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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

ROBERT JAMES WILKES JR.,	) Dept. 1
Petitioner,	) Cause No. DV-11-923
-vs-	) **OPINION and ORDER re: PETITION FOR POST-CONVICTION RELIEF**
STATE OF MONTANA,	
Respondent.	

Pending before the Court is the Petitioner's *Amended Petition for Post-Conviction Relief* (Ct.Doc.17). The original petition was filed with the Court on July 18, 2011 by the Petitioner appearing *pro se*. On November 3, 2011, Petitioner requested appointment of counsel, and on March 2, 2012, the Montana Innocence Project filed a notice of appearance to represent the Petitioner (Ct.Doc.12.1). On March 5, 2012, Petitioner filed an *Uncontested Motion to Continue Briefing Schedule* (Ct.Doc.13) to give the Innocence Project attorneys sufficient amount of time to file an amended petition, and do the legal and medical research necessary to present an argument in support

of a petition for a new trial. After further continuances of deadlines for filing briefs, the Petitioner's *Amended Petition for Post-Conviction Relief* (Ct.Doc.17) was filed on September 5, 2012, along with the Petitioner's *Memorandum in Support of Amended Petition for Post-Conviction Relief* (Ct.Doc.18). The *State's Response to the Amended Petition for Post-Conviction Relief* (Ct.Doc.31) was filed eight months later on May 3, 2013, and the *Reply Brief of Petitioner/Defendant* (Ct.Doc. 36) was filed two and a half months after that on July 17, 2013.

James Wilkes is the father of Gabriel Wilkes who was three months old when he suffered subdural hemorrhaging and retinal hemorrhaging while the two were together their apartment on the evening of October 4th, 2008. Other than James and Gabriel Wilkes, no one else was present as the infant's mother was at her place of employment at the time.

The State's expert witnesses at trial opined that Gabriel was injured after his father fed his son a bottle at the baby sitter's house at approximately 8 p.m. when he arrived to pick up the infant, and that if Gabriel had been injured prior to that, the injuries he suffered would have prevented Gabriel's ability to drink from a baby bottle. The baby sitter testified that she had fed the infant during the afternoon and he had vomited afterward, but Gabriel seemed "content" when his father took him home after his father fed his son

his 8:00 p.m. bottle.

The State's experts testified that because the infant drank the 8 p.m. bottle without difficultly and only went into convulsions and stopped breathing while in his father's exclusive care approximately an hour later, only the father could have injured his son. In other words, the 8 p.m. feeding was presented as the "smoking gun" by the State and its expert witnesses in the underlying criminal case.

The infant was critically ill when he arrived at Missoula Community Hospital by ambulance and the decision was made to transport the infant by emergency transport to Sacred Heart Children's Hospital in Spokane, Washington. The infant was ultimately placed on life support and was transferred to hospice care, and on October 21, 2008 he was taken off life support. Gabriel Wilkes died on October 26, 2008, some 22 days after suffering the injuries. Because of the length of time from being taken off life support and death, there was some damage or deterioration of the brain (see transcript 333-335,342-343, and 356).

The cause of death was determined to be "Phenobarbital toxicity during terminal care due to diffuse hypoxic-ischemic brain injury with coma due to recent bilateral subdural hemorrhage." However, the official autopsy stated that the manner of death was "undetermined."

Petitioner was convicted of the offense of DELIBERATE HOMICIDE, a FELONY, following a jury trial in December of 2009. The Petitioner was found guilty by the jury primarily based on the theory commonly called "Shaken Baby Syndrome" as the cause of abusive head trauma suffered by the infant.

DISCUSSION

The amended petition uses the testimony of Dr. Peter Stephens forensic pathologist who is critical of Scott Spencer, attorney for Mr. Wilkes in the lower court, because he did not make use of a forensic pathologist. This is disconcerting to the court as the expert used by Mr. Spencer in forming his opinion was one Dr. Tom Bennett who is a forensic pathologist who worked for several years doing forensic autopsies for the Montana State Crime Lab in Billings, MT. Dr. Stephens may have some valid criticisms of the procedural and diagnostic procedures of the forensic and medical professions. However, this court uses certain guidelines set forth under Daubert et al., v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579, 1993 U.S. LEXIS 4408 (1993). If there are challenges to the validity of diagnostic procedures, those challenges must be made by the person in charge of the strategy of the case and not by a pathologist who happens to be in the minority with his view points on what is commonly called "shaken baby syndrome." Nor are such decisions readily

subordinated to the opinion of after- acquired experts by appellate attorneys who are attempting to overturn the conviction or to obtain a new trial. The standards on recognizing medical/scientific procedures or diagnosis should be handled within the parameters of the medical and forensic study involved. The recognition of the validity of such testing or diagnosis is within the specialty. Even if Dr. Stephens was known to Mr. Spencer and Mr. Spencer choose Dr. Bennett over Dr. Stephens a new trial would not be warranted because of that decision. The detractors who challenge the diagnosis of "shaken baby syndrome" now known as "abusive head trauma" do not appear to have the support of the medical profession. At least this court is not aware of any organized educational or practical application of any effort to set aside the acceptance of the "abusive head trauma" under the Daubert test (Daubert et al., v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579, 1993 U.S. LEXIS 4408). The medical profession and forensic experts still recognize and accept the "abusive head trauma" as an injury received as a result of violent shaking. Mainstream medical providers still diagnose "abusive head trauma" based on the presence of retinal bleeding, bleeding in the protective layer of the brain, and brain swelling, known as the "diagnostic triad" test.

When the physicians and other medical personal treating the Gabriel Wilkes all concluded Gabriel was suffering from "abusive head trauma" Mr.

Scott Spencer, the attorney for Robert Wilkes Jr., retained the services of Dr. Tom Bennett, forensic pathologist and recognized expert in child abuse. Dr. Bennett traveled to Spokane, examined the child while Gabriel was still alive and reviewed the medical charts and the testing done on the child and came to the conclusion that Gabriel was suffering from "abusive head trauma." Dr. Bennett reported back to Mr. Spencer and disclosed his examination and review of the charts, testing and results, as well as all imaging testing and advised Mr. Spencer that all testing indicated "abusive head trauma." Mr. Spencer is now being criticized for not going to the internet and finding someone who disagreed with the review done by Dr. Bennett and all the medical providers and staff at Sacred Heart Children's Hospital. Mr. Spencer retained an expert to find out the truth of the matter. Scott Spencer did not have the liberty to tell the pathologist what to say. Mr. Spencer sent Dr. Bennett to Spokane to find out the truth of the matter. As soon as the results were made known to Mr. Spencer, he was under no obligation to run to the internet to find testimony contrary to what the experts in Spokane and Dr. Bennett had concluded. Dr. Bennett did not agree with the position of Mr. Wilkes even though Dr. Bennett's testing was done in accordance with the protocol that has been suggested by Dr. Barnes.

The Petitioner also offers written literature from numerous other medical

authorities in support of his claim that he is innocent, and alleges that defense counsel's failure to put experts on the stand to challenge the State's experts violated his constitutional right to effective assistance of counsel. However, the test is not whether there are experts out there who will say what one party wants he/she/them to say. Rather the test is whether Mr. Wilkes was competently represented. A review of the record indicates that he was. It is the further opinion of this court that Mr. Spencer was very observant in how the evidence was obtained, how it appeared and the credibility of the witnesses who were going to present it and what defense(s) was or were available. This court disagrees with the assessment of Mr. Buley in being critical of Mr. Spencer. Defense counsel and Mr. Wilkes planned a defense strategy with Mr. Wilkes denying any abuse of Gabriel. The jury did not believe him and now we have an alternative strategy being submitted by present counsel for Mr. Wilkes. The duty to defend does not extend to putting on evidence 1) that Mr. Spencer was unaware of, or 2) that was inconsistent with accepted forensic analysis, or 3) that Mr. Spencer did not believe to be accurate or credible.

Upon learning Gabriel had been taken to Missoula Community Hospital with a head injury and then transported to Spokane, Washington, Mr. Scott Spencer retained as his expert, Dr. Tom Bennett, a forensic pathologist to

make inquiry as to the infant's condition. Dr. Bennett was able to examine the infant, while the infant was still alive, charts and test results and to confer with the infant's treating physicians. Dr. Bennett reached the conclusion that the infant's brain injury was a non-accidental rotational-type brain injury that would have become almost immediately symptomatic, and that he would not have been able to feed from a bottle after he was injured. Thus, Dr. Bennett agreed with the State's experts that the infant had suffered an abusive traumatic brain injury due to abusive head trauma. In light of Dr. Bennett's opinion, defense counsel stated in his affidavit in this post-conviction case that:

> This was a very difficult case for me as the Defendant insisted that he did not harm the child, yet nothing could be found to overcome the medical opinions, both from the State and from our Expert. **If there was a different line of attack on the medical testimony I was not able to find it.**

Affidavit of Scott Spencer, Ex. C to *State's Response to Amended Petition for Post-Conviction Relief* (Ct.Doc.31) ¶ 27 (emphasis supplied).

The Petitioner now counters that Mr. Spencer should have gone shopping on the internet to find another line of attack on the "abusive head trauma." This Court respectfully disagrees. The last five jury trials that Mr. Spencer has tried in the 4th judicial district, as of the date of this opinion, resulted in either an acquittal or a hung jury. Evidently, Mr. Spencer is doing something right. In this specific case, we have a recognized diagnosis that

has come to be accepted through the Daubert Standard (Daubert et al. v. Merrell Dow Pharmaceuticals, Inc. 409 U.S. 579, 1113 S.Ct. 2786, 1993 LEXIS 4408). After Mr. Spencer retained Dr. Tom Bennett who made a diagnosis pursuant to established medical protocol and the diagnosis was consistent with the diagnosis of the state's experts, a strategy was adopted through the testimony of Defendant Wilkes that proved unsuccessful. Now, the defendant attacks Mr. Spencer arguing the defense should have been based on an attack on established medical protocols and diagnosis of the largest medical facility and expertise in the Inland Northwest because the defense planned by Spencer and Wilkes was unsuccessful. The Court understands Mr. Spencer's argument that in his experience the "shotgun defense" is not an effectual tool. Counsel for the petitioner may feel that seven or eight different causations should have been argued before the jury, but that is pure second guessing that does not warrant a new trial. In the court's opinion, this proceeding is not the proper forum for a handful of experts to extinguish a diagnostic tool without following any of the recognized protocols in the medical and scientific communities for doing so. What the Petitioner Wilkes overlooks is that Mr. Spencer already had hired an expert with particular expertise in this area and who Mr. Spencer had faith in. It was Mr. Spencer's decision to take the evidence as it presented itself and use it in

what Mr. Spencer determined to be in Mr. Wilkes' best interest and to back up Mr. Spencer's position.

Defense trial counsel, Scott Spencer, responded to the Petitioner's challenge to whether he effectively defended the Petitioner in the criminal trial by stating in relevant part:

> I was well aware of people challenging the concept of a "shaken baby syndrome, and am aware that the subject is becoming more and more controversial as time goes on. I am aware that there is debate whether shaking a child can cause severe brain injury. There is extensive reports and literature on both sides of the issue. I read many basic articles on the issue during trial preparation and I believe I understood the arguments of both sides of the debate.
>
> It is my recollection that the alternative explanations of the brain injury as reported in literature, such as clotting disorders, etc., were eliminated by reference to tests and prior medical history. I talked to the doctors about this issue.

Supplemental Affidavit of Scott Spencer, Ex. E to *State's Response to Amended Petition for Post-Conviction Relief* (Ct.Doc.31) ¶ 5, 6.

Dr. Barnes states that the differential diagnosis must also include predisposing or complicating conditions such as "perinatal and birth-related issues; developmental disorders, coagulopathy, vascular disease . . . and a number of others." Dr. Barnes further states that thrombosis and brain edema cannot be precisely timed, and may be weeks to months old and can date back to, or before, birth. Therefore, "in the absence of a specific medical diagnosis, NAI (non-accidental injury) should not be the 'default' diagnosis."

Another of the Petitioner's experts in support of a new trail, forensic pathologist Dr. Peter Stephens, concluded that Gabriel had a rare lethal metabolic liver disease known as Neonatal Hemochromatosis which progressed into a chronic subdural hematoma, which resulted in a probable blood clotting abnormality associated with metabolic liver disease, and the baby eventually died because of it. Dr. Stephens' report also states that until recently this disease required liver transplantation for treatment, however modern understanding over the last few years has led to development of immunological treatments.

Dr. Horace Gardner, who is an ophthalmologist and an attorney, is of the expert opinion that "the symptoms exhibited by Gabriel Wilkes can be explained in other ways, to possibly include disease, short fall, accidents, coagulation disorders, etc., and that it cannot be stated with a reasonable medical certainty that Gabriel Wilkes died from non-accidental trauma," which resulted at trial in "an unfair and biased exhibition for the jury, and doubtlessly led to the conviction of Robert Wilkes."

Dr. Joseph Scheller, a pediatric neurologist, reports that Gabriel went into a coma "as a result of a disease called Cerebral Venous Sinus Thrombosis" and that "the disease can develop quickly and without warning." Dr. Scheller further stated that "[i]nfants who suffer from Cerebral Venous

Sinus Thrombosis are often mistaken for victims of abusive head injury. This unfortunately was the case with Gabriel. He did not suffer abuse; he died from a rare but real medical condition."

In reaching that conclusion, Dr. Scheller stresses the facts that there were no significant signs of external trauma and the infant had no broken bones, ligament or spinal cord injury. He represents that the infant's CT, MR, and MRV scans were highly suggestive of venous sinus thrombosis and that indeed venous sinus thrombosis was found at autopsy three weeks later. Dr. Scheller further attests that this medical condition is often triggered by infection and creates blood clots in the brain's venous system, and that in this case the infant developed a fever of 101.5 early in the morning of October 5, 2008, which is suggestive of possible encephalitis or other life threatening infection.

Dr. John Galaznik, a pediatrician, is also of the expert opinion that Gabriel Wilkes had:

> . . . Chronic Subdural Hematomas and recent Cortical Vein Thrombosis as documented on initial studies, and these were not consistent with having occurred on the evening of October 4, 2008 as a result of abusive shaking. These conditions are capable of producing all of the clinical findings in this case. There was no rib, neck, c-spine, or spinal cord injury to suggest violent forces have been applied to this infant's body as in an abusive shaking."

Dr. Galaznik also says that "this Acute Life-Threatening Event (ALTE)

presentation could have been a choking/aspiration event, or a seizure, or a seizure-inducing vomiting/choking event." Dr. Galaznik further opines that "the case is consistent with known medical conditions, inflicted trauma is not required, and an assertion of abusive shaking or abusive head injury cannot be confirmed to any degree of medical certainty."

Dr. Ross Reichard, Assistant Chief Medical Investigator for the University of New Mexico, Health Science Center, conducted an autopsy (neuropathological examination) on Gabriel's brain in December of 2008, and issued an autopsy report, which was not produced before trial or presented at trial, which concluded that the neuropathological examination revealed changes in the brain indicative of hypoxic-ischemic injury, cerebral venous thrombosis, organizing and organized subdural hemorrhage and old subarachnoid hemorrhage which occurred over time and none of which were caused by non-accidental injury. The Petitioner argues that Dr. Reichard's autopsy report is consistent with the Petitioner's other expert opinions summarized above and provides reasonable medical alternatives for the death of Gabriel Wilkes which were not presented to the jury at trial, and is therefore vital new evidence that tends to establish the innocence of Robert Wilkes and demands a retrial based on his attorney's failure to provide effective assistance of counsel in the criminal trial.

Petitioner's *Motion to Attach Addendum* (Ct.Doc.19) consisting of the report of Dr. Patrick Barnes is GRANTED, and the Court has considered Dr. Barnes' report along with Petitioner's other expert witnesses.

It is interesting to note that Petitioner Wilkes cites the various experts, none of whom seem to agree with the others. We have six to seven opinions, each differing from the others as to the cause of death. This does not lend itself to abandoning a well-accepted diagnosis in the medical community or in the science of forensic pathology. Rather it tends to show the lack of confidence that present counsel has in any one of the numerous detractors.

The State argues that the Petitioner's "new" expert opinions are theoretical, merely speculative and conclusive, and do not create a reasonable probability of a different result in a retrial as required under the test set forth in *State v. Tyler*, 349 Mont. 461 ¶ 14, 204 P.3d 685 (2009). The State also represents that the Petitioner's allegedly new evidence regarding the debate in the medical community on the viability of "abusive head syndrome" and the Petitioner's experts who claim that Gabriel died of a metabolic liver disease do not qualify as newly discovered evidence, as Mr. Scott in his supplemental affidavit in this case stating he was aware of the issues surrounding "Shaken Baby Syndrome or abusive head syndrome," educated himself about them, hired an expert (Dr. Bennett) known to have

experience in child death cases, and made strategic decisions based on his extensive experience trying cases." (Ex. E, Ct.Doc.31). Mr. Spencer also represents that he considered and consulted with an expert about the issues surrounding the "abusive head syndrome" diagnosis, alternative causes of the injuries, the timing of the injuries, etc. before trial. Moreover, defense counsel stated that he chose not to present theories of two different rare diseases in the criminal action because "alternate theories presented to a jury almost invariably do not succeed." *Supplemental Affidavit,* p.6. Thus, the State argues the so called newly discovered evidence was admittedly known by defense counsel before trial and is therefore not newly discovered evidence requiring retrial, but was a strategic decision by trial counsel to not pursue the medical debate line of defense.

See, Affidavit of Scott Spencer, Ex. C to *State's Response to Amended Petition for Post-Conviction Relief* (Ct.Doc.31). Defense counsel Scott Spencer also acknowledged in his affidavit that:

> The medical evidence established that Gabe suffered from two bilateral subdural hematomas occurring on different occasions. The older hematoma was estimated to be 10-14 days old. At the time of examination, the newer hematoma could have been from hours old to up to several days old. The hematomas did not cause Gabe to stop breathing.

Affidavit of Scott Spencer, Ex. C to *State's Response to Amended Petition for Post-Conviction Relief* (Ct.Doc.31) ¶ 16.

The State argues that the only true possible "newly discovered evidence" is the position forwarded by Dr. Peter Stephens, a forensic pathologist, who opined that Gabriel died from the liver malady called Neonatal Hemochromatosis, but does not advance any supporting evidence that Gabriel in fact suffered from the life-threatening metabolic liver disease.

Dr. Stephens responds that he reviewed the adrenal slides from Gabriel's autopsy with Dr. Peter Whitington, a leading expert in the field of neonatal liver disease, which revealed "abnormalities in Gabriel's iron metabolism and obtained iron stains on various organs." Dr. Stephens and Dr. Whitington concurred in finding "anatomic changes in tissues, abnormal in a healthy child of Gabriel's age" showing that in fact "Gabriel suffered from a rare disorder called Neonatal Hemochromatosis, which is commonly lethal."

The State points out that "[c]uriously, the Amended Petition does not include an affidavit from Dr. Whitington himself." Nevertheless, Dr. Stephens claims his opinion regarding Neonatal Hemochromatosis is to a reasonable degree of medical certainty and that evidence of this fatal disease should have been brought before the jury. Dr. Stephen opined that, "the failure to present a balanced view of current medical information by the defense, coupled with the prosecution's reliance on medical dogma that is rapidly being superseded resulted in a miscarriage of justice." However, counsel for

the State interviewed Dr. Stephens and had the following exchange in a telephone interview prior to trial:

> Q. ... So your opinion is that this child had neonatal hemochromatosis and that caused either the subdural hematomas which then...evolved or also caused the CBT [the correct acronym is CVT, for cortical venous thrombosis] which then evolved or, or (sic) caused subdural hematomas?
>
> A. ...I can't say that neonatal hemochrom (sic), hemochromatosis caused it ...I would have to say it ... may have caused it ... [emphasis added]. *Exhibit G, p.8.*

Dr. Stephens was later asked by the State "what is your opinion on the cause of death of Gabriel Wilkes?" Dr. Stephen's answer was "[b]oy...that is...extremely tough. I have to say that it's either chronic subdural hematoma or uh, cortical venous thrombosis." *Id., p. 10.* The State followed up by asking whether Dr. Stephens had an opinion on the cause of the subdural hematoma and cortical venous thrombosis. His answer: "No, no I don't...." *Id., p.11.* Dr. Stephens stated that although he would not be able to say there was a connection between neonatal hemochromatosis and Gabriel Wilkes' brain injuries if he was presenting the case at a medical conference, his opinion that "there is a...connection there" was nevertheless to a reasonable degree of medical certainty in his mind. *Id., p.9.* In his interview with the State, Dr. Stephens also agreed that subdural hematoma and thrombosis can be caused by abusive head trauma, a fact not

acknowledged in his affidavit. *Id. p.15.* The State argues if the best Dr. Stephens can do is testify that Neonatal Hemochromatosis "may" have played a part in Gabriel's death, Petitioner's claim regarding Neonatal Hemochromatosis does not meet the standard of showing a reasonable probability of resulting in a different outcome in a new trial.

The State's expert witness, Dr. Richard Kaplan, testified at trial that what is commonly referred to as "Shaken Baby Syndrome" is now called "abusive head trauma," as the actual mechanism of injury is usually unknown but the injuries themselves evidence some degree of high-force trauma." The Petitioner counters that Dr. Kaplan used misleading testimony and stepped outside his field of expertise in reaching his medical opinion. The State responds that Dr. Kaplan is an internationally recognized pediatrician who is an expert in child abuse cases. His title is Associate Professor of Pediatrics at the University of Minnesota Medical School, and Medical Director for the Center for Safe and Healthy Children at University of Minnesota's Children's Hospital. Dr. Kaplan also represented he consulted with a neuroradiologist, Dr. James Reggin, who is a pediatric neurologist, and Dr. Sally Aiken, who is a pathologist, before forming his expert opinions for trial.

Dr. James Reggin, a pediatric neurologist specializing entirely on the brains of children, treated Gabriel Wilkes in Spokane. The State claims Dr. Reggin's field is more specialized than that of Dr. Stephens, and is therefore the more authoritative source, particularly since he actually treated Gabriel while he was still alive. Dr. Reggin testified that, given the severity of the injury, Gabriel's symptoms would have begun to manifest "immediately, or within minutes of the injury" and that a child who had sustained those injuries would not have been able to feed from a bottle. *Tr., p. 323-324.*

Dr. Sally Aiken, who actually looked at Gabriel's brain on autopsy, specifically testified that she believed the thrombosis was not a primary factor in Gabriel's death, but "a secondary development after injury." Tr., p. 342-43, 356. However, she also stated that she found it "difficult or impossible" to address the questions of cause and manner of death because of the limitations she faced at autopsy, given the lapse of time between injury and death and the time and deterioration of Gabriel's brain that took place between removal of life support and death. *Tr., p. 333-335.*

Dr. Daniel Brutocao, a pediatric intensivist, (a physician that specializes in pediatric critical care), testified at trial that "most critical care units have developed protocols, where you...list out various tests, that you would do, which would include an MRI, a CAT scan, bone scans, laboratory

work, consultations with specialists, and -- just so nothing gets missed." He also testified that those protocols were followed in this case. *Tr., p259.*

Following his investigation of Gabriel's death, Dr. Kaplan summarized his conclusions, stating in a letter to the State prosecutor that:

> Summary: Gabriel was a growing and thriving 3-month-old infant with a normal delivery and extensive well-baby care by multiple providers and community members which require him (sic) as a growing and thriving child. He presented in full cardiac arrest with no evidence of severe illness or underlying medical condition. Detailed review of the medical records leads one to the sad conclusion that the only appropriate medical explanation for Gabriel's problems and ultimate demise comes from severe trauma. Lack of history of severe accidental trauma given by caregivers, one must conclude that this was inflicted trauma.

In evaluating whether a criminal defense attorney failed to provide effective assistance of counsel, the Montana Supreme Court adopted the two-part test set forth in Strickland v. Washington, *466 U.S. 668, 104 S.Ct. 2052 (1984);* State v. Coates, *241 Mont. 331, 337, 786 P.2d 1182 (1989);* State v. Baker, *52 St. Rep. 735 (1995).* That test requires a showing that 1) counsel's performance was deficient and that 2) the deficient performance so prejudiced the Petitioner as to deprive him of a fair trial. *Id.* To assess deficient performance, the Court looks to whether a Petitioner's counsel acted within the range of competence demanded of attorneys in criminal cases." *Id.* Petitioner bears the burden of showing that counsel's performance fell below an objective standard of reasonableness, and that burden is extremely

heavy. *Strickland, 466 U.S. at 688, Coates, 241 Mont. 331 (1990).* The proper standard for attorney performance is that of reasonably effective assistance. *Strickland, 466 U.S. at 687.* A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged 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 Petitioner must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *Strickland at 698 (citations omitted.)* The Montana Supreme Court has held that:

> Judicial scrutiny of counsel's performance must be highly deferential and courts must indulge a strong presumption that counsel's actions regarding defense strategies fall within the wide range of reasonable and sound professional assistance." *State v. Thee, 307 Mont. 450, 454, 37 P.2d 741, 745 (2001), citing Strickland.* In addition, "it is entirely possible within the framework of Strickland to find attorney error which possibly prejudiced the Petitioner, yet conclude that such error did not rise to a level serious enough to result in a verdict unworthy of

> confidence....[a] finding that an attorney could have done a "better" or "more thorough" job and that a Petitioner may have suffered some prejudice as a result is not the equivalent of ineffective assistance of counsel pursuant to *Strickland*. State v. Hagen, *311 Mont. 117, -- P.3d. --, 2002 MT 190.*

A claim of ineffective assistance of counsel must be "grounded in facts found in the record, not on 'mere conclusory allegations." State v. Hagen, *311 Mont. 117, -- p.3d --, 2002 MT 190.* Second, the Petitioner has the burden of showing there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id at 694;* Strickler v. Greene, *527 U.S. 263, 291, 296 (1999).* The prejudice component of the Strickland test focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *Id at 687.* The standard for evaluating prejudice is whether a reasonable probability, as opposed to a possibility, exists that but for counsel's deficient performance, the outcome of the trial would have been different. Coates *at 337 (citing* State v. Leavens, *222 Mont. 473, 475, 723 P.2d 236, 237 (1986)).*

Therefore, even if ineffectiveness were to be found, Petitioner must still demonstrate that a reasonable probability of a different result exists. The Montana Supreme Court has held that "[a] reasonable probability means a probability sufficient to undermine confidence in the outcome, but it does not

require that a defendant demonstrate she would have been acquitted." *State v. Elliott, 325 Mont. 345 ¶8; 106 P.3d 517 (2005).* In addition, a defendant must "prove both prongs in order to succeed on his ineffective assistance of counsel claim. Therefore, if a defendant makes an insufficient showing regarding one prong of the test, there is no need to address the other prong." *Bomar v. State, 365 Mont. 474, ¶; 285 P.3d 396 (2012) (citations omitted).*

The Montana Court has further held that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Becker v. State, 356 Mont. 161¶; 232 P.3d 376 (2010), citing Strickland v. Washington, 466 U.S. 668, 697 104 S.Ct. 2052, 2069 (1984).*

It is clear from the supplemental affidavit of Mr. Spencer that he was aware of the issues surrounding "Shaken Baby Syndrome," that his choice of expert was reasonable and strategic, and that his decisions were strategic, not ineffective. *Exhibit E.* He correctly points out that the opinions of attorney, Mr. Rich Buley, are more along the lines of a difference in trial strategy than true ineffectiveness, echoing the U.S. Supreme Court's observation in *Strickland* that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Strickland, 466 U.S. at 698.*

Mr. Spencer was in the best position to know all of the evidence and issues facing his client at trial. Of particular note is that Mr. Spencer is the person who interviewed the State's witnesses, and was therefore in the best position to judge the viability of the claims now made by the defense, who rely on hindsight and conclusory allegations in their claim of ineffectiveness.

However, even if ineffectiveness were to be found, Petitioner must still demonstrate that a reasonable probability – that is, a probability sufficient to undermine confidence in the outcome – of a different outcome exists. *State v. Elliott, 325 Mont. 345 ¶8; 106 P.3d 517 (2005).* In a case in which a defendant alleged ineffectiveness when her attorney "made efforts to secure an expert witness...but the intended expert backed out due to his apparent unwillingness to testify in support of the defense's legal theory," the Montana Supreme Court held that "even if" an expert could be found, the defendant was not prejudiced because she failed to demonstrate sufficiently "that the testimony of a defense expert witness would have overcome the testimony of the State's four expert witnesses to the extent of showing a reasonable probability that the outcome of the trial would have been different. We agree with the District Court that 'any assertion that the mere presence of an expert for the defense would have made a difference...is mere speculation." *Id, ¶10.* It is precisely this kind of speculation that is found in the case at bar.

It is also clear that upon detailed analysis of the affidavits provided by the defense's experts, and in particular the waffling of Dr. Stephen's statements to the State during a telephone interview as to the cause of Gabriel's brain injuries, the Court concludes there does not exist a reasonable probability of a different result in a new trial.

The Petitioner also alleges trial counsel was ineffective because he abandoned the Petitioner on appeal by failing to inform the Petitioner of his right to appeal and by failing to follow the proper procedure to withdraw from representation as required by Montana law. Therefore, issues that normally must be raised on appeal can be raised and resolved on a *Petition for Post-Conviction Relief.* The Petitioner further argues due to the seriousness of a deliberate homicide conviction, a homicide conviction by a jury should always, except under very rare circumstances, be appealed to the Montana Supreme Court.

In this case, the Affidavit of public defender Susan Boyer shows that she discussed appeal with Petitioner on June 8, 2010. *Exhibit B.* She relayed to him that she and trial counsel, Scott Spencer, both held the opinion that there were no appealable issues in the case. She assumes that the standard closing letter sent by the Office of Public Defender (OPD) to their clients regarding the right to appeal and the time limit was sent to Petitioner,

as it is sent to all OPD clients after sentencing. In addition, Boyer called the prison to arrange to talk to Petitioner about appeal. However, that call was not returned. *Exhibit B, p. 3-4.*

The State responds that even if trial counsel had, in fact, neglected to do anything about appeal, Petitioner's claim still fails on procedural grounds. Petitioner correctly notes that the Montana Supreme Court held in Hans that appeal issues may be raised in a *Petition for Post-Conviction Relief* if those claims were foreclosed on appeal due to the abandonment of counsel. In Hans, the Montana Supreme Court held that "[a] defendant whose counsel has abandoned his or her appeal should raise, in one petition for post-conviction relief, the claim that counsel was ineffective in abandoning the appeal, all claims that could have been raised on direct appeal, and all claims that would normally be appropriate in a petition for post-conviction relief including challenges to the validity of the sentence under MCA 46-21-101, and other ineffective assistance claims." *In re the Petition of Kristofer Hans, 288 Mont. 168 ¶19; 958 P.2d 1175 (1998). (Emphasis added).*

Thus, the State moves to summarily dismiss this claim, arguing that even assuming *arguendo* that trial counsel failed to adequately address appeal issues; petitioner has failed to adequately state a colorable post-conviction claim on this issue. The Petitioner correctly asserts that when an

appeal has been abandoned, he must raise all claims that could have been raised on direct appeal in his *Memorandum in Support of Amended Petition, p. 45.* Yet Petitioner has specified no claims that could have been raised on direct appeal. The claims contained in the Amended Petition are non-record-based claims. Therefore, any claim relating to abandonment of appeal fails.

ORDER

Therefore, based on the Court's analysis of the issues hereinabove, IT IS HEREBY ORDERED that Petitioner's *Amended Petition for Post-Conviction Relief* (Ct.Doc.17) is DENIED.

SO ORDERED and DATED this 2nd day of April, 2014.

ED McLEAN, District Judge

Cc: Larry Mansch, Esq., Montana Innocence Project
Suzy Boylan, Asst. Chief Deputy County Attorney