were dismissed prior to trial. (1:1; 108:1.)

ages with chronic (i.e., old) bleeding on the right side and acute bleeding bilaterally; (iii) a parietal skull bone radiographic "irregularity"; (iv) brain swelling; and (v) a left corner or bucket-handle femur fracture, which is also sometimes referred to as a classic metaphyseal lesion or "CML." (274:3, 6, 8-9.)

Dr. Stier testified at trial that, after performing the autopsy, he concluded to a reasonable degree of medical certainty that L.W. had suffered "nonaccidental" head trauma leading to his death. (495:114.)

The State's other medical witnesses built upon Dr. Stier's autopsy findings and conclusion and supported the State's theory that L.W.'s death was non-accidental. First, two State experts testified there was a 95% likelihood that L.W.'s brain injuries resulted from intentional trauma. (503:25, 116-117.) Second, another State expert agreed with Dr. Stier's characterization of L.W.'s femur fracture as "a unique fracture to abusive pathology." That expert added that 99.9% of femur fractures like L.W.'s are caused by abuse, before he corrected himself and said that "[i]t is not scientifically 99.9 [percent]," "[b]ut the vast, vast majority" of femur injuries like L.W.'s are caused by abuse. (495:108, 499:22-23.) Third, the State built upon ambiguity in Dr. Stier's testimony about whether he had observed a skull fracture—Dr. Stier had testified: "I'm not saying that it is [a skull fracture], I'm not saying that it isn't" (495:103-105)—and offered multiple experts who testified that the skull "irregularity" identified by Dr. Stier was clearly a skull fracture. (499:10; 503:44.)

The ability to conclusively link L.W.'s brain injury to abuse was already controversial in the medical field at the time of Ms. Hancock's trial, as was evidenced in *State* v. *Edmunds*, 2008 WI App 33, 308 Wis. 2d 374, 746 N.W.2d 590. However, Ms. Hancock's

trial attorney, John Hyland, failed to present that evidence to the jury either through effective cross examination or presentation of defense expert witnesses. Ms. Hancock's only expert witness at trial, Dr. Uscinski, did not testify about the significant and growing debate in the medical community regarding the ability to diagnose abusive head trauma in infants. Due to avoidable insufficiencies in Dr. Uscinski's expert report, he was also precluded from testifying that (1) he did not believe L.W. had a skull fracture and (2) there were potential non-abusive causes for L.W.'s femur injury. (292:3-4; 299; 508:27-29; 518:45-49.) While Dr. Uscinski theorized that L.W.'s bilateral acute brain bleed was a re-bleed of a non-bilateral chronic subdural hemorrhage developed at birth, he admitted that he had not reviewed L.W.'s autopsy materials and that his theory was not supported by research available at the time. (*See* 508:87-94, 110, 118, 135-136; 511:181, 265-266; 513:119.) Indeed, one of the State's experts testified that Dr. Uscinski's re-bleed theory was impossible because brain bleeding cannot cross from one hemisphere to another. (503:47-54, 127.)

As a result, the jury heard uncontested testimony from multiple State medical witnesses that L.W.'s brain and femur injuries, and ultimately his death, could conclusively be linked to abuse, and did not hear evidence from the defense about the controversy in the medical community regarding the validity of those conclusions or a compelling alternative explanation for L.W.'s injuries and death.

During closing arguments, the State repeatedly emphasized Dr. Stier's conclusions and the agreement among its experts that L.W. was a victim of abuse. Dr. Stier was the first medical witness the State mentioned in connection with its cause-of-death argument, and the State went on to reference Dr. Stier by name an additional twenty-seven times in closing

argument and thirteen times in rebuttal. (511:106-182, 244-268.) Throughout its argument, the State emphasized that Dr. Stier actually observed L.W. and that the "truth" of what happened was Dr. Stier's findings at autopsy. (511:177, 252-254, 265.)

The State also emphasized that each of its other medical witnesses corroborated Dr. Stier's conclusions and that "[a]ll" the State's medical witnesses, including Dr. Stier, attributed L.W.'s injuries to abuse with "100 percent consistency." (*E.g.*, 511:245-246.) The State dismissed Dr. Uscinski's testimony as the biased opinions of an unqualified doctor who did not know the relevant medical literature and ignored evidence that contradicted his re-bleed theory. (511:169-182.)

The jury convicted Ms. Hancock of First-Degree Reckless Homicide. She was sentenced to twenty years with thirteen years of imprisonment followed by seven years of extended supervision. (112; A-App. 001-002.)

Nine years later (in connection with the motion for a new trial now on appeal), Ms. Hancock's trial attorney, John Hyland,[2] submitted an affidavit and testified that he made a litany of non-strategic errors in her case that left him unprepared for her trial and unable to meaningfully challenge the State's medical testimony. (292; 518:7-173.) Judge Hyland testified that the record reflected his errors and he had expected his ineffectiveness to be challenged on direct appeal. (518:62-63.) But it wasn't. Instead, Ms. Hancock was yet again failed by her attorneys. Her first post-conviction counsel, Morris Berman, was actively investigating an ineffective assistance of counsel claim but then suffered a severe brain injury

[2] Judge Hyland is now a sitting circuit court judge in Dane County.

before finishing, and so his colleague filed a "placeholder" § 974.02 motion on his behalf that failed to raise such a claim. (520:31-75, 123, 154-155.) Berman's successor counsel, Eric Schulenburg, neither finished Berman's investigation into an ineffective assistance of counsel claim nor paid attention to the fact that Berman had been hospitalized when the brief was filed. (520:159-197.) He, too, failed to raise an ineffective assistance of counsel claim in either the § 974.02 proceedings or on direct appeal. (520:191-196.) Both the § 974.02 motion and the direct appeal were denied. (127; 2007CF002381, Doc. No. 228.)

C. Ms. Hancock's Motion for a New Trial Pursuant to Wis. Stat. § 974.06 & The Evidentiary Hearing

While Ms. Hancock was serving her sentence, three significant developments occurred. First, Dr. Stier more than doubled the number of autopsies he had conducted and, based on additional experience, recanted his prior testimony that, to a reasonable degree of medical certainty, L.W.'s injuries and death were caused by abuse. (276; *compare* 495:83 *with* 517:13.) Second, the medical knowledge regarding abuse diagnoses in infants continued to evolve, with numerous new articles adding to growing evidence that injuries like L.W.'s can have non-abusive causes. (*Infra* at 33-34.) And third, Judge Hyland admitted that he had committed non-strategic errors as Ms. Hancock's trial attorney that resulted in his failure to meaningfully challenge the State's expert testimony at trial. (292.)

On February 12, 2019, Ms. Hancock filed a Motion for a New Trial Pursuant to Wis. Stat. § 974.06 (2019-20). (168.) Ms. Hancock argued she was entitled to a new trial on three independent bases: (1) newly discovered evidence in the form of Dr. Stier's changed

opinion and the continued evolution of medical science; (2) ineffective assistance of counsel; and (3) the interest of justice. (168.) The circuit court held a seven-day evidentiary hearing. The court heard testimony from Dr. Stier, three additional medical experts presented by Ms. Hancock, and three medical experts presented by the State. The court also heard testimony from Judge Hyland and Attorneys Schulenburg and Berman.[3]

At the evidentiary hearing, Dr. Stier testified that, contrary to his trial testimony, he can no longer conclude to a reasonable degree of medical certainty that L.W.'s injuries and death were caused by abuse. (517:21, 24, 215.) Dr. Stier testified that he may have rushed to judgment or been biased in his original assessment of L.W.'s injuries and cause of death because he was pressured to find abuse. (517:39-40, 48-49.) He testified that there was "a generalized sense in meetings and discussions" that L.W.'s death "was, without question, a traumatic non-accidental fatality" and he felt "that had [he] or anyone else voiced objection to that assumption, [they] probably would have been laughed out of the room." (517:39-40.) Dr. Stier testified that he felt peer pressure to find abuse specifically from Dr. Barbara Knox, a former University of Wisconsin child-abuse pediatrician who resigned in 2019 during the course of this post-trial proceeding. (267:2; 517:51-52.) Dr. Stier also testified that he felt pressured to leave open the possibility that L.W. had a skull fracture. (276:5; 517:39-40.)

Dr. Stier explained that his experiences in the years following Ms. Hancock's trial obligated him to recant his trial testimony. (517:24-26.) After Ms. Hancock's trial, Dr. Stier conducted numerous

[3] The court also heard testimony from Detective Janet Boehnen, but struck most of her testimony as inadmissible hearsay. (*See* 522:242-246.)

autopsies in which he viewed brain injuries like L.W.'s that could not have been caused by trauma—something he had previously not thought possible. (276:3-4; 517:24-26.) Consistent with his own experiences, Dr. Stier noted there was growing recognition in his field that subdural injuries like L.W.'s can occur in the absence of trauma. (517:26, 153, 201-202.)

Dr. Stier testified that his new experiences since Ms. Hancock's trial convinced him that "a death from natural causes may explain the findings at [L.W.'s] autopsy." (276:6; 517:24-26.) Dr. Stier testified that he also no longer believes his trial testimony that L.W.'s femur injury was uniquely indicative of abuse and would now definitively tell the jury that L.W. did not have a skull fracture. (276:3-6; 517:33-44, 85-101, 225-226.) In light of Dr. Stier's improved understanding of the possible causes of L.W.'s injuries, he also now believes L.W.'s heart virus is a potential alternative explanation for L.W.'s death. (517:41.)

As a result, whereas Dr. Stier told Ms. Hancock's jury that he conclusively determined that L.W. died from non-accidental head trauma, Dr. Stier would now testify that while he believes abuse may be the "most likely" explanation for L.W.'s injuries, his experience and review of the evidence cannot support a conclusion, to a reasonable degree of medical certainty, that L.W. died from abuse. He would instead testify that the cause of L.W.'s injuries and death cannot be determined to a reasonable degree of medical certainty. (276; 517:24-26, 132, 215-218.) Such testimony by a key witness would inject reasonable doubt into the previously one-sided case.

Ms. Hancock presented three additional medical witnesses to corroborate Dr. Stier's new opinion: Dr. Ophoven, a forensic and anatomic pathologist specializing in pediatric pathology; Dr. Sahlein, a

dual-boarded neurologist and radiologist with credentials in diagnostic neuroradiology and interventional neuroradiology; and Dr. Weinraub, a child-abuse pediatrician. All three testified that, as has happened with Dr. Stier, diagnostic judgment improves with additional clinical experience and increased exposure to different data and information. (518:222; 519:178-179, 247.) Each had seen doctors erroneously diagnose abuse as the cause of injuries because those doctors lacked adequate experience or failed to rule out alternative explanations through thorough testing—just as Dr. Stier had at Ms. Hancock's trial. (355:3; 518:220-222; 519:48-49, 162, 188, 218-220, 273-274.) Ms. Hancock's experts all reviewed the medical record in the case and agreed that the science and medical evidence support Dr. Stier's recantation and new view that L.W.'s injuries and death could not be determined to a reasonable degree of medical certainty because they could be explained by non-abusive causes. (518:186, 232-233; 519:19-22, 27-28, 223.) The witnesses further testified that, for various reasons, they believed L.W. had not been abused. (*See generally*, 518:177-233; 519; 521:6-177.)

Numerous articles published after Ms. Hancock's trial were also entered into evidence that reflect the growing collection of data and acceptance in the medical field that injuries like L.W.'s can occur in the absence of trauma. (*See, e.g.*, 277; 289; 329; 332; 336; 334; 454; 456; 457; 467; 468; 517:26, 201-202; 519:23-24; 523:165-178.)

The State called its own medical witnesses to respond to Dr. Stier's new conclusions: Dr. Tranchida, Dane County's subsequently appointed Chief Medical Examiner; Dr. Kara Gill, a pediatric radiologist; and Dr. Nancy Harper, a child abuse pediatrician. As with Ms. Hancock's corroborating experts, each of the State's experts agreed that increased medical

experience, like Dr. Stier's, improves doctors' abilities to accurately interpret medical evidence. (522:28-30, 106-114, 202, 226-227; 523:147-153.) While these experts disagreed with some of Dr. Stier's new opinions, *none* had any information suggesting that Dr. Stier was insincere or mistaken in testifying that he had personally observed subdural hemorrhages in the absence of trauma since Ms. Hancock's trial and no longer believed the conclusions he provided at trial. (522:102-104, 200-202; 523:129.)

The State included Dr. Knox and her supervisor on its witness list for months (267:2-3), but called no witnesses to rebut Dr. Stier's testimony that Dr. Knox had pressured him to find abuse. After the evidentiary hearing concluded, it first became public that the University of Wisconsin had placed Dr. Knox on administrative leave "because of concerns that arose about . . . [her] workplace behavior, including unprofessional acts that may constitute retaliation against and/or intimidation of internal and external colleagues." (477:74-78, 114-117, 147-148.) Before the investigation concluded, she resigned and left for Alaska. (*See* 267:2.) The State was aware of the circumstances surrounding Dr. Knox's departure but concealed that information by: (1) not disclosing it to Ms. Hancock's counsel (despite disclosing it in another case); and (2) objecting on relevance grounds to all questions regarding Dr. Knox's resignation (which the circuit court sustained). (*See* 477:114-117.) Ms. Hancock requested that the circuit court take judicial notice of these facts and grant an adverse inference that testimony from Dr. Knox would corroborate Dr. Stier's testimony that he was pressured to find abuse. (477:114-117.)

D. The Circuit Court's Decision

The circuit court denied Ms. Hancock's motion for a new trial. (484; A-App. 188-220.)

The circuit court held that Ms. Hancock's medical articles, though they were published after her trial, were not "new evidence" because "the origins of all the proposed theories predate the time of trial." (484:16.)

The court similarly held that Dr. Stier's new opinions, although they did not exist at the time of trial, did not qualify as "new evidence" because they were re-evaluations of the medical evidence that existed at trial. (484:2-4.) And despite Dr. Stier's explanation, under oath, that he has a different opinion today because he was pressured at trial to find abuse and had numerous post-trial experiences that led him to conclude that L.W.'s injuries could occur in the absence of trauma, the circuit court (incorrectly) stated that Dr. Stier had failed to explain why his opinions had changed other than "personal speculation" and had provided "no testimony" for the court "to give [Dr. Stier's assertions of pressure] any weight." (484:3-4, 30.) As discussed above, Dr. Stier plainly did all of those things. The circuit court also disregarded Ms. Hancock's request for judicial notice and an adverse inference regarding Dr. Knox.

The circuit court found that Dr. Stier's new opinions were not corroborated because: (1) they were based solely on "personal speculation" with "no medical authority" (which is by the record); (2) each of Ms. Hancock's experts "essentially all think [Dr. Stier] is wrong" because, in their medical opinion, there is *even less* evidence of abuse than Dr. Stier believes; and (3) the State's post-conviction experts agree with the conclusions of the State's experts and Dr. Stier at trial (which is an improper consideration). (484:4-16.) The circuit court failed to consider whether Ms. Hancock's new medical articles corroborated Dr. Stier's testimony.

The circuit court concluded that Dr. Stier's recantation did not provide a reasonable probability of a different result at trial: (a) because the circuit court believed Dr. Stier's trial testimony was more credible than his recantation; (b) because Dr. Stier still believes abuse is the "most likely" cause of L.W.'s injuries; and (c) because of the strength of the "unchanged" testimony of the other prosecution witnesses. (484:14, 16-17.) These comparisons and considerations are improper.

On the ineffective assistance of counsel claims, the circuit court held, despite her prior counsel's admissions, that Ms. Hancock had not met the *Strickland v. Washington* bar for proving that Judge Hyland, Attorney Berman, or Attorney Schulenburg were constitutionally ineffective. (484:17-23.)

The circuit court also denied Ms. Hancock a new trial in the interest of justice, stating only that "[n]othing [the] court has heard in the postconviction hearing in this case leads to the conclusion that this case was not fully and fairly tried." (484:24.)

Ms. Hancock appeals the circuit court's rejection of her newly discovered evidence claim as it relates to Dr. Stier's change of opinion and separately moves the Court to exercise its discretion to grant Ms. Hancock a new trial in the interest of justice.

Ms. Hancock will present additional facts and details in the argument section below.[4]

[4] A fulsome summary of the evidence admitted at the post-conviction evidentiary hearing is located in Ms. Hancock's Proposed Findings of Fact (477; A-App. 003-187).

ARGUMENT

I. MS. HANCOCK IS ENTITLED TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE IN THE FORM OF THE MEDICAL EXAMINER AT TRIAL'S NEW CAUSE-OF-DEATH OPINION.

Ms. Hancock is entitled to a new trial based upon Dr. Stier's new, better-informed, cause-of-death opinion because his new opinion satisfies the *McCallum* test for newly discovered evidence. Under *State* v. *McCallum*, a defendant seeking a new trial in light of newly discovered evidence must first establish the existence of newly discovered evidence by showing, through clear and convincing evidence, that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). When the newly discovered evidence is a witness's recantation, the defendant must show that the recantation is corroborated by other newly discovered evidence. *Id.* at 473-74. If a defendant meets this burden, she is entitled to a new trial if "a reasonable probability exists that a different result would be reached in a trial." *Id.* at 473.[5]

McCallum is the leading Wisconsin case for evaluating motions for a new trial based on newly discovered evidence in the form of a recantation of trial testimony. But in denying Ms. Hancock's newly discovered evidence claim, the circuit court disregarded *McCallum*, never citing it in its opinion. Instead of conducting the analysis required by

[5] The reasonable probability of a different result "need not be established by clear and convincing evidence." *Edmunds*, 2008 WI App 33, ¶ 13.

McCallum, the circuit court instead (1) relied on precedent that has no application in recantation cases to hold that Dr. Stier's new cause-of-death opinion was not "new"; (2) held that Dr. Stier's recantation was uncorroborated, without citing to or applying *McCallum*'s corroboration standard; and (3) applied the wrong standard for reasonable doubt, contrary to *McCallum* and *Edmunds*, in finding that there was not a reasonable probability of a different result at trial.

A. Standard of Review

A circuit court's denial of a motion for a new trial based on newly discovered evidence is reviewed for an "erroneous exercise of discretion." *Edmunds*, 2008 WI App 33, ¶ 8. Under this standard, the circuit court's decision should be reversed "if the circuit court's factual findings are unsupported by the evidence or if the court applied an erroneous view of the law." *Id.* (quoting *State* v. *Martinez*, 150 Wis. 2d 62, 71, 440 N.W.2d 783 (1989)). Whether the circuit court applied an erroneous legal standard when exercising its discretion is reviewed *de novo*. *Seifert* v. *Balink*, 2017 WI 2, ¶ 89, 372 Wis. 2d 525, 888 N.W.2d 816.

B. The circuit court applied the wrong legal standard in holding that Dr. Stier's new cause-of-death opinion is not "new evidence."

The circuit court correctly found that Dr. Stier had changed his conclusion regarding L.W.'s cause of death. (484:2.) However, the circuit court then erroneously applied *State* v. *Fosnow*, 2001 WI App 2, 240 Wis. 2d 699, 624 N.W.2d 883, and *In re Commitment of Williams*, 2001 WI App 155, 246 Wis. 2d 722, 631 N.W.2d 623, to hold that Dr. Stier's new opinion nevertheless did not qualify as newly

discovered evidence because it was a re-evaluation of facts available at trial. (484:2-4.)

Neither *Fosnow* nor *Williams* applies here. Both cases involved newly discovered evidence claims based on a *new* expert's analysis of old facts; neither involved a witness's recantation of his trial testimony. In *Fosnow*, the defendant sought to withdraw his guilty plea based on a new psychiatrist's testimony that he had Dissociative Identity Disorder. *Fosnow*, 2001 WI App 2, ¶¶ 1-5. This Court rejected the defendant's motion to avoid creating a precedent that would allow a defendant to challenge his conviction anytime he "loses, then hires a new lawyer, who hires a new expert, who examines the same evidence and produces a new opinion." *Id.* ¶ 27 (citation omitted). In *Williams*, this Court similarly rejected the State's motion to vacate an order granting the defendant supervised release, because the State had merely obtained a new opinion from a new expert after the circuit court held that the State had failed to meet its burden of showing continued incarceration was necessary. *Williams*, 2001 WI App 155, ¶¶ 2-7, 14-22.

Dr. Stier is not a new expert producing a new opinion; Dr. Stier is the very medical witness who examined L.W. and whose testimony the State offered as evidence at trial, who has now recanted his testimony based on new knowledge and experience he gained after the trial. Accordingly, the circuit court was bound to follow *McCallum*—the Wisconsin Supreme Court's leading case on recantations.[6] There can be no reasonable dispute that Dr. Stier's new

[6] A recantation is a "formal renunciation or withdrawal of one's prior statement or testimony." *Arnold* v. *Dittmann*, 901 F.3d 830, 841 (7th Cir. 2018); *see also Recant*, Black's Law Dictionary (11th ed. 2019) (defining "recant" as "To withdraw or renounce (prior statements or testimony) formally or publicly <the prosecution hoped the eyewitness wouldn't recant her corroborating testimony on the stand>").

conclusion satisfies the first two *McCallum* factors because it did not exist until years after Ms. Hancock's trial and she was not negligent. *See McCallum*, 208 Wis. 2d at 473; *id.* at 484 (Abrahamson, C.J., concurring). Dr. Stier's new opinion also satisfies the third factor, materiality, because it undermines the cause-of-death theory offered by the State, which was the main issue at trial. *Edmunds*, 2008 WI App 33, ¶ 15; *see also*, *State* v. *Plude*, 2008 WI 58, ¶¶ 2, 46-50, 310 Wis. 2d 28, 750 N.W.2d 42 (granting a new trial where new evidence undermined the credibility of one of the State's cause-of-death experts). And it satisfies the fourth factor, non-cumulativeness, because Dr. Stier's recantation does "not merely add to the defense, but also deduct[s] from the prosecution." *Souter* v. *Jones*, 395 F.3d 577, 593 (6th Cir. 2005). Under the *McCallum* standard, the circuit court was therefore bound to hold that Dr. Stier's recantation constitutes newly discovered evidence.

In holding that Dr. Stier's new opinion was not "new," the circuit court ignored *McCallum* and instead based its decision on the mistaken premise that a trial expert's change in conclusions is not new evidence if the underlying facts have not changed. (*See* 484:2-4.) As an initial matter, this reasoning ignores that Dr. Stier was not only an expert witness at trial, but also a fact witness testifying about his observations during autopsy. Furthermore, it is black letter law that experts' opinions, and not solely the facts upon which they were formulated, are evidence. Wis. Stat. § 907.02 (2019-20) *Souter*, 395 F.3d at 592. Therefore, when experts recant their trial opinions, "the evidence itself has changed, and can most certainly be characterized as new." *Souter*, 395 F.3d at 592.

This Court addressed a similar change of opinion in *State* v. *Edmunds*, when it overturned the defendant's conviction based on new evidence

challenging the scientific underpinnings of so-called "Shaken Baby Syndrome." 2008 WI App 33. There, the medical examiner who testified for the State at the *Edmunds* trial originally opined that the infant's death was caused by shaking that must have occurred while the infant was in the defendant's care. *Id.* ¶ 2. However, in a post-conviction hearing, the medical examiner testified that he was no longer sure that shaking was the mechanism that caused the infant's death and that, in light of his increased experience following the *Edmunds* trial, he could no longer deny that the infant's brain injury may have occurred before the infant was in the defendant's care. Br. & App. of Def.-Appellant, at 4, 21, 34-35, *Edmunds*, 2008 WI App 33 (No. 2007AP933), 2007 WL 7260137 at *4, *21, *34-35. This Court granted the defendant a new trial, 2008 WI App 33, and the charges against her were ultimately dismissed.

The Sixth Circuit's decision in *Souter* v. *Jones* is instructive. Similar to the facts in this case, *Souter* involved a motion for a new trial based on the recantations of two doctors who testified at trial that the cause of the victim's death was homicide. 395 F.3d at 582-84, 590-93. The *Souter* district court held that the doctors' changed opinions were not "new" evidence, but rather "merely a restatement of [Souter's] trial defense based upon the changed opinions of some of the prosecution's expert witnesses." *Id.* at 584. The Sixth Circuit reversed, disagreeing with the district court's analysis as well as the State's argument on appeal that one of the new opinions could not support the motion for a new trial because it was based on a "second look" at the same evidence from trial. *Id.* at 592-93. The Sixth Circuit explained:

> [The doctor] was testifying at trial as an expert witness, and therefore, it is his opinion itself, rather than the underlying basis for it, which is

> the evidence presented. Therefore, if [the doctor] has changed his expert opinion, the evidence itself has changed, and can most certainly be characterized as new. . . . [T]he [doctors'] affidavits can be consider[ed] "new reliable evidence" upon which an actual innocence claim may be based.

Id. (citation omitted).

Other state courts have granted new trials using similar reasoning. For example, the Texas Court of Criminal Appeals reversed convictions in two cases with facts strikingly similar to the facts here. In *Ex parte Robbins*, the medical examiner, who testified at trial that the deceased child's death was a homicide, re-evaluated her conclusions years later and changed her cause-of-death conclusion from homicide to "undetermined." 478 S.W.3d 678, 685 (Tex. Ct. Crim. App. 2014). The medical examiner, like Dr. Stier, credited her additional experience in the years after the conviction for her newfound uncertainty regarding cause of death. *Id*. The court granted the defendant a new trial, reasoning that the medical examiner's "labeling cause of death as 'undetermined' was not available at the time of trial because her scientific knowledge has changed since the applicable trial date." *Id*. at 692; *accord id*. at 694 (Johnson, J., concurring). The same court similarly vacated a murder conviction when the medical examiner who had testified at trial that the deceased child's death was the result of intentional abuse subsequently testified that "he now believes that there is no way to determine with a reasonable degree of medical certainty whether [the child's] injuries resulted from an intentional act of abuse or an accidental fall." *Ex parte Henderson*, 384 S.W.3d 833, 833-34 (Tex. Ct. Crim. App. 2012).

Under *McCallum* and these other precedents, the circuit court committed legal error in holding that

Dr. Stier's new opinion did not constitute newly discovered evidence.

C. The circuit court applied an erroneous corroboration standard.

Recantations may serve as newly discovered evidence when they are corroborated by new evidence of "a feasible motive for the initial false statement" and "circumstantial guarantees of [] trustworthiness." *McCallum*, 208 Wis. 2d at 477-78. In determining whether a recantation satisfies the corroboration prong of the *McCallum* test, the court simply makes a threshold determination as to whether the recantation is "incredible" as a matter of law. *Id.* at 475; *id.* at 487 (Abrahamson, C.J., concurring). The court "does not determine whether the recantation is true or false"—it "merely determines whether the recanting witness is worthy of belief." *Id.* at 487 (Abrahamson, C.J., concurring). Similarly, the court need not, and in fact may not, determine "whether the jury could accept the recantation as true, or even whether the jury could believe it," because "[a] jury does not necessarily have to accept a recantation as true, nor believe it, in order to have a reasonable doubt." *Id.* at 475 n.2.

A recantation can be considered corroborated under Wisconsin law where, as here, there is a feasible explanation for the initial false statement and the recantation is both internally consistent and offered under oath. *Id.* at 478. There is no heightened standard for corroboration when a medical expert recants previous trial testimony. Indeed, the corroboration standard for medical examiners' recantations should be lower because their recantations are far more reliable than eyewitness recantations: whereas eyewitness recantations may be considered inherently unreliable, an expert's re-evaluation of a prior opinion in light of further

experience "is the hallmark of 'good' scientific methodology." *Robbins*, 478 S.W.3d at 705 (Cochran, J., concurring); *accord Souter*, 395 F.3d at 592-93 ("This new [expert] opinion is even more reliable than an eyewitness account, however, because . . . it is a result of [the doctor's] increased education, training, and experience[.]").

The circuit court abused its discretion in applying an erroneous standard for corroboration. (*See* 484:11-16.)

Dr. Stier provided, under oath, a feasible explanation for his original testimony and new opinion. First, he explained that his original testimony at trial was influenced, at least in part, from the pressure he felt to find abuse and leave open the possibility of a skull fracture. Second, he explained that, like the medical examiners' changes of opinion in *Edmunds*, *Robbins*, and *Henderson*, his additional experience (in particular, his repeated autopsy observations of non-traumatic acute subdural hemorrhages in the decade since Ms. Hancock's trial)—and the growing recognition in his field that subdural hemorrhages like L.W.'s can occur in the absence of trauma—convinced him that L.W. may not have been abused.

Dr. Stier's recantation was also offered under oath and was internally consistent, which is sufficient to establish its credibility under *McCallum*. That Dr. Stier was willing to subject himself to an unpleasant legal proceeding to voluntarily, and very publicly, impugn his prior professional judgment adds even further indicia of his sincere conviction that his trial testimony needed to be corrected. Further, the State presented no evidence that Dr. Stier was lying about being pressured to find abuse, his experiences since Ms. Hancock's trial, or that he sincerely believed his new opinions.

No further evidence was required to satisfy *McCallum*'s credibility threshold for corroboration. Ms. Hancock nevertheless offered testimony from three additional medical experts to further corroborate Dr. Stier's recantation. All three agreed—as did the State's own post-conviction experts—that diagnostic accuracy improves with additional experience. All three also testified that they had personally seen misdiagnoses of abuse due to a lack of sufficient training, testing, or experience. The circuit court ignored that this testimony adds further circumstantial guarantees that Dr. Stier's recantation was "not incredible" as a matter of law.

Moreover, Ms. Hancock's corroborating experts and numerous medical articles post-dating her trial confirmed, both individually and collectively, that there was a medical basis for Dr. Stier's new opinions. The circuit court did not consider whether the new medical articles provide circumstantial guarantees of the trustworthiness of Dr. Stier's recantation. That alone is reversible error. And, contrary to the circuit court's conclusion, it does not matter that Ms. Hancock's post-conviction experts believe that Dr. Stier can be even more confident that L.W.'s death can be explained by non-abusive causes, because their testimony is still consistent with his recantation. *Cf. McCallum*, 208 Wis. 2d at 478 (evaluating only whether the recantation was "consistent" with testimony from other witnesses). Indeed, the fact that three independent and highly qualified experts believe abuse is *unlikely* in this case only adds further circumstantial guarantees of the trustworthiness of Dr. Stier's recantation of his trial testimony that L.W. conclusively died from abuse.

It is also irrelevant to the question of corroboration that the State found articles and experts that support Dr. Stier's *original* conclusions from trial and disagree with his new opinions. As *McCallum*

makes clear, the only question is whether Dr. Stier's testimony that he no longer believes his original conclusions was "incredible"—it was not the court's role to evaluate who would ultimately win a battle of the experts and journal articles; whether Dr. Stier's new conclusions are true; or even whether Dr. Stier's new conclusions are more or less credible than his trial testimony. *McCallum*, 208 Wis. 2d at 474-75; *id.* at 487 (Abrahamson, C.J., concurring).

The circuit court therefore abused its discretion when, in violation of *McCallum*, it ignored the many layers of corroboration for Dr. Stier's recantation.

D. The circuit court committed multiple legal errors in determining there is not a reasonable probability of a different result at trial.

When a defendant presents a credible, material, and non-cumulative witness recantation, as Ms. Hancock did here, she is entitled to a new trial when "there is a reasonable probability that a jury, looking at both the [trial record] and the recantation, would have a reasonable doubt as to the defendant's guilt." *McCallum*, 208 Wis. 2d at 475. The court may not "base its decision [on this factor] solely on the credibility of the newly discovered evidence, unless it finds the new evidence to be incredible." *State* v. *Avery*, 2013 WI 13, ¶ 25, 345 Wis. 2d 407, 826 N.W.2d 60. Nor may the court base its decision on whether the State's evidence was stronger, for "a jury could have a reasonable doubt as to a defendant's guilt even if the State's evidence is stronger." *Edmunds*, 2008 WI App 33, ¶ 18. Rather, the court should consider only "whether a jury would find that the newly-discovered evidence had a sufficient impact on other evidence presented at trial that a jury would have a reasonable

doubt as to the defendant's guilt." *Plude*, 2008 WI 58, ¶ 33.

The relevant inquiry here is whether Ms. Hancock's jury would have had reasonable doubt if it had also heard Dr. Stier's recantation. The State's case against Ms. Hancock was entirely circumstantial and rested on the testimony of its expert witnesses that L.W.'s injuries and death were conclusively caused by abuse. Dr. Stier's testimony at trial was of special importance to the State's case because, as the only medical witness at trial who physically examined L.W.'s body, he was in the best position to render a cause-of-death diagnosis. *See Souter*, 395 F.3d at 593-94. Upon hearing his recantation, Ms. Hancock's jury would learn that, contrary to what he and other medical witnesses testified at trial, there are plausible non-abusive causes of L.W.'s injuries and the State's own medical examiner could not conclude to a reasonable degree of medical certainty that L.W. was abused. Dr. Stier's recantation not only adds strength to the defense's case, but also detracts from the State's evidence, undermines the State's critical cause-of-death theory, and destroys the unanimity the State's experts presented at trial. *See id.* at 593. When the State's key medical witness at trial, who was in the best position to determine the cause of the deceased's injuries and death, testifies that he now has doubts as to whether a crime occurred, there is a reasonable probability that a jury would also have reasonable doubt.

The circuit court was compelled to reach that very conclusion based on this Court's holding in *Edmunds* that there was a reasonable probability of a different result in an infant head trauma homicide case when newly discovered evidence demonstrated that there were "competing medical opinions as to how [the deceased's] injuries arose." *Edmunds*, 2008 WI App 33, ¶ 23. That conclusion was also compelled by

the Wisconsin Supreme Court's ruling in *Plude* that the "reasonable probability" factor was satisfied when new evidence undermined a critical State expert's credibility. *Plude*, 2008 WI 58, ¶ 36. Similarly, that conclusion is consistent with the holdings of other appellate courts that changes in a medical examiner's cause-of-death opinion are sufficient to create a reasonable probability of a reasonable doubt even when the medical examiner is uncertain about what actually caused the deceased's death or is merely expressing less certainty regarding the cause of death. *Cf., e.g.*, *Souter*, 395 F.3d at 583-84, 593-94; *Henderson*, 384 S.W.3d at 833-34 (infant abusive head trauma homicide case); *id.* at 837 (Cochran, J., concurring) ("This scientific uncertainty about [the infant's] manner of death raises an extremely serious concern about the accuracy of the original jury verdict."); *Robbins*, 478 S.W.3d at 685, 692 (child abuse homicide case). In holding otherwise, the circuit court departed from these consistent precedents.

In its reasonable-probability analysis, the circuit court also expressly violated the Wisconsin Supreme Court's mandate in *McCallum*, reaffirmed by this Court in *Edmunds*, that the court not weigh the credibility of Dr. Stier's trial testimony against the credibility of his recantation. *McCallum*, 208 Wis. 2d at 474-75; *id.* at 487 (Abrahamson, C.J., concurring); *Edmunds*, 2008 WI App 33, ¶¶ 17-18. Likewise, the circuit court also violated the related mandates in *McCallum* and *Edwards* that it not base its reasonable-probability determination on its own belief that the State's evidence was stronger than Ms. Hancock's. *McCallum*, 208 Wis. 2d at 474-75; *id.* at 487 (Abrahamson, C.J., concurring); *Edmunds*, 2008 WI App 33, ¶ 18. Both errors not only improperly usurped the jury's prerogative to weigh the evidence, but also constituted misapplications of the reasonable-doubt standard. As *McCallum* and *Edmunds* make clear, a jury can have a reasonable doubt even if it

finds that a recantation is less credible than the original testimony and/or that the State's case is still stronger despite the recantation. *McCallum*, 208 Wis. 2d at 474-75; *id.* at 487 (Abrahamson, C.J., concurring); *Edmunds*, 2008 WI App 33, ¶¶ 17-18.

The circuit court also misapplied the reasonable-doubt standard in holding that there was not a reasonable probability of a different result because Dr. Stier testified that abuse is the "most likely" cause of L.W.'s injuries and death. (484:17.) A "most likely" standard is a preponderance standard—not a "beyond all reasonable doubt" standard—and evidence that a crime was "most likely" committed does not prove that a crime was committed beyond a reasonable doubt. *See State* v. *Trammell*, 2019 WI 59, ¶ 48, 387 Wis. 2d 156, 928 N.W.2d 564 ("If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a verdict of not guilty." (citations omitted)). In fact, where the State exclusively relies on circumstantial evidence to prove a crime, as it did here, the State must not only prove each element of the crime beyond a reasonable doubt but also disprove every reasonable theory of innocence. *State* v. *Poellinger*, 153 Wis. 2d 493, 502-03, 451 N.W.2d 752 (1990); *State* v. *Johnson*, 11 Wis. 2d 130, 135, 104 N.W.2d 379 (1960). Because Dr. Stier testified that he would now tell the jury there are plausible non-abusive causes for L.W.'s injuries and death, the circuit court committed reversible error in holding that there was not a reasonable probability that a jury conscientiously following the court's instructions would have reasonable doubt.

Dr. Stier's new cause-of-death conclusion is credible new evidence that creates a reasonable probability of a different result at trial. *Plude*, 2008 WI 58, ¶ 36; *Edmunds*, 2008 WI App 33, ¶ 23; *see also Souter*, 395 F.3d at 583-84, 593-94; *Henderson*, 384 S.W.3d at 833-34; *Robbins*, 478 S.W.3d at 692.

Accordingly, the circuit court's denial of a new trial based on newly discovered evidence should be reversed.

II. MS. HANCOCK SHOULD BE GRANTED A NEW TRIAL IN THE INTEREST OF JUSTICE.

Independently, Ms. Hancock is also entitled to a new trial in the interest of justice. This Court has statutory and inherent authority to grant Ms. Hancock a new trial in the interest of justice irrespective of the circuit court's decision to deny a new trial in the interest of justice or on any other ground. Wis. Stat. § 752.35 (2019-20); *State* v. *Hicks*, 202 Wis. 2d 150, 159, 549 N.W.2d 435 (1996); *State* v. *Armstrong*, 2005 WI 119, ¶ 113, 283 Wis.2d 639, 700 N.W.2d 98. A new trial should be granted in the interest of justice in "exceptional cases" where (a) "the real controversy has not been fully tried," for whatever reason, or (b) "it is probable that justice has for any reason miscarried." *Hicks*, 202 Wis.2d at 159-61, 172. Either circumstance would suffice for a new trial. Both are present here.

A. The real controversy regarding the cause of L.W.'s injuries and death was not fully tried.

The real controversy has not been fully tried when either (a) the jury did not hear important testimony that bears on an important issue in the case or (b) the evidence, testimony, or argument before the jury improperly clouded a critical issue in the case because it was improperly admitted or later found to be inconsistent with the facts or science. *Id.* at 160-64, 172. Importantly, a new trial may be granted under the "real controversy" prong "without finding the probability of a different result on retrial." *Id.* at 160.

At Ms. Hancock's trial, the jury heard testimony from five experts that L.W.'s injuries were diagnostic

of abuse to the exclusion of other possible explanations. As a result of her trial counsel's errors, that testimony went virtually unchallenged. Her counsel presented only a single expert witness, hired after the deadline for disclosing expert witnesses, who was precluded from offering critical testimony regarding L.W.'s purported skull and femur fractures and whose theory about L.W.'s brain injury was easily dispelled by the State and found "remarkably unpersuasive" by the court. (*Supra* at 8-9; 513:119; 518:44-45.) And, despite his familiarity with *Edmunds*, Ms. Hancock's trial counsel failed to introduce available evidence showing that the State's expert testimony was highly controversial in the medical community. Ms. Hancock's trial counsel admitted that he had made a litany of significant errors leading up to and during her trial that left him unprepared and unable to meaningfully challenge the State's medical testimony. *Cf. State* v. *Jeffrey A.W.*, 2010 WI App 29, 323 Wis. 2d 541, 780 N.W.2d 231 (granting a new trial in the interest of justice where critical arguments by the State were not undermined due to counsel's errors, even though counsel was not held constitutionally ineffective). Because the State's expert testimony was left virtually unchallenged at trial, the jury could only find that L.W. had been abused.

The already significant controversy in the medical community regarding the validity of the State's experts' opinions has only grown in the twelve years since Ms. Hancock's trial. As noted above, significant developments in the relevant medical research and literature have added to the growing consensus that injuries like L.W.'s can occur in the absence of trauma. Ms. Hancock's jury was not given the opportunity to evaluate evidence of the controversy as it existed at the time of trial, much less

any of the additional medical developments in the twelve years since.

Nor was the jury given the opportunity to evaluate expert testimony showing there were medical reasons, supported by scientific research and experience, to believe L.W. had not been abused. First, the jury did not hear any of the testimony presented by Ms. Hancock's post-conviction medical witnesses concerning plausible (and even likely) non-abusive causes for L.W.'s brain injuries. Second, the jury did not hear that L.W. definitively did not have a skull fracture. And third, the jury did not learn that L.W.'s femur injury—which both the State and the circuit court argued was highly relevant to establishing Ms. Hancock's guilt—may not have been a fracture at all and could be a metabolic condition known as "healing rickets" or a complication from the multiple attempts to force an intraosseous line into the bone in L.W.'s leg. (518:193-200; 519:212-219, 250-251.)

The jury did not hear a variety of important testimony that bears on the critical issue in the case: whether L.W.'s death can be attributed to intentional conduct by Ms. Hancock beyond a reasonable doubt. Even worse, as explained below, much of the highly salient evidence relied upon by the State to prove Ms. Hancock's guilt has since been shown to be inconsistent with the facts and science.

As explained above, the testimony the jury heard about Dr. Stier's conclusions is no longer true. While Dr. Stier originally told the jury he believed L.W.'s brain and femur injuries were uniquely indicative of abuse, he no longer holds those beliefs. Additionally, whereas Dr. Stier originally left the door open to the possibility that L.W. had a skull fracture, he would now definitively tell a jury that L.W. did *not* have a skull fracture. Multiple experts at the post-conviction hearing, and even one of the State's experts

at trial, testified that Dr. Stier's opinion that there is no skull fracture would trump the testimony of three of the State's other trial experts that L.W. had a skull fracture. (499:41-42; 517:38; 518:218; 519:16-17, 196.)

Relatedly, Ms. Hancock's jury was told that L.W.'s purported skull fracture was zero to ten days-old. (499:11-12.) But Attorney Berman—as part of his incomplete investigation into the ineffectiveness of counsel the year after Ms. Hancock's trial—had identified another doctor, Dr. Pressman, who would have disagreed with this testimony. Dr. Pressman would have testified, to a reasonable degree of medical certainty, that it was not possible to age L.W.'s purported skull fracture from the X-ray films alone (as the State's expert had). (377:1.) He also would have testified that the evidence suggested any skull fracture was "more likely than not" more than ten days old (378:1), which could have introduced significant doubt as to whether Ms. Hancock could have inflicted it.

Medical studies since Ms. Hancock's trial also demonstrate that the testimony from two of the State's experts that there was a 95% likelihood L.W.'s acute subdural hemorrhage resulted from abuse is not accurate. For example, a 2011 article, *Estimating the Probability of Abusive Head Trauma: A Pooled Analysis*, demonstrated that if L.W. had no retinal hemorrhages, no external bruising, no femur fracture, and no skull fracture—which multiple medical experts in the post-conviction hearings testified was the case—then there is, statistically, only a 4% chance that L.W.'s acute subdural hemorrhage was caused by abuse. (467:5, 7.) The study demonstrated that this percentage is only raised to between 9% and 76%, with a predicted probability of only 36%, if L.W. had a femur fracture. (467:7.) The study also showed that only when three or more of the significant clinical features are present—which no witness has ever

asserted in this case—does the probability of abusive head trauma rise above 85%. (467:8.)

Similarly, other medical studies published since Ms. Hancock's trial also reveal the inaccuracy of the trial testimony that L.W.'s femur injury was uniquely indicative of abuse and that there was virtually a 99.9% chance it was caused by abuse. Multiple studies have shown that the majority of femur fractures in infants are not caused by abuse and that "no fracture on its own is specific for child abuse." (*E.g.*, 456:1; 522:219-223.) Other studies have established that healing rickets, in particular, must be ruled out before diagnosing child abuse because many infants with unexplained fractures in suspected abuse cases actually had evidence of healing rickets, which "can look like healing fractures which commonly leads to a misdiagnosis of child abuse." (*E.g.*, 331:5; 454:2.)

As yet another example, the State relied on testimony by one of its experts that brain bleeding cannot cross from one hemisphere to another to disprove the sole defense expert's theory that L.W.'s bi-lateral acute subdural hemorrhage was a re-bleed of his chronic non-bilateral subdural hemorrhage. (*Supra* at 8.) However, Dr. Sahlein testified at the evidentiary hearing that it *is* possible for bleeding in the brain to pass from one hemisphere to the other. (519:159-160.)

In these regards, this case is thus subject to the Wisconsin Supreme Court's decisions in *Hicks* and *Armstrong*, in which the Court granted new trials because the jury did not hear important new evidence that contradicted assertions of guilt made by the State at trial. In *Hicks*, the Court granted a new trial where the State "assertively and repeatedly" used hair evidence as affirmative proof of the defendant's guilt, but it was later determined that the State's arguments and implications were false because the hair evidence

had not come from the defendant. 202 Wis. 2d at 153. Similarly, a new trial was granted in *Armstrong* because subsequent testing "discredit[ed]" the State's assertions of guilt based on DNA evidence. 2005 WI 119, ¶¶ 154-156.

The new evidence in this case is even more critical than the new evidence found to warrant new trials in *Hicks* and *Armstrong*. In those cases, the new evidence challenged only a piece of the State's case, which included other compelling evidence of guilt. By contrast, Ms. Hancock's conviction rested solely on the circumstantial medical evidence presented at trial that has been shown to be highly controversial and, in critical regards, demonstrably false.

This case is also analogous to *State* v. *Louis*, another infant abusive head trauma case in which this Court affirmed the grant of a new trial under the "real controversy" interest-of-justice prong. No. 2009AP2502-CR, unpublished slip op. (WI App Mar. 15, 2011); A-App. 221-225. In *Louis*, this Court found that the jury had not heard evidence regarding three topics that were "highly relevant" to the cause-of-death diagnosis and "directly challenge the State's theory at trial." *Id.* at ¶¶ 15-19. First, the jury did not hear testimony regarding "the legitimate medical debate" about "whether the symptoms commonly associated with shaken baby syndrome are exclusively characteristic of that diagnosis." *Id.* at ¶¶ 15-16. Second, the jury did not hear medical evidence that undermines the inference that the defendant caused the infant's injuries "simply because [the infant] was in his care at the time [the infant] manifested symptoms of trauma." *Id.* at ¶¶ 15, 17. And third, the jury heard testimony that the infant had an injury indicative of abuse but was not told that the presence of that injury had not been scientifically confirmed. *Id.* at ¶¶ 15, 18. Ms. Hancock's jury also did not hear evidence falling into each of these three categories.

Persuasive precedent from other jurisdictions support this analysis as well. *Commonwealth* v. *Epps*, yet another child abusive head trauma case, is also analogous. 474 Mass. 743, 53 N.E.3d 1247 (2016). The defendant in *Epps*, like Ms. Hancock, challenged his conviction because (1) his counsel had failed to sufficiently challenge the State's expert testimony that the child's injuries could have been caused only by abuse and (2) articles published after his trial further undermined the State's expert testimony. The Massachusetts Supreme Judicial Court vacated the defendant's conviction in the interest of justice because "the defendant was deprived of a defense" due to "the confluence" of his counsel's failures and the evolving medical research. *Id.* at 767, 770.

Numerous other cases granting new trials for child abusive head trauma convictions are also instructive. *See, e.g.*, *Commonwealth* v. *Millien*, 474 Mass. 417, 50 N.E.3d 808 (2016); *People* v. *Ackley*, 497 Mich. 381, 870 N.W.2d 858 (2015); *Edmunds*, 2008 WI App 33; *State* v. *Hales*, 2007 UT 14, 152 P.3d 321. While these cases granted new trials without reaching the interest of justice analysis, they too support the principle that where the jury did not hear critical evidence regarding the serious debate in the medical community about the ability to conclusively diagnose abuse, the controversy has not been fully tried and the defendant should be granted a new trial.

Accordingly, Ms. Hancock should be granted a new trial in the interest of justice because, as the Wisconsin Supreme Court explained in *Hicks*:

> To maintain the integrity of our system of criminal justice, the jury must be afforded the opportunity to hear and evaluate such critical, relevant, and material evidence, or at the very least, not be presented with evidence on a critical issue that is later determined to be inconsistent

> with the facts. Only then can we say with confidence that justice has prevailed.

Hicks, 202 Wis. 2d at 171-72.

B. There is a substantial probability that justice has miscarried.

Separately, Ms. Hancock is also entitled to a new trial under the "miscarriage of justice" test. There has been a miscarriage of justice when there is "a substantial probability that a new trial would produce a different result." *State* v. *Murdock*, 2000 WI App 170, ¶ 31, 238 Wis. 2d 301, 617 N.W.2d 175.

Ms. Hancock's counsel failed her at trial. (477:79-92, 128-137.) Despite it being clear from the outset that the critical dispute at trial would be the medical analysis of L.W.'s injuries and cause of death, her counsel failed to meaningfully challenge the State's medical theories at trial. Her jury heard no evidence of the "fierce disagreement" as to possible causes of L.W.'s injuries, *Edmunds*, 2008 WI App 33, ¶ 23, or that there are several potential explanations, other than abuse, for those injuries that are supported by medical research and experience.

Ms. Hancock's previous post-conviction and appellate counsel failed her as well. Despite obvious evidence of her trial counsel's errors in the record, Ms. Hancock's prior counsel did not fully investigate an ineffective assistance of counsel claim or raise such a claim in prior proceedings.

If tried today by competent counsel, Ms. Hancock's trial would be fundamentally different and likely lead to an acquittal.

The jury would learn that there were several plausible, non-abusive explanations for L.W.'s acute subdural hemorrhage, including: (1) hypoxic-ischemic

injury; (2) the CPR performed in an effort to revive him following his cardiac arrest, which could have been triggered by his heart virus; (3) a spontaneous bleed; or (4) a re-bleed of the chronic subdural hemorrhage he most likely developed at birth due to a minor impact such as coughing, vomiting, or when the toddler fell on him on the day of his collapse. (518:220-224; 519:19-25, 116-117, 147.) The jury would learn that the probability that his acute subdural bleed was caused by abuse could be as low as 4% and that it is undisputed that he lacked the injuries required to raise that probability above 85%. (*See supra* at 33.) And the jury would be reminded that L.W., like his cousin, may have been an unfortunate victim of Sudden Infant Death Syndrome. (519:25-26.)

Even if some experts might testify that L.W.'s acute subdural hemorrhage is consistent with abuse, the jury would also hear medical evidence suggesting that abuse was unlikely. For example, the jury would learn that the pattern of L.W.'s acute subdural bleeding is less consistent with trauma than non-traumatic causes. (518:220-222; 519:19-28, 116-117, 147, 151.)

The jury would also learn that neither possible mechanism of abuse—blunt force or shaking—are likely because L.W. had no external signs of injury. If Ms. Hancock had hit L.W.'s head hard enough to kill him, L.W. should have had external evidence of that force, such as a skull fracture and bruising on his scalp. (517:35-37; 519:20, 151.) L.W. had neither.[7] Similarly, if L.W.'s acute subdural hemorrhage had

[7] Dr. Stier's conclusion that L.W. did not have a skull fracture is entitled to deference and is supported by the identical conclusions of each of Ms. Hancock's post-conviction experts. (*Supra* at 32; 518:218; 519:15-16, 194.) Further, even if some witnesses may say L.W. had a skull fracture, other evidence suggests that any skull fracture was more likely than not older. (378.)

been caused by shaking—and there is significant debate in the medical community about whether shaking could ever cause such an injury, *Edmunds*, 2008 WI App 33, ¶¶ 12, 15—there should have been visible trauma to his head, neck, or body from the force of the shaking. (519:20, 151, 197-202.) No such injuries existed. Likewise, the jury would hear that 85% of infants with abusive head trauma have retinal hemorrhages and 78% have spinal injuries. (290:6-7.) But, again, L.W. had no such injuries.

Ms. Hancock's jury would also be told that, regardless of whether L.W.'s acute subdural hemorrhage was caused by abuse, the hemorrhage was not large enough to have caused L.W.'s death. (519:21-22.)

If Ms. Hancock were tried today, her jury would also be told that L.W.'s femur injury may not have been caused by abuse. Her jury would learn L.W.'s femur injury may not have been a fracture, but could have instead been healing rickets, which mimics healing fractures. (518:197-198; 519:212-219, 250-251.) And her jury would learn that healing rickets cannot be ruled out because L.W. was never tested for metabolic disorders, which the standard of care now requires. (519:218-219.) Her jury would also learn that even if L.W.'s femur injury was a fracture, it may have been caused by the numerous attempts to force an intraosseous line into the bone of that leg. (518:193-200.)

In sum, if Ms. Hancock were tried today, her jury would hear multiple plausible non-abusive causes for each of L.W.'s injuries and his ultimate death, and evidence showing that abuse was unlikely. Because the evidence can be reconciled with reasonable hypotheses consistent with Ms. Hancock's innocence that the State could not disprove, a conscientious jury would find reasonable doubt. *See Poellinger*, 153 Wis. 2d at 502-03; *Johnson*, 11 Wis. 2d at 135; *Trammell*,

2019 WI 59, ¶ 48; *see also Souter*, 395 F.3d at 596-97. Ms. Hancock is therefore entitled to a new trial to correct a manifest injustice. *Cf., e.g.*, *Louis*, No. 2009AP2502-CR; *Epps*, 474 Mass. 743; *Edmunds*, 2008 WI App 33.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Jennifer Hancock asks that this Court reverse the decision and order of the circuit court denying Ms. Hancock a new trial, and remand to the circuit court with instructions to vacate Ms. Hancock's conviction and grant her a new trial.

Dated this 2nd day of August, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of the brief is 10,986 words.

Dated this 2nd day of August, 2021.

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