No.

In the
Supreme Court of the United States

ALMA CALDAVADO,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented For Review

Addressing what has become best known as "Shaken Baby Syndrome" (SBS), in *Cavazos v. Smith*, Justice Ginsburg observed that "[d]oubt has increased in the medical community 'over whether infants can be fatally injured through shaking alone.'" 565 U.S. 1, 13 (2011) (Ginsburg, J., joined by Breyer and Sotomayor, JJ., dissenting) (quoting *State v. Edmunds*, 2008 WI App. 33, ¶15, 308 Wis.2d 374, 385, 746 N.W.2d 590, 596 (2008)). That is because

> [b]y the end of 1998, it had become apparent that "there was inadequate scientific evidence to come to a firm conclusion on most aspects of causation, diagnosis, treatment, or any other matters pertaining to SBS," and that "the commonly held opinion that the finding of subdural hemorrhage and retinal hemorrhage in an infant was strong evidence of SBS was unsustainable." "Head acceleration and velocity levels commonly reported for SBS generate forces that are far too great for the infant neck to withstand without injury. An SBS diagnosis in an infant without cervical spine or brain stem injury is questionable and other causes of the intracerebral injury must be considered."

Cavazos, 565 U.S. at 13 (Ginsburg, J., dissenting) (quoting Donohoe*, Evidence–Based Medicine and Shaken Baby Syndrome, Part I: Literature Review, 1966–1998*, 24 Am. J. Forensic Med. & Pathology 239, 241 (2003), and Bandak, *Shaken Baby Syndrome: A Biomechanics Analysis of Injury Mechanisms*, 151

Forensic Sci. Int'l 71, 78 (2005)) (citations, footnotes, brackets, and ellipses omitted).

The views of the dissenting Justices in *Cavazos v. Smith* have been embraced by state courts of last resort and a United States Circuit Court. *See, e.g.*, *People v. Ackley*, 497 Mich. 381, 870 N.W. 2d 858 (2015); *Commonwealth v. Millien,* 474 Mass. 417, 50 N.E. 3d 808 (2016); *Commonwealth v. Epps*, 474 Mass. 743, 53 N.E. 3d 1247 (2016); and *Ceasor v. Ocwieja*, 655 F. App'x 263, 2016 WL 3597633 (6th Cir. 2016). *See also People v. Bailey*, 144 A.D. 3d 1562, 41 N.Y.S. 3d 625 (4th Dep't 2016); and *State* v. *Edmunds*, *supra*,

This petition presents two questions for review:

1. In an SBS prosecution, where defense counsel neither calls, nor consults with, an SBS expert to counter the prosecution's expert testimony on the "triad"findings of retinal hemorrhage, cerebral edema, and subdural hematoma, does such attorney's performance fall within the "rare" types of situations envisioned in *Harrington v. Richter*, 562 U.S. 86, 106 (2011) and *Strickland v. Washington*, 466 U.S. 668, 689 (1984) in which defense counsel can be found ineffective for failing to present counter expert testimony?; and

2. If so, where a defense attorney neither presents nor seeks such readily available counter-expert testimony demonstrating that a conviction based on the triad has become "unsustainable" since 1998, does a presumption of ineffective assistance of counsel arise under *Strickland*?

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 2018

ALMA CALDAVADO,
Petitioner,
-against-

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

Petitioner Alma Caldavado seeks a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

Opinions Below

The judgment and opinion of the Appellate Division, Second Judicial Department (Appendix A), was entered on November 14, 2018, affirming an order of the Supreme Court of the State of New York, Queens County (Buchter, J.) (Appendix B), entered May 25, 2017, denying, following an evidentiary hearing at the direction of the New York Court of appeals, *People v.*

Caldavado, 26 N.Y. 3d 1034, 43 N.E. 3d 36922 N.Y.S. 3d 159 (2015), Petitioner's motion, pursuant to New York Criminal Procedure Law ("NYCPL") §440.10(1)(h), to vacate a judgment, rendered on April 1, 2009. *See People v. Caldavado*, 78 A.D. 3d 962, 910 N.Y.S. 2d 673 (2d Dept. 2010), *lv denied*, 16 N.Y. 3d 829, 946 N.E. 2d 181, 921 N.Y.S. 2d 193 (2011). Such judgment convicted Petitioner, upon a jury verdict, of Assault in the First Degree (New York Penal Law ("N.Y.P.L.") § 120.10(3)) and Endangering the Welfare of a Child (N.Y.P.L. § 260.10(1)), and imposed concurrent sentences of imprisonment of eight years and one year. Petitioner has since completed her term of imprisonment.

Basis for Jurisdiction

The judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, was entered on November 14, 2018 (Appendix A). Thereafter leave to appeal was denied by the New York Court of Appeals on January 24, 2019 (Appendix C). Jurisdiction to entertain this petition for a writ of certiorari, therefore, lies pursuant to 28 U.S.C. § 1257(a) and Rules 10(b) and 13 of the Rules of the Supreme Court.

Constitutional Provisions Involved

United States Constitution, **Amendment VI,** provides in pertinent part:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence [sic.].

United States Constitution, **Amendment XIV,** provides in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Statement of the Case

A. The Indictment and Theory of the Prosecution

Petitioner Alma Caldavado was charged under Queens County Indictment No. 1251/06 with the crime of Assault in the First Degree (N.Y.P.L. § 120.10(3)) and Endangering the Welfare of a Child (N.Y.P.L. § 260.10(1)). The theory of the prosecution's case was that Petitioner had injured a 7-month-old-infant, F.Q., the child of friends for whom she had been a caregiver, by violently shaking F.Q. According to *nine prosecution experts*, whose collective testimony was the linchpin of the case, the prosecution's theory of SBS was demonstrated by a triad of medical findings with respect to F.Q., including retinal hemorrhage in both eyes, cerebral edema (manifested by swelling of the brain and general encephalopathy or anoxic and ischemic injury), and subdural hematoma (resulting in developmental complications).

B. The Defense

At Petitioner's 2009 trial, her attorney -- although later admitting to having had the means, knowledge and wherewithal, and despite having

promised Petitioner and her family that he would do so -- declined to call a single medical expert to rebut the prosecution's expert testimony based on an independent analysis of F.Q.'s medical records and images. Thus, counsel failed to affirmatively demonstrate, as he easily could have done, that Petitioner most likely could not have committed the alleged offenses. At the very least, such a showing would have raised a reasonable doubt as to Petitioner's guilt.

Specifically, faced with the support of only one medical practitioner with whom he had consulted (who admitted to having no expertise in SBS cases and who had declined to appear as a witness), counsel made no effort at the 2009 trial to seek out any other expert. He therefore failed to present what by then was readily available testimony regarding empirical studies showing that an assessment of SBS, based on the triad findings alone, had become a fiercely disputed issue in the medical community for at least the preceding eleven years.

Instead, counsel only called a few character witnesses who testified, *inter alia*, to Petitioner's excellent reputation for peaceableness, truthfulness, kindness, and compassion. Then, aside from cross-examining the prosecution's experts based on the unsupported information obtained from his uncalled medical consultant, he relied solely on Petitioner's testimony, wherein she adamantly denied having shaken the infant to any degree resembling the level described by the prosecution's nine experts. Rather, Petitioner testified that she had only shaken the infant gently upon finding F.Q. already gasping, solely in an

effort to revive her. Petitioner further insisted that she had braced the infant's neck.[1]

Based on that limited defense, counsel sought a *full* acquittal, arguing that both *mens rea* elements of depraved indifference and recklessness in the charging statute, N.Y.P.L. § 120.10(3), had not been established.[2] *See People v. Feingold,* 7 N.Y. 3d 288, 852 N.E. 2d 1163, 819 N.Y.S. 2d 691 (2006). Thus, contrary to his later hearing testimony, wherein he would swear that his only strategy was to seek a misdemeanor conviction, not once in his summation did counsel ask the jury to find Petitioner guilty of nothing greater than the lesser included misdemeanor of Assault in the Third Degree (N.Y.P.L. § 120.00(2)), which involves mere recklessness, absent depraved indifference.

The jury convicted Petitioner of all counts. In light of the uncontradicted medical evidence, Petitioner

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1 At trial, one of the physician's testified that while the infant was on a stretcher surrounded by her parents and Petitioner, she had seen Petitioner, "out of the corner of [her] eye," shake the baby and say "be quiet." But the infant's parents, who were right next to Petitioner (and who certainly wanted a conviction), each testified that they never witnessed any such conduct.

2 N.Y.P.L. §120.10 provides:

> A person is guilty of assault in the first degree when:***
> 3. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person[.]"

was thereafter unsuccessful on direct appeal from the judgment in arguing that the aggravating element of depraved indifference had not been established. *People v. Caldavado*, 78 A.D.3d 962 , 910 N.Y.S. 2d 673 (2d Dept. 2010), *aff'd*, 16 N.Y. 3d 829, *lv. denied*, 16 N.Y. 3d 829, 946 N.E. 2d 181, 921 N.Y.S. 2d 193 (2011).

C. The Motion to Vacate the Judgment

In February 2012, Petitioner moved to vacate the judgment of conviction, *inter alia*, pursuant to N.Y.C.P.L. § 440.10(1)(h).[3] The motion was premised, *inter alia*, on the federal and New York constitutional standards of ineffective assistance of counsel. As relevant to this petition, Petitioner alleged that, in her 2009 trial, her attorney's failure to mount any attack on the triad, reflected in the fierce medical debate extant since at least 1998 as pathognomonic of SBS, essentially amounted to ineffective assistance of counsel, *per se*, or at least created a presumption of ineffectiveness under *Strickland* standards.

In support of the motion, new counsel -- having served *pro bono* for the past nine years of litigation, following the direct appeal from the judgment of

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[3] N.Y.C.P.L. § 440.10 provides in relevant part:

> 1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:***
>
> (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States[.]"

conviction -- enlisted the further *pro bono* services of two nationally prominent medical practitioners and commentators: (1) **Dr. Ronald Uscinski**, a pediatric neurosurgeon and the author of several widely-respected articles on the subject agreed to consult; and (2) **Dr. Joseph Scheller**, a well-recognized pediatric neurological diagnostician, then connected with the Children's National Medical Center in Washington, D.C., an associate professor of pediatrics at George Washington University, and a fellow in Neuroradiology at the Winchester Valley Medical Center in Winchester, Virginia. After reviewing F.Q.'s medical records and imaging, Drs. Scheller and Uscinski each issued individual reports maintaining that F.Q. *could not have been shaken*.

According to Dr. Scheller, the prosecution's experts failed to recognize that F.Q. had been suffering from a disproportionately large head, called "benign external hydrocephalus," a conclusion with which Dr. Uscinski agreed. Such condition, otherwise known as BEH or BESS ("benign enlargement of the subdural space"), had presented in F.Q.'s imaging as the chronic (old) subdural hematoma that was even recognized by prosecution experts, but which they had discounted as causative of F.Q.'s injuries. Moreover, according to Dr. Uscinski (whose work was cited by the dissenting Justices in *Smith*, *see* 565 U.S. at 14), it would have been virtually impossible for the seven-month-old infant *not* to have sustained any neck injuries had she actually been violently shaken, as demonstrated by the highly inflammatory anatomical doll demonstration which the district attorney routinely offers and which had been upheld by the Appellate Division on appeal from the judgment of conviction. Yet, the defense

experts observed that no such head or neck injuries had been presented by the infant.

On the other hand, according to the prosecution's experts, F.Q.'s injuries were caused by an acute subdural hematoma (new bleed) that only *appeared* as chronic (old) due to dilution with cerebrospinal fluid which exists in the brain. (A15, Mot. ¶ 42). This misinformation, however, would have been decisively refuted by the defense's experts, who maintain that FQ's BEH/BESS condition had caused the seizures which Petitioner had repeatedly reported. Hence, no such dilution, as testified by prosecution experts, was medically possible.

In her § 440.10 motion, Petitioner alleged that trial counsel had originally promised to call an expert since he was "not a doctor." Yet, just before trial, counsel told Petitioner and her sister that, given the number of experts whom the prosecutor was calling as witnesses, any counter-testimony by a defense expert would be "pointless." Following the original denial of the motion and the Appellate Division's affirmance thereof, leave to appeal to the Court of Appeals was granted. *People v. Caldavado*, 23 N.Y. 3d 1060, 18 N.E. 3d 1140, 994 N.Y.S. 2d 319 (2014). Thereafter, the Court of Appeals ordered a hearing on the claim of ineffective assistance of counsel, finding that, "where casting doubt on the prosecution's medical proof is the crux of the defense, a decision that it would be futile to call an expert based solely on the volume of expert testimony presented by the People is not a legitimate or reasonable tactical choice." *People v. Caldavado*, 26 N.Y. 3d at 1036, 43 N.E. 3d at 371, 22 N.Y.S.3d at 161 (2015).

D. The Hearing

1. Petitioner's Case

Petitioner's sister testified as to trial counsel's initially stated strategy. She recalled him stating "I am an attorney, not a doctor, so in order to do this case I definitely need the medical witness to view the baby's medical." Counsel also told her, "I need expert witnesses to testify in behalf of [Petitioner] because the jury needs to hear the other side also." Counsel advised that he would need an investigator to examine F.Q.'s records and an expert witness to look at all the evidence in the case. He added that he would do research and check on similar trials.

At a later meeting, however, counsel informed Petitioner and her sister that the prosecution was hiring many medical expert witnesses. Counsel concluded, therefore, that it was "pointless" to have only one expert. Counsel explained that, instead of hiring an expert medical witness, he would have the prosecution's witnesses contradict each other. Petitioner's sister confirmed that, had counsel stood by his original strategy and called a medical expert witness the family would have been ready and willing to compensate such person, having been prepared "to do anything to prove [her] sister's innocence." In the end, counsel never hired any doctor and never asked Petitioner's sister to pay for an expert.

After reviewing the trial transcript, two legal

experts voluntarily testified on behalf of Petitioner.[4] First called was **Professor Keith Findley**, a professor of law at the University of Wisconsin Law School and a co-founder and co-director of the Innocence Project at that School, and counsel for the defendant in *State* v. *Edmunds*, 308 Wis. 2d 374, 746 N.W. 2d 590 (Ct. App. 2008), *petition for review denied,* 308 Wis. 2d 612, 749 N.W. 2d 663 (2008). Also appearing was **Professor Adele Bernhard,** a distinguished adjunct professor at New York Law School, where she heads the Innocence Project, who had earlier taught at Pace Law School for 20 years, and who had been counsel in *People v. Bailey*, 144 A.D. 3d 1562, 41 N.Y.S. 3d 625(4th Dept. 2016).

The two experts explained how an SBS case *must* be defended, given the current state of the debate in the medical community regarding the evidential viability of the triad. Both experts testified that, as held in a growing number of cases around the country, when the prosecution relies solely upon expert medical opinions in an SBS case, "[t]he only effective strategy . . . is to call upon the medical expertise that exists that challenges the hypothesis, the Shaken Baby hypothesis, and challenges the diagnostic reliability of the triad and related findings."

Findley's *uncontradicted* testimony included his assessment that

> any competent lawyer that w[as] going

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4 The hearing court stated that it did not want to hear from medical experts, as it was already well aware of the SBS debate.

> into trial taking on Ms. Bishop [the prosecutor] in one of these cases, it is inconceivable to me that I would do that without seeking out the very best expert opinions I can, the very best expert assistance I can because I could know my own skills as a cross examiner, but without knowledge of the science she would be no match.

Yet, here, according to Findley, defense counsel "didn't do the basic medical and legal research that could have been done that my students in 2004 as second-year law students did with no problem and found all of the contrary evidence and experts." Rather, in Professor Findley's view, echoed by Professor Bernhard, counsel

> tried to make the medical case. He tried to make the case that this was a re-bleed. He just did it without the support, without the finding of Bess, B-E-S-S and I don't know that the People's experts would have disagreed. Even the People's experts agree to some extent that re-bleeds can happen and there is ample medical literature to support the proposition that a re-bleed from benign external hydrocephalus is a known risk.

2. The Prosecution's Case

The People called Petitioner's trial counsel, who denied ever having told her sister that it would be "pointless" to call only one expert in order to meet the

testimony of the People's twelve medical witnesses. Counsel admitted, however, having had knowledge of F.Q.'s hydrocephalus condition and that a prosecution witness, Dr. Maytal, had written four articles on the subject. He also conceded the condition could cause an acute bleed, which counsel never used in cross-examination, absent the ability to provide any "tactical reason." He stated that he had been *well aware of the SBS debate*, but elected not to educate the jury, repeating the refrain that he wanted to "try a case, not a cause," and had not wanted to get involved in a "street fight."

Counsel claimed to have fully researched the issue before deciding to rely completely on cross-examination; that his sole strategy—despite *never* once having made that argument to the jury—was to simply get Petitioner convicted, if anything, of the lesser included misdemeanor. He stated that, in fact, he did have an "expert," **Dr. Joseph Klein**, who, *he admitted*, *was not at all versed in SBS*. Counsel maintained that he had repeatedly consulted with Dr. Klein, his "quarterback" or "coach," whom he had never met, to prepare his cross-examinations -- but who had, nonetheless, "made it clear that *you couldn't get away from a diagnosis of shaken baby syndrome*."

Finally, trial counsel claimed that, because Petitioner had admitted to him that she had shaken the baby, he was handicapped in that he could not allow her to testify to not having committed the crime. Yet, when asked if he believed Petitioner's trial testimony -- *wherein she had absolutely denied any such forceful shaking* -- to have been "accurate, truthful and honest," he readily conceded "[i]n the best light

that [h]e prepared her, correct." Such "truthful and honest" testimony involved Petitioner stating that it was "after she finds the baby unresponsive, she shakes the baby," *id.*, gently, in an effort to revive her.[5]

3. The Hearing Court's Decision

On May 25, 2017, the hearing court denied Petitioner's § 440.10 motion, holding that trial counsel had not been ineffective. *Appendix B*. The court simply concluded that "the cases cited by the defendant in support of his motion . . . [we]re not compelling in assessing the effectiveness of counsel in this particular case." *Id.* at 30.

Still, the hearing court "credit[ed] the testimony of *all* the witnesses who testified in all pertinent and relevant respects." *Id.* at 2 (emphasis added). Thus, rather inexplicably, the court likewise accepted the fact, as testified by Petitioner's sister, that trial counsel had indeed told her it would be "pointless" to call an expert. Yet, the hearing court maintained that counsel had not been ineffective, reasoning that (1) counsel had been stymied by Petitioner's admission to having shaken the baby (even though counsel inconsistently admitted that Petitioner's testimony, denying such act, had been truthful); and (2) counsel had indeed pursued

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5 The prosecution sought to portray this case as a "Triad *Plus*" prosecution, given that the infant also presented with cross-eyes ("strabimus"). This, however, ignored defense counsel's non-SBS "expert's" own letter stating that such condition "may have been of congenital origin according to a later ophthalmologist's report and not related to head injury."

the strategy of seeking a misdemeanor (which, the court advised, made perfect sense since Petitioner would thereby not have been exposed to deportation) – notwithstanding the non-existence of any such effort in the record of trail.

4. **The Appellate Division' s Decision**

An appeal, by permission, was thereafter taken to the Appellate Division, Second Judicial Department. In a decision dated November 23, 2018, that court affirmed the denial of Petitioner's motion to vacate the judgment. Finding that counsel's failure to have educated the jury to the intense debate in the medical community, discussed by Justice Ginsburg in *Smith*, was a "tactical decision," the court

> agree[d] with the Supreme Court's determination that trial counsel provided meaningful representation notwithstanding his decision not to call an expert witness to counter the People's medical evidence. The record shows that trial counsel made efforts to investigate the medical issues in this case. He effectively cross-examined the People's witnesses, including the experts, and elicited testimony that was damaging to the People's case. The fact that the defense did not call its own expert witnesses was the result of trial counsel's legal strategy that the best way to defend this case was through impeachment of the People's witnesses. Under the particular circumstances of this case,

> trial counsel provided effective representation . . . .

Appendix A, at A4-A5. *See People v. Caldavado*, 166 A.D. 3d 792, 794, 88 N.Y.S. 3d 236 (2nd Dept. 2018) (citing *Harrington*, 542 U.S. at 111 and *People v. Aiken*, 45 N.Y.2d 394, 400, 380 N.E.2d 272, 408 N.Y.S.2d 444 (1978)). Leave to appeal was denied by the New York Court of Appeals on January 24, 2019. *Appendix C*; *see People v. Caldavado*, 32 N.Y.3d 1170 (2019).

Reasons for Allowance of the Writ

The Sixth Amendment to the United States Constitution, which applies to the States via the Fourteenth Amendment, *Missouri v. Frye*, 566 U.S. 134, 138 (2012), guarantees a criminal defendant the effective assistance of counsel. That guarantee "entails that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence." *Hinton v. Alabama*, 571 U.S. 263, 272 (2014) (discussing *Strickland v. Washington,* 466 U.S. at 685–687 (1984). In evaluating a claim of ineffective assistance of counsel, a court "first determine[s] whether counsel's representation fell below an objective standard of reasonableness," and then "ask[s] whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Hinton*, 571 U.S. at 272 (internal quotation marks omitted).

Regarding the "performance" prong, "[t]here is a strong presumption that counsel's representation [falls] within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562

U.S. at 109. However, this Court recognized in *Harrington* that "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Id.* at 106. To be sure, the *Harrington* Court cautioned that "[r]are are the situations in which the wide latitude counsel must have in making tactical decisions will be limited to any one technique or approach." *Id.* (internal quotation marks omitted); *but see Hinton*, 571 U.S. at 275 (finding that trial counsel's "inexcusable mistake of law . . . that caused counsel to employ an expert that he himself deemed inadequate" fell within the situation recognized by *Harrington*). Moreover, "[i]t can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts, but even that formulation is sufficiently general that state courts would have wide latitude in applying it." *Id.*, 562 U.S. at 109.

It is submitted that where an SBS prosecution has been theorized and premised on the triad, a challenge to any resulting conviction based on the failure of defense counsel to have offered expert testimony to educate the jury about the intense debate in the relevant medical community -- certainly since 1998 -- presents the Court with the opportunity to consider whether such amounts to that "rare" situation. As explained by *Smith*'s dissenting Justices, 565 U.S. at 13, educating the trier of fact about the other side is absolutely essential. The failure to do so, therefore, might well give rise to a presumption of a deficient performance, *notwithstanding some Monday morning strategy newly articulated by a defense attorney in response to a collateral challenge. See*

Wiggins v. Smith, 539 U.S. 510, 526 (2003) ("The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment."); *Quartararo v. Fogg*, 679 F. Supp. 212, 247 (E.D.N.Y. 1988) (citations and internal quotation marks omitted) ("[N]ot all strategic choices are sacrosanct. Merely labeling [defense counsel]'s errors strategy does not shield his trial performance from Sixth Amendment scrutiny. To the contrary, certain defense strategies or decisions may be so ill chosen as to render counsel's overall representation constitutionally defective.")

Several state courts of last resort, and a United States Circuit Court, have issued opinions in SBS cases (sometimes called "Abusive Head Trauma") that conflict with the rulings of the Appellate Division in this case. For example, in *People v. Ackley*, the Michigan Supreme Court held "that counsel performed deficiently by failing to investigate and attempt to secure an expert witness who could both testify in support of the defendant's theory that the child's injuries were caused by an accidental fall and prepare counsel to counter the prosecution's expert medical testimony":

> As defense counsel was well aware before trial, the prosecution's theory of the case was that the defendant intentionally caused the child's unwitnessed injuries, a premise that it intended to prove with expert testimony. *This testimony would require a response* . . . . While an

> attorney's selection of an expert witness may be a "paradigmatic example" of trial strategy, that is so only when it is made "after thorough investigation of the law and facts' in a case."

497 Mich. at 389, 870 N.W. 2d at 863 (quoting *Hinton*, 571 U.S. at 274) (first emphasis added; other emphasis omitted) (brackets omitted).

The Michigan Supreme Court thereby concluded that

> [w]e fail to see how counsel's sparse efforts satisfied his "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," especially in light of the prominent controversy within the medical community regarding the reliability of SBS/AHT diagnoses. In this case involving such substantial contradiction in a given area of expertise, counsel's failure to engage expert testimony rebutting the state's expert testimony and to become versed in the technical subject matter most critical to the case resulted in two things: a defense theory without objective, expert testimonial support, and a defense counsel insufficiently equipped to challenge the prosecutions experts because he possessed only [a forensic pathologist's]] reluctant and admittedly ill-suited input as his guide.

Id. at 391–92, 870 N.W. 2d at 864 (quoting *Hinton,* 571 U.S. at 274) (citing *Edmunds,* 308 Wis. 2d at 391–392, 746 N.W. 2d at 50, and Findley *et al.*, *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right,* 12 Hous J. Health L. & Policy 209, 212 (2012); (internal quotation marks and brackets omitted).[6]

This holding was soon echoed by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Millien,* 474 Mass. 417, 50 N.E. 3d 808 (2016), another SBS case, upon addressing the same deficiency of that trial counsel. Upon ordering a new trial, the Court stated:

> At trial, the jury *heard only one side of this debate*, because the defense attorney did not retain a medical expert to offer opinion testimony or to assist him in cross-examining the Commonwealth's medical experts. We conclude that, in these circumstances, where the prosecution's case rested almost entirely on medical expert testimony, the defendant was denied his constitutional right to the effective assistance of counsel because, *by not providing the jury with the other side of this debate*, his attorney's poor performance likely deprived the defendant of an otherwise available, substantial

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6 The referenced author is Professor Keith Findley, one of Petitioner's expert witnesses who testified at the hearing on the ineffective assistance of counsel claim.

> ground of defence.

474 Mass. at 418, 50 N.E. 3d at 809–10 (internal quotation marks omitted omitted) (emphasis added). The same result was reached soon thereafter in *Commonwealth v. Epps*, 474 Mass. 743, 53 N.E. 3d 1247 (2016).

Most important for purposes of this petition, a federal Court of Appeals has also weighed in, thereby effectively creating a conflict with the decision sought to be reviewed. *See* Sup. Ct. R. 10(b). In *Ceasor v. Ocwieja*, 655 F. App'x 263 (6th Cir. 2016), the United States Court of Appeals for the Sixth Circuit observed that

> [t]he linchpin of the prosecution's theory was the expert testimony of Dr. Holly Gilmer–Hill, who opined that Brenden's subdural hematoma and retinal hemorrhages were (1) symptoms commonly associated with [SBS], (2) caused by an intentional act, and (3) inconsistent with Ceasor's version of the facts—that Brenden's injuries resulted from an accidental fall from the couch.

Id. at 265. The Sixth Circuit noted that one of the issues was

> whether Ceasor ha[d] demonstrated the strength of his claim that his trial counsel rendered constitutionally ineffective assistance by failing to retain an expert witness to rebut Dr. Gilmer–Hill's testimony due to his ignorance (or

> misapprehension) of Michigan law governing public funding for indigent defendants.

Id. Then, addressing the prejudice prong of the standard for ineffective assistance of counsel under *Strickland*, the Sixth Circuit was "mindful of the Supreme Court's admonition that 'the selection of an expert witness is a paradigmatic example of the type of strategic choice that, when made after thorough investigation of the law and facts, is virtually unchallengeable.'" *Id.* at 285 (quoting *Hinton,* 571 U.S. at 275). However, the Court of Appeals recalled that

> "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

Id. (*quoting Strickland*, 466 U.S. at 690–91).

Continuing to discuss the Michigan Supreme Court's decision in *Ackley,* the Sixth Circuit concluded:

> The crux of the prosecution's proof that Ceasor knowingly or intentionally caused Brenden serious physical harm—an element of first-degree child abuse that the prosecution was required to prove beyond a reasonable doubt—was Dr.

> Gilmer–Hill's expert testimony. At closing argument, the prosecution went out of its way to point out that this testimony was uncontroverted. Brenden's injuries—a subdural hematoma and retinal hemorrhaging—were medically complex and beyond the easy comprehension of the jury. **Further, no amount of cross-examination or lay witness testimony could have rebutted Dr. Gilmer–Hill's medical opinions that these injuries were medically consistent with abuse and inconsistent with an accidental fall.** Thus, we acknowledge, as the *Ackley* court did, that in many SBS cases "where there is 'no victim who can provide an account, no eyewitness, no corroborative physical evidence and no apparent motive to harm,' the expert '*is* the case.' "

Id. At 286 (quoting *Ackley*, 870 N.W.2d at 867, and Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash U. L. Rev. 1, 27 (2009)) (brackets omitted) (italics in original; bold added). The Sixth Circuit therefore remanded the matter to the district court on the issue of appellate counsel's failure to have moved, under Michigan law, for a hearing on the issue of ineffective assistance of trial counsel. *Id.* at 290.

This issue, in different forms, arises frequently. *See, e.g.*, *Del Prete v. Thompson*, 10 F..Supp. 3d 907 (N.D. Ill. 2014) (ineffective assistance of counsel); *Dobson v. Maryland*, No. 20-K-09-9572 (Circuit Court,

Kent County, Apr. 7, 2014) (same); *Bailey*, 144 A.D. 3d at 1564, 41 N.Y.S. 3d at 627 (addressing a claim of newly discovered evidence, finding that "the cumulative effect of the research and findings on retinal hemorrhages, subdural hematomas or hemorrhages and cerebral edemas as presented in SBS/SBIS cases and short-distance fall cases supports the court's ultimate decision that, *had this evidence been presented at trial, the verdict would probably have been different*.") (citing *Caldavado,* 26 N.Y. 3d at 1037, 43 N.E. 3d at 371) (emphasis added).

Petitioner asks the Court, therefore, to address the three dissenters' irrefutable observation in *Cavazos* and thereby consider their stated proposition that since 1998, "the commonly held opinion that the finding of subdural hemorrhage and retinal hemorrhage in an infant was strong evidence of SBS was unsustainable," 565 U.S. at 13 (Ginsburg, J., dissenting)[7] (brackets omitted). Petitioner prays that the Court will decide to

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[7] Notably, the upholding of the conviction in *Cavazos* was solely predicated on owed deference to state factual determinations. *See* 565 U.S. at 7–8 (citing 28 U.S.C. § 2254(d)(1)). Thus, the majority did not so much disagree with Justice Ginsburg and the Ninth Circuit's conclusion, as it criticized the right of the Court of Appeals to so conclude. *See Smith v. Mitchell*, 437 F. 3d 884 (9th Cir. 2006). As the majority explained:

> Doubts about whether Smith is in fact guilty are understandable. But it is not the job of this Court, and was not that of the Ninth Circuit, to decide whether the State's theory was correct. The jury decided that question, and its decision is supported by the record. 565 U.S. at 8.

consider, on the merits, whether "in many SBS cases where there is no victim who can provide an account, no eyewitness, no corroborative physical evidence and no apparent motive to harm, the expert *is* the case. *Ceasor*, 655 F. App'x at 286 (internal quotation marks omitted). In doing so, the Court will be afforded the opportunity to review whether the "rare" case noted in *Harrington* and *Strickland* is present in SBS prosecutions when the prosecution's evidential linchpin is the unrefuted expert testimony of the triad and that, in such instance, the failure of a defense attorney to present a counter expert amounts to a presumption of ineffective assistance.

Conclusion

The Petition for a Writ of Certiorari Should Be Granted

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Respectfully submitted,

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