STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN,

PLAINTIFF,

—vs.—

JENNIFER HANCOCK,

DEFENDANT.

Case No. 2007 CF 2381

DEFENDANT JENNIFER HANCOCK'S MOTION FOR NEW TRIAL PURSUANT TO WIS. STAT. § 974.06

Carrie Sperling
State Bar No. 1094464
WISCONSIN INNOCENCE PROJECT
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
Tel. 608-262-2240

Craig A. Benson (admitted *pro hac vice*)
Zachary A. Dietert (admitted *pro hac vice*)
Sarah M. Ripa (admitted *pro hac vice*)
Katherine S. Stewart (*pro hac vice* motion forthcoming)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, NW
Washington, DC 20006
Tel. 202-223-7300

Attorneys for Defendant Jennifer Hancock

TABLE OF CONTENTS

Page

Table of Authorities iii

Introduction 1

Statement of Facts 2

Ms. Hancock was an attentive caretaker to LW. 2

The day of LW's collapse. 4

Doctors attempted to determine why LW collapsed, and police began an investigation. 5

Judge Flanagan instructed the jury to search for truth rather than reasonable doubt, and the State presented experts who testified to near-certainty that LW suffered abuse. 8

Ms. Hancock's attorney failed to challenge the State experts' incomplete and inaccurate description of LW's injuries and cause of death. 11

After trial, Dr. Michael Stier recanted four central opinions presented, and his new findings are supported by four renowned medical experts. 13

New medical studies published since trial expose the State experts' certainty regarding LW's cause of death as false and misleading. 15

Legal Standard 17

Argument 18

I. Ms. Hancock should be granted a new trial on the basis of new evidence because the medical examiner whose testimony formed the basis for Ms. Hancock's conviction recanted his opinions after trial and new studies refute the State's theory. 18

A. Both Dr. Stier's recantation and new medical research could not have been discovered before Ms. Hancock's conviction. 19

B. Neither Dr. Stier's recantation nor the new medical research are cumulative of evidence presented at trial. 20

C. Dr. Stier's recantation and the new medical research are further corroborated by Ms. Hancock's post-conviction experts and the medical findings established at autopsy. 21

D. Dr. Stier's new affidavit and the new medical studies are material because they rebut the prosecution's diagnostic certainty. 24

E. In light of new evidence, there is a reasonable probability that a different result would be reached. 26

II. Trial and Appellate Counsel failed to provide constitutionally effective assistance to Ms. Hancock. 28

A. Trial counsel's performance was unreasonably deficient. 29

1. Trial counsel unreasonably failed to investigate promising leads in LW's medical record. 29

2. Trial counsel unreasonably failed to obtain experts to rebut the State's flawed medical testimony. 30

3. Trial counsel unreasonably failed to prepare his sole expert witness. 33

B. Trial counsel's performance prejudiced Ms. Hancock. 34

C. Appellate counsel's performance was unreasonably deficient and prejudiced Ms. Hancock's ability to effectively seek post-conviction relief. 38

III. Ms. Hancock was denied due process of law when her jury was improperly instructed on reasonable doubt. 39

IV. Ms. Hancock is entitled to a new trial in the interest of justice because the real controversy has not been tried and there has been a miscarriage of justice. 40

V. Conclusion 42

TABLE OF AUTHORITIES

Page(s)

CASES

People v. *Ackley*,
497 Mich. 381 (2015) 33, 41

Ake v. *Okla*.,
470 U.S. 68 (1985).....33

In re Alexandria G.,
2013 WI App. 83, 348 Wis. 2d 593, 834 N.W.2d 432 38

State v. Allen,
274 Wis. 2d 568.....41

State v. *Armstrong*,
2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98 .....19, 26

State v. *Austin*,
2013 WI App. 96, 349 Wis. 2d 744, 836 N.W.2d 833 .....18, 39

People v. *Bailey*,
999 N.Y.S.2d 713 (N.Y. 2014).....15, 27

Brown v. *Sternes*,
304 F.3d 677 (7th Cir. 2002) 29

State v. Caldwell,
322 N.W.2d 574 (Minn. 1982) 19

Com v. *Epps*,
474 Mass. 743 (2016) 15, 41

Com. v. *Millien*,
474 Mass. 417 (2016) 41

Conwell v. *Woodford*,
312 Fed. Appx. 58 (9th Cir. 2009).....31

State v. *Dillard*,
2014 WI 213, 358 Wis. 2d 543, 859 N.W.2d 44 35

Duncan v. *Ornoski*,
528 F.3d 1222 (9th Cir. 2008) 31

State v. *Edmunds*,
2008 WI App. 33, 308 Wis. 2d 374, 746 N.W.2d 590 .....passim

State v. *Forester*,
No. CA-93-3, 1994 WL 167937 (Ohio Ct. App. April 14, 1994) 27

State v. Gilbreath,
2018 WI App. 39, 382 Wis. 2d 830, 917 N.W.2d 232 20

State v. *Glass*,
170 Wis. 2d 146 35

United States v. *Gonzalez-Balderas*,
11 F.3d 1218 (5th Cir. 1994) 39

State v. Hales,
152 P. 3d 321 (Utah 2007).....31, 33, 41

State v. *Harp*,
161 Wis. 2d 773 (Ct. App. 1891).....40

Harris v. *Thompson*,
698 F.3d 609 (7th Cir. 2012) 34

Ex parte Henderson,
384 S.W.3d 833 (Tx. Ct. Crim. App. 1912) (per curiam) 19

State v. *Henley*,
2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350 40

State v. *Hicks*,
202 Wis. 2d 150 (1996) 40

Hinton v. *Alabama*,
571 U.S. 263 (2014).....30, 31, 33

Kendrick v. State,
454 S.W.3d 450 (Tenn. 2015) 31

State v. *Manning*,
305 S.C. 413 (1991).....39

State v. *McAlister*,
2018 WI 34, 380 Wis. 2d 684, 911 N.W.2d 77 20

State v. *McCallum*,
208 Wis. 2d 463, 561 N.W.2d 707 (1997).....18, 19, 21

Miller v. *Beard*,
214 F. Supp. 3d 304 (E.D. Pa. 2018) 34

State v. *Moffett*,
147 Wis. 2d 343 (1989) 34

State v. *Plude*,
2008 WI 58 ..... 24, 27

State v. *Plude*,
2008 WI 58, 310 Wis. 2d 28, 750 N.W.2d 42 24

Porter v. *McCollum*,
558 U.S. 30 (2009) (per curiam) 34

Ex Parte Robbins,
478 S.W.3d 678 (Tx. Ct. Crim. App. 1914) 19

Rompilla v. Beard,
545 U.S. 374 (2005) 29

Souter v. *Jones*,
395 F.3d 577 (6th Cir. 2005) 19

Strickland v. *Washington*,
466 U.S. 668 (1984) ..... passim

State v. *Thiel*,
2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305 (2003) ..... passim

Thomas v. *Clements*,
789 F.3d 760 (7th Cir. 2015) ..... passim

State v. *Trammell*,
2017AP1206-CR (Wis. Sup. Ct. Nov. 13, 2018) 39

Vanek v. *Wofford*,
No. CV 14-4427-AG (KK), 2016 WL 6783340 (C.D. Cal. 2016) 15, 31

Wiggins v. *Smith*,
539 U.S. 510 (2003) 29, 33

Williams v. *Taylor*,
529 U.S. 362 (2000) 29, 30

Woolley v. *Rednour*,
702 F.3d 411 (7th Cir. 2012) 30

State v. *Wyss*,
124 Wis. 2d 681 (1985) 40

State v. *Zimmerman*,
2003 WI App. 196, 266 Wis. 2d 1003, 669 N.W.2d 762 35

STATUTES

Wis. Stat. § 940.02(1) 8, 26

Wis. Stat. § 974.06.....passim

Wisconsin Code § 885.10 33

Wisconsin Stat. § 752.35 40

OTHER AUTHORITIES

Catherine Adamsbaum, *Dating the Abusive Head Trauma Episode and Perpetrator Statements: Key points for Imaging*.....17

Colin Paterson, *Fractures in Rickets Due to Vitamin D Deficiency*.....16

Kamal Abulebda, Samer Abu-Sultaneh & Riad Lutfi, *It is Not Always Child Abuse: Multiple Fractures Due to Hypophosphatemic Rickets Associated with Elemental Formula Use*.....16

Laura Elizabeth Cowley, Charlotte Bethan Morris, Sabine Ann Maguire, Daniel Mark Farewell & Alison Mary Kemp, *Validation of a Prediction Tool for Abusive Head Trauma* 17

Michael Aertsen, *An Update on Imaging in Child Abuse* 17

Michael Cicchini & Lawrence White, Testing the Impact of Criminal Jury Instructions on Verdicts, 117 Colum. L. Rev. Online 22 (2017).....39

Sabine Ann Maguire, Alison Mary Kemp, Rebecca Caroline Lumb & Daniel Mark, *Estimating the Probability of Abusive Head Trauma: A Pooled Analysis* 16

Steven C. Gabaeff, *Challenging the Pathophysiologic Connection between Subdural Hematoma, Retinal Hemorrhage and Shaken Baby Syndrome* 16

Steven C. Gabaeff, *Exploring the Controversy in Child Abuse Pediatrics and False Accusations of Abuse* 15

United States Constitution Sixth Amendment.....18

11 WIS. PRAC., TRIAL HANDBOOK FOR WIS. LAWYERS § 33:02 (3d ed.).....18

Wisconsin Constitution Article 1, Section 7..18

INTRODUCTION

A series of tragic events resulted in the unexpected death of four-month-old LW in September 2007 and the wrongful conviction and imprisonment of Jennifer Hancock, the daycare provider who called 9-1-1 and performed CPR when she found LW unresponsive. Physicians who were seeking an explanation for LW's death hastily concluded he had been abused, and police identified a suspect: Ms. Hancock, the last person seen with the child. The case that the State built against Ms. Hancock was an exercise in confirmation bias. Medical personnel, relying on outdated scientific theories and assumptions, inaccurately attributed the death to abuse. The prosecution, seeking to corroborate this initial theory, pursued evidence of abuse while disregarding contradictory medical findings and the lack of evidence tying Ms. Hancock to LW's death. When Ms. Hancock was tried for First Degree Reckless Homicide, trial counsel failed to challenge the State's flawed arguments and inaccurate expert testimony. Ms. Hancock, caught in the convergence of outdated science, a biased investigation, and inadequate trial counsel, was convicted of a crime that never occurred. She has served more than eight years in prison, away from her home and two children, who are growing up without their mother.

Ms. Hancock now requests that the Court correct this past error by vacating her conviction and granting her a new trial. She is entitled to retrial for four independent reasons: (1) the State's key witness, Dr. Michael Stier, who determined the cause of death, has changed his opinion based on new, exculpatory evidence not available at the time of trial; (2) trial counsel's and appellate counsel's deficient performances prejudiced Ms. Hancock; (3) improper jury instructions violated Ms. Hancock's right to due process; and (4) the interest of justice requires that Ms. Hancock receive a fair trial on the merits.

Together, these reasons provide overwhelming support in favor of granting Ms. Hancock's motion.

STATEMENT OF FACTS

In August 2007, Ms. Hancock, an experienced home-daycare operator, began caring for LW, an infant with a complicated medical history. LW's birth and early development were atypical. Six weeks before LW was due, his mother Erin Wilber suffered a placental abruption, a condition involving separation of the placenta and uterus that is associated with premature birth, fetal oxygen deprivation, and developmental difficulties. *See* App. 1, Erin Wilber Birth Records 7–8, Apr. 25, 2007. LW was born on May 10, 2007, one month premature, by unscheduled caesarian section. *See id.* at 1–2. He was quiet when born, prompting the application of "suctioning and vigorous stim[ulation]" to activate breathing. *Id.* at 2.

LW's medical issues progressed in the weeks leading up to his death. He experienced projectile vomiting, decreased appetite, and irritability. *See* App. 2, West Pediatrics Office Visit 1, Aug. 29, 2007; Trial Tr. 179:1–5, Mar. 31, 2009. At a medical appointment on August 29, 2007, he was diagnosed with acid reflux. *See* App. 2, West Pediatrics Office Visit 1, Aug. 29, 2007. LW's family's medical history also included Sudden Infant Death Syndrome ("SIDS")—his cousin suffered an inexplicable, SIDS-related death during infancy. *See* App. 3, Univ. of Wis. Trauma Consult Note 1, Sept. 7, 2007 ("Trauma Consult").

Ms. Hancock was an attentive caretaker to LW.

In fall 2007, Ms. Wilber first brought three-month-old LW to meet Ms. Hancock based on co-worker recommendations. *See* Trial Tr. 163:12–166:10, Mar. 31, 2009. Ms. Hancock is the mother of two children, who were born in 2001 and 2005. *See* Trial

Tr. 81:21–24, Apr. 3, 2009; 206:2–4, Mar. 30, 2009. After Ms. Hancock's first child was born, Ms. Hancock decided to leave her job at a healthcare cooperative and open a daycare service at her home in Verona, Wisconsin. *See id.* at 85:5–8, 88:3–4. She took educational courses to prepare for operating the daycare, including classes to become a certified daycare provider and to perform CPR. *See id.* at 83:16–84:17, 101:7–12, 153:17–19. Between 2001 and 2009, Ms. Hancock provided childcare for several families.[1] *See id.* at 88:8–97:25.

Ms. Hancock enjoyed caring for children of all ages and was especially fond of babies. *See id.* at 99:9–19. She was an active caregiver, routinely taking the children on walks to the park and participating in crafts and field trips. *See id.* at 99:20–100:16. Before 2009, Ms. Hancock had no criminal history; as the sentencing court in this case later noted, she "worked hard and had a responsible life." Trial Tr. 120:23–24, Jul. 2, 2009.

Ms. Hancock invited Ms. Wilber into her home twice prior to accepting LW into her daycare. *See* Trial Tr. 103:11–108:17, Apr. 3, 2009. The visits went smoothly—Ms. Hancock answered Ms. Wilber's questions and fed LW in front of his mother. *See id.* Over the next few weeks, Ms. Hancock continued to care attentively for LW,

[1] In 2002 and 2003, years before LW entered Ms. Hancock's care, Ms. Hancock was the subject of three complaints to Dane County Child Protective Services. *See* App. 4, Comm. Coordinated Child Care, Inc., Complaint Intake Forms Re Jennifer Hancock 1–2 (2004). The first complaint was found entirely unsubstantiated. *See id.* at 2, 6. The second complaint was found to contain allegations that were not rule violations and otherwise were largely unsubstantiated. *See id.* at 2. The only two substantiated allegations were not related to abuse and involved claims that Ms. Hancock sometimes allowed children to sleep on the couch and to be upstairs without supervision when Ms. Hancock was speaking to parents. *See id.* at 2, 10. The third complaint was taken "as matter of record" and was never investigated. *Id.* at 2. Further, two of these complaints were submitted by parents after Ms. Hancock had requested that they pay outstanding childcare dues. *See id.* at 2, 5. Despite the increased scrutiny, Ms. Hancock was permitted to continue operating her daycare as a safe place for the care of children. *See id.* at 2.

watching over him every Monday, Tuesday, and Friday. *See id.* at 109:15–16. LW's parents raised no concerns about Ms. Hancock's caretaking prior to September 2007.

The day of LW's collapse.

On the morning of September 7, 2007, Ms. Hancock opened her daycare as usual and welcomed LW and three other children into her home. *See id.* at 130:13–132:10. LW was notably fussy when he arrived. *See id.* at 171:5–8. After spending the morning in the backyard with the children, Ms. Hancock brought them into the playroom and changed LW. *See id.* at 135:16–138:5. She stepped away to throw his diaper into the garage trash bin, and when she returned, saw a thirty-seven-pound toddler lifting herself off of LW. *See id.* at 138:25–140:6. LW was "crying really hard." *Id.* at 139:20–140:2. Ms. Hancock immediately picked LW up to console him, and after crying for twenty minutes, he settled down and took a fifteen minute nap. *See id.* at 140:23–142:5.

After LW awoke, Ms. Hancock fed LW, held him for about twenty minutes until he fell asleep, and laid him on his mat with a pacifier. *See id.* at 146:2–147:6, 148:2–24. A few minutes later, Ms. Hancock checked on LW and noticed his pacifier had fallen out of his mouth. *See id.* at 150:2–158:21. When she picked him up, LW was limp. *See id.* at 151:12. Ms. Hancock immediately called 9-1-1 and, following the operator's instructions, performed CPR. *See id.* at 151:23–155:14. LW vomited into her mouth, but she wiped LW clean and continued. *See id.* at 154:8–20. Police arrived two minutes after her 9-1-1 call, followed several minutes later by emergency medical services ("EMS"). *See id.* at 155:16–17; *see also* Trial Tr. 42:19–22, Apr. 2, 2009; App. 5, Police Department Records ("PR") at 5.

An ambulance then transported LW to University of Wisconsin ("UW") Hospital Emergency Room. *See* Trial Tr. 155:19–20, Apr. 3, 2009. EMS conducted an initial

assessment in the ambulance, noting that LW had stopped breathing, did not have a heartbeat, and was not responding to stimuli. *See* Trial Tr. at 240:10–15, Mar. 30, 2009. They attempted to administer fluids to LW using an intraosseous ("IO") line, a method for providing fluids through a needle drilled into the shin.[2] *See* Trial Tr. 252:15–255:11, Mar. 30, 2009. EMS drilled the needle into LW's shin several times before stabilizing the line. The hole drilled into the bone was larger than the needle, which rocked against the bone once inserted. *See* Trial Tr. 31:9–17, Mar. 31, 2009. EMS checked LW into the emergency room ("ER") in the late afternoon.

Doctors attempted to determine why LW collapsed, and police began an investigation.

In the ER, doctors noted that LW's IO line had become loose and they reinserted it. *See* Trial Tr. 29:21–32:4, Mar. 31, 2009; App. 6, Univ. of Wis. Emergency Room Note 1, Sept. 7, 2007 ("ER Note"). They drilled twice more into LW's bone before reinserting the line—by the end of the process, eight puncture wounds marked LW's left leg. *See* Trial Tr. 33:17–38:24, Mar. 31, 2009; App. 6, ER Note at 1.

ER doctors then ran a CT scan (a cross-sectional X-ray image). *See* Trial Tr. 21:10–22:2, 203:22, Mar. 31, 2009; App. 6, ER Note at 1. Radiologists analyzed the scan and identified a subdural hematoma, or bleeding between the brain and skull. They made no statements about possible causes. *See* App. 6, ER Note at 1. ER doctors transferred LW to the intensive care unit and requested consultation from specialists. *See* App. 3, Trauma Consult at 1. The first consultation was from neurosurgeons, who examined LW and determined he presented "no outward signs of accidental trauma or nonaccidental trauma" and "no signs of swelling or other obvious blunt head trauma." *Id.* Dr. Barbara

[2] An IO line connects directly to a patient's bone marrow and is used when access to the patient's veins is not available. *See* Trial Tr. 253:11–24, Mar. 30, 2009.

Knox, a child abuse specialist from the UW Pediatrics Child Protection Program, then conducted a half-hour physical examination followed by a full hour of "detailed discussion" with police. *See* Prelim. Hearing Tr. 57:7–9, Mar. 12, 2008; App. 7, Univ. of Wis. Child Protection Consult Note 4–5 ("Knox Consult"), Sept. 7, 2007. She noted that LW's head did not exhibit external abnormalities and that "the skin exam is without evidence of lesions," except for the puncture marks from the IO line. App. 7, Knox Consult at 3–4. Because radiologists observed subdural hematomas on LW's CT scan, however, Dr. Knox concluded that his condition was "consistent with" violent shaking, impact, or a combination of the two. *Id.* at 4. She recommended further radiology scans and an ophthalmologic examination. *See id.*

Meanwhile, on the day of LW's collapse, police who spoke to Dr. Knox conducted a series of interviews with Ms. Hancock's family, clients, friends, and neighbors. *See* App. 5, PR at 17–22, 25–30, 90. They asked each person if they had witnessed abusive behavior by Ms. Hancock. No person had. *See id.* Police also interviewed the three children attending Ms. Hancock's daycare on the day LW collapsed, asking if they remembered Ms. Hancock abusing LW. No child did. *See id.* at 13–14, 19–20, 44–47.

On September 8, 2017, LW received further radiology scans, including X-rays and an MRI. *See* Trial Tr. 21:10–22:2, 203:22, Mar. 31, 2009. Radiologists noted a darkened area on LW's skull. App. 8, Univ. of Wis. Skeletal Survey 1, Sept. 8, 2007. They interpreted this as a "probable nondisplaced fracture" but explained it could represent "an asymmetric calvarial vascular channel"—a channel for blood supply. *Id.* at

1. Radiologists also identified a small fracture on the corner of the left femur. *See id.* at 1.

On September 11, 2007, four days after his hospital admission, doctors took LW off life support and he passed away. *See* Prelim. Hearing Transcript 80:1–2. The County Coroner requested a forensic autopsy to determine the cause of death and, accompanied by police, the Coroner transported LW to the morgue. *See* App. 9, Dane County Coroner's Report, Sept. 12, 2007, at 4. Pathologist Dr. Stier conducted the autopsy while two police officers observed. *See* App. 10, Univ. of Wis. Autopsy No. W07-467-F at 1, Sept. 12, 2007 (signed December 2, 2007 and amended Mar. 5, 2008) ("2008 Autopsy Report"); App. 5, PR at 67–70.

During autopsy, Dr. Stier conducted an external and internal examination. He noted no signs of external trauma—no "acute hemorrhage or discoloration" of the scalp or visible trauma to the head, neck, or body. *See* App. 10, 2008 Autopsy Report at 3–4. However, he observed three internal abnormalities: (1) an acute femoral corner fracture, or a small separation at the tip of the femur bone, with no internal bleeding or swelling around the bone, *see id.* at 6; (2) a "slight irregularity" of the left parietal bone of the skull, *id.* at 3–8; and (3) two subdural hematomas—clots of blood between the brain and skull, *id.* at 1, 4. Neither of the subdural hematomas was enough to create a "mass effect," a condition where blood builds up inside the skull, increasing pressure and endangering the brain. *Id.* at 1, 4. Dr. Stier also reviewed the results of separate tests conducted on LW's heart and eyes, noting in his final report that: (1) high-magnification analysis of the heart tissue revealed the presence of a virus, *id.* at 1; App. 11, Univ. of Wis. Electron Microscopy Report 1, Aug. 7, 2008; and (2) microscopic analysis of LW's

eyes revealed "no retinal hemorrhages," or bleeding in the eyes. App. 12, Univ. of Wis. Eye Pathology Laboratory at 2, 6, Sept. 20, 2007; *see* App. 10, 2008 Autopsy Report at 1.[3] Dr. Stier concluded that the autopsy "support[ed] an interpretation of a non-accidental infant fatality" and that the heart virus was of "undetermined significance." App. 10, 2008 Autopsy Report at 1.

After LW's collapse, Ms. Hancock cooperated with police. She voluntarily met with police officers several times, speaking with two officers on the day of LW's collapse and allowing them to enter her home, take pictures, and gather evidence. *See* App. 5, PR at 5–6, 31–38. She traveled to the police station with the officers and voluntarily gave a statement about the events leading to LW's collapse. *See id.* at 31. Ms. Hancock told the same story each time, explaining the chronology of events on the day of LW's collapse, and stating consistently that she had never hit or shaken LW. *See id.* at 5–6, 31–38. Nonetheless, police arrested Ms. Hancock on December 13, 2007. *See id.* at 707.

Judge Flanagan instructed the jury to search for truth rather than reasonable doubt, and the State presented experts who testified to near-certainty that LW suffered abuse.

After LW's death, Wisconsin state prosecutors charged Ms. Hancock with First Degree Reckless Homicide.[4] Her trial began on March 30, 2009. At the start of trial and before opening statements, the presiding judge read his preliminary instructions to the jury and included instructions on reasonable doubt and the burden of proof. Over the

---

[3] Dr. Stier created an initial version of the report in December 7, 2007, four months prior to the final report of March 5, 2008. *See* App. 13, Univ. of Wis. Autopsy No. W07-467-F 1, Sept. 12, 2007 (signed Dec. 7, 2007) ("2007 Autopsy Report"). In the initial report, Dr. Stier reported a "remote retinal hemorrhage," a known marker for Shaken Baby Syndrome. *Id.* The final version of the report states: "[t]he original notation of remote retinal hemorrhage was erroneous." App. 10, 2008 Autopsy Report.

[4] The elements of First Degree Reckless Homicide under Wisconsin law are: (1) defendant caused the death of another person, (2) by criminally reckless conduct, (3) under circumstances showing the utter disregard for human life. *See* App. 14, Wis. Stat. § 940.02(1).

objections of trial counsel, the Judge instructed the jury "you are not to search for doubt, you are to search for the truth." Trial Tr. 176:11–21, Mar. 30, 2009.[5]

After opening statements, the State presented its case against Ms. Hancock. Because the police investigation revealed no evidence of abuse, the State's case rested entirely on LW's medical records and expert testimony. The State presented six experts during trial. Two were physicians who directly examined LW: Dr. Thomas Brazelton, the pediatrician who treated LW following his admittance to the ER; and Dr. Stier, the forensic pathologist who conducted LW's autopsy. Additionally, the State hired four out-of-state experts: (1) Dr. Wilber Smith, a pediatric radiologist; (2) Dr. Carole Jenny, a pediatrician; (3) Dr. Jeffrey Jentzen, a forensic pathologist; and (4) Dr. Lucy Rorke-Adams, a pediatric neuropathologist. None of these experts ever directly examined LW. All four had an extensive history of testifying for the prosecution in child abuse cases.

Dr. Brazelton provided only a general overview of LW's admission to UW Hospital. He offered no opinions regarding cause of death. *See* Trial Tr. 8:12–46:20, Mar. 31, 2009. Dr. Stier, who conducted the autopsy, addressed LW's physical condition and cause of death directly. He confirmed that the autopsy revealed a subdural hematoma, a skull irregularity, and a small corner fracture of the femur. *See id.* at 63:4, 75:10–12, 78:1–4. As to the subdural hematoma, Dr. Stier stated that "the pattern of this type of subdural hemorrhage" was "a marker for nonaccidental type of injury." *Id.* at 64:23–65:1. Regarding the skull irregularity, he stated that "under oath and in my report I cannot say that I identified a fracture"—but he suggested the irregularity might

[5] Judge Flanagan's full instructions were: "While it is your duty to give the defendant the benefit of any reasonable doubt you are not to search for doubt, you are to search for the truth. As I have instructed you, the burden of establishing each and every element necessary to constitute guilt is upon the State." Trial Tr. 176:11–25, Mar. 30, 2009; *see also* Trial Tr. 92:17–23, Apr. 7, 2009 (final instructions).

be a fracture, commenting: "I'm not saying that it is, I'm not saying that it isn't." *Id.* at 75:9–10, 76:14–16. Dr. Stier also testified that LW's femur fracture was "a unique fracture to abusive pathology" and that LW's death was a "nonaccidental child abuse fatality." *Id.* at 75:23–25, 79:17–18.

The out-of-state experts, Drs. Smith, Jenny, Jentzen, and Rorke-Adams, all expressed certainty that LW's death was caused by abuse. Radiologist Dr. Smith based his testimony on the radiology scans and not the autopsy materials. *See* Trial Tr. 10:21, Apr. 1, 2009. He stated that LW had a subdural hematoma, which represented "a marker" for trauma. *Id.* at 15:24–25, 16:23–17:15, 26:1–3. He also identified "clear" fractures of LW's skull and femur, asserting that such injuries were attributable to abuse in "the vast, vast majority" of cases. *Id.* at 10:21, 18:22–31:13.[6] However, Dr. Smith acknowledged he could not give a definite opinion without looking at the autopsy slides, stating that "if a pathologist says to me I cut right through that area, I took multiple sections and I can't find a fracture, then I'll back down grudgingly." *Id.* at 41:4–42:3. Pediatrician Dr. Jenny testified after viewing only the autopsy photographs and not the radiology scans or autopsy slides. *See* Trial Tr. 109:12–20, Apr. 2, 2009, A.M. She stated that "in 95 percent of kids" over two months old, "subdurals are due to trauma"; and that femur fractures were "almost diagnostic of child abuse" such that "in accidental scenarios we just rarely see them." *Id.* at 116:24–119:23. She concluded that "this child died as a result of abusive head trauma." Trial Tr. 6:21–22, Apr. 2, 2009, P.M.

[6] *See also* Trial Tr. 10:11–23, Apr. 1, 2009 ("[LW] suffered a skull fracture . . . It's pretty clear on the x-ray"); *id.* at 18:22–24 ("[T]here had to be direct injury to the skull to cause skull fracture"); *id.* at 22:17–23:18 ("[LW's corner fracture] is caused by a twisting and wrenching force applied to the leg.").

Only Drs. Jentzen and Rorke-Adams viewed both the radiology scans and the microscopic slides. Pathologist Dr. Jentzen stated that LW's subdural hematoma was "a marker that there has been substantial blunt trauma," and that LW had a skull fracture of the type "you would expect to see with a blunt force impact." Trial Tr. 16:10–21:18, Apr. 1, 2009; Trial Tr. 25:22–25, 116:24–117:2, Apr. 2, 2009. He concluded that LW's injuries were "nonaccidental in nature." Trial Tr. 24:13–25, Apr. 1, 2009. Neuropathologist Dr. Rorke-Adams testified "the chances are 95 percent" that LW's subdural hematoma resulted from trauma. Trial Tr. 25:22–25, 34:6–7, Apr. 2, 2009. She stated that LW died with a skull fracture, which "tells me that there was blunt head trauma,"[7] and that there was "no evidence of any kind of disease . . . or something else that might have killed him." Trial Tr. 44:1–6; 46:10–17, Apr. 2, 2009.

Ms. Hancock's attorney failed to challenge the State experts' incomplete and inaccurate description of LW's injuries and cause of death.

Compared to the State's case, Ms. Hancock's defense was far less robust. Ms. Hancock's counsel performed limited cross-examination of the prosecution's six experts, failing to clarify that each expert had gaps in expertise—pediatrician Dr. Brazelton did not specialize in analyzing radiology scans or autopsy materials, pathologists Drs. Stier, Jentzen, and Rorke-Adams did not specialize in analyzing radiology scans; and radiologist Dr. Smith did not specialize in analyzing autopsy materials. Trial counsel also failed to ask Dr. Stier to clarify his earlier statement regarding LW's skull irregularity and to confirm the absence of a skull fracture. *See* Trial Tr. 115:3–135:21, Mar. 31, 2009. And counsel did not question any expert about the

[7] "Skull fractures are a consequence of some kind of blunt trauma" that reflect "some kind of physical trauma to the head," she explained. Trial Tr. 42:1–9, Apr. 2, 2009. But Dr. Rorke-Adams also stated that she was "not an expert bone pathologist." *Id.* at 79:17–22.

autopsy report findings showing LW died with a heart virus and without any bleeding in his eyes. *See id.*; *see also* App. 10, 2008 Autopsy Report at 1.

Additionally, trial counsel presented only one expert, neurosurgeon Dr. Ronald Uscinski. *See* Trial Tr. 9:7–107:8, Apr. 6, 2009, A.M.[8] Dr. Uscinski, who was not a radiologist, based his opinion on the radiology scans without looking at autopsy materials.[9] *See id.* at 110:8–12. He agreed that LW died with a subdural hematoma and said it might have resulted from the re-bleed of an older subdural hematoma developed at birth, though he admitted research at the time did not support this theory. *See id.* at 60:23–62:16, 118:17–18. He conceded that LW had a femur fracture but the court precluded him from discussing its potential causes due to his failure to address them in his expert report. *See id.* at 120:4; 68:11–15. He could not dispute that LW died with a skull fracture because he had not raised these issues in his report. *See id.* at 28:12–29:10. At Ms. Hancock's sentencing hearing, the court described Dr. Uscinski's testimony as "remarkably unpersuasive" and "based largely upon his personal views rather than medical research or medical authority." Trial Tr. 119:9–16, Jul. 2, 2009.

In closing arguments, the State spoke extensively about its expert witnesses and how they attributed LW's injuries to abuse with "100 percent consistency." *See* Trial Tr. 245:11–12, Apr. 7, 2009. In the end, the jury convicted Ms. Hancock of First Degree Reckless Homicide. *See* Trial Tr. 4:4–9, Apr. 8, 2009. The court sentenced Ms. Hancock

---

[8] The State emphasized this point multiple times during closing arguments. *See* Trial Tr. 170:8–11, Apr. 7, 2009 ("Dr. Uscinski is not a radiologist. He's not a pediatric neurosurgeon. He's not a Board certified pediatrician. He's in private practice."); Trial Tr. 177:20–21, Apr. 7, 2009 ("Well, first and foremost he is not a radiologist, he is not a pediatrician.").

[9] The State highlighted this fact during its cross-examination. The prosecutor asked Dr. Uscinski: "No tissue was examined at all, correct?" Trial Tr. 110:13–14, Apr. 6, 2009. He also pressed Dr. Uscinski about whether he had asked "for any additional information, or particularly any slides or tissue samples or anything else," contrasting with the State's expert witness, Dr. Lucy Rorke-Adams. *See id.* at 110:19–23.

to twenty years, including thirteen years' confinement and seven years' extended supervision. *See* Trial Tr. 122:23–123:1, Jul. 2, 2009. To date, Ms. Hancock has served more than eight years of her sentence, away from her two children and her aging father. Her mother has since passed away.

After trial, Dr. Michael Stier recanted four central opinions presented, and his new findings are supported by four renowned medical experts.

Dr. Stier was the only witness who testified on behalf of the State on cause of death who had also examined LW. He has now submitted an affidavit that meets the definition of new evidence under § 974.06. *See* App. 15, Wis. Stat. § 974.06. Though Dr. Stier testified at trial that LW's injuries resulted from abusive trauma, he no longer concludes LW died from abuse. *See* Trial Tr. 49:2–86:2, Mar. 31, 2009; App. 16, Stier Aff. at ¶ 3. He states, "[i]f I were to testify at trial today, I would not testify that LW's death was caused by non-accidental inflicted injury"—"I would testify that there is no definitive cause of death." App. 16, Stier Aff. at ¶ 14. This reversal rests on four new conclusions not available to Ms. Hancock at the time of trial, which directly undermine Dr. Stier's original trial testimony.

First, Dr. Stier has reversed his conclusion on whether LW's subdural hematoma indicates abuse. At trial, Dr. Stier testified that LW's subdural hematoma was "a marker for nonaccidental type of injury." *See* Trial Tr. 62:18–53:1, Mar. 31, 2009. But since trial, Dr. Stier has performed autopsies on people with subdural bleeding identical to LW's whose injuries were not caused by abuse. *See* App. 16, Stier Aff. at ¶¶ 3–5. He has also encountered medical literature establishing that subdural hematomas may be unrelated to abuse. *See id.* at ¶ 3. As a result of this clinical experience and literature, Dr. Stier now understands that subdural hematomas may result from a variety of

accidental and natural causes and are not diagnostic of abusive head trauma. *See id.* at ¶¶ 4–5.

Second, Dr. Stier now testifies with confidence that LW did not have a skull fracture. Dr. Stier testified at trial that he could not rule out the possibility LW had a skull fracture: "I'm not saying that it is [a skull fracture], I'm not saying that it isn't." Trial Tr. 76:14–16, Mar. 31, 2009. As reflected in his affidavit, he would now testify "the autopsy definitively established that there was no skull fracture." App. 16, Stier Aff. at ¶ 10.

Third, Dr. Stier now concludes that the near-microscopic corner fracture at the tip of LW's femur is not diagnostic of abuse. Dr. Stier testified at trial that the small femur fracture he identified at autopsy was "a unique fracture to abusive pathology." Trial Tr. 79:17–18, Mar. 31, 2009. Dr. Stier now states that this area of the femur "is prone to fracture in children" such that fractures may result from causes besides abuse, including "attempts at placement of the [IO] line under the conditions present during LW's admission." App. 16, Stier Aff. at ¶ 12.

Fourth, Dr. Stier would no longer dismiss other non-abusive causes of LW's death. At trial, Dr. Stier testified that LW's death was caused by abuse without considering alternative theories. *See* App. 10, 2008 Autopsy Report; Trial Tr. 54:16–85:24, Mar. 31, 2009. His view has since changed. Dr. Stier now asserts that "a death from natural causes may explain the findings at autopsy," and that LW's heart virus provides an "alternative, viable explanation of LW's demise." App. 16, Stier Aff. at ¶¶ 7, 13.

Dr. Stier's opinions have significantly and materially changed since trial. Although Dr. Stier does not recant factual findings made in the autopsy report—small amounts of subdural bleeding, no evidence of a skull fracture, a near-microscopic fracture on LW's femur, a heart virus, and no eye bleeding—he now interprets those findings differently, leading him to a profoundly different conclusion about LW's cause of death. Moreover, in the time since Ms. Hancock's trial, four physicians with expertise in radiology, pathology, neurology, and pediatrics—Drs. Daniel Sahlein, Janice Ophoven, Joseph Scheller, and Michael Weinraub, respectively—have reviewed the evidence presented during Ms. Hancock's trial and found it does not support the conclusion that LW died from abuse, or that any abuse was inflicted by Ms. Hancock. *See* App. 17, Sahlein Aff.; App. 18, Ophoven Aff; App. 19, Scheller Aff.; App. 20, Weinraub Aff.

New medical studies published since trial expose the State experts' certainty regarding LW's cause of death as false and misleading.

The State's four out-of-state witnesses all testified that LW's subdural hematoma and femur fracture supported conviction because those types of injuries were exclusively associated with abuse. But in recent years, the scientific community has rejected this theory, and has recognized how these conditions can result from various accidental and natural causes. *See, e.g.*, *Vanek* v. *Wofford*, No. CV 14-4427-AG (KK), 2016 WL 6783340, at *1 (C.D. Cal. 2016) (and cases cited therein); *Com* v. *Epps*, 474 Mass. 743, 764–70 (2016); *People* v. *Bailey*, 999 N.Y.S.2d 713, 724–27 (N.Y. 2014). Numerous medical studies confirm that infant subdural hematomas are commonly attributable to short falls, low-impact accidents, seizures, and birth trauma. *See* App. 21, Steven C. Gabaeff, *Exploring the Controversy in Child Abuse Pediatrics and False Accusations of*

Abuse, 18 Legal Med. 90 (2016).[10] Similarly, new medical studies show that small femur fractures in children frequently result from vitamin D deficiency, an increasingly common condition in the United States due to changes in breastfeeding habits, decreased rates of sun exposure, and other factors. *See* App. 23, Colin Paterson, *Fractures in Rickets Due to Vitamin D Deficiency*, 26 Current Orthopaedic Practice 261, 262–63 (2015).[11]

Two of the State experts—Dr. Jenny and Dr. Rorke-Adams—testified that, based on LW's subdural bleed and fracture, it was "ninety five percent likely" that LW's injuries resulted from abuse. But no studies published in peer-reviewed medical publications after Ms. Hancock's 2009 trial corroborate such an association. To the contrary, beginning in 2011, medical journals began publishing studies directly analyzing the connection between physical symptoms—including subdural bleeds and fractures—and abuse. *See, e.g.*, App. 25, Sabine Ann Maguire, Alison Mary Kemp, Rebecca Caroline Lumb & Daniel Mark, *Estimating the Probability of Abusive Head Trauma: A Pooled Analysis*, 128 Pediatrics e1 (2011). These studies concluded that when a child younger than three presents with an intracranial bleed in the absence of other physical conditions, such as eye bleeding, bruising, or fractures, the probability of abusive head trauma is ***less than four percent***. *See id.* at 554. When an infant presents with an intracranial bleed accompanied by bleeding in the eyes—a key indicator that was notably absent in LW's case—the probability increases, but only to fifty-six percent. *See id.*

---

[10] *See also* App. 22, Steven C. Gabaeff, *Challenging the Pathophysiologic Connection between Subdural Hematoma, Retinal Hemorrhage and Shaken Baby Syndrome*, 12 Western Journal of Emergency Medicine 144, 152–56 (2011).

[11] *See also* App. 24, Kamal Abulebda, Samer Abu-Sultaneh & Riad Lutfi, *It is Not Always Child Abuse: Multiple Fractures Due to Hypophosphatemic Rickets Associated with Elemental Formula Use*, 5(8) Clin. Case Rep. 1348 (2017).

Even when intracranial injury is accompanied by three or more other injuries such as eye bleeding, bruising, or long-bone fracture, the probability rises to only eighty-one percent. *See id.*; *see also* App. 26, Laura Elizabeth Cowley, Charlotte Bethan Morris, Sabine Ann Maguire, Daniel Mark Farewell & Alison Mary Kemp, *Validation of a Prediction Tool for Abusive Head Trauma*, 136 Pediatrics 290 (2015). None of these studies, and no studies published in peer-reviewed medical publications after Ms. Hancock's 2009 trial, corroborate the State experts' testimony that subdural bleeding without eye bleeding can support a finding of abuse to a ninety-five percent degree of certainty.

Finally, recent studies emphasize that the dating of subdural hematomas and fractures in children is "an inexact science" and that "estimates of the time of injury are made in terms of weeks rather than days." App. 27, Michael Aertsen, *An Update on Imaging in Child Abuse*, 101(S1) Journal of the Belgian Society of Radiology 1 (2017).[12] Thus, neither the cause nor the timing of LW's brain irregularities could be determined with the degree of certainty the State experts expressed on the stand.

LEGAL STANDARD

In Wisconsin, a party may move to set aside a criminal verdict and request a new trial on various grounds. *See* App. 15, Wis. Stat. § 974.06. Section 974.06 provides that a party may move for a new trial because of newly discovered evidence. Wisconsin courts also recognize that an ineffective assistance of counsel argument may support motions for a new trial, and that a second trial can provide a remedy for the violation of a

[12] *See also* App. 28, Catherine Adamsbaum, Baptiste Morel, Béatrice Ducot, Guillemette Antoni & Caroline Rey-Salmon, *Dating the Abusive Head Trauma Episode and Perpetrator Statements: Key points for Imaging*, 44 Pediatric Radiology S578 (2014).

defendant's state and federal right to effective assistance of counsel.[13] *See State* v. *Thiel*, 2003 WI 111, ¶ 63, 264 Wis. 2d 571, 665 N.W.2d 305 (2003); *see generally* App. 30, 11 WIS. PRAC., TRIAL HANDBOOK FOR WIS. LAWYERS § 33:02 (3d ed.). In addition, faulty jury instructions may warrant a new trial, *State* v. *Austin*, 2013 WI App. 96, ¶ 6, 349 Wis. 2d 744, 836 N.W.2d 833, and the court has the authority to order a new trial in the interest of justice. *See* App. 15, Wis. Stat. § 974.06.

Ms. Hancock satisfies her burden of proof and shows she is entitled to a new trial on four different grounds, any of which alone would suffice: newly discovered evidence; constitutionally deficient assistance from counsel; improper jury instruction; and the interest of justice. Accordingly, her motion for a new trial should be granted.

ARGUMENT

I. MS. HANCOCK SHOULD BE GRANTED A NEW TRIAL ON THE BASIS OF NEW EVIDENCE BECAUSE THE MEDICAL EXAMINER WHOSE TESTIMONY FORMED THE BASIS FOR MS. HANCOCK'S CONVICTION RECANTED HIS OPINIONS AFTER TRIAL AND NEW STUDIES REFUTE THE STATE'S THEORY.

Wisconsin Statute § 974.06 entitles a defendant to another trial when newly discovered evidence is (1) discovered after conviction; (2) not cumulative of evidence presented at trial; (3) corroborated by other new evidence; and (4) material to an issue in the case. *See State* v. *McCallum*, 208 Wis. 2d 463, 474, 561 N.W.2d 707 (1997); *State* v. *Edmunds*, 2008 WI App. 33, ¶¶ 11–13, 308 Wis. 2d 374, 746 N.W.2d 590. The new

[13] The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Similarly, Article 1, Section 7 of the Wisconsin Constitution (App. 29) provides that "[i]n all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel."

evidence must create a reasonable probability of a different result.[14] *State* v. *Armstrong*, 2005 WI 119, ¶ 104, 283 Wis. 2d 639, 700 N.W.2d 98.

A. Both Dr. Stier's recantation and new medical research could not have been discovered before Ms. Hancock's conviction.

New evidence under § 974.06 must be discovered after the defendant's original conviction. *See McCallum*, 208 Wis. 2d at 474. When medical experts offer different conclusions about a cause of death asserted at trial, these new conclusions constitute newly discovered evidence. *See Edmunds*, 2008 WI App. 33, ¶¶ 18–23. The Wisconsin Court of Appeals in *Edmunds* found that testimony describing the emergence of "significant debate in the medical community" about whether certain symptoms were indicative of infant abuse constituted newly discovered evidence under § 974.06. *See id.* ¶¶ 5–7. Other states have come to the same conclusion about new opinions from medical examiners. *See*, *e.g.*, *Souter* v. *Jones*, 395 F.3d 577, 590–91 (6th Cir. 2005); *Ex Parte Robbins*, 478 S.W.3d 678, 690–92 (Tx. Ct. Crim. App. 1914); *Ex parte Henderson*, 384 S.W.3d 833, 833–34 (Tx. Ct. Crim. App. 1912) (per curiam). Dr. Stier's recantation is based on clinical experience he had after 2009 and literature that emerged after trial.[15] The new medical studies contradicting State expert testimony regarding the likelihood of abuse based on LW's injuries also were published after trial. Thus, at trial, no one—not Ms. Hancock's counsel, the prosecutor, the expert witnesses, or the jury—had access to this information undercutting the State's case.

---

[14] Although the first three prongs of the newly discovered evidence test must be established by clear and convincing evidence, the reasonable probability prong is not subject to the clear and convincing standard. *Armstrong*, 283 Wis. 2d at 703–04.

[15] Although recantations most often involve deliberate falsehoods later recanted, witnesses can also provide false testimony inadvertently. *See State v. Caldwell*, 322 N.W.2d 574, 587 (Minn. 1982) (reasoning that 'the witness' state of mind' should not 'be the factor that determines whether a defendant is entitled to a new trial'). Dr. Stier's false testimony did not have to be knowingly presented at the time of trial to undermine the outcome.

B. Neither Dr. Stier's recantation nor the new medical research are cumulative of evidence presented at trial.

New evidence under § 974.06 must not be cumulative, meaning it must "differ[] from the substance and quality of the defense evidence at trial." *Edmunds*, 2008 WI App. 33, ¶ 15.

Dr. Stier's affidavit is not cumulative and is instead substantively and qualitatively different from evidence previously presented at trial.[16] As demonstrated below, Dr. Stier now expresses opinions that contradict his testimony at trial.

	Dr. Stier's Trial Testimony	Dr. Stier's Affidavit
Subdural bleeding	"[T]he pattern of this type of subdural hemorrhage . . . is a marker for nonaccidental type of injury." Trial Tr. 64:18–53:1, Mar. 31, 2009.	"I can no longer support an opinion that LW's intracranial findings could only have resulted from non-accidental causes. . . . LW had an identifiable virus in the heart tissue as well as an older or chronic hemorrhage in the subdural space that would put him at risk." App. 16, Stier Aff. ¶ 5.
Skull fracture	I'm not saying that it is, I'm not saying that it isn't [a fracture] . . . . it is an irregularity and it is radiographic and I can't further specify." Trial Tr. 76:14–16, Mar. 31, 2009.	"[I]f called to testify today, I would say definitively that there was no skull fracture." App. 16, Stier Aff. ¶ 9.
Corner femur fracture	The femur fracture was "a unique fracture to abusive pathology." Trial Tr. 79:17–18, Mar. 31, 2009.	"I would no longer regard a bucket handle fracture as a definitive indicator of abuse"—"had I performed LW's autopsy in the present day, I would have reported the bucket handle fracture finding without indicating a conclusion that it was caused by abuse." App. 16, Stier Aff. ¶ 12.

[16] This case is distinct from Wisconsin cases where courts have found recantation evidence cumulative of evidence at trial related to witness credibility. *Cf. State* v. *McAlister*, 2018 WI 34, ¶ 50, 380 Wis. 2d 684, 911 N.W.2d 77; *State v. Gilbreath*, 2018 WI App. 39, ¶¶ 1–23, 382 Wis. 2d 830, 917 N.W.2d 232. Here, Ms. Hancock's counsel presented no evidence at trial undermining Dr. Stier's credibility—*e.g.*, evidence demonstrating Dr. Stier had motivation to lie or that his conclusions were inaccurate. Dr. Stier's new affidavit does not "serve[] merely to impeach," and instead presents a non-cumulative opinion formed in light of new literature and experience. *McAlister*, 2018 WI 34, ¶¶ 37–38.

	Dr. Stier's Trial Testimony	Dr. Stier's Affidavit
Cause of death	"I believe that the child sustained nonaccidental physical injury." Trial Tr. 84:22–23, Mar. 31, 2009.	"In my opinion, a death from natural causes may explain the findings at autopsy: a thin film subdural hemorrhage with both acute and chronic bleeding; a heart virus; very little swelling of the brain; no mass effect from the subdural hematoma; no retinal hemorrhages; and absolutely no evidence of any blunt force trauma." App. 16, Stier Aff. ¶ 13.

In addition, at trial, Dr. Jenny and Dr. Rorke-Adams testified that ninety-five percent of infant subdural hematomas resulted from abusive trauma.[17] New peer-reviewed medical research shows that their probability estimates were highly inaccurate. *See, e.g.*, App. 21, Gabaeff, Exploring the Controversy at 92–97. This new research directly contradicts the highly prejudicial, unchallenged testimony heard by the jury. Dr. Stier's affidavit and peer-reviewed medical studies thus present powerful new, non-cumulative evidence within the meaning of § 974.06.

C. Dr. Stier's recantation and the new medical research are further corroborated by Ms. Hancock's post-conviction experts and the medical findings established at autopsy.

When a claim of newly discovered evidence relies on a recantation, that recantation must be corroborated by other new evidence. *See McCallum*, 208 Wis. 2d at 476. The corroboration must provide a "feasible motive" for the initial false statement and "circumstantial guarantees of trustworthiness" for the recantation. *Id.* at 477. "The degree and extent of the corroboration required varies from case to case." *Id.* (quoting *State v. McCallum*, 198 Wis. 2d 149, 159–60, 542 N.W.2d 184 (1995)).

[17] *See* Trial Tr. 116:24–117:2, Apr. 2, 2009 (Dr. Jenny: "in 95 percent of kids, say, over two months of age subdurals are due to trauma."); Trial Tr. 25:22–25, Apr. 2, 2009 (Dr. Rorke-Adams: "If you have a distribution of hemorrhage such as we see in this particular infant, the chances are 95 percent that this is a consequence of trauma.").

Dr. Stier had two "feasible motives" for his trial testimony. First, Dr. Stier lacked certain clinical experiences at the time of his original testimony, and had not yet performed autopsies on persons who did not die from abuse but nonetheless exhibited the same symptoms as LW. *See* App. 16, Stier Aff. at ¶¶ 3–5. It was not until after trial that he had these clinical experiences and realized LW's death could not be attributed to abuse. *See id.* Second, Dr. Stier now admits that he felt pressured by the prosecution to "leave the door open" to the possibility that LW had a skull fracture. *Id.* at ¶ 9. Although he found no skull fracture during his autopsy, his equivocal testimony at trial left the jury with the false impression that he did not disagree with the other State witnesses.

New expert opinions supporting Dr. Stier's current conclusions provide additional circumstantial guarantees of trustworthiness. First, new expert opinions support Dr. Stier's new conclusions regarding potential non-abusive causes for LW's subdural bleeding. Drs. Sahlein, Ophoven, Scheller, and Weinraub—specialists in radiology, pathology, neurology, and pediatrics, respectively—all agree that LW's subdural bleeding could have resulted from accidental or natural causes, including from collision with another toddler, resuscitative efforts, birth trauma, heart viruses, seizures, and SIDS. *See* App. 17, Sahlein Aff. at ¶¶ 11–13, 17–22; App. 18, Ophoven Aff. at ¶¶ 24–28; App. 19, Scheller Aff. at ¶¶ 3, 14; App. 20, Weinraub Aff. at ¶¶ 18–30. These experts also confirm Dr. Stier's opinion regarding LW's skull irregularity, finding that based on all the relevant medical evidence, LW did not have a skull fracture when he died. *See* App. 17, Sahlein Aff. at ¶ 10; App. 18, Ophoven Aff. at ¶¶ 17–18, 29; App. 19, Scheller Aff. at ¶¶ 5–6; App. 20, Weinraub Aff. at ¶¶ 10–17. Dr. Weinraub notes that the lack of scalp

trauma "substantiates the absence of an acute skull fracture and indicates that LW did not suffer abusive head trauma or blunt force head impact." App. 20, Weinraub Aff. at ¶ 13.

Drs. Ophoven and Weinraub's statements corroborate Dr. Stier's current opinion regarding potential alternative causes of LW's near-microscopic femur irregularity. According to Drs. Ophoven and Weinraub, rickets is an especially likely culprit given that radiology scans of the femur showed abnormal bone mineralization suggestive of low vitamin D and calcium intake. *See* App. 18, Ophoven Aff. at ¶ 30; App. 20, Weinraub Aff. at ¶¶ 31–38. Dr. Weinraub states LW's radiology scans may in fact show demineralized channels formed by healing rickets, not a corner fracture. *See* App. 20, Weinraub Aff. at ¶¶ 31–36. Additionally, Drs. Ophoven and Weinraub state that the many attempts, in frantic conditions, to insert an IO line may have led to a small fracture of the femur bone. *See* App. 18, Ophoven Aff. at ¶ 32; App. 20, Weinraub Aff. at ¶¶ 31–38. The new experts support Dr. Stier's conclusion that any corner fracture cannot be definitively attributed to abuse. *See* App. 18, Ophoven Aff. at ¶ 30; App. 19, Scheller Aff. at ¶¶ 7–8; App. 20, Weinraub Aff. at ¶¶ 37–38.

Finally, each of these physicians agrees with Dr. Stier that it is impossible to definitively conclude that LW died from abuse and that various aspects of his medical record suggest otherwise—his prior birth trauma, his heart virus, the absence of bleeding around his eyes, and the complete absence of external bruising or internal trauma to the abdomen or neck. *See* App. 17, Sahlein Aff. at ¶¶ 16–20; App. 18, Ophoven Aff. at ¶¶ 11–12, 33; App. 19, Scheller Aff. at ¶¶ 3, 9–15; App. 20, Weinraub Aff. at ¶¶ 10–39. These experts all believe that the evidence did not support the opinion Dr. Stier gave at trial, that LW's death was the result of non-accidental trauma. *See* App. 17, Sahlein Aff.

at ¶ 5; App. 18, Ophoven Aff. at ¶ 30; App. 19, Scheller Aff. at ¶¶ 3, 14–15; App. 20, Weinraub Aff. at ¶ 10.

Ultimately, Dr. Stier's affidavit provides a feasible explanation for inaccuracy in his trial testimony and is corroborated by opinions from Drs. Sahlein, Ophoven, Scheller, and Weinraub. Dr. Stier's recantation evidence is sufficiently reliable to represent new evidence under § 974.06, and it provides a trustworthy basis for the grant of a new trial.

D. Dr. Stier's new affidavit and the new medical studies are material because they rebut the prosecution's diagnostic certainty.

Recently discovered evidence is material in a homicide trial if it bears on the cause of death. *See Edmunds*, 2008 WI App. 33, ¶ 15; *State* v. *Plude*, 2008 WI 58, ¶ 37–45, 310 Wis. 2d 28, 750 N.W.2d 42; *Thomas* v. *Clements*, 789 F.3d 760, 771–73 (7th Cir. 2015).

Dr. Stier's affidavit is patently material because it contradicts the cause of death he asserted at trial. Furthermore, Dr. Stier's affidavit contradicts the testimony of other state experts at trial regarding cause of death, as displayed below.

	State Expert Testimony at Trial	Dr. Stier's Affidavit
Subdural bleeding	1. Dr. Smith: "So this was . . . what we call a marker subdural hematoma, a marker for that trauma." Trial Tr. 16:24–17:15, Apr. 1, 2009. 2. Dr. Jenny: "[I]n 95 percent of kids, say, over two months of age subdurals are due to trauma." Trial Tr. 116:24–117:2, Apr. 2, 2009. 3. Dr. Jentzen: A subdural hematoma in a child of LW's age is "a marker that there has been substantial blunt trauma." Trial Tr. 20:2–11, Apr. 1, 2009, Vol. II. 4. Dr. Rorke-Adams: "[T]he chances are 95 percent that this [subdual bleeding]	"I can no longer support an opinion that LW's intracranial findings could only have resulted from non-accidental causes." App. 16, Stier Aff. at ¶ 5.

	State Expert Testimony at Trial	Dr. Stier's Affidavit
	is a consequence of trauma." Trial Tr. 25:22–25, Apr. 2, 2009.	
Skull fracture	1. Dr. Smith: "[LW] suffered a skull fracture . . . It's pretty clear on the x-ray." Trial Tr. 10:11–23, Apr. 1, 2009. 2. Dr. Jentzen: "It's my opinion that there was a skull fracture located over the left parietal bone . . . it was the type of injury that you would expect to see with a blunt force impact." Trial Tr. 16:10–12, Apr. 1, 2009, Vol. II. 3. Dr. Rorke-Adams: "[T]his child had a skull fracture. . . So that tells me that there was blunt head trauma." Trial Tr. 44:1–4, Apr. 2, 2009.	"[I]f called to testify today, I would say definitively that there was no skull fracture." App. 16, Stier Aff. at ¶ 9.
Corner femur fracture	1. Dr. Smith: "[LW] had what's called a corner fracture of the left distal femur"—"This is caused by a twisting and wrenching force applied to the leg" in "the vast, vast majority" of instances. Trial Tr. 22:17–23:18, Apr. 1, 2009. 2. Dr. Jenny: "[T]hose kinds of [femur] fractures are almost diagnostic of child abuse . . . And in accidental scenarios we just rarely see them." Trial Tr. 118:19–23, Apr. 2, 2009. 3. Dr. Jentzen: "There was a fracture of the left distal femur bone. . . It was a recent fracture." Trial Tr. 17:4–18:5, Apr. 1, 2009.	"I would no longer regard a bucket handle fracture as a definitive indicator of abuse"—"had I performed LW's autopsy in the present day, I would have reported the bucket handle fracture finding without indicating a conclusion that it was caused by abuse." App. 16, Stier Aff. at ¶ 12.
Cause of death	1. Dr. Smith: "[T]here had to be direct injury to the skull to cause skull fracture." Trial Tr. at 18:22–24, Apr. 1, 2009. Corner fractures such as the one exhibited by LW are caused by "abusive twisting" in "the vast, vast majority" of instances. *Id.* at 23:5–18. 2. Dr. Jenny: "I believe this child died as a result of abusive head trauma." Trial Tr. 6:21–22, Apr. 2, 2009. 3. Dr. Jentzen: "It would be my opinion that [LW's injuries] are nonaccidental in nature. Trial Tr. 24:13–20, Apr. 1, 2009.	"In my opinion, a death from natural causes may explain the findings at autopsy: a thin film subdural hemorrhage with both acute and chronic bleeding; a heart virus; very little swelling of the brain; no mass effect from the subdural hematoma; no retinal hemorrhages; and absolutely no evidence of any blunt force trauma." App. 16, Stier Aff. at ¶ 13. "In light of my current understanding of alternate

	State Expert Testimony at Trial	Dr. Stier's Affidavit
	4. Dr. Rorke-Adams: There is "no evidence of any kind of disease . . . or something else that might have killed him." Trial Tr. 46:13–17, Apr. 2, 2009.	causes of hemorrhage, the virus may be of more significance to LW's demise. The heart virus provides and (sic) alternative, viable explanation of LW's demise." *Id.* at ¶ 7.

The State had the burden of demonstrating Ms. Hancock caused LW's death. *See* App. 14, Wis. Stat. § 940.02(1). But Dr. Stier's affidavit and the new medical studies present alternative explanations for LW's injuries and demonstrate that his death cannot be attributed to abuse. This new, material evidence warrants a new trial. *Edmunds*, 2008 WI App. 33, ¶ 15.

E. In light of new evidence, there is a reasonable probability that a different result would be reached.

A defendant seeking another trial on the basis of newly discovered evidence must show there is a "reasonable probability that a different result would be reached in a trial." *Armstrong*, 2005 WI 119, ¶¶ 161–62. The defendant need not show that her evidence is stronger than the prosecution's evidence. *See Edmunds*, 2008 WI App. 33, ¶ 17. She need only show that a juror hearing all of the evidence "would have a reasonable doubt as to the defendant's guilt."[18] *Id.* Wisconsin courts have found that new evidence meets the reasonable probability standard in the homicide context when it undermines the

[18] The Wisconsin Supreme Court has not decided whether the "reasonable probability" test in the new evidence context requires defendant to show that a new trial would result in a different verdict, or simply that confidence in the original outcome is undermined. *See Edmunds*, 2008 WI App. 33, ¶ 21–22. Ms. Hancock is entitled to a new trial under either standard.

prosecution's cause of death theory, for example, by undercutting testimony from a critical State witness. *See Plude*, 2008 WI 58, ¶ 36; *Edmunds*, 2008 WI App. 33, ¶ 23.[19]

In *Edmunds*, the defendant-appellant had been convicted of reckless homicide for the death of a seven-month-old infant in her care. *Edmunds,* 2008 WI App. 33, ¶ 2. The State experts testified that the death had been caused by violent shaking or shaking combined with impact causing a fatal head injury. *Id.* The Court of Appeals found that Edmunds's post-conviction experts presented newly discovered evidence in the form of a legitimate and significant dispute within the medical community as to the cause of death, and that there was a reasonable probability that a jury, considering the evidence, would have reasonable doubt as to the defendant-appellant's guilt. *Id.* at ¶ 23.

Here, similar to *Edmunds,* Hancock's experts offer new evidence challenging the infant's cause of death diagnosis, and the evidence emerged after trial. *Edmunds*, *Edmunds*, 2008 WI App. 33, ¶ 22. Dr. Stier's affidavit, corroborated by multiple experts, and new medical studies undermine the State's main argument at trial: that LW's physical condition at death proved abuse. Dr. Stier's testimony was central to the State's case and the State relied heavily on it in closing arguments. *See* Trial Tr. 114:23–115:5, Apr. 7, 2009. Further, medical studies that existed only after trial now show that, when a child younger than three presents with an intracranial bleed in the absence of other physical conditions, the probability of abusive head trauma is less than four percent. *See* App. 25, Maguire at e5. Even when an infant does additionally present with eye

[19] Other state court decisions are in accordance. *See*, *e.g.*, *Bailey*, 999 N.Y.S.2d at 726 (2014) ("The credible evidence adduced at the hearing established that recent medical and scientific opinion [regarding abuse] significantly, and substantially, undermines that 2001 Trial testimony."); *State* v. *Forester*, No. CA-93-3, 1994 WL 167937 (Ohio Ct. App. April 14, 1994) (granting a new trial after defendant was convicted of involuntary manslaughter and child endangerment, because new evidence indicated the child died from apnea rather than abuse).

bleeding—a condition absent in LW's case—the probability increases to only fifty-eight percent, leaving considerable room for reasonable doubt that the child died of abuse. *See id.* In *Edmunds,* the court found reasonable probability that a jury would find reasonable doubt because of the new evidence and remanded for a new trial. *Edmunds*, 2008 WI App. 33, ¶ 23. Here, had the jury read Dr. Stier's new affidavit contradicting his trial testimony on the crucial cause of death issue and also learned of the new medical studies, there is a reasonable probability the jury would have reasonable doubt as to whether Ms. Hancock caused LW's death.

Ms. Hancock has presented new evidence that emerged after her conviction, is material, and creates a reasonable probability of a different result at retrial. On this basis alone, even absent consideration of other errors in this case—of which there were many—Ms. Hancock is entitled to a new trial.

II. TRIAL AND APPELLATE COUNSEL FAILED TO PROVIDE CONSTITUTIONALLY EFFECTIVE ASSISTANCE TO MS. HANCOCK.

A defendant demonstrates ineffective assistance of counsel by showing that counsel's performance was deficient and resulted in prejudice. *Thiel*, 2003 WI 111, ¶ 18; *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is deficient if it falls "below an objective standard of reasonableness" and prejudice results when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Thiel,* 2003 WI 111, ¶ 18 (citing *Strickland*, 466 U.S. at 694).

Here, trial counsel's performance was deficient in three overlapping, independent ways. He failed to: (1) sufficiently investigate key medical records, (2) consult and retain necessary experts, and (3) adequately prepare his only expert. These errors precluded

counsel from rebutting the State expert testimony and cause of death theory, prejudicing Ms. Hancock. Appellate counsel performance was also deficient because he failed to conduct a reasonable investigation into the issues of Ms. Hancock's trial.

A. Trial counsel's performance was unreasonably deficient.

1. *Trial counsel unreasonably failed to investigate promising leads in LW's medical record.*

Trial counsel is unreasonably deficient when he fails to conduct a reasonable investigation. *See Thiel*, 2003 WI 111, ¶ 40 (citing *Strickland*, 466 U.S. at 691). To show failure to reasonably investigate, a defendant must demonstrate that counsel's failure to investigate was not the product of informed deliberation. *See id.* Failure to investigate is not the product of informed choice where the evidence not investigated was "readily available" and might have benefited the client. *Brown* v. *Sternes*, 304 F.3d 677, 693 (7th Cir. 2002); *see also Rompilla v. Beard*, 545 U.S. 374, 384, 392–93 (2005); *Thomas* v. *Clements*, 789 F.3d 760, 768–69 (7th Cir. 2015). Trial counsel cannot abandon investigation based on an uninformed decision that evidence will not benefit the client, or based on a mistake of basic law or fact. *See Williams* v. *Taylor*, 529 U.S. 362, 396 (2000); *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003); *see also Thiel*, 2003 WI 111, ¶ 51.[20]

Here, trial counsel failed to reasonably investigate LW's medical history. Counsel acknowledges that before Ms. Hancock's trial, he did not speak with any doctors who treated LW at UW Hospital. *See* App. 31, Hyland Aff. at ¶ 10. He did not meaningfully consult with Dr. Stier, who conducted LW's autopsy, beyond speaking with

[20] Under the Supreme Court's decision in *Strickland*, "[s]trategic choices made after counsel's thorough investigation of the facts and the law are nearly unchallengeable." *Strickland*, 466 U.S. at 690. Not so with choices made *before* proper investigations. *See Clements*, 789 F.3d at 768.

him only briefly on one occasion. *See id.* at ¶ 9. Trial counsel also did not notice or follow up on medical conditions noted in LW's medical records. *See id.* at ¶ 10. This medical history was essential to Ms. Hancock's defense, as the records created prior to LW's collapse revealed no signs of abuse. *See* App. 17, Sahlein Aff. at ¶ 19; App. 18, Ophoven Aff. at ¶ 11; App. 19, Scheller Aff. at ¶ 5; App. 20, Weinraub Aff. at ¶ 10. A radiology report noted a skull irregularity, but Dr. Stier sectioned the skull, viewed it under a microscope, and found no fracture. *See* App. 10, 2008 Autopsy Report at 6–8. He also found none of the scalp swelling or bleeding that would accompany a blow significant enough to cause a skull fracture. *See id*; *see also* App. 18, Ophoven Aff. at ¶ 19.

Trial counsel's failure to investigate was not the product of informed choice. As trial counsel now acknowledges, he initially (and erroneously) thought the State's case "was based on the theory of [Shaken Baby Syndrome]" and pursued only evidence addressing the biomechanical question of whether shaking could have caused LW's death. App. 31, Hyland Aff. at ¶ 3. He did not consult with Dr. Stier about LW's autopsy because he was under the incorrect impression that Dr. Stier was committed to be a State's witness and would be uncooperative. *See id.* at ¶ 9. This premature abandonment of the investigation, based solely on mistakes of fact, was objectively unreasonable. *See Williams*, 529 U.S. at 396.

2. *Trial counsel unreasonably failed to obtain experts to rebut the State's flawed medical testimony.*

Trial counsel is ineffective when he does not consult with expert witnesses necessary to the defense. *See Hinton* v. *Alabama*, 571 U.S. 263, 273 (2014); *Clements*, 789 F.3d at 768–69; *Woolley* v. *Rednour*, 702 F.3d 411, 424–25 (7th Cir. 2012). The

failure to consult with such witnesses represents unreasonably deficient performance if "the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Hinton*, 571 U.S. at 263 (internal citations omitted).[21] Where the State's case hinges on medical evidence, federal courts find that trial counsel provides unreasonably deficient representation by not consulting with experts qualified to interpret that evidence or introducing testimony from such experts at trial. *See Thomas*, 789 F.3d at 769–70; *Conwell* v. *Woodford*, 312 Fed. Appx. 58, 59–60 (9th Cir. 2009); *Duncan* v. *Ornoski*, 528 F.3d 1222, 1235–36 (9th Cir. 2008); *Vanek*, 2016 WL 6783340, at *12–16.

In *State* v. *Hales*, the Utah Supreme Court found that trial counsel provided unreasonably deficient representation in a murder trial by failing to consult with a radiologist about the victim's CT scans. *See* 152 P. 3d 321, 344 (Utah 2007). The court noted that the CT scans were "the primary source of information" regarding cause of death, making an expert necessary. *Id.* at 339. But at trial, counsel presented only one expert, a pathologist. *Id.* at 340. The court found this was "not a reasonable professional judgment" because the expert was a "pathologist who did not interpret CT scans in his practice, not a radiologist." *Id.* at 341.

Here, the State argued that LW's death could only have resulted from abuse. The prosecution relied on two pieces of evidence—LW's pathology photos and slides and his radiology scans—and assembled experts in pathology (including Drs. Stier, Jentzen, and Rorke-Adams) and radiology (Dr. Smith) qualified to interpret this evidence.

---

[21] *See also Kendrick v. State*, 454 S.W.3d 450, 475 (Tenn. 2015) ("From *Hinton*, we learn that when the prosecution's theory of the case hinges on expert forensic science testimony, the acquisition of an expert witness for the defense may be exactly what professional norms under *Strickland* v. *Washington* require.").

Ms. Hancock's case thus required experts who were also competent in both pathology and radiology to interpret the key medical evidence in the case.

However, trial counsel failed to consult, retain, and present a pathologist or radiologist. Instead, counsel called only one expert, neurosurgeon Dr. Uscinski, who was not qualified to provide opinions on the radiology scans or the pathology slides and who did not review the slides prior to testifying.[22] *See* Trial Tr. 110:13–15, Apr. 6, 2009. Trial counsel now acknowledges that Dr. Uscinski's background as a neurosurgeon made his trial testimony "much weaker than the State's radiology experts" and that he "should have retained a radiologist to testify." *See* App. 31, Hyland Aff. at ¶ 6. This failure to consult with and retain a radiologist was not a strategic choice. In his affidavit, counsel explains he failed to seek essential experts for two reasons: (1) his inaccurate initial understanding of the prosecution's case delayed his search for appropriate experts; and (2) he had not conducted basic research into state law providing funding for defense experts. *See id.* at ¶¶ 3, 7. Neither of these grounds justifies counsel's inaction.

Regarding the first ground, as mentioned above, trial counsel initially assumed that "the State's case against Ms. Hancock was based solely on the theory of [Shaken Baby Syndrome]," which could be rebutted with testimony from a biomechanical engineer. *Id.* at ¶ 3. When counsel discovered the State was pursuing a different theory, he "delayed in finding an expert" and ultimately did not consult or call a radiologist or a

---

[22] As noted above, *supra* n.10, the State emphasized Dr. Uscinski's limited review of evidence during cross-examination, asking: "No tissue was examined at all, correct?" Trial Tr 110:13–14, Apr. 6, 2009. The State also asked Dr. Uscinski about whether he had requested "any additional information, or particularly any slides or tissue samples or anything else," contrasting with a State expert. *Id.* at 110:16–22. In closing arguments, the State also emphasized Dr. Uscinski's specialized area of practice: "Dr. Uscinski is not a radiologist. He's not a pediatric neurosurgeon. He's not a Board certified pediatrician. He's in private practice." Trial Tr. 170:8–11, Apr. 7, 2009; *see also id.* at 177:20–21 ("Well, first and foremost he is not a radiologist, he is not a pediatrician.").

pathologist capable of rebutting the State experts' testimony. *Id.* at ¶ 8. This delay cannot be excused as a strategic choice, because it was based on counsel's failure to timely investigate basic facts of Ms. Hancock's case and was thus objectively unreasonable. *See Strickland*, 466 U.S. at 690–91; *see also People* v. *Ackley*, 497 Mich. 381, 391–92 (2015); *Hales*, 152 P.3d at 338–341.

Trial counsel's second reason for failing to consult with and retain necessary experts is similarly insufficient. Counsel refrained from seeking necessary experts because his client's finances were limited, and he believed State funding for experts was reserved for public defender cases. *See* App. 31, Hyland Aff. at ¶ 7. However, he abandoned the search for appropriate experts without investigating alternative sources of funding. For example, Wisconsin Code § 885.10 provides an avenue for funding for those assigned counsel, and the State will reimburse witness expenses for defendants with proof of indigence.[23] If Ms. Hancock did not have the resources to pay for experts, counsel should have investigated the alternative sources of funding under the statute or requested the funding from the circuit court.[24] Because counsel's failure to retain experts was based purely on an uninformed choice to forego a request for funding, it is objectively unreasonable. *See Hinton*, 571 U.S. at 274; *see also Wiggins*, 539 U.S. at 524 (finding that failure to retain an expert even though the State made funds available for that purpose constitutes ineffective assistance of counsel).

3. *Trial counsel unreasonably failed to prepare his sole expert witness.*

---

[23] *See* App. 32, Wis. Stat. § 885.10 ("Determination of indigency under s. 977.07 (App. 33) is proof of the respondent's or defendant's financial inability to procure the attendance of witnesses for his or her defense.").

[24] The circuit court was obligated to provide Ms. Hancock with access to a competent medical expert if it determined she was not able to afford one herself. *See Ake* v. *Okla.*, 470 U.S. 68, 83 (1985).

A defendant may show ineffective assistance of counsel by proving that the attorney failed "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Harris* v. *Thompson*, 698 F.3d 609, 641–43 (7th Cir. 2012) (internal citation omitted); *see also Williams* v. *Taylor*; *Porter* v. *McCollum*, 558 U.S. 30, 39 (2009) (per curiam). In cases where expert consultation is necessary, defendants may also show unreasonably deficient representation by demonstrating their counsel failed to consult with experts in preparing cross-examination. *See, e.g.*, *Miller* v. *Beard*, 214 F. Supp. 3d 304, 337–40 (E.D. Pa. 2018).

Trial counsel failed to adequately prepare his sole expert witness, Dr. Uscinski, to rebut the State's case against Ms. Hancock. Given the State's reliance on expert testimony during trial, independent expert witness testimony was critical to Ms. Hancock's defense. But while the State's four out-of-state experts testified that LW had a skull fracture, trial counsel did not ask Dr. Uscinski about this critical issue, and Dr. Uscinski did not offer an opinion on it. Trial counsel's omissions were due to a lack of diligence rather than informed choice, and his actions thus fell well below the minimum federal and state standards of professional conduct.

B. Trial counsel's performance prejudiced Ms. Hancock.

A defendant seeking to show ineffective assistance of counsel must also demonstrate that she was prejudiced by counsel's performance. *See Thiel*, 2003 WI 111, ¶ 18; *see also Strickland*, 466 U.S. at 692. To show prejudice, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State* v. *Moffett*, 147 Wis. 2d 343, 355 (1989) (internal quotations omitted). A reasonable probability is one sufficient to undermine confidence in the outcome of the proceeding—certainty of a different outcome at trial is

not required. *See State* v. *Dillard*, 2014 WI 213, ¶¶ 95–97, 358 Wis. 2d 543, 859 N.W.2d 44; *see also Strickland*, 466 U.S. at 694.[25] A defendant may show prejudice by demonstrating the cumulative effect of counsel's deficient performance, and defendant need not show prejudice for each individual deficient act. *See Thiel*, 2003 WI 111, ¶ 59; *State* v. *Zimmerman*, 2003 WI App. 196, ¶¶ 34–35, 266 Wis. 2d 1003, 669 N.W.2d 762.

Trial counsel's failure to investigate red flags in LW's medical history and autopsy report, to consult appropriate experts, and to adequately prepare the defense's sole expert witness, all collectively prejudiced Ms. Hancock. Wisconsin courts find prejudice when potentially exculpatory evidence is not presented to the jury. *See Zimmerman*, 266 Wis. 2d at 1029–31; *State* v. *Glass*, 170 Wis. 2d 146, 153. In particular, failure to present independent medical testimony constitutes deficient performance when independent testimony could have revealed viable alternatives to the State's main theory of the case. *See Zimmerman*, 266 Wis. 2d at 1022-24; *see also Clements*, 789 F.3d at 771–73.

Here, trial counsel's deficient performance prejudiced Ms. Hancock by precluding the jury from hearing a number of critical facts bearing on LW's cause of death. *First*, counsel's failure to investigate and consult with experts prevented him from presenting evidence showing LW's death was likely not caused by abuse, but rather by LW's underlying medical conditions. Had trial counsel conducted even minimal research into LW's medical history, he would have discovered LW exhibited a number of preexisting medical conditions that more likely contributed to his death. Had trial counsel consulted sufficiently with Dr. Stier, he would have known to emphasize that LW's pathology

[25] The prejudice standard for ineffectiveness claims is thus distinct from the standard applicable to new evidence claims. *See Strickland*, 466 U.S. at 694; *see also supra* n.19.

showed no convincing evidence of a fracture. Had trial counsel consulted with experts, he would have discovered LW's symptoms may indicate death from hypoxia, a lack of oxygen, and not from abuse. Dr. Sahlein explains that "something caused LW to stop breathing, which led to his collapse and death," and describes how LW's lack of oxygen could have resulted from non-abusive causes such as vomit blocking his airways, a heart virus, arrhythmia, a seizure, or SIDS. App. 17, Sahlein Aff. at ¶ 16; *see also* App. 18, Ophoven Aff. at ¶¶ 24–28; App. 19, Scheller Aff. at ¶¶ 3, 14; App. 20, Weinraub Aff. at ¶¶ 21, 27.

Second, trial counsel's deficient performance prevented him from demonstrating to the jury that LW did not have a skull fracture. At trial, the State argued that Ms. Hancock struck LW, causing his acute subdural hematoma and immediate death. Four State expert witnesses confidently testified LW had a skull fracture.[26] *See* Trial Tr. 18:22–24, Apr. 1, 2009; Trial Tr. 44:1–46:3, Apr. 2, 2009 A.M.; Trial Tr. 22:23, Apr. 2, 2009 P.M. In his testimony, Dr. Stier confirmed LW's skull had an irregularity and declined to completely rule out the existence of a fracture. Trial counsel's inadequate investigation prevented him from cogently challenging the existence of a skull fracture. *See* App. 31, Hyland Aff. at 5, 9. Had counsel investigated this issue on cross-examination, he could have underlined the ambiguity in Dr. Stier's testimony by emphasizing that the most Dr. Stier could say is that there was an irregularity. *See* App. 16, Stier Aff. ¶ 11. The jury did not hear this testimony, nor did it hear from experts such as Drs. Sahlein, Ophoven, Scheller, and Weinraub, all of whom examined LW's radiology scans after the trial and determined that LW did *not* have a fractured skull.

[26] Drs. Smith, Jentzen, Roarke-Adams, and Jenny.

App. 17, Sahlein Aff. ¶ 6; App. 18, Ophoven Aff. at ¶¶ 17–18, 29; App. 19, Scheller Aff. at ¶¶ 5–6; App. 20, Weinraub Aff. at ¶¶ 11–17.

Third, counsel's deficient performance precluded him from presenting evidence that LW's femoral fracture was likely due to natural causes, not abuse. The State presented expert testimony that LW had a corner femur fracture and that the "vast, vast majority" of such fractures result from abuse. Trial Tr. 22:17–23:18, Apr. 1, 2009. Because of his inadequate investigation, trial counsel did not challenge this inaccurate opinion. Had counsel consulted a radiology expert, he could have presented evidence that the radiology scans of LW's femur likely reflected demineralized channels in the bone caused by vitamin deficiency. *See* App. 18, Ophoven Aff. at ¶ 30; App. 20, Weinraub Aff. at ¶¶ 31–36. Had he consulted with a pathologist, he could also have presented alternative, non-abusive causes for the condition of LW's femur. *See* App. 18, Ophoven Aff. at ¶¶ 4, 12.[27]

Ms. Hancock's trial counsel provided ineffective assistance because he unreasonably failed to investigate key issues in the case and appropriately consult with necessary experts. His inadequate performance prevented him from presenting significant exculpatory evidence in this case to the jury. Ultimately, trial counsel's deficient investigation prejudiced Ms. Hancock because it is reasonably probable that the result of the trial would have been different had the jury heard that LW did not suffer a skull fracture and that a non-abusive, plausible explanation for LW's death existed.

[27] Even though there was no credible evidence that LW died as a result of abusive trauma, the evidence the State relied on to try to tie Ms. Hancock to the injury–a subdural hematoma–was deficient, because such a hematoma could well have been chronic and preceded the time LW was in Ms. Hancock's care.

C. Appellate counsel's performance was unreasonably deficient and prejudiced Ms. Hancock's ability to effectively seek post-conviction relief.

In addition to trial counsel's ineffective assistance, appellate counsel's performance fell "below an objective standard of reasonableness" and prejudice results when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Thiel*, 2003 WI 111, ¶ 19-20 (citing *Strickland*, 466 U.S. at 694).

Appellate counsel performance was deficient because he failed to conduct a reasonable investigation into the issues of Ms. Hancock's trial. *See id.* Appellate counsel is expected to testify that he received Ms. Hancock's file with little time to perfect the appeal. He did no independent investigation into the medical issues, despite the fact that the medical evidence was the linchpin of the State's case. He did not attempt to interview trial counsel or the medical examiner, or review the medical records. Therefore, he could not have discovered that the medical evidence presented to the jury was based on invalid testimony from a handful of out-of-state experts and that the defense expert was unprepared to meet the State's expert medical testimony. Appellate counsel's deficient performance was prejudicial because the failure to investigate, and thus bring an ineffective assistance of counsel claim on appeal, deprived Ms. Hancock of her fundamental right to an opportunity to be heard on an appellate challenge to her conviction. *See In re Alexandria G.*, 2013 WI App. 83, 348 Wis. 2d 593, 834 N.W.2d 432.

III. MS. HANCOCK WAS DENIED DUE PROCESS OF LAW WHEN HER JURY WAS IMPROPERLY INSTRUCTED ON REASONABLE DOUBT.

Ms. Hancock asserts, for the purposes of preserving her right to raise a fundamental constitutional issue, that the jury instructions defining the State's burden of proof violated Ms. Hancock's right to due process and effective assistance of counsel. At trial, the Judge provided Wisconsin Pattern Instruction 140 and told the jury: "You are not to search for doubt; you are to search for the truth." Trial Tr. 176:11–21, Mar. 30, 2009. Even though the Judge responded to objection from defense counsel by adding a line immediately thereafter saying, "the burden of establishing each and every element of the offense necessary to constitute guilt is upon the state," this does not mitigate the confusion imposed on the jury by the preceding sentence. *See id.* at 23:10–25; 176:18–25. A new trial is warranted if a jury has been improperly instructed regarding the State's burden of proof. *See State* v. *Austin*, 2013 WI App. 96, 349 Wis. 2d 744, 836 N.W.2d 833. Courts specifically analyzing instructions advising jurors to "search for truth" have concluded that such instructions improperly modify the reasonable doubt burden of proof. *See, e.g.*, *United States* v. *Gonzalez-Balderas*, 11 F.3d 1218, 1223 (5th Cir. 1994); *State* v. *Manning*, 305 S.C. 413 (1991). Recent studies also demonstrate that jurors who receive "search for the truth" instructions are significantly more likely to convict than jurors who do not. *See, e.g.*, App. 34, Michael Cicchini & Lawrence White, Testing the Impact of Criminal Jury Instructions on Verdicts, 117 Colum. L. Rev. Online 22 (2017). The Wisconsin Supreme Court recently granted review on the issue of whether Instruction 140 represents error serious enough to merit a new trial. *See State* v. *Trammell*, 2017AP1206-CR (Wis. Sup. Ct. Nov. 13, 2018).

IV. MS. HANCOCK IS ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE BECAUSE THE REAL CONTROVERSY HAS NOT BEEN TRIED AND THERE HAS BEEN A MISCARRIAGE OF JUSTICE.

A defendant may properly move for a new trial based on the interest of justice if two conditions are met: (1) she has properly filed a motion for a new trial under Wisconsin Statute § 974.06; and (2) the motion for a new trial includes "one of the types of claims allowed by statute" and is not procedurally barred. *State* v. *Henley*, 2010 WI 97, ¶ 63, 328 Wis. 2d 544, 787 N.W.2d 350. Because this motion properly includes a newly discovered evidence claim and an ineffective assistance of counsel claim, claims specifically allowed by Wisconsin statute, an interest of justice argument is properly presented.

Courts will grant a new trial in the interest of justice if: (1) "the real controversy was not fully tried"; or (2) "it is probable that justice has for any reason miscarried." *State* v. *Wyss*, 124 Wis. 2d 681, 735 (1985).[28] The real controversy is not fully tried when the jury receives information clouding a crucial issue at trial, or does not hear important testimony bearing on a significant trial issue. *State* v. *Hicks*, 202 Wis. 2d 150, 160 (1996) (granting a new trial in the interest of justice because the real controversy of identification was not fully tried where DNA excluding evidence was not presented to the jury because defendant's counsel failed to conduct DNA testing prior to trial); *see also State* v. *Harp*, 161 Wis. 2d 773, 775 (Ct. App. 1891). A miscarriage of justice occurs when there is a "reasonable probability" that a different result would occur on retrial.

[28] The standard for granting a new trial in the interest of justice at the trial court level is identical to the standard outlined for the court of appeals in Wisconsin Statute § 752.35 (App. 35). *See Henley*, 2010 WI 97, ¶ 64 (citing *State* v. *Harp*, 161 Wis. 2d 773, 775 (Ct. App. 1891)).

Thiel, 2003 WI 111, ¶ 20 (citing *Strickland*, 466 U.S. at 694). *See enley*, 2010 WI 97, ¶ 81.[29]

Wisconsin courts have granted new trials in the interest of justice where the jury heard misleading expert opinions and did not hear accurate scientific testimony. *See Hicks*, 202 Wis. 2d at 161–64. Similarly, other states' highest courts have granted new trials where defendants were convicted based on outdated expert medical testimony linking subdural hematomas to abuse. *See, e.g.*, *Epps*, 474 Mass. at 767; *Com.* v. *Millien*, 474 Mass. 417, 437 (2016); *Ackley*, 497 Mich. at 398; *Hales*, 152 P.3d at 337–44.

At Ms. Hancock's original trial, the jury heard confusing, misleading jury instructions. The Jury also heard misleading expert testimony and did not have access to critical evidence bearing on LW's cause of death. The State's key evidence at trial consisted of expert testimony regarding LW's injuries at his time of death, and the State called five experts who told the jury that it was extremely unlikely these injuries could result from non-accidental causes. Research published after the trial has since discredited this level of certainty in child abuse diagnosis. The jury also did not hear the new evidence from the State's key witness, Dr. Stier, regarding the benign causes of subdural hematomas and infant femur fractures, and the absence of a fracture on LW's skull.

The inclusion of misleading evidence and the absence of critical testimony from Dr. Stier ultimately prevented the real controversy in Ms. Hancock's case from being fully tried. If the jury had the opportunity to hear accurate medical testimony and a coherent cause-of-death theory presented by the defense, there is substantial probability that they would have reached a different verdict. The deficiencies in Ms. Hancock's

[29] *See generally Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

original trial therefore also resulted in a miscarriage of justice. Consequently, the interest of justice requires that Ms. Hancock be granted a new trial.

V. CONCLUSION

Ms. Hancock's post-conviction motion meets "the 'five w's' and 'one h'" test explained in *Allen*. *See* 274 Wis. 2d 568, ¶ 23. That is, "who, what, when, where, why, and how." A motion provides sufficient material facts if it provides the name of the witness (the who), the reason the witness is important (the why and how), and the facts that can be proven (the what, where, and when). *See id*. at ¶ 23. At a Machner hearing, Ms. Hancock intends to present seven witnesses who meet the *Allen* test:

Dr. Stier will testify to the changes in his medical opinion since the initial trial, and challenge the opinions of the State's trial experts. First, he will testify that due to his experience as a forensic pathologist since the autopsy, the cause of LW's death is undetermined. Specifically, he will challenge the State experts on four main points, including that: (1) there was no evidence of a skull fracture; (2) a subdural hematoma is not specifically diagnostic of abuse; (3) a corner fracture of the femur is not specifically diagnostic of abuse; and (4) LW's symptoms often appear from non-abusive causes.

Four highly qualified medical experts (Drs. Ophoven, Scheller, Weinraub, and Sahlein) from different specialties will testify to the faults in the State's medical experts' opinions relied upon at trial. Specifically, they will testify that: (1) no evidence supports the conclusion that LW died from inflicted trauma; (2) there was no skull fracture; (3) the femur fracture was benign and not indicative of abuse; (4) LW's symptoms were consistent with a non-abusive cause of death; and (5) the State experts provided unsupported and misleading testimony that LW's symptoms were ninety-five percent

indicative of abuse, when newer research shows that abuse was less likely than a non-abuse as the cause of death.

Trial counsel will explain his actions preparing for and during trial. He will testify that he: (1) initially misunderstood the State's theory of the case and sought experts who were inappropriate; (2) waited too long to change course and look for more appropriate experts; (3) presented only one expert who was unable to challenge the State's key evidence; (4) failed to sufficiently investigate the opinions of treating physicians (including Dr. Stier); and (5) failed to seek funds for additional experts despite knowing the defense would have been stronger with them.

Appellate counsel will explain his actions preparing for and submitting the direct appeal. Specifically, Appellate counsel will testify that he: (1) received Ms. Hancock's file too late to conduct an investigation; and (2) only raised a single, evidentiary issue that prior counsel had noted, rather than seek additional time to investigate.

With this testimony, and for the reasons set forth in this motion, Ms. Hancock expects to establish a basis for this Court to vacate her conviction and order a new trial.

Respectfully submitted, this 12th day of February, 2019

Carrie Sperling
State Bar No. 1094464
WISCONSIN INNOCENCE PROJECT
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
Tel. 608-262-2240

Craig A. Benson (admitted *pro hac vice*)
Zachary A. Dietert (admitted *pro hac vice*)
Sarah M. Ripa (admitted *pro hac vice*)
Katherine S. Stewart (*pro hac vice* motion forthcoming)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, NW
Washington, DC 20006
Tel. 202-223-7300

Attorneys for Defendant Jennifer Hancock

cc: Dane County District Attorney