IN THE CIRCUIT COURT FOR KENT COUNTY

GAIL PINDER DOBSON **Petitioner**	
v.	**Talbot County Case No. 20-K-09-9572**
STATE OF MARYLAND	

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CIRCUIT COURT
FOR TALBOT COUNTY
EASTON, MARYLAND

MEMORANDUM, STATEMENT OF REASONS AND ORDER REGARDING PETITION FOR POST CONVICTION RELIEF

Petitioner, Gail Pinder Dobson ("Petitioner"), is before the Court on her first Petition for Post Conviction Relief, filed in accordance with the Uniform Post Conviction Procedure Act, Md. Code Ann., Criminal Procedure Article, §§ 7-101 through 7-109, and Md. Rules 4-401 to 4-408. A hearing was held on the petition on February 24 and 25, 2014. Petitioner appeared with counsel, Flynn M. Owens and John R. Garey. The State was represented by Special Prosecutors William Jones and Maurice Nelson from Dorchester County. The Court heard testimony from Dr. Peter Stephens, Dr. Ronald Uscinski, Dr. Allen Walker, and trial counsel, Raymond Simmons. Petitioner did not testify. Petitioner and the State offered the complete trial transcript as a joint exhibit. Following the two-day hearing, the Court held the matter *sub curia* for the purpose of rendering this written decision.

I. SUMMARY OF FINDINGS AND CONCLUSIONS OF LAW

The Court has reviewed the arguments regarding all of the issues raised at the hearing by Petitioner and Petitioner's counsel, including those set out in the petition, as well as all of the documents, transcripts, and files in the records of the case, and the Court is well aware of the law that applies to this matter. For the reasons set forth below, the Court finds the following:

Petitioner's counsel was deficient in representing her in his failure to make reasonable efforts to produce an expert, or experts, to testify at her trial to refute the conclusions of the State's expert witnesses as to the cause of Trevor Ulrich's death. The Court further finds that counsel's deficient performance prejudiced Petitioner. From its findings of deficient performance and prejudice to Petitioner, the Court concludes that Petitioner was denied a fair trial and will vacate the conviction and order a new trial.

II. BACKGROUND FACTS

Petitioner was a licensed daycare provider who watched children out of her home in Trappe, Maryland. Petitioner had been a daycare provider since 1986 and enjoyed a strong reputation in the community. One of the children in Petitioner's care was Trevor Ulrich ("Trevor"), who was born to parents, Kelly Ulrich ("Mrs. Ulrich") and Dominic Ulrich ("Mr. Ulrich" with Mr. Ulrich and Mrs. Ulrich being collectively referred to as "the Ulrichs") on November 22, 2008, nearly two months premature. Petitioner had known Mrs. Ulrich for twenty (20) years and, in fact, had cared for her when Mrs. Ulrich was a child. The Ulrichs hired Petitioner to care for Trevor when Mrs. Ulrich returned to work after her maternity leave.

On August 31, 2009, an incident occurred while Trevor was in Petitioner's care. According to Petitioner, Trevor had hit his face on the activity bar of a bouncy seat he was in, leaving a

mark under his eye. Trevor vomited after being placed in his grandmother's car to be taken home. That day, Trevor was taken to the emergency room, examined, and discharged. He returned to Petitioner's care two days later. On that day, September 2, 2009, Trevor stopped breathing. Petitioner called 911 and contacted Mrs. Ulrich. Trevor was transported by ambulance to the local hospital and was later transferred to Children's Hospital in Washington, D.C. At Children's Hospital he was placed on life support and died on September 3, 2009.

On November 17, 2009, Petitioner was indicted on the charges of first degree child abuse and second degree murder. On November 23, 2009, Raymond Simmons entered his appearance on behalf of Petitioner. Trial commenced on April 16, 2010. After both sides had rested, the jury returned its verdict on August 20, 2010. The jury found Petitioner guilty of second degree murder, first degree child abuse, and second degree assault as to the events of September 2, 2009, but not guilty of child abuse as to the "bouncy seat" incident on August 31, 2009.

III. STANDARD OF REVIEW

Petitioner's claims of ineffective assistance of counsel are founded under the Sixth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment; the Maryland Declaration of Rights; and Maryland substantive law. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."

Article 21 of the Maryland Declaration of Rights declares, "the Sixth Amendment to the U.S. Constitution and this article guarantee a right to counsel...in a criminal case involving incarceration." Article 21 also states, "[t]here is no distinction between the right to counsel guaranteed by the Sixth Amendment and this article."

The United States Supreme Court has recognized that the right to counsel is the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). However, the purpose of the effective assistance of counsel guarantee of the Sixth Amendment is not to improve the quality of legal representation, but simply to ensure that criminal defendants receive a fair trial. *Id.* at 689. The Court in *Strickland* further stated that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Id.* at 686. Petitioner alleges trial counsel made errors which meet the *Strickland* two-prong test for ineffective assistance of counsel which requires Petitioner to show that: (1) Counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Id.* at 687.

As to the first prong of deficient performance, the *Strickland* Court stated:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Id. at 689.

The Court further explained that judicial scrutiny of counsel's performance must be highly deferential, stating:

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged conduct 'might be considered sound trial "strategy.'

Id. supra at 688-89.

With respect to the second prong of prejudice, the Supreme Court, in *Strickland* stated that, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect of the judgment." *Id.* at 691. Further, in *Strickland*, the Court held that it is "not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id. supra* at 693. Rather,

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694.

IV. PRE-TRIAL AND POST-TRIAL PROCEDURAL HISTORY

On November 17, 2009, Petitioner was indicted on the charges of second degree murder, first degree child abuse, and other related charges for Trevor's death. A jury trial was scheduled for April but, due to a continuance requested by Defense counsel, the trial commenced in the Circuit

Court for Talbot County on August 16, 2010 before the Honorable Broughton M. Earnest. At trial, the State alleged that Petitioner abused Trevor on August 31, 2009, while Trevor was attending daycare at Petitioner's home. The State further alleged that on September 2, 2009, Petitioner fatally injured Trevor.

On August 20, 2010, the jury returned its verdict, finding Petitioner guilty of second degree murder, first degree child abuse, and second degree assault for the incidents on September 2, 2009. Petitioner was acquitted of the charge of child abuse for the allegations stemming from the August 31, 2009 incident.

Petitioner was sentenced to confinement for thirty (30) years, with all but twenty (20) years suspended, followed by a five (5) year term of probation, as to second degree murder, with the same sentence imposed concurrently as to first degree child abuse. For sentencing purposes, the Court merged the second degree assault conviction. Petitioner filed a Motion for Modification of Sentence on March 3, 2011, which the court denied. Petitioner thereafter filed a notice of appeal and on March 23, 2012, in an unreported opinion, the Court of Special Appeals affirmed Petitioner's convictions.

V. PETITION FOR WRONGFUL CONVICTION

On March 21, 2013, Petitioner, through counsel, filed her Petition for Post Conviction Relief and requested that this Court grant Petitioner a new trial. Petitioner made the following allegations of error:

1) Trial counsel was ineffective for not obtaining a qualified expert or experts to testify to refute the conclusions of the State's expert witnesses as to the cause of Trevor's death.

2) Trial counsel was ineffective for opening the door to allow Dr. Allen Walker, an expert witness for the State, to tell the jury his opinions were based on a better than 98%-99% degree of certainty.

3) Trial counsel was ineffective for not calling Petitioner's husband as a witness.

4) Trial counsel was ineffective for not properly preparing Petitioner for her trial testimony.

5) Interests of due process and fundamental fairness mandate Ms. Dobson be granted a new trial, in light of deposition testimony by medical experts given in preparation for a lawsuit by Trevor's parents against Easton Memorial Hospital.[1]

6) Cumulatively, Ms. Dobson was denied a fair trial, as a result of allegations 1-5 above.

The State answered the Petitioner, denying the allegations and asserting that Petitioner has no basis for relief.

VI. FINDINGS OF FACT[2]

Mrs. Ulrich gave birth to Trevor on November 29, 2008, nearly two months earlier than his due date. In September, 2009, the Ulrichs decided to place Trevor in daycare with Petitioner so that Mrs. Ulrich could return to work. The Ulrichs had known Petitioner for twenty years (20) and Petitioner had a strong reputation in the community as a daycare provider.

On August 31, 2009, his first day at daycare, Trevor sustained an injury under his right eye as a result of hitting his face on the activity bar while he was on a "bouncy seat." Petitioner explained the injury to Mrs. Ulrich's mother, Ms. Apple, when she arrived at Petitioner's home

[1] After Petitioner presented all her evidence at the Post Conviction hearing, the State moved to dismiss allegation 5, claiming the Petitioner failed to present any evidence in support of this allegation. The Court granted the State's motion and dismissed allegation 5. Allegations 1, 2, 3, 4, and 6 remained viable for the Court's consideration.

[2] The Court adopts Section II, Background Facts, in its findings.

to pick the child up. When placed in Ms. Apple's car, Trevor began vomiting. When Mrs. Ulrich retrieved Trevor from her mother, he was limp and lethargic. Mrs. Ulrich took Trevor to the emergency room at the local hospital, where he was examined and discharged. Trevor did not attend daycare the next day, as he was not completely back to normal health. Trevor returned to Petitioner's daycare on September 2, 2009.

When Trevor was dropped-off at Petitioner's home on September 2, 2009, Petitioner noticed he was "dull" and not as active as she thought he would be. Petitioner testified that, although his appetite was not that good, Trevor did eventually eat lunch at approximately 1:00 p.m. Following lunch, Trevor was crawling around, while the other three children at daycare napped. At 2:15 p.m. Petitioner went to the kitchen and prepared Trevor a bottle. When she returned, she saw that Trevor had soiled himself. Petitioner testified that she laid a blanket on the floor and changed Trevor. After changing him, Petitioner fed Trevor his bottle and placed him in his crib. Petitioner returned to the kitchen to prepare a bottle for one of the other children in her care, a process involving the thawing of frozen pouches, taking six to ten minutes. Upon finishing up in the kitchen, Petitioner returned to the living room, whereupon she saw Trevor in his crib lying on his back making gurgling sounds.

Believing Trevor was choking, Petitioner immediately picked him up and applied several back thrusts to him. When Trevor did not respond to the back thrusts, Petitioner called both Mrs. Ulrich and 911 and began to perform cardiopulmonary resuscitation (CPR) on him. When emergency personnel arrived, Petitioner turned over treatment of the child to the EMTs who continued CPR until he arrived at the local hospital. Due to the severity of his condition, Trevor was airlifted to the Children's Hospital in the District of Columbia. At the Children's Hospital, he was placed on life support with zero-percent (0%) chance of survival. On September 3, 2009,

the Ulrichs decided to take Trevor off of life support and he was subsequently pronounced dead that day.

The facts surrounding his death led doctors and law enforcement authorities to investigate to determine if Trevor was a victim of a homicide. Specifically, the authorities reviewed whether Trevor's death resulted from abuse, or 'shaken baby syndrome,' at the hands of Petitioner. The investigation led to charges against Petitioner, which ultimately led to her indictment by a Talbot County Grand Jury on November 17, 2009. The indictment alleged that Trevor was abused by Petitioner while the child was in her care on two separate occasions, the first day being August 31, 2009. The second date of the alleged abuse was September 2, 2009. Among other offenses, the Petitioner was charged with first degree child abuse and second degree murder.

Petitioner's Trial

Raymond Simmons entered his appearance on November 23, 2009 on behalf of Petitioner. At the inception of his representation, Mr. Simmons recognized that it would be imperative to retain an expert witness. In preparing for the case, Mr. Simmons had conversations with the Office of the Public Defender in order to locate an expert who could testify for the defense. The name of Alan R. De Jong, M.D., a pediatrician in Wilmington, Delaware, was suggested by a staff member of the Public Defender's office. Simmons spoke to Petitioner about retaining an expert and she permitted Mr. Simmons to make such a selection. Mr. Simmons contacted and retained Dr. De Jong. Mr. Simmons' testified that he never considered speaking with any experts other than Dr. De Jong.

On March 5, 2010, at a Motions Hearing, Mr. Simmons informed the Court that Dr. De Jong would be out of the country during the time scheduled for the trial (April 26 through May

4) and that the Defense would therefore need a continuance. By March 5, the State had provided all discovery to Petitioner except for Dr. Walker's report. Consequently, the Court granted Mr. Simmons' request but cautioned that the Court "would not be prone to postponing this case simply for discovery issues."[3]

Dr. De Jong did not render his opinion until July 30, 2010, when he prepared a four (4) page report stating that (1) some of the bruises on Trevor's face could have been caused by the bouncy seat accident and (2) Trevor died of abuse which occurred at Petitioner's house on September 2, 2009.[4] The Court concludes that Simmons received this letter shortly after it was written, only two weeks from trial. It was only after the letter was received from Dr. De Jong that Mr. Simmons decided to have a face-to-face meeting with him for the first time, occurring only three (3) days before trial. After this meeting, Mr. Simmons then decided to forego the utilization of any experts to refute the State's experts and simply have Petitioner testify. Additionally, the defense produced nine (9) character witnesses to reflect that Petitioner enjoyed a good reputation.

The trial commenced on August 16, 2010. Among those who testified were, Dr. Brian Corden, Trevor's Pediatrician; Sharon Apple, Trevor's grandmother; Craig McCracken, Talbot County Emergency Services Dispatcher; Dr. Frederick Bauer from Easton Memorial Hospital; Diane Walbridge, director of nursing at Shore Health System; Elwood Roberts, EMT for Talbot County; Dana Sullivan, childcare licensing specialist for the State of Maryland in Talbot County; Sergeant Scott Cook of the Maryland State Police Homicide Unit; Andrea Dixon, Child Protective Services Investigator; Dr. Tonya Hinds, Children's National Medical Center

[3] Trial Transcript from March 5, 2010, Motions Hearing, page 5.

[4] Petitioner's Exhibit 8, Dr. De Jong's letter to Ray Simmons.

pediatrician; Dr. Carolyn Revercomb, Deputy Medical Examiner for the District of Columbia; and Dr. Allen Walker, Johns Hopkins University School of Medicine pediatrician.

The first of the State's experts, Dr. Tonya Hinds, testified as a hybrid witness in that she was a treating physician and was accepted by the Court as an expert in the field of general pediatrics and child abuse. Dr. Hinds' testimony was that Trevor had widespread brain swelling, subdural bleeding, and retinal bleeding, all of which were caused by vigorous, repetitive shaking with impact. She further testified that the "bouncy seat" incident on August 31, 2009 was not the cause of Trevor's death.

Mr. Simmons attempted to cross-examine Dr. Hinds on biomechanical engineering issues, an area in which she had no expertise and on which she held no opinion. The State's numerous objections were sustained prompting Judge Earnest to state to defense counsel at a conference at the Bench:

> "Well I mean, I think we just end this discussion by saying <u>if you had an expert</u> you could prompt her with what the expert was going to say. It would disagree or support your thesis it would be a little easier for me to deal with this, but we're dealing with a pretty abstract question here. Let me give you a certain amount of latitude."

Trial Transcript, August 18, 2010, page 82 (emphasis added).

Dr. Hinds was followed by Dr. Carolyn Revercomb, Deputy Medical Examiner for the District of Columbia, who performed the autopsy on Trevor. She concluded that the scalp bruising, along with the bleeding around the brain and in between the hemispheres of the brain were indicative of blunt head trauma which resulted in death. Dr. Revercomb opined that these were not accidental injuries, but rather that the death was a homicide. She also indicated that there were optic nerve hemorrhages and retinal hemorrhages, also caused by head trauma. Once

again, defense counsel attempted, unsuccessfully, to cross examine the witness concerning technical medical issues.

The last State's witness was Dr. Allen Walker, a pediatrician at Johns Hopkins School of Medicine, who was qualified as an expert in pediatrics, pediatric emergency medicine, and child abuse and neglect. Dr. Walker never examined or treated Trevor, but based his testimony on a review of various medical records in the case. He concluded that the child died as a result of blunt trauma to the head as well as shaking injury to the brain, and that the retinal bleeding was the result of shaking. Even more damaging to the defense was his conclusion that the injuries to Trevor occurred shortly before the 911 call was placed by the Petitioner on September 2, 2009. Mr. Simmons' cross examination of Dr. Walker included the following colloquy:

> Q: Doctor, do you know of any condition that could cause the injuries depicted or reported, more accurately in the medical examiner's report than by shaken baby?
>
> A: Any condition other than…
>
> Q: Is there anything else that would cause what you see, what you saw in the medical examiner's report?
>
> A: Not in my opinion, no.

Trial Transcript, August 19, 2010, pages 47-48.

The cross-examination continued:

> Q: Now all of your testimony is given to a reasonable degree of medical certainty, is that correct?
>
> A: That's correct.
>
> Q: And for the jury, reasonable degree of medical certainty is 51 percent, is it not?

A: No.

Q: By definition?

A: No. Not my definition.

Q: The standard accepted definition of reasonable degree of medical certainty, what is that Doctor?

A: In my, when I use the term to a reasonable degree of medical certainty I am saying better than a 98-99 percent chance.

Q: So you're definition of reasonable degree of medical certainty is different than everybody else's?

A: It's the one I've always understood and the one I've used.

Id. at pages 50-51.

Following the State's case, Defense moved for judgment of acquittal, which was denied on all counts. Petitioner then was called to the stand to testify in her own defense. She testified that she was fifty-three (53) years old and had been a licensed daycare provider in Trappe, Maryland since 1986. Petitioner testified that she had known Mrs. Ulrich for about twenty (20) years, and had provided daycare for Mrs. Ulrich when she was a child. When Mrs. Ulrich became pregnant, she had requested Petitioner to watch Trevor after her maternity leave. Mrs. Ulrich testified to the facts regarding Trevor's injury on August 31, 2009 and to the events leading up to his hospitalization and eventual death on September 2, 2009.

Following her testimony, the defense called nine (9) character witnesses who all uniformly testified that Petitioner was a truthful person with no abusive tendencies. At the conclusion of the testimony of the defense character witnesses, Mr. Simmons advised the court that, based on Dr. Walker's earlier testimony, he would not be calling Petitioner's expert medical witness, Dr. De Jong, and was prepared to rest.

The State called two rebuttal witnesses. The first rebuttal witness was Sergeant Cook, who testified about statements Petitioner made to him on September 3, 2009, and regarding the August 31, 2009, bouncy seat incident. The second rebuttal witness was Sergeant Chastity Blades of the Maryland State Police Homicide Unit, who testified about certain statements Petitioner made to her on September 4, 2009.

At the conclusion of the State's case, the defense renewed its motion for judgment of acquittal, which was again denied. On August 20, 2010, the jury returned its verdict, finding Petitioner not guilty of all charges relating to the August 31, 2009 charges, but finding her guilty of second degree murder, first degree child abuse, and second degree assault, relating to the September 2, 2009 charges.

Post Conviction Hearing

At the post conviction hearing, Mr. Simmons explained several times that, although he originally intended to have an expert testify at trial, he later decided to forego using one because Petitioner denied any type of abuse and that her credibility should have been sufficient. Mr. Simmons never contended that such expert opinions were not available, or that Petitioner lacked the funds to pay for them, only that such testimony was not necessary. He explained to the Court that an expert was not necessary because Petitioner contended that nothing of a violent or an abusive nature occurred in the events leading up to Trevor's death and that any expert testimony would have been inconsistent with that "fact pattern."

Mr. Simmons purportedly began considering changing his strategy from the utilization of an expert to relying solely on Petitioner's credibility after receiving Dr. De Jong's four (4) page report just over two weeks before trial. Mr. Simmons testified that he made the final decision to

abandon utilizing an expert witness after meeting Dr. De Jong only three days before trial. Mr. Simmons contended that he did not ask for a continuance to procure another expert after obtaining Dr. De Jong's opinion so close to trial because an expert was not needed.

At the post conviction hearing, Petitioner gave the Court a glimpse of what the defense could have presented at the underlying trial through testimony presented by Dr. Peter Stephens and Dr. Ronald Uscinski. Dr. Stephens and Dr. Uscinski offered opinions which disputed the conclusions of State's experts who testified at trial, as well as disagreeing with the conclusions drawn by Dr. De Jong.

Dr. Stephens, a forensic pathologist, opined that there were significant errors in the medical testimony which the jury heard, which included:

1. There was no blunt force injury to Trevor's head sufficient to cause death.
2. The autopsy slides showing sections of Trevor's brain reflected "older bleeding," as well as recent bleeding. He concluded that, whatever caused Trevor's apnea (cessation of breathing), started prior to September 2, 2009 (the day of the alleged abuse) and that a more likely explanation of Trevor's collapse on September 2, 2009, was a reoccurrence of bleeding in a pre-existing hematoma which could have been caused by the "bouncy seat" incident.
3. Dr. Stephens characterized some of Dr. Walker's opinion as to "shaking" being a definitive cause of death as "reckless."
4. Dr. Stephens was very critical of the significance which the State's witnesses placed on the hemorrhages in Trevor's eyes and stated that such hemorrhages are not diagnostic of inflicted trauma.
5. That, in no way, did the findings support an opinion of inflicted or repetitive injury as suggested by Doctors De Jong and Hinds and that their opinions (that Trevor was abused) was a common error made by those unfamiliar with neuropathology.

6. That the array of State experts gave the jury a "distorted presentation of obsolete information under the masquerade of science."

Dr. Uscinski, who was qualified as an expert in the field of neurological surgery, was also in disagreement with the State's experts in concluding that Trevor's death was from child abuse. He opined that:

1. The child had a subdural hematoma, but that the clinical information indicated that it was a chronic hematoma, pre-existing the day of the alleged abuse (September 2, 2009).

2. His rationale for concluding that Trevor's condition was chronic was the presence of iron in the dura as well as the disproportionate increase of the child's head size from below the 5th percentile to the 68th percentile in six months.

3. He, like Dr. Stephens, disagreed with the significance placed on the retinal hemorrhaging by the State's experts.

VII. OPINION

The Court will focus its attention solely on Petitioner's allegation that "trial counsel was ineffective for not obtaining a qualified expert or experts to testify to refute the conclusions of the State's expert witnesses as to the cause of Trevor's death." This Court has been particularly sensitive to the Strickland Court's mandate of avoiding the "distorting effects" of hindsight. The Court has "indulge[d] a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland, supra* at 689.

Trial Counsel's Performance Was Deficient

In its analysis of Mr. Simmons' performance, the Court should first note that Mr. Simmons knew shortly after he was retained that a successful defense would necessitate securing

a medical expert to testify at trial. The only evidence of any investigation on the part of Mr. Simmons to secure such an expert was his testimony that he spoke with a staff member of the Public Defender's Office to get a recommendation. He was given the name of Dr. Alan De Jong, a pediatrician in Wilmington, Delaware, as someone who was knowledgeable in the field of child abuse. Other than Dr. De Jong's having the recommendation of the Public Defender's Office, the record is bereft of any effort on the part of counsel to investigate the doctor's background. In fact, it was not until three (3) days before trial that Mr. Simmons actually met personally with him. As well, there is no evidence that counsel conducted any other investigation or research to secure any other names of experts who might assist him in the defense of Petitioner. To the contrary, Mr. Simmons' acknowledged that he never sought another medical opinion.

The State's case against Petitioner consisted entirely of circumstantial evidence. There were no eye-witnesses who saw the Petitioner inflict any abuse upon Trevor. Although the prosecution called sixteen (16) witnesses, by far the most critical evidence presented by the State came from three (3) experts: Dr. Hinds, Dr. Revercomb, and Dr. Walker. The upshot of their unrebutted testimony was that Trevor had widespread brain swelling, subdural bleeding, and retinal bleeding, caused by repetitive shaking with impact, the injuries were not accidental, not caused by the bouncy seat, and the injuries occurred shortly before the 911 call was placed by Petitioner on September 2, 2009

We must look at the trial of this case not in retrospect, but through the lens of foresight at the time of trial. Although Mr. Simmons could not have been expected to know of every exact detail of the aforegoing three experts' testimony, he clearly knew from discovery that the State would base its case primarily on (1) the autopsy report from the Office of the Chief Medical Examiner which would be explained and introduced through Dr. Revercomb; (2) the medical

records of the Children's Hospital; (3) the findings, conclusions, and opinions of Dr. Hinds, Dr. Walker, and Dr. Revercomb that Trevor's symptoms of subdural hematoma, brain swelling, and retinal hemorrhages (commonly referred to in the field of child abuse as the "triad of symptoms") were diagnostic of child abuse. These facts were disclosed to Mr. Simmons by March 4, 2010. At the March 5th Motions Hearing, the only item of discovery which Mr. Simmons stated he did not have was Dr. Walker's report. Therefore, the Court concludes that he was in possession of sufficient information at that time for Dr. De Jong to form an opinion.

An attorney following prevailing professional norms would have immediately provided to his expert all discovery received by March 4, 2010. It is important to note that trial was still nearly five and one half (5 ½) months away. There was more than ample time (a) to ascertain Dr. De Jong's opinion and (b) to procure other medical experts as alternatives to Dr. De Jong. Clearly, an abundance of such experts were available.

Rather than proceeding expeditiously, however, Mr. Simmons was dilatory in securing the doctor's opinion, which he received only two weeks before the continued trial date. Dr. De Jong made it clear that he essentially agreed with the State's theory of the case; that, because of Trevor's symptoms, his conclusion was that the cause of death was child abuse. He even went so far as to say that Trevor's inflicted head trauma occurred shortly before the 911 call while he was at the home of Petitioner.

Had trial counsel acted with reasonable diligence, he could have learned of Dr. De Jong's opinion months before trial, instead of days. He then would have had more than adequate time to have procured an alternate expert, or experts, helpful to the defense. As events unfolded, however, Mr. Simmons decided that an expert was not necessary.

Mr. Simmons gave the Court no rational reason why his strategy changed from initially knowing that he needed expert testimony to the position of deciding that such testimony was not needed at all. He explained several times at the post conviction hearing that he decided he did not need such testimony because Petitioner denied any type of abuse and that her credibility should have been sufficient. Further, he explained that such testimony would not fit the "fact pattern" of Petitioner's version of the facts. He never contended that expert opinions were not available, or that Petitioner lacked the resources to retain experts, only that such expert testimony was not necessary. As well, Mr. Simmons testified that he did not ask for a continuance to get an alternate expert after obtaining Dr. De Jong's opinion so close to trial because an expert wasn't needed.

The State argues that Mr. Simmons' choice to not obtain an expert to testify was a strategy and that the Court should not second-guess his decision. The Court is well aware of the Supreme Court's caution in *Strickland*, that the Court should "eliminate the distorting effect of hindsight" and not be tempted to second-guess counsel's strategy. However, the Court cannot reconcile Mr. Simmons' change in position from that of needing an expert to testify for the defense, to simply relying on his client's credibility and reputation without expert testimony to refute the testimony of the State's experts. There is a great gap between those two positions which the word "strategy" cannot bridge.

It is significant that Mr. Simmons insists that he didn't need a continuance after receiving Dr. De Jong's opinion. Although he denies ever requesting one at any time, in point of fact he did. The record reflects that on March 5, 2010, at the Motions hearing, Mr. Simmons informed the Court that Dr. De Jong would be out of the country during the time scheduled for the trial (April 26 through May 4) and that the Defense would therefore need a continuance. The Court granted

Mr. Simmons' request but cautioned that the Court "would not be prone to postponing this case simply for discovery issues" but only because Petitioner's expert would be unavailable for part of the trial. Mr. Simmons was therefore on notice that he would not likely be granted any further continuances.

As well, the Court also does not accept Mr. Simmons' assertion at the post conviction hearing that he received most of the State's discovery "closer to trial than January." Mr. Simmons would have this Court believe that Dr. De Jong's belated opinion came as a result of the State being tardy in providing such discovery. The record indicates that the only item of discovery left for the State to disclose as of the March 5, 2010 Motions Hearing was the report from Dr. Walker. This report was simply cumulative of all the other evidence and was not necessary for Dr. De Jong to form his opinion. This is borne out by the fact that Walker's opinion was not even mentioned in De Jong's July 30th letter.

It is unreasonable that Mr. Simmons did not procure an earlier opinion from Dr. De Jong. Further, it is unreasonable that Mr. Simmons did not seek other opinions from experts who clearly disagreed with the triad diagnosis approach and who would be helpful to the defense. The Court finds that Mr. Simmons did not use reasonable diligence in ascertaining Dr. De Jong's opinion because the Doctor's name had been suggested by the Public Defender's Officer. Relying on Dr. De Jong having the imprimatur of the Public Defender, it is clear to the Court that he *assumed* that this doctor would be helpful to the defense. Such an assumption was not reasonable and further demonstrates Mr. Simmons' failure to adequately investigate available experts.

Mr. Simmons' assertion that he did not need expert testimony is both illogical and untenable. Such testimony would have both corroborated Petitioner's version of the facts and refuted the

testimony of the State's experts. It is evident that Mr. Simmons knew he needed expert testimony by the manner in which he attempted to cross examine the State's experts. When Dr. Hinds was on the stand, he tried unsuccessfully to explore issues of biomechanical engineering. After many objections, Judge Earnest expressed the Court's difficulty in permitting the line of questioning in light of the fact that Petitioner did not have an expert to establish a foundation for the questions.

In spite of the generous latitude granted by the trial judge, counsel continued, unsuccessfully, to bring out issues on which a defense expert in the field of biomechanical engineering could have opined. Mr. Simmons' attempts at cross examination of Dr. Walker could only be described as a complete failure, culminating with the following exchange:

> Q: Now that all of your testimony is given to a reasonable degree of medical certainty, is that correct?
>
> A: That's correct.
>
> Q: And for the jury, reasonable degree of medical certainty is 51 percent, is it not?
>
> A: No.
>
> Q: And for the jury, reasonable degree of medical certainty is 51 percent, is it not?
>
> A: In my, when I use the term to a reasonable degree of medical certainty I am saying better than a 98-99 percent chance.

Trial Transcript, August 19, 2010, pages 47-48, 50-51.

It is clear that, had experts testified for the Petitioner at trial to refute the conclusions of the State's experts, such disastrous cross-examination would not have taken place. Most

particularly, the question concerning "reasonable degree of medical certainty" could have been posed to a defense expert rather than the State's witness. The Court emphasizes that it is not making a finding that Mr. Simmons' attempts on cross examination to elicit technical information from the State's experts do not constitute deficient representation, but that such cross examination belies his assertion that he was not in need of expert testimony.

It is clear from the record of this case that Mr. Simmons' failure to produce an expert to testify at trial was not a strategy. The immutable reality is that, when he ascertained Dr. De Jong's opinion, two weeks before trial, he was painted into a corner. Assuming he would not likely be granted another continuance to obtain another expert to testify, he decided to go into trial armed only with Petitioner's version of the facts and her character witnesses.

At the post conviction hearing, Petitioner presented two experts, Dr. Uscinski and Dr. Stephens, who testified that there were significant errors in the medical testimony which the jury heard at Petitioner's trial. The Court finds these two experts to be credible. The two experts explained that, for at least a decade prior to Petitioner's trial, a growing number of authorities in the medical community have brought into serious question the traditional conclusion that the "triad of symptoms" of brain swelling, retinal hemorrhages, and subdural hematoma is diagnostic of child abuse. Specifically, Doctors Uscinski and Stephens refuted the proposition that Trevor's "triad of symptoms" and ensuing death was necessarily caused by child abuse.

Dr. Stephens was particularly critical of the State's experts' conclusion that Trevor died as a result of blunt force trauma. He further stated that Trevor likely had a hematoma which was "chronic" that predated the events leading up to his death on September 2, 2009. Significantly, he found that Dr. Walker was "reckless" in his opinion that shaking was a definitive cause of Trevor's death.

Dr. Uscinski also testified that Trevor had a chronic hematoma, which existed prior to the day of the alleged abuse. He based his opinion on the disproportionate increase in Trevor's head size from birth until the time of his death.

The Court finds that all of the aforementioned expert opinions were available had Mr. Simmons conducted a reasonable investigation. At the time of trial, Dr. Uscinski and Dr. Stephens were not the only doctors that advocated for the more recent school of thought refuting that the "triad of symptoms" (brain swelling, retinal bleeding, and subdural hematoma) were automatically diagnostic of child abuse. The Court finds the significance of the charges mandated that any competent defense attorney would have become acquainted with the fierce debate going on at the time of trial concerning shaken baby syndrome. In fact, there was evidence at the post conviction hearing that Mr. Simmons, only a few days before trial, discovered a plethora of material on the internet regarding the controversies concerning shaken baby diagnosis.[5] A reasonable attorney, under prevailing professional norms, would have obtained such information earlier and retained an expert (or experts) to testify well before trial.

Of course, it is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist. Such a duty is imposed for the solitary reason that "[p]rior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts." *State v. Lloyd*, 48 Md. App, 535, 547. In failing to procure experts to rebut the State's expert witnesses, Mr. Simmons failed in his "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process" and the "overarching duty to advocate the defendant's cause." See *Strickland* at 688. See also *Bower v. State*, 326 Md. 416 at 428. The failure by trial counsel to present evidence that rebuts critical evidence offered by the State constitutes a deficient act. *Bower, supra*, 428.

[5] Petitioner's Exhibits 22 and 23, articles on the debate surrounding shaken baby syndrome.

It has been specifically held that trial counsel has a duty to investigate the facts. *Kimmelman v. Morrison*, 477 U.S. 365 (1986); *Harris v. State*, 303 Md. 685, 717 (1985); *Wiggins v. State*, 352 Md. 580, 608-13. Where counsel is required to choose between two or more courses of action, he will not be deemed to have committed a deficient act *as long as the action he chooses is reasonable. Adams v. State*, 171 Md. App. 688 (2006), *aff'd in part, reversed on other grounds*, 406 Md. 240, 296 (2008), *cert. denied*, 556 U.S. 1133 (2009), (emphasis added). In other words, considerable deference is given to trial counsel's decision not to investigate provided that the decision is based on *reason*. The law does not require an attorney to render perfect representation; some missteps are allowed. *Carter v. State*, 73 Md. App. 437, 440 (1988). Raymond Simmons' actions were more than missteps; they were actions fatal to Petitioner's defense.

Mr. Simmons knew from the beginning of his representation of Petitioner that the testimony of the State's expert witnesses was critical to the prosecution's case against her. He initially acknowledged at the post conviction hearing that it was imperative that a medical expert be retained by Petitioner. It was of critical importance that Petitioner effectively refute the State's experts through her own experts and Mr. Simmons was deficient in failing to procure such experts.

Trial Counsel's Deficient Performance Prejudiced Petitioner

As stated, *infra*, counsel's performance was deficient, even through the deferential lens of Strickland. In order to warrant relief, however, Petitioner must successfully establish prejudice, to wit: a showing that there is a reasonable probability, *i.e.* a probability sufficient to undermine confidence in the outcome that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. *Strickland,* 466 U.S. at 694. "Reasonable probability" does not mean that the petitioner need show that the result 'more likely than not' would have been different. *Cirincione v. State*, 119 Md. App. 471, at 485 (1998). In fact, "[a] proper analysis of prejudice ... should not focus solely on an outcome determination, but should consider whether the result of the proceeding was fundamentally unfair or unreliable." *Oken v. State*, 343 Md. 256, 284 (1996).

Petitioner has already unsuccessfully challenged the sufficiency of the evidence in her appeal and the jury was obviously not bound to have accepted her version of the facts. Had the jury heard experts testify that Trevor's death could have been as the result of a reoccurrence of bleeding in a chronic hematoma caused (1) by the bouncy seat incident or (2) spontaneously, without head trauma, there is a reasonable probability that the jury would have found a reasonable doubt as to Petitioner's guilt at her trial. This is particularly true where the critical evidence linking Petitioner to Trevor's death came from the unrebutted expert testimony of the three State's witnesses.

As demonstrated at the post conviction hearing, at least two witnesses were available to testify at Petitioner's trial to refute the testimony of the State's experts. But the jury heard only one side of the significance of the "triad of symptoms," i.e. , that Trevor's death was the result of child abuse. Because of trial counsel's failure to investigate the availability of witnesses who could have refuted the State's experts, Petitioner's testimony went uncorroborated.

As well, Mr. Simmons agreed at the post conviction hearing that, given the absence of any defense expert witness, it was an "absolute necessity" to have Petitioner take the stand. This was not a choice, nor a valid trial strategy; Mr. Simmons did not have the option to choose between two or more courses of action because of his failure to investigate the availability of

experts with reasonable diligence. As a result of counsel's deficient performance in not obtaining expert testimony, Petitioner never had a viable option to not take the stand at trial.

Petitioner cites the 2007 Utah case of *State v. Hales*, 152, P. 3rd 321, both in her Petition and in final argument, which the Court finds persuasive. In *Hales*, as in Petitioner's case, Hales' trial attorney failed to hire an expert to effectively refute the testimony of a critical State expert. The Supreme Court of Utah opined in *Hales* that,

> "[W]e do not need to find that the jury would have more likely than not believed another expert's interpretation over [the State's expert]. A reasonable probability is a probability sufficient to undermine our confidence in the outcome. That standard is met on the facts of this case because Hales' trial attorneys' failure to investigate had a 'pervasive effect on the key evidence at trial.'"

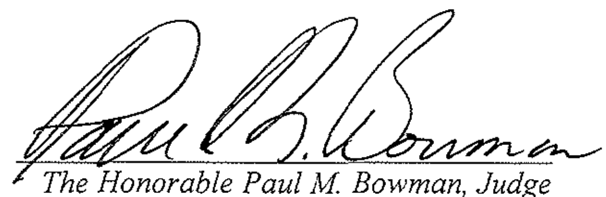
Hales at 343-344.

As in *Hales*, the Court is of the opinion that trial counsel's dereliction in his performance had a "pervasive effect" in that the jury heard only one side of the discussion in a field which has two distinct camps. The lack of a balanced discussion effectively foreclosed the trier of fact's ability to fairly consider the salient medical issues in the case. Thus, the prejudice which Petitioner suffered as a direct result of trial counsel's deficient performance is palpable and amounts to Petitioner having been deprived of her Constitutional right to effective assistance of counsel.

VIII. <u>CONCLUSION</u>

It is the Court's opinion that Mr. Simmons' failure to procure experts to refute the State's experts resulted in Petitioner's being denied a fair trial. The reality is that this was a case which should have been a battle of experts but, because of counsel's failure to properly investigate the facts of the case, his unexplainable delay in his investigation of Dr. De Jong's opinion, and his

unreasonable decision to abandon having an expert testify, his client was doomed to be convicted. Quoting Mr. Simmons' testimony, it was an "absolute necessity" to have Petitioner testify without the testimony of an expert. Petitioner was forced to take the stand, with her uncorroborated version of the facts, against three compelling expert witnesses who all reached unrebutted conclusions pointing to her guilt. An attorney adhering to reasonable professional norms under these circumstances would have had an expert at trial to corroborate Petitioner's version of the facts, the only direct evidence in the case, and to refute the conclusions of the State's experts. Mr. Simmons rendered ineffective assistance for failing to procure such experts. His deficient performance clearly prejudiced Petitioner. Ultimately, what should have been a battle of experts became a rear-guard action on the part of Petitioner, which caused her to be denied a fair trial. The Court will order that the conviction be vacated and that Petitioner be granted a new trial.



The Honorable Paul M. Bowman, Judge

4-7-14
Date

IN THE CIRCUIT COURT FOR KENT COUNTY

GAIL PINDER DOBSON	
Petitioner	
v.	**Talbot County Case No. 20-K-09-9572**
STATE OF MARYLAND	

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CIRCUIT COURT FOR TALBOT COUNTY EASTON, MARYLAND

ORDER REGARDING PETITION FOR POST CONVICTION RELIEF

For the reasons set forth in the foregoing Memorandum and Statement of Reasons, Petitioner has met her burden of proof that she was denied effective assistance of counsel in her attorney's failure to obtain a qualified expert or experts to testify to refute the conclusions of the State's experts as to the cause of Trevor Ulrich's death. It is, therefore, this 7th day of April, 2014, by the Circuit Court for Kent County, hereby:

ORDERED, that the Petition for Post-Conviction Relief is **GRANTED**; and it is further

ORDERED, that Petitioner's conviction in Talbot County Criminal Case Number 20-K-09-9572 be **VACATED**; and it is further

ORDERED, that Petitioner, Gail Pinder Dobson, be **GRANTED** a new trial; and it is further

ORDERED, that copies of this Memorandum and Statement of Reasons and Order be distributed to:

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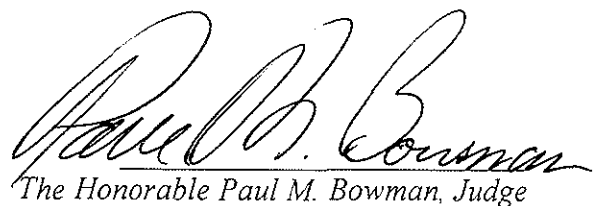

The Honorable Paul M. Bowman, Judge