

SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

In re: Nicholas Newbold)
CDC#BB-7499)
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HC016172A

**RULING AFTER EVIDENTIARY HEARING
ON WRIT OF HABEAS CORPUS**

Nicholas Newbold (“Petitioner”) filed a Petition for Writ of Habeas Corpus (“Writ”) April 9, 2019 based primarily upon grounds of ineffective assistance of counsel (“IAC”).

HISTORY OF THE UNDERLYING CRIMINAL CASE.

Petitioner and his girlfriend, Juliana Linn, (“Jude’s Mother”), were both charged with the death of their two-month old child, Jude, along with other criminal charges. The prosecution’s theory of Jude’s death was shaken-baby syndrome.

Before trial, Jude’s Mother pled no contest to the charge of willful endangerment or injury to a child (*Penal Code §273a(a)*) and was sentenced to six (6) years. She agreed to testify truthfully at Petitioner’s trial.

In 2016, Petitioner was found guilty of assault on a child causing death (*Penal Code §273ab*), child abuse or neglect (*Penal Code §273a(a)*) and unlawful chemical processing of marijuana (*Health and Safety Code §11379.7*). He was sentenced to 25 years to life in prison, plus 5 years for the Health and Safety Code violation (Kern County Case BF144277A).

Petitioner appealed his conviction to the Court of Appeal, Fifth District, (#F074821) based upon theories other than IAC, with one exception (“Appeal”). On March 18, 2020, the Court of Appeal, Fifth District, rendered an opinion in the Appeal. The judgment against Petitioner was affirmed. Petitioner’s argument raised in the Appeal that his counsel was ineffective because his trial counsel, Brian Foltz (“Attorney Foltz”), was unprepared to address an aiding and abetting theory was rejected by the Court of Appeal. Other IAC claims were not raised. The Petition for Review was denied by the California Supreme Court on June 11, 2020 (S262208).

THE TRIAL IN THE UNDERLYING CRIMINAL CASE.

Pediatrician Suresh Sing testified to conducting the well-baby exam on July 17, 2012, and finding nothing wrong with Jude. Per documentation in the medical records, there were no broken bones or any swelling consistent with having a broken bone, however, there were no x-rays or scans taken of Jude.

A neighbor of Petitioner, Andrew Hughes, testified to hearing crying from the baby, which worsened when the mother was gone. He would also hear Petitioner stomping around and muttering angrily during these times. The day before the police came, there was such crying and he heard the crib rattling against the wall.

Donald Cameron and Melissa Grant visited Petitioner and Jude's Mother the evening before Jude's death. They had visited together on a number of prior occasions. Neither saw anything unusual that night. In the past, Melissa felt that in holding the child, not enough support was given to the neck by both parents. Petitioner appeared to be frustrated that night. He complained about being a stay-at-home dad and having to get up in middle of night when Jude cried even though Jude's Mother was home.

Jude's Mother testified to her plea deal. She testified to Petitioner being a good parent and never harming the child. She stated she heard clicking noises coming from Jude the day of her death, but she held Jude and clicking noises went away.

Due to availability issues, there was a break in the People's case and the defense called their only witness, Dr. Ronald Gabriel, out of order. Dr. Gabriel, a child neurologist, testified that he reviewed Jude's medical records, including the pregnancy, labor and delivery, well-baby exam on July 17, 2012, emergency room records from September 11, 2012, and records from the hospital where Jude was transferred to that morning. Dr. Gabriel said Jude was born underweight, had an abnormality in the brain, which occurred sometime during pregnancy, and caused her to have an underdeveloped brain. He also noted the medical records indicated there was an infarction of the placenta. Dr. Gabriel said Jude had sustained multiple rib fractures on both sides of the chest that were of various ages. Dr. Gabriel testified the most recent rib fractures were sustained at least 7 to 10 days before Jude died. Dr. Gabriel said Jude's rib injuries would have caused symptoms such as crying, fretfulness, irritability, and not taking the bottle. Jude also had sustained bleeding in the brain of a traumatic nature; some of the blood was very fresh, and some was a bit older. He testified that the brain bleed was "certainly" caused by "blunt force trauma." He opined that the most recent bleeding was from 12 to 36 hours before Jude's CAT-scan, which took place at 2:18 a.m.

Dr. Gabriel explained that on September 11, 2012, there was at least one blunt force trauma that caused the bleeding, but couldn't determine with certainty if there was one or more injurious events. Gabriel said either there was a blunt force trauma that occurred anywhere from two to six days earlier, and the blood continued to seep, or there were two separate injuries with a second injury causing the bleeding, which was 12 to 36 hours old. Dr. Gabriel testified at the trial that "there's no question" the cause of Jude's injuries was physical abuse. The injuries were non-accidental and inflicted by someone. Jude's preexisting brain condition may have made her more susceptible to death from injury than a healthy child, but the abnormality was not the cause of death.

Upon return to the People's case, Kern County Sheriff's Sargent, Michael Dorkin, testified as to the marijuana processing taking place in the residence and the flammable nature of the chemicals involved.

The property maintenance person for the apartment building where Petitioner, Jude's Mother and Jude lived, Mike Chavez, testified to seeing the commotion on the night of the death and speaking to Petitioner. Petitioner advised Mike Chavez that his baby passed away, but according to Mike Chavez, Petitioner seemed more concerned about law enforcement finding his marijuana.

The last law enforcement witness was Detective James Conner. In the course of his testimony, a number of Petitioner's recorded statements were played for the jury. Petitioner stated that the evening prior to her death, Jude whined approximately four or five times between the time she went to bed and 1:00 a.m. At around 1:00 a.m., Petitioner woke her up, and she would not take her "binky," so he took her into the living room to feed her. When Petitioner gave Jude her bottle, she took two or three drinks and spit out the milk. Petitioner held her for a second and let her drool, then she started screaming. Petitioner laid her down on his lap and tried to give Jude the "binky." Jude then opened her mouth and sat up a little bit and kind of hiccupped. Jude started spitting up in his arms. Jude's eyes closed and she started going white, stopped breathing, and went limp. Petitioner stated he then ran back into the bedroom, yelled for help, and told Jude's Mother to call 911. He thought Jude was choking. Petitioner stated he did not know how she got hurt or why she had broken ribs. Petitioner explained Jude had bruises since the day she was born. He was told by the doctors that Jude would bruise just by holding her wrong. Petitioner and Jude's Mother were the only people besides Jude in the apartment when Jude became nonresponsive. Jude did not fall or have any accidents that day. Jude was not left alone that day. Finally, Petitioner stated he has never disciplined Jude.

The final witness for the People was forensic pathologist Doctor Eugene Carpenter who had performed Jude's autopsy on September 12, 2012, at approximately 9:40 a.m. Dr. Carpenter testified Jude had no external injuries except that the soft spot of her head was a little swollen. Dr. Carpenter said it is common in shaken baby cases for the infant not to exhibit external injuries.

Dr. Carpenter testified Jude suffered rib fracturing. The nature of the fractures indicated child abuse by violent shaking with force "sufficient to break the otherwise almost unbreakable ribs of the infant." Some of the rib fractures were older and healing; these were at least 10 to 14 days old, but not older than three weeks. Dr. Carpenter said the radiologist opined the rib fractures were consistent with being in different states of healing and that some of the ribs had been broken and then re-broken. Jude had 18 rib fractures in total; 11 on the left side and seven on the right. Dr. Carpenter said he found a small area of bleeding underneath Jude's scalp consistent with, but not specific for, a pinching type of injury between where the head hinges on the neck and is consistent with "violent shaking." Dr. Carpenter said this injury is very suspicious by itself, however, broken ribs are rather rare in infants, and this "shows a greater extent of the severity of the injuries."

Jude also had hemorrhages on her retinas in both eyes and around the optic nerve in her left eye. Dr. Carpenter explained that in shaken baby cases, retinal hemorrhages are present, whereas in other types of injuries, such as car accidents or falling from a height, they are not. Retinal hemorrhages are caused by the rotational motion of the head during the shaking and by itself is highly suspicious of traumatic head injury to an infant. Hemorrhages on the optic nerve is also common in shaken baby cases.

The last type of injury common in violent shaking is brain injury. Dr. Carpenter found several examples “classically associated with violent shaking and the death of infants” in Jude’s case. Jude had a subdural hemorrhage, or bleeding under the thick lining of the skull over the brain. Dr. Carpenter explained that on a violent shaking and in rotational injuries of the head, where the head is moving violently from right to left, the veins in the brain easily tear. A small amount of blood can come out to the surface of the brain before death and is caused by the deeper, more severe brain injuries. Dr. Carpenter said the blood is just a sign of severe violent injury to the brain. It is the violent injury to the internal parts of the brain that causes death.

Dr. Carpenter explained Jude would have displayed symptoms from the injury that caused her death immediately. She would have been in a coma because once the injury is inflicted, the infant is doing nothing but dying from that injury. The infant would never look normal or even a little better. There was no evidence the blood from the subdural hematoma was two days old. Dr. Carpenter did find other areas on the brain, specifically the temporal lobes, which indicated an injury consistent with two or several days old, but that that blood was not the hematoma itself. This older blood was evidence of other injuries. Dr. Carpenter indicated he would expect Jude’s breathing to be impacted by the rib injuries.

ORDER TO SHOW CAUSE AND RESPONSES.

The Writ was filed with this Court on April 9, 2019. In the Writ, Petitioner claimed Attorney Foltz provided ineffective assistance of counsel by:

- (1) failing to investigate the facts of the case, secure an investigator or interview witnesses;
- (2) failing to make Petitioner’s medical expert aware that the police report indicated that Jude’s pupils did not dilate symmetrically;
- (3) objected to prosecutor’s aiding and abetting theory, but did not seek a continuance to investigate facts regarding Petitioner’s knowledge of earlier acts of abuse; and,
- (4) failed to object when prosecution’s forensic pathologist opined about the timing of the injuries leading to the child’s death.

Petitioner contended that because the jurors were not offered any evidence as to other causes for Jude’s death, which should have been investigated and developed by Attorney Foltz, the jurors were left with only one potential cause – abuse.

Prior to the Court of Appeal, Fifth District, (#F074821) March 18, 2020 ruling affirming the conviction and sentence of Petitioner, this Court issued an Order to Show Cause (“OSC”) on September 3, 2019.

As provided in the OSC this Court found that Petitioner had met his burden to show a prima facie case for habeas corpus relief based upon grounds of IAC. As described in the OSC, the Court found potential fault with the legal representation received by Petitioner from Attorney Foltz in that: (1) Attorney Foltz's own medical expert requested that other experts be consulted and they were not, (2) Attorney Foltz did not interview the child's grandmother, who offered information regarding the child's eyes, (3) Attorney Foltz did not provide his medical expert with the police reports, which included a report of asymmetrical pupil dilation by the grandmother, and Petitioner's statements to law enforcement, and (4) if Attorney Foltz had investigated the case more fully he might have discovered evidence to refute the coroner's conclusion as to the cause of death.

Pursuant to the OSC, KCDA was ordered to file a Return, which was accomplished in a timely manner, after the granting of several requests for extension of the deadline, on September 11, 2020. KCDA argued that Petitioner has failed to meet his burden of proof for establishing a case for IAC necessary to overturn Petitioner's conviction and sentence, which is presumptively correct.

KCDA contended that Attorney Foltz conducted reasonable investigation, prepared for the trial, and contrary to Petitioner's representations, Attorney Foltz did actually provide his expert all of the medical records and police reports. KCDA did not provide any evidentiary support for the allegations in the Return.

Petitioner's latest counsel, Aaron Meyer ("Attorney Meyer") filed a timely Denial or Traverse on behalf of Petitioner on December 1, 2020, also after the granting of an extension of the deadline.

In the Traverse, Petitioner contended that many of the allegations in the Writ went unanswered in the Return and therefore, must be accepted as true by the Court. The Traverse included a list of relevant factual points regarding Jude's physical conditions, which could lead to a conclusion that her death was caused by some other factor than shaken baby syndrome.

ORDER FOR EVIDENTIARY HEARING.

As stated in the Order entered on January 28, 2021, the Court found there were factual disputes regarding whether Petitioner suffered from ineffective assistance of counsel, which could only be resolved through an evidentiary hearing. Consequently, the Court ordered the matter be set for an evidentiary hearing and limited the potential live witnesses to Dr. Eugene Carpenter, Brain Foltz, Dr. Ronald Gabriel, M.D, Dr. Charles Hyman, and Dr. Carl Wigren.

The evidentiary hearing was conducted on the dates of August 23, 2021, September 30, 2021, October 24, 2021, and December 10, 2021.

Petitioner commenced the evidentiary hearing with a motion for the court to rule without the necessity of an evidentiary hearing ("Motion"). It was argued that Attorney Foltz had admitted IAC in his declaration attached to the Writ as an Exhibit. He admitted that he failed to investigate by consulting other experts indicated by his own expert, Dr. Gabriel, needed to form an opinion on cause of death. He admitted he failed to discover important facts in the police reports,

specifically admitting to not seeing any information regarding Jude's asymmetric pupil dilation. He admitted he was unaware of other possible causes for the rib injuries to Jude and assumed the rib cage was not available for testing. Petitioner further argued that the testimony of the expert witnesses would essentially be identical to that which was contained in their declarations. Petitioner also argued that the Respondent failed to narrow the issues and conceded the relevant facts in their pleading of the Return.

In response to the Motion, Respondent argued that there was no "context" for the claims of IAC and the evidentiary hearing would assist the court in its determination on the issue. Respondent further argued that Attorney Foltz was faced with an overwhelming case of Petitioner's guilt and did not provide IAC. It was argued that the Return did challenge necessary facts to give rise to the need of an evidentiary hearing.

In its' ruling on the Motion, the Court agreed with much of what the Petitioner had argued in the Motion. In particular, the Court agreed that in its decision to determine if there was IAC, it was not to weigh the contradicting opinions of the experts and decide which were more believable as to the cause of death. To adequately address the claim of IAC, the Court needed to determine if in the trial there should have been evidence presented as to cause of Jude's death instead of conceding the cause of child abuse. If so, did the failure to present such evidence constitute a withdrawal of a valid defense on the part of Attorney Foltz and give rise to a claim of IAC. However, the Court believed there were still factual disputes necessitating a hearing based on the totality of the pleadings, which included the declaration of Attorney Foltz.

The declaration of Attorney Foltz appeared to have been prepared by Petitioner's counsel who prepared the Writ and was simply signed off on by Attorney Foltz. Thereafter, Attorney Foltz declined to discuss certain issues with Respondent prior to the filing of the Return. There remained a factual dispute as to what Attorney Foltz provided to Dr. Gabriel and what Dr. Gabriel advised Attorney Foltz as to the need of additional experts and testing.

The Court concluded that under the circumstances, and for the purpose of an evidentiary hearing, the only needed testimony was from Dr. Gabriel and Attorney Foltz, however, the Court left the decision as to what witnesses would be called to the counsel. Counsel for both parties agreed that the hearing would include testimony from Doctors Wygrin, Hyman, and Carpenter. The court allowed their testimony and has considered it in this ruling. The Court has also considered the trail testimony in the matter, discussed above.

FACTUAL ISSUES WHICH WERE ADDRESSED AT THE EVIDENTIARY HEARING.

The evidentiary hearing in this matter was set for the purpose of resolving primarily two factual disputes:

- (1) Did Attorney Foltz provide Dr. Gabriel with the portions of the file necessary for him to render a confident and informed opinion as to the cause of Jude's death, in particular, the police reports?
- (2) Did Dr. Gabriel advise for the need of additional experts and/or testing in order to render a valid opinion?

- (3) In the course of the hearing, another unexpected factual dispute arose: Was Jude's birth natural via the birth canal or a C-section?

THE EVIDENTIARY HEARING WITNESSES.

The Petitioner called as witnesses Doctors Wigren, Hyman, and Gabriel. The Respondent called Attorney Foltz and Dr. Carpenter. Doctors Wigren and Hyman each had previously prepared reports of their findings and opinions, which were attached to the Writ as exhibits. Dr. Gabriel and Attorney Foltz each prepared a declaration also attached to the Writ as exhibits. Dr. Gabriel's declaration also offered a new diagnosis based on new information. Dr. Carpenter prepared a report in the form of a response to the reports of Dr. Wigren, Dr. Hyman, and Dr. Gabriel, and although provided to Petitioner, this report by Dr. Carpenter was not made an exhibit to the Writ or reviewed by the Court.

In the testimony at the evidentiary hearing, the expert witnesses referred and responded to these various reports, the original autopsy report, and the testimony which had been presented at trial. Doctors Wigren, Hyman, and Gabriel all testified consistently with their reports and the Court will only recount limited aspects of their testimony herein below.

Dr. Wigren

The first witness to testify at the evidentiary hearing on behalf of the Petitioner was forensic pathologist Doctor Carl Wigren. Dr. Wigren testified consistent with his declaration/report, Exhibit B7 to the Writ. He reviewed the autopsy report, law enforcement narratives, which included interviews with the Petitioner and Jude's Mother, interviews with Dr. Carpenter, the 2016 letter from Dr. Gabriel, and Dr. Carpenter's rebuttal, which is what he first addressed.

Dr. Wigren testified there was nothing in Dr. Carpenter's rebuttal that caused him to change any of his opinions. Dr. Carpenter's mention of bleeding at the nerve rootlets of the spinal cord was not mentioned in the autopsy report and was of concern to him. This is because in a hypoxic infant, profusion can cause bleeding that can mimic blunt force entry, specifically tensile injuries of the nerve rootlet. This can occur if there is a period of low oxygen in the bloodstream followed by CPR with reestablishment of blood flow. In this case, there was improper intubation, which could have created or aggravated the retinal hemorrhaging seen in the case.

Dr. Wigren disagreed with Dr. Carpenter's belief that the rib fractures were clearly not due to a natural process. The number of rib fractures points to either abuse or to a natural process which could be osteopenia, the result of a vitamin D deficiency. It could be due to a collagen disorder. Another possibility is fracture during childbirth. In a truncated pregnancy, insufficient vitamin D may be provided to the infant through the placenta, making the bones more fragile and susceptible to fracture. Jude's blood tests results are suggestive of an underlying bone disorder of some sort. This possibility was never explored. If the fractures were caused by grabbing the baby and violently shaking, you would expect to see bruising where the baby is being tightly held. The absence of any such bruising in this case is remarkable.

Dr. Wigren did not see in any reports, or in what he personally reviewed, evidence of shearing of the bridging veins or a shearing injury in the brain, also known as a diffuse axonal injury. Bridging veins produce about 50 milliliters of blood per minute per hundred grams of brain. In this case, you would expect to have 250 milliliters of blood flowing into the subdural space and creating a very large hematoma; which is inconsistent with the just three milliliters found by Dr. Carpenter.

One of the prongs of the triad of the shaken baby syndrome is encephalopathy, often manifested by swelling of the brain, but in this case there was no swelling of the brain, also called cerebral edema. He believes that the subdural blood is the result of a clot that formed in one of the veins that goes through the dura. If you get a clot in one of the veins in the dura, you can get a backup of blood because the veins in the dura drain the blood, and that will cause blood to ooze into the subdural phase and cause the subdural hematoma. Dr. Wigren suggested that the dura needs to be reexamined by sectioning to see if a clot can be found, and a radiologist would need to examine the CT of Jude's head for a clot.

Dr. Wigren noted that Jude was born slightly prematurely at 38 weeks and had a head circumference that didn't even register on the CDC head circumference chart. A head this abnormally small speaks to some sort of congenital issue in the child.

The Antelope Valley Hospital records indicated that Jude possibly had disseminated intravascular coagulopathy (DIC), a condition that occurs when the blood loses its homeostatic ability to balance clotting with spotting. That can be due to a brain injury, like a stroke. It can also be due to a low body temperature and at one point Jude had a temperature of 94 degrees. This can cause the blood to not clot efficiently, and lead to excessive bleeding in organs. The bleeding seen in Jude and attributed to abuse at trial, the retinal hemorrhaging and subdural hematoma, could alternatively be explained by DIC.

Dr. Wigren indicated that the grandmother's report of pupil asymmetry is a clue there is something potentially going on inside the head. If the brain begins to impinge on a certain nerve that feeds the pupil of the eye, then the pupil may dilate or it may constricted. This could be an indication of pressure in the brain secondary to hypoxic state, secondary to a blood clot or thrombosis. This could be a signal that there is some pathology within the brain, possibly a stroke. Jude's Mother's car accident, a month and a half to two months prior to Jude's birth, could also be significant. It could explain the infarction of the placenta. If the placenta was examined closely, it could possibly be determined if the infarction dates back to the car accident. If so, it would have exacerbated Jude's other conditions.

Without the autopsy photos, Dr. Wigren was unable to fully speak to the spot on the head that seemed a little distended to Dr. Carpenter. However, significant to its cause, was the absence of a fracture or contusion in the brain underlying the spot. The distention may have simply been caused by the administration of CPR on Jude.

In Dr. Wigren's opinion, Dr. Carpenter's testimony at trial that there would be no lucid interval after the injury is not supported by the state of literature then or now.

Dr. Hyman

The next witness to testify at the evidentiary hearing on behalf of the Petitioner was board-certified pediatrician Doctor Charles Hyman, also an expert in infant bone disorders. He testified consistent with his declaration/report, Exhibit F. In addition to the reports of the other expert witnesses, Dr. Hyman reviewed the autopsy report, interviews by law enforcement with Petitioner, and medical records of Jude which included: birth records, the well-baby exam, EMT and hospital records the night of Jude's death, CT and x-ray images on the night of her death, and Jude's Mother's prenatal medical records. He also reviewed the grandmother's statement regarding Jude's pupils, and the trial testimony. Dr. Hyman's overall opinion is that Jude's death was the result of natural causes, and was misdiagnosed clinically and then forensically by Dr. Carpenter. There was nothing in Dr. Carpenter's responsive declaration that caused him to change any of his findings or opinions.

Dr. Hyman testified there are no scientific objective findings that support abuse. Everything can be explained medically in a nonabusive fashion. Dr. Hyman's opinion is that Dr. Carpenter made certain statements that were not scientifically valid. In order to explain his conclusions, Dr. Hyman prepared a number of slides which he discussed throughout his testimony.

Petitioner's account of the baby's final moments, raising the chest and then going suddenly limp, is a typical finding of stroke or seizures or bleed in infants. Strokes are caused by blood clotting in the brain, and his review of the imaging in the case leads Dr. Hyman to the conclusion that Jude suffered from brain thromboses (clotting) in various locations. One of which was the left vein of Labbe. The vein of Labbe and the transverse sinus are major blood vessels. If you have a blockage the vein which is a conduit for blood that's coming from the vein back into the central circulation, but you have arterial blood that's still able to pump, you're going to get a pressure buildup. Because there is a connection between the cerebral circulation and the retinal circulation, you can have sheath and retinal hemorrhages associated with thrombosis. The significance of this to Jude's case is, although a stroke could be caused by head trauma causing a thrombosis, there is no evidence of a head trauma and/or shaking. There is no evidence of bruises or head trauma. The finding of the thrombosis can explain the optic sheath hemorrhage. The thought that retinal hemorrhages is only seen with shaking is not supported at all by outside science.

Based on review of the medical records, Dr. Hyman sees no evidence of trauma to the Jude's head. What's being described as trauma, he believes is a product of the six or seven hours of resuscitation.

Dr. Carpenter's testimony that there are no latent intervals in a central nervous system injury is not consistent with the current literature. In a case where there is a vein of Labbe stroke resulting in a retinal hemorrhage, a child of Jude's age could have a latent period of lucid interval from the stroke to collapse before the symptoms are readily seen.

Dr. Hyman stated that pupil asymmetry is a sign of brain stem problems.

Dr. Hyman indicated the records show no fracture or combination of fractures that is diagnostic of abuse. The imaging of the ribs in this case shows the fractures could be more than a month old. There is no way to tell without further testing. The acute fractures of Jude's ribs likely came from the vigorous CPR. There is evidence of diminished mineralization in that the baby had atypically low calcium and was acidotic. The numerous rib fractures with no evidence of interior or exterior bruising or impact on the lungs, points to possible bone fragility, however, Dr. Hyman indicated a final diagnosis would require further testing.

Dr. Gabriel

Doctor Ronald Gabriel is a pediatric neurologist and pediatric neuro imager who testified for the defense at the trial. When Dr. Gabriel testified in 2016, his opinions were based solely on the medical records. The subdural hematoma in this case could be from some underlying pre-existing natural process. However, when he testified, there were only two options for purposes of rendering his opinion. There was an injurious process of some nature that occurred several days prior to admission and death with minor bleeding thereafter, or there were two separate injurious processes: one occurring several days before February 11th and one occurring within 12 to 36 hours. Now, looking at the new information, Dr. Gabriel opinions as to Jude's death have completely changed.

The asymmetric pupils that are described by Jude's grandmother in the police reports on February 8th, three days before admission, is a "golden diagnostic signal" to a neurologist. Considering that Jude's brain was abnormal when it developed from the very beginning, by the time they did a CAT scan on the February 11th, there was a huge amount of clear fluid over the surface of the brain, and the head circumference had exploded from the 20th percentile to the 75th or 80th percentile.

Dr. Gabriel now concludes that based upon the asymmetrical pupils that this was a progressive case of hydrocephalus. The spinal fluid that is manufactured in the brain on a 24-hour basis could not exit because of venous throbbing. The fluid accumulated over the surface of the brain, and at some point there were ruptured vessels. The rupture could have been due to jarring of the baby's head in any manner, or it could've been simply jarring because of the stress on the vessels due to the hydrocephalus. There was old bleeding indicated by the autopsy, more than two or three days old, and new fresh bleeding or re-bleeding, which then occurred acutely also described at autopsy. It is now his opinion that there was most likely one injurious process which occurred followed by re-bleeding acutely, which resulted in a seizure, cardiac arrest, and death on February 11th.

When Dr. Gabriel testified at trial that the totality of the child's condition indicates this was not accidental, he took at face value the report regarding the ribs, although he knew the ribs had not been properly evaluated at autopsy by microscopic examination, or by a bone specialist looking at the X-rays. Dr. Gabriel recognized the medical evidence was incomplete, but based upon what he knew at that time, he had no choice.

As evidenced by his original report in 2016, he made it clear to Attorney Foltz that this was an incomplete medical evaluation. He advised Attorney Foltz that there had been no nerve

pathology which was critical, no bone pathology, and there was a need for an expert radiologist to examine the X-rays.

Dr. Gabriel indicated it is important to obtain and review the police reports. In this case, there was information that would have been critical to his analysis. However, Attorney Foltz never provided him with the police reports. The fact he never received the police reports is evidenced by their absence in his 2016 report and his trial testimony, wherein he listed everything that he considered in forming his opinion.

Dr. Gabriel was first made aware of the pupil asymmetry and that Jude's Mother was involved in a car accident when she was pregnant in her third trimester with Jude by Petitioner's appellate attorney. The car accident is the likely cause of the placenta infarction and possible explanation of the child's growth retardation and why the baby's brain was abnormal from the beginning. Dr. Gabriel stated receipt of the information of the car accident and pupil asymmetry would have affected his testimony as to the cause of the brain injuries, the brain hemorrhaging, and cause of Jude's death.

Dr. Gabriel suggested to Attorney Foltz, that in light of only being able to give an incomplete analysis due to the lack of histology and testing, that he obtain other consultations in the case. He believes he suggested a neuropathologist, possibly Dr. Bennett Omalu, and Dr. James Collins to review the X-rays.

Attorney Foltz

Attorney Foltz spent 8 years in the Kern County Public Defender's Office before moving to the San Bernardino County Public Defender's Office, where he has been the last 5 years. He had about 45 trials before Petitioner's case, which was his fifth murder trial. Attorney Foltz had the case for quite a while before trial and "did the things a defense attorney would ordinarily do" to prepare for trial. He travelled to the jail and spoke to Petitioner about a dozen times to discuss the case. He conducted the preliminary hearing.

Attorney Foltz spent time discussing the case with his direct supervisor, who assigned Petitioner's case to him and had done multiple child murder cases. The supervisor recommended, and other attorneys in the office concurred, that Dr. Gabriel was the expert he needed for the case.

On direct examination at the evidentiary hearing, Attorney Foltz testified that he believed he provided Dr. Gabriel with everything he had, which included the police reports, all medical records, and later, Jude's Mother's birth records. He couldn't remember the specific individual records, but recalled it was a large packet. There was no reason not to give Dr. Gabriel all the records he had. Attorney Foltz was "pretty confident" that he provided the police reports to Dr. Gabriel, and had a recollection of discussing with him things in the police reports. However, on second thought, Attorney Foltz couldn't be certain if what was discussed was in the police reports or the medical records. He believed he would not have given Dr. Gabriel any of Petitioner's confidential attorney/client statements.

It was Attorney Foltz's belief that he subpoenaed the birth records at the request of Dr. Gabriel, however, he had no recollection of Dr. Gabriel requesting or mentioning the police reports. Attorney Foltz did recall that Dr. Gabriel made a request for another doctor's report and an inquiry by Dr. Gabriel about something to do with the rib cage and another doctor on that subject. Attorney Foltz could not clearly recall if there were conversations with Dr. Gabriel about talking to other experts. As to why he did not consult other experts that might have been mentioned by Dr. Gabriel, Attorney Foltz said Dr. Gabriel told him that his opinion was that this was blunt-force trauma and not classic shaken baby, which is how he viewed the case thereafter. Definitely early on, Dr. Gabriel's opinion that it was blunt-force trauma significantly shaped the way Attorney Foltz saw the case.

On cross-examination at the evidentiary hearing, Attorney Foltz testified that none of his prior four murder trials involved a child's death or shaken baby syndrome, however, he did research into the area. Once he received Dr. Gabriel's opinion of blunt force trauma, he no longer focused on the shaken baby syndrome issue. He interpreted Dr. Gabriel's opinion to be "pretty concrete" as to it being blunt force trauma. Attorney Foltz acknowledged that in Dr. Gabriel's 2016 report, Dr. Gabriel advised that his opinion was based on an "incomplete medical analysis." Attorney Foltz couldn't recall if he sent a cover letter itemizing the records he sent to Dr. Gabriel and it is possible there was none. Attorney Foltz has no reason to believe he provided Dr. Gabriel with transcripts of what Petitioner said to law enforcement.

Although not certain as to when Attorney Foltz first became aware of mention of pupil asymmetry by Jude's grandmother, it was not of any significance to him nor did he ever discuss it with Dr. Gabriel.

Attorney Foltz reiterated that his initial belief of sending the police reports to Dr. Gabriel might be faulty, and the discussions leading to that conclusion could have been based on information in the medical records. In reviewing his notes in the file, there is no mention of a discussion with Dr. Gabriel regarding the contents of any of the police reports.

Attorney Foltz testified that he did not get an investigator assigned to the case because he didn't know who they would interview under the circumstances of the case. He personally conducted no outside investigation. Jude's grandmother could have been the individual actively seeking him out to give him information, but Attorney Foltz was not sure. Attorney Foltz was exchanging e-mails with someone claiming to be working for the defense that could have been her. Attorney Foltz never spoke with her on the phone. There was a statement taken by the police from Jude's grandmother, and knowing Petitioner's co-defendant was seeking to make a deal, Attorney Foltz was operating under the assumption that these people weren't going to be very favorable to Petitioner.

Attorney Foltz testified he was not aware that a car accident involving Jude's Mother had happened just before Jude's birth. On redirect, Attorney Foltz testified that Petitioner never mentioned the car accident to him in any of their conversations.

Attorney Foltz's trial tactic was to concede that the rib fractures happened because of abuse as an extension of his expert's opinion of blunt force trauma to the head. Attorney Foltz assumed the ribs had been destroyed.

Attorney Foltz recalled that Dr. Gabriel did ask him for some other reports and to have things reviewed by some different doctor at UCLA. Attorney Foltz did not remember Dr. Gabriel indicating a need for a neuropathologist, but did recall mention of a Dr. Boyer. Dr. Gabriel never told him that he had conclusively determined that the ribs could have only been fractured by abuse. He acknowledged a note to himself indicating Dr. Gabriel will want the X-rays looked at by James Collins at UCLA. He never asked Dr. Boyer to give a histological review of the case as possibly recommended by Dr. Gabriel. He did not have Dr. James Collins at UCLA look at the X-rays for signs of potential calcification or abnormal healing. Attorney Foltz did not believe he could get the money approved for other experts.

Dr. Carpenter

In the evidentiary hearing, Dr. Carpenter testified consistent with his autopsy report and trial testimony for the most part. He could find no external injuries on Jude. Internally, the first noted injuries were the rib fractures. They appeared to be consistent with fractures occurring at different times with some being very recent. Dr. Carpenter opined that the fractures were indicative of having been caused by abuse. He reasoned that any rib fractures in an infant needs to be seen as a case of adult-involved injury until it can be proven that it's not. There was nothing Dr. Carpenter saw that led him to believe the fractures were caused at birth, by CPR, or bone fragility. The location of the fractures are consistent with someone positioning their hands on Jude's body and shaking her violently. The fractures are in the same area as the tips of the fingers near the spine. Most often the association has been strong or reported to be strong between the violent shaking of an infant and the fractures along the spine. He did locate a bruise at the back midline part of the head which was supportive of his beliefs as well. It was a subgaleal bruise corresponding to where Jude's head theoretically would've stricken her back had Jude been violently shaken. Dr. Carpenter indicated another possibility was that the bruise might have been caused by direct impact to the back of Jude's head.

Significant to Dr. Carpenter's opinion was the finding of retinal hemorrhages, caused in Jude's case by head trauma, mainly to the area of the brain stem. He located injuries to Jude's brain. There was hemorrhaging at the nerve rootlets coming out of the upper part of the spinal cord near the brain stem confirmed microscopically. Dr. Carpenter opined these injuries were signs of head trauma. He testified that he believed there would be no lucid period, wherein the infant would look normal subsequent to the fatal injury.

On cross-examination, Dr. Carpenter stated that there is no single pathognomonic sign or diagnostic of child abuse or anything. It is collective signs of trauma that make a diagnosis and not one individual sign is conclusory. Dr. Carpenter disagreed that the rib fractures could be explained by CPR. He did acknowledge that with bone fragility or a pre-existing healing fracture, a rib fracture could be caused by CPR, but not in this case. He testified that 30 percent of the children shaken violently die. He reaffirmed his belief of there being no lucid interval with children who have been shaken violently.

Dr. Carpenter was examined extensively on his use of studies in forming his opinions, the textbooks he relied upon, and his ability to interpret medical information gathered from x-rays, MRIs, and tissue collection. He admitted he was not equipped to identify a thrombosis on a scan. However, Dr. Carpenter believed he could say there was not a thrombosis in Jude's brain based on his direct examination of the brain. He acknowledged that (1) a venous thrombosis can cause seizures, (2) a seizure can sometimes look like a hiccup, (3) that a young child that has had a stroke can have pupil dilation, (4) that Hypoxia and ischemia can cause a child's pressure to rise in their cranium, (5) that a stroke can cause subdural hematoma, and (6) a child can die from a combination of seizures and stroke that are secondary to a thrombosis. Dr. Carpenter believes that violent shaking can cause a stroke.

Dr. Carpenter believes that Jude was repeatedly violently shaken with injuries to the brain stem and parts of the brain. Jude survived those events then was shaken to death and died in the last event.

Dr. Carpenter acknowledged there was no injury to Jude's neck musculature, no cervical spine fracture or spinal cord dislocation, no inflammation found in the tissues of the neck, and no injury to the larynx, however, Dr. Carpenter still believed Jude's head was violently shaken.

Dr. Carpenter acknowledged not knowing whether it is possible that blood can escape vessels and get into the tissue of the spinal nerve when there's low oxygen in the blood stream followed by CPR resulting in re-establishment of blood flow.

ANALYSIS

The Resolution of the Factual Issues.

The purpose of the evidentiary hearing was to resolve the factual disputes as to whether Attorney Foltz provided Dr. Gabriel with the portions of the file necessary for him to render a confident and informed opinion as to the cause of Jude's death and whether Dr. Gabriel advised Attorney Foltz of the need of additional experts and/or testing in order to render a valid opinion. In the course of the hearing, the issue as to whether Jude's birth was natural via the birth canal or a C-Section also arose.

Dr. Gabriel was not Provided with the Portions of the File Necessary for Him to Render a Confident and Informed Opinion as to the Cause of Jude's Death.

Dr. Gabriel was certain he did not receive the police reports. He checked his files and there are none. Dr. Gabriel's 2016 report does not list the police reports as something he reviewed. He testified at the trial under oath as to what he reviewed and they are not mentioned.

Attorney Foltz, although initially confident he provided the police reports to Dr. Gabriel, ultimately testified he could not be certain and believed he may not have provided them. Attorney Foltz's belief that he did provide the police reports to Dr. Gabriel was founded upon discussions he recalled with Dr. Gabriel about some of the contents of the police reports, and Dr.

Gabriel testifying to having reviewed them at trial. During Attorney Foltz testimony, after reviewing Dr. Gabriel's trial testimony, Attorney Foltz realized he was mistaken about Gabriel's testimony, and now could not be sure if he ever discussed anything in the police reports with Dr. Gabriel, as opposed to information in the medical reports.

Based on the entirety of the evidence, this Court finds that the police reports were not provided to Dr. Gabriel and he was not apprised of any of the contents that would have aided in his opinions.

Dr. Gabriel did Advise Attorney Foltz of the Need of Additional Experts and/or Testing in Order to Render a Valid Opinion.

Dr. Gabriel testified to discussing with Attorney Foltz that he could not provide a complete evaluation of Jude's cause of death and injuries without further testing and getting other experts involved. He recalled providing Attorney Foltz with the names of Drs. Collins and Boyer. Dr. Gabriel indicated he may have also recommended Dr. Omalu, but he was not certain of that suggestion. Dr. Gabriel indicated in his testimony that he explained to Attorney Foltz what these other doctors needed to examine and the testing needed to be done.

In his testimony at the evidentiary hearing, Attorney Foltz acknowledged discussions with Dr. Gabriel. Attorney Foltz remembered conversations with Dr. Gabriel wherein other doctors and testing were mentioned, however, he had no clear recollection as to what was actually discussed during these conversations. Attorney Foltz acknowledged that in Dr. Gabriel's 2016 report, Gabriel advised that it was an incomplete medical evaluation. Attorney Foltz acknowledged his notes reflected the names of Drs. Collins and Boyer. Attorney Foltz testified that he did not contact them because of Dr. Gabriel's representation to him that the cause of death was blunt force trauma, and Attorney Foltz did not think he could get the funding from his office for these additional experts.

Again based on the entirety of the evidence, this Court finds that Dr. Gabriel made clear to Attorney Foltz that there was a need for additional medical evaluation workups, further testing, and consultations with other experts, however, none of these tasks were done.

Jude's Birth was a Natural Birth via the Birth Canal.

Having reviewed the birth records (Court Exhibits P1 and P2) and the exhibits provided by the Respondent (Court Exhibits R1 and R2), this Court finds there was a natural vaginal birth with a prolonged period of labor. The delivery doctors, Dr. Zafur and Dr. Lauria, noted in several places on several different reports consistently that it was a vaginal delivery the early morning of June 30, 2012. The NICU (neonatal intensive care unit) notes signed by Richardson also indicates a vaginal delivery. The anesthesia notes indicate vaginal delivery. The hand written respiratory care notes of Doctor Larry Tinsley dated June 30th indicate a vaginal delivery.

There is also a detailed handwritten timeline of events of the entire delivery which indicates the time the epidural was given, when the mother started pushing, when the baby's head crowned, when the episiotomy was done and the status of the placenta when it was delivered. These notes

and records were all created contemporaneously with the delivery and the care given and there are many other hospital forms indicating vaginal delivery.

The only contrary statement as to the method of delivery being by C-section is in Dr. Larry Tinsley's notes in the patient history section of his examination conducted on July 1, 2021. The day after the baby was delivered. This report is also contrary to Dr. Tinsley's own handwritten notes on the respiratory care notes written on June 30, 2021.

Dr. Tinsley was not the doctor who delivered the baby but instead the respiratory expert who assessed Jude's health on the day of birth, when he noted a vaginal delivery, and the day after, when he noted a C-Section.

With the resolution of these factual issues, the determination as to whether Petitioner suffered from ineffective assistance of counsel in his criminal trial is ripe for adjudication.

Petitioner's IAC Claims.

In the Writ, Petitioner claims Attorney Foltz provided ineffective assistance of counsel by failing to sufficiently investigate the case, in particular, other potential non-abuse causes for the death and injuries of Jude, and by failing to provide Petitioner's medical expert, Dr. Gabriel, significant information which would have altered Dr. Gabriel's opinion. The critical missing information, in part, was contained in the police reports; that two days prior to the death the grandmother reported Jude had exhibited irregular eye dilation, and (not in the reports) that Jude's Mother had been in a car accident while pregnant.

Petitioner contends that because of the lack of investigation and failure to provide Dr. Gabriel with all of the relevant information, Attorney Foltz made the strategic decision to concede to the prosecution's theory that abuse of Jude was the only viable explanation of the child's death, and chose to provide a defense solely related to the timing of the death.

Petitioner offers that, had the jurors been aware of the other medical explanations, the verdict would have been acquittal.

Standard for an Ineffective Assistance of Counsel Claim.

“An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense.” (*Wiggins v. Smith* (2003) 539 U.S. 510, 521; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 687); see also *Smith v. Robbins* (2000) 528 U.S. 259, 285–89). 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.” (*Strickland, supra*, 466 U.S. at 686)

To obtain relief, a petitioner must demonstrate “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, supra*, 466 U.S. at p. 694; accord, *People v. Rices* (2017) 4 Cal. 5th 49, 80).

Deficient Performance.

To establish deficient performance, a petitioner must show that counsel’s performance fell below an objective standard of reasonableness. (*Strickland, supra*, 466 U.S. at p. 688). Under *Strickland*, we apply a strong presumption that counsel’s performance was within the wide range of reasonable professional assistance. (*Id.* at 689).

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. Rather, to establish deficient performance, a petitioner must demonstrate that counsel’s representation ‘fell below an objective standard of reasonableness,’ as measured by ‘prevailing professional norms.’ (*Wiggins v. Smith, supra*, 539 U.S. at p. 521; *Strickland, supra*, 466 U.S. at p. 688).

To succeed on an IAC claim, a petitioner must show the attorney’s “omission ‘fell below an objective standard of reasonableness’ [citations] in light of ‘the professional norms prevailing when the representation took place’ [citations].” (*In re Long* (2020) 10 Cal.5th 764, 773.)

When applying this standard, we ask whether any reasonably competent counsel would have done as counsel did. (*In re Reno* (2012) 55 Cal.4th 428, 465.) Counsel’s performance “is assessed according to the prevailing norms at the time.” (*In re Thomas*, (2006) 37 Cal.4th 1249, 1257.)

There is a “strong presumption” that counsel’s conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight. In analyzing an IAC, the Court must reconstruct the circumstances of counsel’s challenged conduct, and evaluate the conduct from counsel’s perspective at the time. (*In re Long* (2020) 10 Cal.5th 764, 774.)

Judicial review of counsel’s performance is deferential; to establish deficient performance, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. (*Strickland, supra*, 466 U.S. at p. 689.), (*In re Gay* (2020) 8 Cal.5th 1059, 1073.)

The decision whether to call a particular witness is a matter of trial tactics and strategy which a reviewing court generally may not second-guess, unless defendant shows an unreasonable failure to investigate. (*People v. Bolin* (1998) 18 Cal.4th 297, 334.) The choice of what type of expert to use, however, is one of trial strategy and deserves “a heavy measure of deference.” (*Turner v. Calderon* (9th Cir. 2002) 281 F.3d 851, 876 (quoting *Strickland*, 466 U.S. at 691).)

The Duty to Investigate.

Petitioner is not claiming that Attorney Foltz is not a good attorney, or even that Attorney Foltz performed deficiently during the trial. Petitioner's claim is that Attorney Foltz was deficient in his failure of investigation, which led to the withdrawal of viable defense focusing on the cause of Jude's death.

Before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation. (*In re Thomas, supra*, 37 Cal.4th at p. 1258, quoting *In re Marquez* (1992) 1 Cal.4th 584, 602).

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. (*Strickland, supra*, 466 U.S. at pp. 690–691; *In re Thomas*, at p. 1258).

In the early 1980s, the “American Bar Association Standards for Criminal Justice published at the time described the duty to investigate this way: ‘It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.’ ” (*In re Thomas*, at p. 1262, quoting 1 ABA Stds. for Crim. Justice (2d ed. 1982 supp.) std. 4-4.1; See, *Wiggins v. Smith, supra*, 539 U.S. at pp. 522–523.)

When “counsel were not in a position to make a reasonable strategic choice as to whether to” present evidence “because the investigation supporting their choice was unreasonable”, (*Wiggins v. Smith, supra*, 539 U.S. at p. 536), a court must consider whether there is “a reasonable probability that a competent attorney ... would have introduced” the evidence the attorney's inadequate investigation failed to unearth (*Id.* at p. 535).) At the same time, “Courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.” (*People v. Scott* (1997) 15 Cal.4th 1188, 1212).

The Performance of Attorney Foltz Fell Below an Objective Standard of Reasonableness.

The prosecution theory in the case was child abuse, in particular, that the death of Jude was caused by shaken-baby syndrome. Attorney Foltz ultimately made the decision to concede child abuse as the cause of Jude's injuries and death, and to focus on the timing of the injuries in hopes of evidencing that Petitioner was not the perpetrator. According to Attorney Foltz, the decision was made based on what he characterized as a “concrete” opinion that blunt force trauma was the cause of Jude's death. Consequently, Attorney Foltz did not further investigate into the cause of Jude's death or injuries.

On its' face one might think this to be a reasonable decision, however, under what Attorney Foltz should have recognized would be the state of the evidence before the jury, it was a long shot at best. There was no direct evidence regarding who injured Jude. Attorney Foltz knew the

prosecution expert would, in effect, be pointing to the last person with Jude as the perpetrator of the fatal injury. Petitioner was this last person with Jude before her death by Petitioner's own admission.

Furthermore, the neighbor's testimony pointed to Petitioner as the perpetrator; Jude's crying loudly when Jude's Mother was gone and Petitioner stomping around angrily. The friends visiting the evening prior to the death testified how Petitioner voiced his frustrations with Jude. Petitioner was the stay-at-home dad, the primary care-taker, and the person who spent the most time with Jude. The property manager said that on the night of Jude's death, Petitioner seemed more concerned about Petitioner's marijuana than the death of his child. Seemingly, the only favorable evidence in store at the trial would be Jude's Mother's taking of the plea deal. However, her testimony of taking the deal was, in effect, an admission that Jude had been abused and set the stage for the jury to find Petitioner guilty on an aiding and abetting theory. Would the jury possibly believe Jude's Mother abused the child and Petitioner was not somehow complicit? In the death of a baby, with all the other evidence pointing to Petitioner, the defense theory was a Hail Mary.

Attorney Foltz recognized this was a complex case involving medical theories. There was no direct evidence of the cause of the injuries inflicted upon Jude. There were no admissions by his client, Petitioner. There were no external injuries pointing to abuse. Jude was infirm from birth, having been born prematurely and suffering from a myriad of health issues, including a brain abnormality.

Attorney Foltz also recognized the need for an expert and believed he retained a top-notch expert in Dr. Gabriel. Attorney Foltz's expert, Dr. Gabriel, advised him of the fact that he could not provide a complete medical evaluation with the limited information Dr. Gabriel had been provided, and there was a need for further testing and consultations with other experts in different areas. Yet, Attorney Foltz, admittedly suffered from tunnel vision, and did not further investigate the case by following the recommendations of his one and only expert.

In assessing the reasonableness of an attorney's investigation, for Sixth Amendment purposes, the court must consider not only the quantum of evidence known to the attorney, but also whether the known evidence would lead a reasonable attorney to investigate further. (*In re Long* (2020) 10 Cal.5th 764, 773.)

Based on the circumstances of the case, the Court finds that a reasonable attorney would have investigated further by, if nothing else, complying with his experts requests for additional testing and consultations with other experts on the results. There is reason to believe this would have happened if the full discovery materials had been provided to Dr. Gabriel in the first place; the police reports of the grandmother's observation of the pupils, and Petitioner's description of Jude's final moments, which evidenced a seizure. Dr. Gabriel would have never given an opinion of blunt force trauma.

For these reasons, the Court finds the performance of Attorney Foltz fell below an objective standard of reasonableness, as measured by prevailing professional norms at the time of the trial, and Petitioner suffered from ineffective assistance on the part of Attorney Foltz.

A Deficiency which Prejudiced the Defense is Required.

The prejudice prong of the two part *Strickland* analysis is equally burdensome. A petitioner must show that it is “reasonably likely” that the result would have been different. *Harrington v. Richter* (2011) 562 U.S. 86, 111 (citing *Strickland*, 466 U.S. at 696). The likelihood of a different result must be substantial, not just conceivable. *Id.* at 112. Assessing whether such a reasonable probability of a different trial outcome would have existed but for counsel’s deficient performance requires assessing the hypothetical impact of evidence not presented at trial on that which was presented. *Strickland*, 466 U.S. at 696 (“Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.”). Our analysis “must consider the totality of the evidence before the judge or jury,” keeping in mind that the weaker the evidence at trial, the more likely it was that an attorney’s error was prejudicial. *Id.* at 695–96.

To obtain relief, a defendant must demonstrate “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*, *supra*, 466 U.S. at p. 694; accord, *People v. Rices* (2017) 4 Cal. 5th 49, 80; *see also Fields v. Woodford* (9th Cir. 2002) 309 F.3d 1095, 1107–08 (requiring that a petitioner “demonstrate that the errors *actually* prejudiced him”).

The Deficient Performance of Attorney Foltz Prejudiced Petitioner.

Although the jury acquitted Petitioner of first degree murder, he was convicted of violations of *Penal Code* §§ 273ab and 273a(a). Both charges have as elements, in effect, “child abuse,” to wit: assaulting a child resulting in death and inflicting physical pain likely to produce great bodily injury or death. Attorney Foltz’s trial tactic was to concede “child abuse,” and left the jury with really just one question, to wit: Who abused Jude? As reasoned above, the state of the evidence at trial overwhelmingly pointed to either Petitioner or Petitioner and Jude’s Mother together. A no win situation for Petitioner was created.

If there had been a reasonable investigation, the jury may have never reached the question of who abused Jude. As a result of the faulty investigation, Attorney Foltz failed to discover that there were other non-abusive medical explanations for all of Jude’s injuries and death, and Dr. Carpenter’s opinions would have been seriously challenged.

As Dr. Gabriel testified, simply having the police reports containing the grandmother’s observation of Jude’s pupils and Petitioner’s statements to law enforcement would have changed Dr. Gabriel’s opinion. He would never have concluded the cause of death was blunt force trauma. As Dr. Gabriel detailed in his testimony at the hearing, there were reasonable natural causes for the death of Jude inconsistent with abuse. Based on the reports of the other experts provided in this proceeding, Dr. Gabriel is confident of his current conclusions that there were reasonable natural causes for the death of Jude inconsistent with abuse.

If the investigation would have followed Dr. Gabriel's recommendations for further testing and consultations, the jury would have potentially received Dr. Wigren's and Dr. Hyman's detailed analysis of the cause of injuries and death, both concluding Jude likely died of natural causes, and not due to abuse. Dr. Hyman's beliefs that Jude suffered from brain thromboses (clotting) in various locations would have been presented to the jury. The jury would have heard the expert testimony regarding Jude's chemical deficiencies and the possibility of bone fragility. The jury could have heard of other possible causes of the rib fractures, such as the car accident, the prolonged delivery process, and the CPR performed on Jude. The jury would have heard how the medical evidence does not support shaken-baby syndrome and that Dr. Carpenter's opinions are not supported by the medical evidence or, in some parts, by current studies and other experts in the field.

There can be no doubt that an attorney adhering to the objective standards of reasonableness in light of the professional norms prevailing at the time of the trial would have presented all this undiscovered evidence at the trial, and most importantly, there is a reasonable probability the jury would have returned a different verdict.

This was a circumstantial evidence case of a deceased child with no direct evidence of anyone inflicting injuries to Jude and no admissions. There were no external injuries consistent with abuse, and the cause of the internal injuries was not limited to abuse. The internal injuries could be explained as non-abusive, as demonstrated at the evidentiary hearing. The jury was instructed as to circumstantial evidence that in order to convict on such evidence "you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another guilt, you must accept the one that points to innocence." The jury was told that this, in effect, is reasonable doubt.

Even accepting that faced with this additional defense evidence, the prosecution may have had additional experts as well in the trial, this Court finds that based on the totality of the trial evidence, and the evidence presented in this Writ proceeding, that one or more jurors could, and likely would, have had a reasonable doubt about Petitioner's guilt. That is, it is highly probable that one or more jurors would have found the circumstantial evidence pointing to non-abusive explanations for the injuries and death to be reasonable.

Attorney Foltz's failure to investigate other causes of the injuries and death of Jude was crucial to Petitioner's ability to receive a fair trial. The lack of such inquiry is an error on counsel's part "sufficient to undermine confidence in the outcome" of the original trial and provides sufficient grounds for habeas corpus relief. (See, *Strickland*, supra, at p. 694).

ORDER

Based upon the above, this Court finds that the Petitioner is entitled to the relief requested in the Writ. The Writ is hereby granted, the judgements in Kern County Case BF144277A, as to Counts 2 and 3, are hereby vacated, and the OSC is discharged.

It is further ordered that the matter (BF144277A) be scheduled in Department CC of the Metropolitan Division of the above entitled court on January 4, 2022 at 8:30 a.m. for setting of the new trial date. The currently scheduled Lamont court date of December 22, 2021 in case HC016172A is vacated.

Dated: _____

Michael E. Dellostritto
Judge of the Superior Court