APPENDIX

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Appendix A — Decision & Order, Dated November 14, 2018

SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

_____AD3d_____

Argued - May 29, 2018

MARK C. DILLON, J.P.
JOHN M. LEVENTHAL
SHERI S. ROMAN
COLLEEN D. DUFFY, JJ.

2017-05897

DECISION & ORDER

The People, etc., respondent
v Alma Caldavado, appellant.

(Ind. No. 1251/06)

Mark M. Baker, New York, NY, for appellant.

Richard A. Brown, District Attorney, Kew Gardens, NY (Robert J. Masters, Joseph N. Ferdenzi, and John M. Castellano of counsel), for respondent.

Dana M. Delger and M. Chris Fabricant (Fried, Frank, Harris, Shriver & Jacobson LLP, New York, NY [Douglas W. Baruch and Michael P. Sternheim], of counsel), for amicus curiae The Innocence Network.

Appeal by the defendant, by permission, from an order of the Supreme Court, Queens County (Richard L. Buchter, J.), dated May 25, 2017, which, after a hearing, denied her motion pursuant to CPL 440.10 to vacate a judgment of the same court (Robert McGann, J.), rendered April 1, 2009, convicting her of assault in the first degree and endangering the welfare of a child, upon a jury verdict, and imposing sentence.

ORDERED that the order is affirmed.

In the early afternoon of January 11, 2006, a seven-month-old infant was left at the defendant's home while the infant's parents went to work. At approximately 5:00 p.m., the infant was transported to St. John's Hospital in Queens and diagnosed as suffering from shaken baby syndrome. The defendant was charged with assault in the first degree and endangering the welfare of a child. At trial, the People called 13 medical professionals in support of their case, 9 of whom testified as expert witnesses. Trial counsel for the defendant did not call a medical expert. Instead, trial counsel obtained the written report of a medical expert before the trial and retained a pediatric neurologist as a consulting expert, whom he consulted as issues arose during trial. During cross-examination of the People's witnesses, trial counsel elicited testimony that supported the defendant's theory of the case that the infant sustained injuries prior to being left at the defendant's home. The jury found the defendant guilty of both charges, and this Court affirmed the judgment of conviction (*see People v Caldavado*, 78 AD3d 962). Thereafter, the defendant moved pursuant to CPL 440.10(1) to vacate the judgment, as is relevant here, on the ground of ineffective assistance of trial counsel. The Supreme Court denied the motion to vacate, without conducting

an evidentiary hearing, and this Court affirmed (*see People v Caldavado*, 116 AD3d 877). The Court of Appeals reversed, determining that a hearing was necessary to resolve the defendant's claim that she received ineffective assistance of counsel (*see People v Caldavado*, 26 NY3d 1034, 1036-1037).

After the hearing, the Supreme Court denied the defendant's motion, determining that trial counsel's decision not to call an expert was a strategic one and that trial counsel was not ineffective. The defendant appeals, and we affirm.

In *Strickland v Washington* (466 US 668), the United States Supreme Court adopted a two-part test for evaluating claims of ineffective assistance of counsel. A "defendant must show that counsel's performance was deficient," and "that the deficient performance prejudiced the defense" (*id.* at 687). "The first prong of the *Strickland* test is essentially a restatement of attorney competence, which requires a showing that counsel's representation fell below an objective standard of reasonableness. The second prong, also known as the prejudice prong, focuses on whether" (*People v McDonald*, 1 NY3d 109, 113-114 [citation and internal quotation marks omitted]) "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'" (*People v Pagan*, 155 AD3d 779, 781, quoting *Strickland v Washington*, 466 US at 694).

To establish a claim of ineffective assistance of counsel under the New York Constitution, a defendant must show that he or she was not afforded "meaningful representation" based upon "the evidence, the law, and the circumstances of a

particular case, viewed in totality and as of the time of the representation" (*People v Baldi*, 54 NY2d 137, 147). "Our cases, however, agree with *Strickland* on the first prong" in that "'counsel's efforts should not be second-guessed with the clarity of hindsight'" and the defendant is not entitled to perfect representation (*People v Turner*, 5 NY3d 476, 480, quoting *People v Benevento*, 91 NY2d 708, 712).

Generally, whether to call an expert is a tactical decision (*see People v McDonald*, 79 AD3d 771; *People v Daniels*, 35 AD3d 495, 496; *People v Foust*, 192 AD2d 718; *People v Baston*, 181 AD2d 786, 787; *People v Diaz*, 131 AD2d 775, 775). In many instances, cross-examination of the People's expert will be sufficient to expose defects in an expert's presentation (*see Harrington v Richter*, 562 US 86, 111). "As long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance" (*People v Benevento*, 91 NY2d at 712-13).

Here, we agree 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 (*see Harrington v Richter*, 562 US at 111; *People v Aiken*, 45 NY2d 394, 400), and we agree with the court's determination to deny the defendant's CPL 440.10 motion.

DILLON, J.P., LEVENTHAL, ROMAN and DUFFY, JJ., concur.

ENTER:
s/Aprilanne Agostino
Aprilanne Agostino
Clerk of the Court

**Appendix B — Memorandum,
Dated May 25, 2017**

MEMORANDUM

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF QUEENS:
CRIMINAL TERM: PART-K10

THE PEOPLE OF THE STATE OF NEW YORK	X	REPORT
	:	BY: Richard L. Buchter, JSC
– against –	:	DATE: May 25, 2017
ALMA CALDAVADO,	:	
Defendant.	X	INDICT. NO.: 1251/06

MOTION TO: VACATE JUDGMENT

FOR DEFENDANT: MARK BAKER, ESQ.

FOR PEOPLE: ROBERT MASTERS, ESQ., ADA
LEIGH BISHOP, ESQ., ADA
JOHN CASTELLANO, ESQ., ADA

The defendant was charged with Assault in the First Degree and Endangering the Welfare of a Child in connection with an incident in which a seven-month-old infant sustained serious injury while in her care. After trial, the defendant was convicted of both charges. Her conviction was affirmed by the Appellate Division, and leave to appeal to the Court of Appeals was denied (78 AD3d 962 [2d Dept 2010], lv denied 16

NY31 829 [2011]). Subsequent to the exhaustion of her appeals, the defendant moved for an order vacating judgment on the grounds of newly discovered evidence, ineffective assistance of counsel, and actual innocence. Her motion was denied without a hearing and the denial was affirmed by the Appellate Division (116 AD3d 877 [2d Dept 2014]). Thereafter, leave to appeal to the Court of Appeals was granted (23 NY3d 1060 (2014]) and the Court of Appeals reversed. The Court found that there was no basis to vacate judgment on the ground of newly discovered evidence and that the defendant had "failed to demonstrate factual innocence" (26 NY3d 1034, 1037 (2015]). Nevertheless, it remitted the case for a hearing to provide the defendant with an opportunity "to establish that she was deprived of meaningful representation" (id, p1036). The sole question to be resolved is "whether counsel's alleged deficiencies were merely the result of a reasonable, but unsuccessful trial strategy or whether counsel failed to pursue the minimal investigation required under the circumstances" (id, p1037). A hearing to make this determination was held on June 6, June 7, June 14, and November 14, 2016. The defendant called Entela Shurdho, Keith Findley, Esq., and Adele Bernhard and the People called Oliver Storch, Esq. The Court credits the testimony of all of the witnesses who testified in all pertinent and relevant respects.

Ms. Shurdho testified that she is the defendant's sister. She said that her sister's first attorney told her to "plead guilty or flee the country" (Hearing minutes, p15), and that she and her brother began to look for another attorney. She contacted Mr. Storch, who told her that he would like to take the case but could not prepare the defense in one week - the amount of time the judge was allowing to find new counsel. She met

with a few other attorneys but did not hire them because they were not experienced enough. She again contacted Mr. Storch, who ultimately agreed to take the case. The witness stated that Mr. Storch initially advised her that he needed investigators and expert witnesses to examine the baby's medical records because he was "an attorney, not a doctor" (id, p118). However, after learning more about the case, well before the trial commenced, he changed his strategy, informing her that it was "pointless" to hire one expert witness to testify against the many expert witnesses that the prosecutor planned to call and that his new strategy would be to have the prosecutor's expert witnesses "contradict one another" (id, p22). Ms. Shurdho testified that defense counsel advised her that his goal was to have the charges reduced to a misdemeanor or dismissed and that it looked "very promising" (id, p24). The witness said that she would have been willing to pay for expert witnesses but that defense counsel did not hire one.

On cross-examination, Ms. Shurdho testified that part of the discussion she had with prospective attorneys was that her sister's status in the United States would be jeopardized by a felony conviction. She said that the first lawyer retained on behalf of her sister was Jake LaSala, who appeared in Court many times, filed motions, and obtained discovery materials. He also consulted with a doctor, who wrote a summary of the matter in which he "agreed with the prosecutor" that the evidence demonstrated "Shaken Baby Syndrome" (id, p35). The witness stated that Mr LaSala advised her that this was "bad news" for her sister (id), that the case was very strong and was strengthened by the fact that her sister had told a number of people that she had shaken the baby, that the possible sentence ranged from a minimum of five

years to a maximum of 25 years, and that the plea offer was a severe one. Mr. LaSala ultimately withdrew from the case after advising Ms. Shurdho that a conviction and a lengthy sentence would be probable, "followed by removal back to Albania" (id, p44). He recommended that the defendant accept a guilty plea, indicating to her that he "saw no way of succeeding in this case because. . . [the prosecutor] Ms. Bishop had superior knowledge and skills with regard to this type of case" (id, p345).

According to Ms. Shurdho, Mr. Storch initially did not want to take the case because "he wanted to make sure that he had time to thoroughly prepare" (id, p47). When he did agree to take the case, he told Ms. Shurdho that he needed to consult with a doctor and to have a doctor view the evidence in order to effectively cross-examine the People's expert witnesses. Ms. Shurdho said that he also told her that he needed expert witnesses to testify on the defendant's behalf.

Ms. Shurdho further testified on cross-examination that Mr. Storch advised her that instead of calling witnesses, his strategy was to have the prosecutor's witnesses "contradict one another" (id, p358). She said that she did not challenge this decision.

On re-direct examination, Ms. Shurdho testified that she had a great deal of confidence in Mr. Storch when she hired him and trusted him when he told her of his intent not to call expert witnesses.

Keith Findley testified as an expert in the area of shaken baby cases. He said that prior to 1998, the shaken baby diagnosis was one of exclusion, that is, the diagnosis would be made if the "classic triad of findings" (subdural hematoma, retinal hemorrhage,

and cerebral edema or encephalopathy) was found and there were no other explanations for those findings such as a "high-speed automobile accident" or a "fall [from] a multi-story window" (id, p57). However, by the early 2000's, a "schism within the medical community" developed (id, p59), with critics of the standard practice who believed that there were alternate causes of each of the triad symptoms and that the Shaken Baby Syndrome could not be diagnosed solely upon three medical findings. The new approach, which he described as "evidence-based medicine" (id, p60), suggests that the "triad" diagnosis was a "hypothesis without a scientific finding" (id, p61). The witness stated that in his opinion, when the prosecutor relies upon expert medical opinions in order to meet their burden in a shaken baby case, the only effective strategy to defend it is "to call upon the medical expertise that exists and that challenges the ...Shaken Baby hypothesis and challenges the diagnostic reliability of the triad and related findings" (id, p61). These include pediatricians, ophthalmologists and, in the case of deceased infants, pathologists. His position is that where the People's experts testify that only a massive degree of force could result in the child's injuries, it would not be pointless to call experts and in fact, "the only way to respond" (id, p69) would be to "present counter medical expert opinions" (id) to demonstrate that there are alternate causes for the findings that do not necessarily involve violence. He found this to be especially so where, as here, over ten experts testified for the People. The witness further stated that even if the sole defense strategy was to cross-examine the People's witnesses, a competent defense attorney would have familiarized himself with the research in order to confront those witnesses with contrary medical findings in order to

demonstrate a different perspective. He said that Mr. Storch did not do this and seemed "utterly clueless" as to this other perspective (id, p71). For example, he did not cross-examine Dr. Maytal, one of the People's witnesses, with respect to an article he had written concerning infants with hydrocephalus, who may develop subdural hematomas with minimal or no trauma.

Mr. Findley testified that at the time of this prosecution, Mr. Storch could have found experts to challenge the People's witnesses. He cited the work of Dr. Uscinski and Dr. Scheller, both of whom "re-examined the scientific foundation for the shaken baby hypothesis and found it wanting" (id, p80), and claimed that an article discussing their work was written in 2004 and appeared on the internet before 2009. The witness referred to a 2007 post-conviction hearing for which he was the supervising attorney and at which six experts were called in connection with the defense of a shaken baby case. The experts who testified were discovered by second year law students whose research on the internet - mostly conducted in 2006 - led them to articles challenging the reliability of the triad diagnosis. Mr. Findley said that on the strength of the expert testimony, demonstrating that there was a "legitimate debate within the medical community" as to the Shaken Baby Syndrome, the Wisconsin Court of Appeals ordered a new trial. Charges against the defendant in that case were ultimately dismissed.

According to Mr. Findley, although the People did not utilize the term "triad" in their prosecution of this matter, their experts on several occasions "recited those essentially three diagnostic features as being what led them to conclude this was Shaken Baby

Syndrome" (id, p75), for there were no other signs of abuse. For this reason, it would not have been "pointless" to have at least one and preferably more than one expert testify to challenge that view. He referred to an article, written by Dr. Uscinski, that suggested that shaking a baby hard enough to cause brain damage would require the child's neck to be severely damaged and would involve injury to the cervical spine port. Mr. Findley testified that since there was no evidence of neck injury in the case herein, counsel should have contacted Dr. Uscinski to see if he was available to testify or if he could direct him to other experts in the field to at least consult on this matter.

Mr. Findley further stated that Mr. Storch was ineffective in not pursuing the concept of "lucid interval" (id, p84), which refers to the sometimes "extended period of time between injury ... and the point of collapse (id). He said that he was "completely unprepared" to counter the testimony of the People's witnesses who testified that the person with the child at the time of collapse was the one who inflicted the injury.

In Mr. Findley's opinion, Mr. Storch was unprepared to make the case that the child suffered a re-bleed of a chronic subdural hematoma" (id, p88) and without expert evidence could not undermine the prosecutor's experts who testified that such a thing could not occur. He found that the case was "woefully under-tried" (id, p90) and that since "science was the case" (id), it needed to be confronted with science, or else all he could do was suggest that the People's experts were incredible or the defendant was too good a person to have committed the acts with which she was charged.

When asked by the Court if he had read the medical records in this case, Mr. Findley testified that he had not.

On cross-examination, Mr. Findley testified that he has tried two cases and that most of his work involves post-conviction litigation. He acknowledged that a case with an autopsy provides more evidence and that where there is no autopsy or surgical procedure, expert opinions become more "dubious" and "tenuous" (id, p118).

On further cross-examination, Mr. Findley testified that he was aware that the defendant had admitted to both of the child's parents and to the 911 operator that she had shaken the baby, but he stated that the shaking occurred after the baby was unresponsive and that it was not violent shaking. He was not present at trial to see the demonstration of how the defendant shook the baby.

According to Mr. Findley, defense attorneys should generally consider the skill of opposing counsel. He agreed that in some cases a witness called for a particular proposition could corroborate opposing counsel's position. He stated that the prosecutor who tried this case, Leigh Bishop, "is widely recognized as one of the premiere child abuse and Shaken Baby Syndrome litigators in this country" and that to "take her on" (id, p126), counsel for the defendant herein should have consulted experts who did not adhere to the prevailing view on Shaken Baby Syndrome. He nevertheless acknowledged that pediatricians "as a whole are protective of the [Shaken Baby] hypothesis…and are engaged in…a fairly systematic attempt to deny the existence of controversy" (id, p143). He also conceded that Shaken Baby Syndrome

is taught "in a huge number of schools" (id, p170). However, he claims that other medical experts, while in the minority, do recognize the controversy. In this regard, the witness acknowledged that Dr. Uscinski, one of these medical experts, has been censored by the American Association of Neurological Surgeons for acting in a biased manner.

Mr. Findley testified that while there was evidence of the "triad" in this case, there were additional symptoms that contributed to the diagnosis herein, specifically, crossed and blackened eyes, symptoms that were not present in any of the cases that he referred to and that neither Dr. Uscinski nor Dr. Scheller mentioned in their articles. He acknowledged that the crossed and blackened eyes make the case "something other" than the triad with which Dr. Uscinski, Dr. Scheller, and others had taken issue.

On re-direct examination, Mr. Findley testified that defense counsel did not cross-examine the prosecutor's experts about the existence of a debate, did not confront Dr. Maytal with his article on benign external hydrocephalus, and did not ask any - questions about the absence of a neck injury, which some experts have held must be present where shaking causes brain injury. The witness stated that defense counsel in his summation did not argue for the lesser included charge, but argued instead that the defendant had not done anything to the child and that chronic bleeding was the cause of the injury, which he pointed out was a challenge to all of the charges, not just the top count.

On further re-direct examination, Mr. Findley testified that the Wisconsin Court in Edmonds recognized a "shift in mainstream medical opinion" (id, p204) in the area of Shaken Baby Syndrome.

Adele Bernhard, a law professor, was qualified by the Court as an expert in post-conviction litigation, "specifically involving ineffective assistance of counsel" in defending shaken baby cases" (id, p225). She referenced a case with which she was involved during its post-conviction phase in which the defendant, Ms. Bailey, had been convicted on the basis of three experts who claimed that the triad of injuries suffered by a child in her care (brain swelling, retinal hemorrhages and bleeding) "meant irrefutably that the child had been violently shaken" (id, p227). The defendant claimed that the child had fallen, testimony that was corroborated by a second child who had witnessed the incident. At the hearing, conducted ten years after conviction, she called eight doctors who agreed "that the science that had been testified to at the trial [regarding the triad] was not ... medically accurate" (id, p225). She said that one expert witness would not have been enough because "the medicine is actually fairly complicated and each case is very different" (id, p234). For example, she called a biochemical engineer to address the fact that the child had no neck injury. The witness testified that had the child had been violently shaken enough to cause internal bleeding and brain swelling, there would have been neck injuries as well. According to Ms. Bernhard, this testimony was a "prominent feature" in the Court's decision to vacate judgment in the Bailey case (id, p235).

Ms. Bernhard further testified that after reading the trial transcript in the case at bar, she finds that defense counsel's representation was "completely inadequate" (id, p236). She said it was "clear from the cross-examination that he [did not] understand the medical issues ... [and] was not in a position to refute the allegations of the prosecutor" (id).

On cross-examination, Ms. Berhard testified that she did not review police reports, nor suppression hearing minutes, motion papers, or medical records prior to testifying at this hearing. She said that the hearing in the Bailey case was conducted in 2014 and that although the grounds for her motion included ineffective assistance of counsel, the sole issue at the hearing was newly discovered evidence.

Ms. Bernhard agreed that the status of a defendant who is in this country as a result of political asylum and therefore "vulnerable to removal" (id, p281) upon conviction would be a factor for a lawyer to consider in trying the case. However, she believed that counsel in this case was ineffective for "failing to investigate, prepare, learn, [or] develop" (id, p283).

Ms. Bernhard further testified on cross-examination that she was aware of the changes in the law regarding depraved indifference that occurred just after the indictment in this case was filed and acknowledged that "if counsel defeated the charge of depraved indifference on the basis of [the] new more elevated culpable mental state, the defendant would only be liable for conviction of a misdemeanor."

On re-direct examination, Ms. Bernhardt testified that she did not see evidence in counsel's summation that he was seeking a lesser included offense.

On re-cross examination, Ms. Bernhard testified that the determination that the child in the Bailey case had neck injuries was only made at an autopsy, which could not have occurred in this case.

Oliver Storch testified that he specializes in the practice of criminal law and was retained in this matter on April 26, 2008. He said that he had never tried a shaken baby case before and made that clear to the defendant's brother and sister during the initial consultation in this matter. The witness stated that the defendant's family was stressed about the defendant going to prison but seemed even more concerned about the possibly of her being deported back to Albania. He learned that the defendant was being represented by an immigration attorney in relation to the granting of political asylum in this country and at some point spoke with him about this matter.

According to Mr. Storch, the case was already in a trial posture when he entered it. He learned that the prosecutor trying the case was an expert in shaken baby cases. He read the file, listened to the 911 tape, and read the report prepared by the medical expert for prior counsel, Jake LaSala, which he characterized as "devastating" to the defendant. He obtained an adjournment to prepare for trial and secured the defendant's release on bail. The witness said that he spoke with the defendant, who told him that she had shaken the baby, that she knew she had hurt the baby, and knew she "ha[d] to pay" (id, p407). However, she believed that an eight year sentence, which was the plea offer, was too much. She told counsel that two to five years would be a fairer sentence.

According to Mr. Storch, he had Joseph Stone, a seasoned trial attorney, assist him in the preparation and trial of this matter. He conducted research on the internet concerning Shaken Baby Syndrome (SBS), reading a number of articles, several of which he downloaded and printed. He retained Dr. David Klein, a pediatric neurosurgeon and member of the American Association of Pediatric Neurosurgeons, who confirmed what he had read, that there was a minority group of physicians who believed that SBS was not a diagnosis, but who advised him that "any competent pediatrician in the field would have to concede…that [the injuries in this particular case were] consistent with Shaken Baby Syndrome" (id, p413) and that "no reputable physician would testify that this was not SBS" (id, p416). Mr. Storch stated that although the doctors who held the minority view would volunteer their time, he believed that it was unwise to have the case degenerate into a point-counterpoint "law review debate" (id, p413). He said that he did not want to "dirty up" the case by having a "circus atmosphere" created by calling a series of "well-intentioned experts" who would ultimately be forced by the prosecutor, who he said was arguably the leading authority in these cases, to concede that the baby was shaken. He therefore "consciously did not pick somebody who was in the minority" (id, p428). His belief was that if he called the doctors who subscribed to the minority view, he would have to cast the many people to whom the defendant had admitted she shook the baby - including both parents, the police, and doctors - as "conspirators against her" in an "us against the world" defense (id, p422). Rather, he relied on Dr. Klein, who "was on board throughout the trial" (id, p417) and who advised him that it would be a viable strategy to establish that the baby arrived

at the defendant's home with "subacute" or "chronic" "subdurals already in place" (id. p421), so that even minimal shaking could have caused the injury to the baby. Therefore, although he testified that he never told the defendant or her sister that it would be "pointless" to call a doctor, he ultimately decided not to do so.

Mr. Storch further testified that he advised the defendant that he would attempt to obtain an acquittal but that on the facts of this case, a conviction on a lesser charge would be a victory. He explained the Feingold decision to her and the drastic impact that case was having on "depraved indifference" prosecutions. He said that the defendant was not a felon, but was an articulate, presentable, and trusted babysitter who was a caring mother to her own child, and so he wanted to establish that the shaking she had admitted to was an attempt to help a child who had a pre-existing condition. His strategy was to create reasonable doubt as to when the child was injured by showing "inconsistencies" and "concessions" in his cross-examination of the People's witnesses - one of whom indicated in his report that there was old blood in the baby's head, which could mean an old injury - without "subjecting [his experts] to withering cross-examination" (id, p426). He also intended to establish reasonable doubt with his own witness, who had seen the baby's father put her in the car without a car seat, supporting the view of a prior injury. Mr. Storch testified that if the jury believed that there was a possibility of a prior injury, then heard from a priest and teacher as to the defendant's humanity and peacefulness, they would be disinclined to find that the defendant was depraved as that term is defined in the jury charge for depraved indifference assault and to instead find reckless assault, the lesser

included charge he requested and obtained at trial. He believes that this was a safer strategy than taking on the "daunting medical evidence" the People had in this case, along with the defendant's admission that she had, albeit in her opinion not forcibly, shaken the baby just prior to her injury. Mr. Storch stressed that in determining strategy he had to consider that the victim was a helpless infant and that this was not just a science case. He said that he had to deal with the defendant's admission and could not have her perjure herself or appear to be lying. He indicated that his decision not to call experts had nothing to do with money or with the number of the People's experts, but that in a case such as this, where the child had crossed and blackened eyes in addition to the trio of injuries associated with SBS, and where the defendant had made admissions about shaking the baby, the better decision was not to call the experts but to put on a reasonable doubt defense.

On cross-examination, Mr. Storch testified that he was familiar with the notion that the lack of a neck injury made it more unlikely that the injury was due to shaking. He said that he did not recall if it was a conscious decision not to bring up the concept of lucid interval or the lack of cervical injury. His goal was to avoid a "street fight" with respect to medical controversy.

Mr. Storch acknowledged that he had never met Dr. Klein, who was not an SBS expert, had never been published, and was his partner's cousin. He said that Dr. Klein indicated in his letter that he was not certain that all of the child's injuries could be explained by one episode of shaking. He did not contact either Dr. Uscinski or Dr. Barnes, but spoke with an attorney who had cross-examined Dr.

Alexander. The witness testified that he spoke with Dr. Klein almost daily when the People's medical witnesses testified.

Mr. Storch further testified on cross-examination that he was aware that Dr. Alexander characterized typical SBS defendants as having a propensity for substance abuse but chose not to question him about it, indicating that he was dealing with a "real world jury," not with academia (id, p490).

The witness acknowledged that he never mentioned the decision in Feingold on the record, indicating that his was a post-Feingold case and that Feingold was the law. He said that calling experts in this case would only have added additional prosecution witnesses.

CONCLUSIONS OF LAW

The sole issue before the Court is whether Oliver Storch provided the defendant with "meaningful representation" (People v Benevento 91 NY2d 708 (1998). In making this assessment, the Court may not second-guess counsel's performance "with the clarity of hindsight to determine how the defense might have been more "effective" (id, p712). The test is not whether the representation was perfect, but whether it reflected "reasonable competence" (id). As long as a defense "reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance" (id, p713). To prevail on a claim of ineffectiveness of counsel, the defendant bears the burden of establishing that counsel's conduct "constituted egregious and prejudicial error" such that she did not receive a fair trial (id).

The question of effectiveness herein was framed by the Court of Appeals when it remanded the matter for a hearing. The Court noted that it was "exceedingly rare" to characterize an attorney's performance as ineffective because of his "strategic decision not to present expert testimony" (People v Caldavado, 26 NY3d 1034, 1036 (2015]), but found that 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" (id). It also found that there were "sufficient questions of fact as to whether counsel had an adequate explanation" for his failure to pursue certain lines of defense on cross-examination" (id). It thereupon directed that a hearing be held to determine whether counsel's "alleged deficiencies were merely the result of a reasonable, but unsuccessful trial strategy" (id, p1037) or were due to ineffectiveness as that term is construed in the law.

In the opinion of the Court, counsel was not ineffective and provided the defendant with "meaningful representation." This is not one of those "exceedingly rare" cases in which an attorney is deemed ineffective for failing to present expert testimony. It appears clear to the Court, on the basis of the testimony adduced at the hearing, that defense counsel did not indicate that it was "pointless" to call an expert solely because the People were calling so many. Counsel did not throw up his hands in defeat at the prospect of confronting a voluminous number of prosecution experts. His decision not to call expert witnesses was not a surrender, nor was it money driven, for the defendant's sister had agreed to pay for expert witnesses in the event that any were called, and a number of experts charge no fee for their testimony. Rather, the decision was a strategic one.

After examining the facts and circumstances surrounding this matter, researching the medical literature on Shaken Baby Syndrome, considering the status of the law regarding depraved indifference, and recognizing the skill of the prosecutor trying the case, counsel made a strategic decision not to call expert testimony and to pursue instead a reasonable doubt defense. So while Mr. Storch may have believed it to be an exercise in futility to call expert witnesses in the defense of this case (although he denied using the term "pointless"), this belief reflected a legitimate, reasonable strategy, not resignation, and surely not ineffectiveness.

With respect to the facts and circumstances confronting Mr. Storch, he was clearly facing an uphill battle. The victim was a 7-month old baby who was alert, happy, and normal when she was dropped off at the defendant's home on the day of the incident and who several hours later, after being in the defendant's care, had acute subdural hematomas, severe retinal hemorrhaging, and ischemic brain injury, classic symptoms of what is known as Shaken Baby Syndrome. She also had blackened and crossed eyes. In addition, the defendant had admitted to the parents of the child and to the police that she had shaken the baby, something she admitted to Mr. Storch as well, although when she spoke with him she indicated that she knew that she had hurt the baby and knew that she had to pay for it, whereas when speaking with the parents and police, she indicated that she had shaken the baby to revive her after she had become unresponsive. In any event, counsel was no doubt aware that some suspects minimize their participation in criminal conduct and more importantly, that a jury might be equally aware of that fact and thereby reject her representation that

the shaking occurred after the injury, and not before. Added to this scenario was the fact that the first lawyer retained in the matter, an experienced criminal defense attorney who had consulted with his own medical expert, withdrew from the case after telling the defendant's sister that the defendant would probably be convicted, given a lengthy sentence, and deported, and suggesting that she should "plead guilty or flee the country" (Hearing minutes, p15). Mr. Storch read the report prepared by prior counsel's expert, which he described as "devastating" to the defendant's case in that it agreed with the conclusion that the injuries were due to Shaken Baby Syndrome. It is with this backdrop that counsel agreed to take the case and developed a trial strategy. To do so, counsel researched the matter on the internet, familiarizing himself with the syndrome and with the small schism of detractors who disagreed with the foundation of the shaken baby diagnosis. He then contacted Dr. David Klein, a pediatric neurosurgeon, who reviewed all of the medical records in this case and who advised him that "any competent pediatrician in the field would have to concede ... that [the injuries in this particular case were] consistent with Shaken Baby Syndrome" (id, p413) and that "no reputable physician would testify that this was not SBS" (id, p416), thereby confirming his research that the overwhelming majority of pediatricians and other medical professionals subscribed to the SBS diagnosis[1]. It would appear that this information

[1] It bears noting that even Mr. Findley conceded that pediatricians "as a whole are protective of the [Shaken Baby] hypothesis…and are engaged in…a fairly systematic attempt to deny the existence of controversy" (id, p143) and that Shaken Baby Syndrome is taught "in a huge number of schools" (id, p170).

alone might dissuade counsel from taking on what he described as the "daunting medical evidence" the People had in this case and the entire mainstream view on Shaken Baby Syndrome by calling experts who espoused the minority view. This is particularly so here, in which the defendant admitted to shaking the baby, albeit not in her opinion violently, and in which the injured child not only presented with the three classic symptoms of SBS (the "triad"), but also had crossed and blackened eyes[2], so that calling experts to testify against prosecutions based solely on the existence of the "triad" had even less of a logical underpinning. But this was not the only reason counsel opted for an alternate strategy. He was advised by Dr. Klein that the CT scan taken on the day of the incident showed both acute and chronic subdural hematomas, suggesting that the baby may have been previously shaken or injured and that minimal shaking by the babysitter could have caused the injury. This defense would be consistent with the defendant's claim that she shook the baby to revive her and would not require counsel to subject his witnesses to "withering" cross-examination by the prosecutor, one of the leading experts in shaken baby cases. Furthermore, the strategy of creating reasonable doubt by obtaining concessions from the People's witnesses that a prior injury was possible was seen as being even more viable in view of the Court of Appeals decision in People v Feingold (7 NY3d 288 [2006]), decided shortly after the defendant

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[2] The Court notes that although the defendant suggested that the baby herein had congenitally crossed eyes, the testimony adduced at trial demonstrated that this was not the case. Both the child's mother and pediatrician testified that the first time they noticed the child's crossed eyes was after the incident.

was indicted. In Feingold, the standard for depraved indifference changed from an objective factual assessment to a subjective mens rea, meaning that the People would no longer be only required to prove that a defendant's act was "wicked," "evil," or inhumane, but that a defendant "subjectively harbored a wicked or evil mind" in committing that act (id, p298). As Judge Kaye stated in her dissent, the decision left nothing of depraved indifference "but a risk for prosecutors in charging these offenses" (id, p304). Defense counsel believed - and told the defendant - that this decision would be a tremendous asset in his defense of the case. With the prosecution of depraved indifference cases so compromised, he could attempt to convince the jury that the defendant, a caring mother and trusted babysitter who was clearly distraught over the child's injuries, did not have a wicked or evil mind and at worst, was reckless in shaking the baby. The plan to evince through cross-examination that the child had a preexisting injury and was the victim of a re-bleed that only required minimal shaking to cause her injuries fit perfectly with the defendant's admissions and with the new much higher standard for finding depraved indifference. Under these circumstances, the Court finds that not only was it not ineffective to opt for this strategy, but in looking at the case objectively, without the benefit of hindsight, it appears to be the better choice.

In reaching this conclusion, the Court is not suggesting that calling experts to testify as to the minority view concerning the Shaken Baby Syndrome diagnosis would not be a viable strategy on a different set of facts but where, as here, the child had injuries beyond those in the "triad", the defendant admitted to shaking the child to some degree, there was medical

evidence of a preexisting injury that required only minimal shaking, and the law with respect to depraved indifference had just become very favorable to the defendant, the risk of calling these witnesses and having their testimony used against his client by a very skillful prosecutor was substantial. It bears noting that the experts who testified at this hearing did not read the child's medical records in this case and thus were ill-equipped to discuss this particular case. Rather, they testified as proponents of the distinctly minority view of the anti-SBS diagnosis, espousing the view that the only way to respond to medical evidence was to "present counter medical opinions" (id, p69) and to confront science with science. There was no weighing of the strengths and weaknesses of the different strategies on the basis of the medical and other evidence in this particular case or the impact each would have on a jury. For them, the issue was the relevance of the anti-SBS diagnosis, but for counsel, the concern was dealing with a "real world jury" and the specific facts in this case, not with academia (id, p490). As counsel testified to at the hearing, this was not just a science case. He had to provide a defense in a case in which the victim was a helpless infant and he needed to persuade the jury that his client did not harbor "a wicked or evil mind" when she shook the child. That he was not able to do so does not mean that he was ineffective.

Not only does the Court find that counsel's strategy was a legitimate and reasonable one, but it finds that he effectively executed this strategy through his cross-examination of the People's witnesses and by presenting his own witnesses. When he cross-examined the physicians called by the People, counsel established:

1) that the child's CT scan and MRI indicated that there were subacute or chronic subdural hematomas in her brain which could have been caused weeks or months earlier;

2) that there was "chronic blood" present that indicated a prior injury, the date of which could not be determined;

3) that the "chronic blood" could have injured the child;

4) that the prior injury would make the child more susceptible to a re-bleed;

5) that the child may have been shaken earlier;

6) that an existing clot could move and cause a re-bleed;

7) that a subdural bleed could cause a seizure and that the child's preexisting condition could have done so;

8) that a re-bleed could occur without the use of significant force; and

9) that the child did not have CT scan or MRI before the incident, so that the prior subdural hematomas would not have been evident. In addition, counsel elicited from the child's father that doctors had advised him that his daughter had a prior injury.

On the defense case, counsel called seven witnesses, six of whom testified to the defendant's character in order to persuade the jury that his client was not depraved, and at most, was only reckless. The six character witnesses, including a priest, testified that the defendant had a reputation for being kind, gentle, patient, caring, compassionate, peaceful, law-abiding,

honest, good, and a good mother. The other witness, a neighbor of the defendant, testified that she had seen the child's father on a number of occasions put the baby in his car without a car seat. Prior to this testimony, during cross-examination, counsel had elicited a denial from the father that he had ever placed the child in his car without a car seat. The purpose of this testimony was to suggest to the jury that the father was responsible for the child's preexisting injury and that his immigration problems, also elicited on cross, could be the motive for him to deny any role in the child's injury.

In short, counsel elicited the evidence that he intended to: that the child had been injured before and had a previous subdural hematoma; that the child's father may have been the cause of that prior injury; that the child's preexisting condition caused the seizure described by the defendant when she called 911 and when she described shaking the child to revive her; and that the defendant was a kind, loving, and caring person who had no motive to hurt the child. This was "meaningful representation" and once again, that the strategy and its execution were not successful does not mean that counsel was ineffective.

In finding counsel's execution of his strategy to be effective, the Court notes that he was not required to cite the holding in Feingold, supra, for the Court's consideration. Feingold was the law and defined the parameters of the depraved indifference aspect of the case. Furthermore, counsel was not required to call the jury's attention to the distinction between depraved indifference and reckless conduct, and in fact, many judges do not permit counsel to comment on the law. However, he did ask for and obtain the lesser included offense of Assault in the Third Degree

and by arguing for an acquittal, could have been hoping for a compromise verdict. This is particularly so because of the difficulty in proving depraved indifference after Feingold and the testimony elicited at trial as to the defendant's character and her care and concern for the child.

Despite the effectiveness of counsel's performance in terms of strategy and execution on cross-examination and with his own witnesses, the defendant claims that his failure to elicit testimony regarding three particular areas rendered him ineffective. One is the premise that shaking a child violently enough to cause subdural hematomas would necessarily cause a neck injury; the second is the concept of lucid interval, which is the period of time between the infliction of trauma and the onset of severe symptoms; and the third is the alleged correlation between hydrocephalus and the development of subdural hematomas. The Court agrees with the People that pursuing these avenues on cross-examination was not a pre-requisite to effectiveness. With respect to the correlation between violent shaking and neck injury, the People point out that this proposition "is not generally accepted in the scientific community" and has not passed a Frye test (People's Memo of Law, p92), and so would be susceptible to rebuttal testimony. In addition, as Ms. Berhard conceded, neck damage may not be apparent unless there is an autopsy, which thankfully was not required in this case. Furthermore, arguing this concept - that no neck injury meant no shaking - would undermine the defendant's attempt to show that the child was previously injured when her father put her in the car without a car seat. As to the concept of lucid interval, Mr. Findley testified that children could suffer a serious brain injury "and yet have an

extended period of time between injury and…the point of collapse" (Hearing minutes, p84). However, he said that the child "would not be completely normal during that time period…[but] might be lethargic, fussy, clinging, or somehow not quite normal" (id). However, in this case, everyone concedes that the child was laughing and playing earlier in the day, with no indication that anything was awry. Under these circumstances, the Court agrees with the People that the introduction of the concept of lucid interval herein could have backfired with the jury, who might conclude that because there was no fussiness or other indicia of lucid interval, there was no prior injury, thereby undermining counsel's theory of the defense. Finally, with respect to the correlation between benign external hydrocephalus (BEH) and subdural hematoma, none of the physicians who treated the child indicated that she suffered from BEH, nor is there any indication that counsel was advised that she did. Furthermore, while the articles to which the defendant refers indicates that BEH could result in a susceptibility to subdural hematomas, nothing in the research surrounding BEH would suggest that it would cause the other severe symptoms the child in this case suffered. Accordingly, counsel's decision to forego utilizing these three concepts on cross-examination was neither improvident nor ineffective. This is particularly so because, as the Court has already pointed out, counsel had to convince a jury that his client was not guilty of the charges leveled against her, not argue law in a post-conviction setting, where advancing a variety of claims cannot backfire.

Finally, with respect to the cases cited by the defendant in support of his motion, the Court finds that they are not compelling in assessing the effectiveness of counsel in this particular case. There

is no question that "[e]ssential to any representation, and to the attorney's consideration of the best course of action on behalf of the client, is the attorney's investigation of the law, the facts, and the issues that are relevant to the case" (People v Tiger, 48 NYS3d 685 [2d Dept 2017]. There is also no question that there is, as Judge Ginsberg found in her dissenting opinion in Cavazos v Smith, 565 US 1 [2011], a growing debate over the SBS diagnosis. However, as the Court has already found, the attorney in this case did conduct investigation into the facts of this particular case, including the child's medical condition, her prior medical history, the circumstances surrounding the incident, and the defendant's admissions. He familiarized himself with the law, particularly with respect to the changes in the depraved indifference standard and the way it could be utilized herein. He also investigated the prevailing and overwhelmingly accepted view concerning the Shaken Baby Syndrome by hiring his own expert, and utilized the internet to read articles about and familiarize himself with the minority SBS view. Then, after weighing all of the information, he concluded that he would have more success with a jury by employing a reasonable doubt defense and obtaining concessions from the People's witnesses to establish that the child had suffered a prior injury, that this injury caused the seizure described by the defendant, that shaking the baby to revive her resulted in the more severe symptoms, and that this shaking, which the defendant admitted to on several occasions, was at worst reckless and could not be characterized as depraved, particularly after the holding in Feingold, supra. It bears noting that counsel actually obtained the requisite concessions from the People's witnesses, which the Court finds

was preferable to eliciting the information from his own expert witnesses, who would have had to make their own concessions to the very skilled prosecutor trying this matter. Thus, as the Court has already found, it is not finding that the growing debate concerning SBS could not be a viable defense in a shaken baby case, but that in this case, on these particular facts, it was not necessarily the wisest option. The strategy utilized by counsel seemed to be, looking prospectively, the better course of action[3]. That it was not successful does not mean that it was not reasonable and legitimate.

Based upon the foregoing, the Court finds that counsel was not ineffective.

This constitutes the decision and order of the court.

The clerk of the court is directed to mail copies of this decision and order to the attorney for the defendant and to the District Attorney.

s/Richard L. Buchter, J.S.C.
RICHARD L. BUCHTER, J.S.C.

[3] The Court notes that the Court of Appeals, in its recent decision in People v Henderson, 27 NY3d 509 [2016], held that "courts should not be in the business of deciding, in hindsight, what would have been the best or a better trial strategy in any given case."

Appendix C — Order Denying Leave, Dated January 24, 2019

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. MICHAEL J. GARCIA
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

ALMA CALDAVADO,

Appellant.

ORDER DENYING LEAVE

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: January 24, 2019
at Albany, New York

s/Hon. Michael J. Garcia
Associate Judge

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* Description of Order: Order of the Appellate Division, Second Department, entered November 14, 2018, affirming an order of Supreme Court, Queens County, dated May 25, 2017.