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Stevens v. State Appellant's Reply Brief 1 Dckt. 39218

IN THE SUPREME COURT OF THE STATE OF IDAHO

EDWARD STEVENS, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent-Respondent.	)	S. Ct. No. 39218-2011 Ada Co. CV-PC-2009-13971

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho
In and For the County of Ada

HONORABLE DARLA WILLIAMSON
District Judge

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II. INTRODUCTION

The state begins its brief by asserting that Mr. Stevens "killed Casey Whitehead," as if that was an unassailable truth. In fact, there is substantial doubt whether Mr. Stevens killed Casey and the jury verdict does not prove otherwise. The jury never heard the evidence that Casey's eyes were removed post-embalming, a critical fact which was withheld from the defense by the prosecution team and was not discovered in time for the trial due to the inadequate investigation by defense counsel. The jury never heard the readily available evidence regarding the adverse and sometimes fatal side effects of Propulsid and Zithromax on infants, and how those medications could have caused Casey's death. And, it did not hear the evidence that the head injuries could have been caused at a time when Mr. Stevens was not with Casey or that the skull fracture was actually 3-4 cm, not 8 cm as claimed by the state's experts, and thus the fracture could have been caused just as Mr. Stevens described, by an accidental fall down the stairs. Had the jury heard any of that evidence, it would have acquitted Mr. Stevens. This Court should give a jury an opportunity to hear all that evidence.

III. ARGUMENT IN REPLY

A. *The Ineffective Assistance of Appellate Counsel Claim is Properly Presented to this Court and is Meritorious*

1. The issue has been properly presented to this Court

The state first argues that Mr. Stevens did not articulate or apply "the relevant legal standards." State's Brief, pg. 5. However, that is plainly not the case. Mr. Stevens cites the controlling United States Supreme Court case, *Strickland v. Washington*, 466 U.S. 688 (1984), numerous times, starting on page 3 of the Opening Brief. In his statement of issues, he asked

whether "the *Strickland* claim that appellate counsel was ineffective for failing to raise the judge disqualification issue on appeal" presented a genuine issue of material fact requiring an evidentiary hearing. Opening Brief, pg. 26. He noted that appellate counsel failed to raise the issue on appeal. Opening Brief, pg. 29. He argued why it was a meritorious issue and argued that Mr. Stevens was prejudiced by the failure of appellate counsel to raise the claim because he would have prevailed on appeal. Opening Brief, pg. 30-34. He concluded, "in light of the above, it was deficient performance on the part of appellate counsel to fail to raise the issue and that failure prejudiced Mr. Stevens." Opening Brief, pg. 34. Thus, the state's assertion that Mr. Stevens did not cite the applicable law, *Strickland*, *supra*, and then argue to that standard, *i.e.*, that appellate counsel's performance was deficient and Mr. Stevens was prejudiced, is without merit.

2. The "law of the case" doctrine does not apply here

Next, the state argues that the Court's decision could not have been raised on appeal because it "had become law of the case." State's Brief, pg. 6. However, the cases it cites for that proposition disprove its position. This Court has stated that:

> The doctrine of 'law of the case' is well established in Idaho and provides that 'upon an appeal, the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal....'

Swanson v. Swanson, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000), citing *Suitts v. First Sec. Bank of Idaho*, 110 Idaho 15, 21, 713 P.2d 1374, 1380 (1985) (quoting *Fiscus v. Beartooth Elec. Coop., Inc.*, 180 Mont. 434, 591 P.2d 196, 197 (1979)). Thus, the law of the case doctrine does not apply here because the doctrine only applies to rulings "upon an appeal," and not to an order

issued by this Court during new trial proceedings in the district court. And, in fact, none of the cases string-cited by the state address a ruling made by this Court in a matter which was still pending before the district court. *Stuart v. State,* 136 Idaho 490,495, 36 P.2d 1278, 1283 (2001) (quoting "upon appeal" language from *Swanson* approvingly); *Spur Products Corp. v. Stoel Rives LLP*, 143 Idaho 812, 816, 153 P.3d 1158, 1162 (2007) (same); *accord Dachlet v. State*, 136 Idaho 752, 759, 40 P.3d 110, 117 (2002) (quoting same language but attributing *Suitts v. First Sec. Bank*); *see Taylor v. Maile*, 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009) (quoting *Suitts*, but omitting the "upon an appeal" phrase from quotation). All of the cases relied upon by the state are subsequent appeals after a remand by this Court for further proceedings and on that basis easily distinguishable from this case.

In addition, *Swanson* says that the law of the case doctrine applies when this Court is "deciding a case," and the objection to this Court assigning Justice Eismann to preside over the new trial proceedings was not "a case" for purposes of law of the case doctrine. But, even if the objection were a case, this Court in denying the objection did not state "in its opinion a principle or rule of law," as required by *Swanson.* It did not issue an opinion, only an order, and that order simply denied the objection without stating a principle or rule of law. Moreover, as previously argued, it is manifest that the Court denied the objection on a procedural basis. Opening Brief, pg. 31 (Noting that the objection was neither an appeal nor a proper original action before the Court). Thus, the Court denied the objection without comment, almost certainly on a procedural ground, and there is no principle or rule of law from that order which could have been applied during the appeal of the criminal case. Consequently, the law of the case doctrine would not have applied and appellate counsel could have raised the issue on appeal.

3. The state's characterization of the issue raised is a straw man

The state next argues against an argument Mr. Stevens does not make, *i.e.*, that "appellate counsel should have presented [the claim] that Justice Eismann, acting as a district court judge . . . erred by not concluding that the Idaho Supreme Court's denial of Stevens' petition . . . was rendered without jurisdiction, and then further erred by not concluding the Idaho Supreme Court erred by not concluding the Idaho Supreme Court erred in its initial appointment." State's Brief pg. 7.

Mr. Stevens is unsure whether the state is sincere in its attempt to summarize his argument and is simply mistaken on whether the quote above is an attempt to make a point by the misuse of sarcasm. In either case, it is clear that the state is confused both about the facts of the case and the nature of Mr. Stevens's argument. Justice Eismann never denied Mr. Stevens's petition. Judge Williamson presided over the matters in this case. Justice Eismann did deny a Motion to Disqualify himself during the new trial proceedings, CR 1148, and a motion to reconsider that ruling. CR 1182. Judge Williamson, however, dismissed the ineffective assistance of appellate counsel claim in this case saying that this Court (with Justice Eismann presumably not participating in the "4-0 decision") had "already decided" the issue when it denied the Objection to Justice Eismann's appointment filed in this Court. CR 1182 ("4-0"); 1806 ("already decided"). But Judge Williamson erred because, as explained above, the law of the case doctrine did not prevent this issue from being raised on direct appeal. This Court's Order denying Mr. Stevens's objection was not issued "upon appeal," nor was the Court deciding a "case" when it denied the Objection nor did it set out a "principle or rule of law" in its Order. While Justice Eismann, during the new trial proceedings, may have been bound by this Court's

order appointing him, this Court was not bound by its own order. Consequently, the issue could and should have been raised on appeal.

4. The state offers no defense to the merits of the claim

Finally, the state offers no cogent explanation of why a sitting Supreme Court Justice was constitutionally eligible to preside over the new trial motion. While the state argues that Article V, § 2, creates "a unified and integrated judicial system for administration and supervision by the Supreme Court," it does not acknowledge that the Court's supervisory power has constitutional limits. The Court's supervisory authority over the appointment of district judges for temporary service is constrained by Article V, § 12 which limits the class of persons who may be appointed for such duty to a "judge of any district court, or any retired justice of the Supreme Court, or any retired district judge." Justice Eismann did not fit into any of the three permitted classes and should never have presided over the new trial motion.

Crooks v. Maynard, 112 Idaho 312, 315-16, 732 P.2d 281, 284-85 (1987), cited by the state, is not apposite. It held that a district judge has the administrative authority to refuse to accept the assignment of a deputy clerk to court-related functions while, at the same time, acknowledging that the County Clerk had the authority to hire the deputy clerk. It simply does not address the question presented here. Nor does the state's citation to I.C. § 1-613 shed any light on the matter. That statute provides that "[w]henever the administrative director's report indicates that there is need for judicial assistance in any court, the Supreme Court, shall assign to that court *any judge* for a fixed period or for specific purposes." (Emphasis added.) Justice Eismann was not a judge or even a retired judge at the time of his assignment to preside in the district court and, under its plain language, I.C. § 1-613 has no application here. Even if the

statute were ambiguous, it would need to be read strictly so that it would not conflict with limitation in Article 1 § 12. "[A]ny doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional. *State v. Delling*, 152 Idaho 122, 125, 267 P.3d 709, 712 (2011), *reh'g denied* (2012), *cert. denied*, 133 S. Ct. 504 (2012), quoting *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990).

Finally, no one who has considered the question here, Justice Eismann, Judge Williamson, this Court, the Ada County Prosecuting Attorney Office or the Attorney General's Office, has explained why Justice Eismann's appointment did not violate Article V, § 12. Absent any argument about why Mr. Stevens was wrong in this regard, appellate counsel could have and should have raised this issue on appeal. This issue was stronger than the following issues raised on appeal: 1) that an expert's testimony that Casey's injuries could not have resulted from a fall was not relevant; 2) that the animated video of objects falling down stairs was not admissible for illustrative purposes; 3) that evidence which was available at the time of trial that an expert testified falsely at trial about his affiliation with Rutgers University constituted newly discovered evidence; 4) that the trial court violated the Fifth Amendment and abused its discretion by considering Mr. Steven's failure to admit guilt at sentencing; and 5) the trial court abused its discretion in imposing sentence. *See State v. Stevens*, 146 Idaho 139, 191 P.3d 217 (2008). Thus, the presumption of effective assistance of appellate counsel has been overcome. *See Smith v. Robbins*, 528 U.S. 259, 288, 120 S. Ct. 746, 765, 145 L. Ed. 2d 756 (2000) *citing Gray v. Greer*, 800 F.2d 644, 646 (C.A.7 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome").

If appellate counsel had raised this claim, in addition to or in place of the weaker claims actually raised, this Court would have vacated the order denying the new trial motion and remanded. Thus it was deficient performance for appellate counsel to not raise the issue, Mr. Stevens was prejudiced thereby and his right to effective assistance of counsel on appeal was violated. *Strickland, supra.* At the least, he has presented a *prima facie* case and should have been granted on evidentiary hearing on this claim.

B. *There is Not Substantial Evidence in the Record to Support the Court's Determination that the Eyes Were Taken Pre-Embalming*

1. The eyes were removed post-embalming

The state argues that the district court's factual findings demonstrate the prosecution team did not possess evidence that Casey's eyes had been removed post-autopsy. State's Brief, pg. 12. It points to the following findings in support of its contention. First, it claims that the court found that Dr. Slaughter "was the 'only person' who could have removed the eyes[.]" *id.* However, the state misquotes the district court. The court's finding was: "Dr. Slaughter is the only person who has ever claimed to have removed or even seen Casey's eyes being removed." CR 2368. While that is true, it does not prove Dr. Slaughter took the eyes at the autopsy. And since Mr. Reinke, the embalmer, saw the eyes *in situ*, after the autopsy, it must be that Dr. Slaughter took the eyes at the mortuary after the embalming but before the transfer to St. Luke's for the long bone scan. Other than Dr. Slaughter's uncorroborated statement that he consulted with two forensic pathologists prior to the autopsy about removing the eyes, there is no evidence, whatsoever, that he took the eyes at that time. Tellingly, there is no notation of the eyes being removed in the autopsy report. Had Dr. Slaughter actually consulted the specialists prior to the

autopsy, as claimed, and then actually removed eyes at the autopsy, their removal certainly would have been noted in the autopsy report. Additionally, there are no autopsy photos of Casey with his eyes removed. None of the witnesses at the autopsy (Sgt. Trakel, Detective Jim Miller and Deputy Coroner Dave Sherner), recall the eyes being removed. Dr. Slaughter also does not recall when he removed the eyes, but only assumed it was at the autopsy. But even then his recollection of the circumstances of the eye removal are such that it could not have occurred at the autopsy because he recalls only one other person being present during the removal, while there were three others present during the autopsy. Thus, the district court's finding is not supported by substantial evidence.

2. A state agent removed the eyes post-embalming

Next the state points to the court's finding that "no agent of the state had access to Casey's body after it was delivered to the funeral home . . . except a 15 -20 minute window when a long bone scan was conducted[.]" State's Brief, pg. 12-13. The evidence shows, however, that Casey's body was in a prep room at the funeral home from the completion of the embalming at about 2:30 p.m on December 29 until Paul Kerr transported the body back to Ada County for the long bone survey around 1:30-3:00 p.m. on December 31. Thus, there was a 48 hour period where the eyes could have been removed by Dr. Slaughter, who stated during his testimony at the new trial proceedings that he did not recall where he removed the eyes.

As it is the state's position that Dr. Slaughter removed the eyes, and the evidence shows the eyes were removed post-embalming, Mr. Stevens proved that a member of the prosecution team, Dr. Slaughter, an agent of the coroner's office, was aware of the post-embalming removal. Dr. Slaughter also testified that it was the coroner who instructed him to remove the eyes. Thus,

the coroner, Erwin Sonnenberg, knew of the post-embalming removal too. Mr. Sonnenburg told Detective Joe Miller at 5:30 p.m. on December 30 that "Casey's eyes have been taken." Miller Report (9/4/2003), pg. 5 (attached to Petitioner's Exhibit U.) Mr. Sonnenberg told Detective Joe Miller that the "eyes had been taken, and the Coroner would be checking on having a long bone x-ray done[.]" Miller Report (2/21/1997), pg. 13 (attached to Petitioner's Exhibit Y.) In other words, the eyes were removed after the autopsy on either the 29th or 30th, prior to the long bone survey on December 31.

The state argues that the district court weighed conflicting evidence about the removal of the eyes and that this Court should not disturb the district court's findings of fact on appeal. But the evidence is not conflicting. None of the state's witnesses could testify that Casey's eyes were removed at the autopsy, not Dr. Slaughter, who didn't recall where he removed the eyes, not Detective Jim Miller who could not say that he saw the eyes removed, and not Sgt. Trakel or Dave Sherner. While Mr. Sonnenberg said that he believed he was at the autopsy and that he believed the eyes were removed then, he did not have a specific recollection of the removal. (Further, no one recalls him being present, nor is his presence noted in any document. In fact, Mr. Sherner's notes taken during the autopsy only lists him, Sgt. Trakel, Detective Miller and Dr. Slaughter as being present. State's Exhibit 204 (Deposition of Erwin Sonnenberg, exhibit CC) There are no contemporaneous notes of the eyes being removed at the autopsy and none of the autopsy photographs show that the eyes were removed. Thus, no one can dispute Mr. Reinke's testimony that he saw Casey's brown eyes when he prepared Casey for embalming and no

conflict in the evidence exists.[1]

3. The personal attack by the state is fallacious

Next, the state calls Mr. Stevens "reckless at best" for arguing that the evidence shows that members of the prosecuting attorney's office also knew of the late removal of the eyes. State's Brief, pg. 16. That line of "argument," however, is simply an *ad homium* attack on counsel and a logical fallacy in that it does not actually address the argument made. Moreover, there is circumstantial evidence that the prosecutors knew as set forth on pages 49-51 of the Opening Brief.[2] Finally, as previously argued, it does not matter if one of the prosecuting attorneys knew because the evidence shows that Dr. Slaughter, Mr. Sonnenberg and Detective Joe Miller knew.

4. Members of the prosecution team knew of the post-embalming removal

Since the evidence shows post-embalming removal, and the state concedes the removal was done by Dr. Slaughter, and Dr. Slaughter testified that he removed the eyes at the direction of the coroner, and Mr. Sonnenberg told Detective Joe Miller on December 30th that the eyes had

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[1] The state's suggestion, made in a footnote, that the prosecution team might not have known that the removal was post-embalming, as opposed to post-autopsy, is not persuasive as it requires concluding that Dr. Slaughter, a board certified pathologist, would not recognize that Casey's body had been embalmed when he removed the eyes at the funeral home, an impossible scenario. (Although no more so than its far-fetched position that a trained mortician would not know what an eye looks like.) More to the point, evidence of any type of post-autopsy removal of the eyes would be *Brady* evidence subject to mandatory disclosure.

[2] As was recently noted, "A healthy skepticism of authority, while generally advisable, is an absolute necessity for a lawyer representing a client charged with capital murder. After all, the custodians of authority in our democracy are ordinary people with imperfect skills and human motivations. The duty of the defense lawyer 'is to make the adversarial testing process work in the particular case,' *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052—an obligation that cannot be shirked because of the lawyer's unquestioning confidence in the prosecution." *Elmore v. Ozmint*, 661 F.3d 783, 859 (4th Cir. 2011), *as amended* (Dec. 12, 2012).

been taken, Mr. Stevens proved that at least one member of the prosecution team was aware of the late removal.[3] This conversation between Mr. Sonnenberg and Detective Joe Miller explains why the detective, in 2003, reported that "he remembers Casey's eyes being collected after the autopsy. He thought there had been at least one trip made to Dakan's Funeral Chapel by the coroner's office to collect Casey's eyes and the tissue sample." Exhibit U, attachment pg. 2. Joe Miller's 2003 recollection is very likely based on Mr. Sonnenberg telling him Casey's eyes had been taken, after Mr. Sonnenberg learned from Dr. Slaughter that the eyes had been retrieved from the funeral home.

As the fact of the post-autopsy removal of the eyes was known to members of the prosecution team and that fact was never disclosed to Mr. Stevens prior to trial, and as the state does not dispute the materiality of the evidence on appeal, a *Brady* violation has been demonstrated. (See Opening Brief, pg. 34-59 for discussion of why evidence was material.) This Court should reverse the district court and remand for a new trial.

C. *Trial Counsel's Failure to Discover and Present Evidence of the Post-Embalming Removal of the Eyes was Deficient Performance*

1. The Court decided the due diligence issue on appeal

The Court wrote in the direct appeal that

> The district court denied Stevens's motion. It determined that this evidence was not newly-discovered evidence. It found that Stevens was aware of the issue earlier and there was "no showing that the embalming report could not have been obtained prior to trial with the exercise of due diligence." Additionally, the court

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[3] The state suggests in another footnote that Mr. Sonnenberg's December 30th reference to the taking of the eyes could mean that they had were taken from the coroner so that Mark Pressman could photograph them. However, Dr. Gregory Kent testified at the criminal trial that he and Dr. Pressman took those photographs on December 27, at St. Luke's intensive care unit, when Casey was still alive. Petitioner's Exhibit C, pg. 747, ln 9 - pg. 748, ln. 21.

concluded that the expert witness affidavits submitted with Stevens's motion all contained opinions based on a review of evidence which was available prior to trial, that this testimony could have been discovered prior to trial, and that this testimony was simply a different interpretation of existing evidence.

Once again, the district court did not abuse its discretion. *Substantial and competent evidence in the record supports a conclusion that the primary evidence that Casey's eyes were removed after embalming—the Mortuary Embalming Report—was available before trial.* It also supports a conclusion that the affidavits Stevens presented did not contain new evidence, but only new interpretations of existing evidence. The record also supports that Stevens was aware the State would use expert witness testimony about injuries to Casey's eyes to support its theory that Stevens killed Casey during a battery. Having determined the district court's findings are not clearly erroneous, we turn to the issue of whether it correctly applied the law to the facts found.

In order to be newly discovered evidence, the evidence itself, not just importance or materiality of that evidence, must be unknown and unavailable prior to trial. *State v. Weise*, 75 Idaho 404, 410, 273 P.2d 97, 100–01 (1954). *The fact that the defense did not inquire about the report until well after the trial does not make this report newly discovered.* Likewise, that Stevens failed to present his own experts' opinions at trial does not make the evidence on which they rely newly discovered. At most, Stevens has demonstrated that he did not recognize the importance or materiality of the Mortuary Embalming Report. As such, he has not presented any newly discovered evidence within the meaning of I.C. § 19–2406(7) and is not entitled to a new trial based on newly discovered evidence.

Based on the evidence presented, the district court correctly applied the law. It recognized that a defendant wishing to gain a new trial based on newly discovered evidence must show that the evidence meets all four of the requirements set out in Idaho law. It then properly concluded that Stevens had failed to show the first requirement—the evidence was newly discovered. While the district court also examined the due diligence factor, we need not analyze that or the other two factors as all four factors must be present in order to grant a defendant a new trial. See [*State v.*] *Drapeau,* 97 Idaho [685,] 691, 551 P.2d [972,] 978 [1976]. We hold, therefore, that the district court did not abuse its discretion when denying Stevens's motion for a new trial based on evidence regarding the removal of and injuries to Casey's eyes.

State v. Stevens, 146 Idaho 139, 146, 191 P.3d 217, 224 (2008) (emphasis added, footnote omitted).

Here, the evidence, *i.e.*, that Mr. Reinke observed the eyes *in situ* after the autopsy and memorialized his observations in the Mortuary Embalming Report, was unknown to the defense at the time of trial. However, Justice Eismann only found that Detective Jim Miller's 2003 report was not newly-discovered. Justice Eismann wrote,

> Obviously, since Mr. Elam [the defense investigator] raised the issue [in 2003] to Jan Bennetts [the deputy prosecutor] that Casey's eyes had been removed post embalming and had already spoken with the funeral director, Detective Miller's supplemental report [which was made in response to Mr. Elam's inquiry] was not newly-discovered evidence on the issue. There is no showing that the embalming report could not have been obtained prior to trial with the exercise of due diligence.

Petitioner's Exhibit E-6, pg. 692. There was no finding that the evidence itself (as opposed to the 2003 report about it) was not new evidence. Justice Eismann thus found that the Mortuary Emablming Report, while unknown to the defense could have been found by due diligence. As Justice Horton observed, "The trial court clearly decided the motion for new trial, as it related to Casey's eyes, on the fourth element of the *Drapeau* test, *i.e.*, 'that failure to learn of the evidence was due in no part to lack of diligence on the part of the defendant.'" *State v. Stevens*, 146 Idaho at 152, 191 P.3d at 230 (Horton, J., specially concurring).[4] Thus, the question of whether the Mortuary Embalming Report could have been found prior to trial in the exercise of due diligence was determined by Justice Eismann and this Court found that substantial evidence supported that conclusion. *Stevens*, 146 Idaho at 146, 191 P.3d at 224 ("Substantial and competent evidence in the record supports a conclusion that the primary evidence that Casey's eyes were removed after embalming—the Mortuary Embalming Report—was available before trial."). Thus that issue

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[4] This is why Justice Trout, in her dissent, also focuses on the fourth *Drapeau* factor. *Stevens*, 146 Idaho at 152, 191 P.3d at 230 (Trout, J., dissenting).

was actually decided in the direct appeal.

2. The finding of a lack of due diligence is tantamount to a finding of deficient performance

In addition, that issue is the same as the question presented here: Was trial counsels' performance deficient during the investigation of the case, thus failing to find the Mortuary Embalming Report? If, as had been found, trial counsel failed to use due diligence they *perforce* did not conduct an adequate investigation. Due diligence is the constitutional minimum in this regard. As the Court stated in *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 690-691; *accord Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003).

Here, it would not have been reasonable to forego investigation of the condition of the eyes, as that was an important and central fact in the state's case. As noted by Justice Eismann, Mr. Stevens "was obviously aware of the issue," prior to the discovery of the Mortuary Embalming Report. Petitioner's Exhibit E-5, pg. 692. Justice Eismann found that there was reason to conduct an investigation into the condition of the eyes because the evidence of the macular folds (which were not seen in the photographs taken by Dr. Kent and Dr. Pressman, but which were seen later by Dr. Crawford) was an important issue at trial. *Id.* And, had that investigation been conducted, it would have had the same results of Detective Jim Miller's 2003 investigation, which uncovered the Mortuary Embalming Report and related documents.

Further, the fact that the autopsy report does not mention the removal of the eyes should have alerted counsel that further investigation was needed. Likewise, counsel should have been alerted after reviewing the autopsy photographs, none of which show Casey with his eyes

removed. Finally, counsel should have been alerted when they reviewed the transcripts of the preliminary hearing and first trial in the case because Dr. Slaughter was never asked whether he removed the eyes at the autopsy. In fact, the preliminary hearing transcript strongly suggests that the eyes were removed post-autopsy: "Q. And Doctor, *after you completed the autopsy* – were there documented retinal hemorrhages in Casey? A. Yes. *I retrieved the eyes* and sent them to the University of California at San Francisco. . . ." Exhibit A, p. 96, ln. 9-14 (emphasis added). In light of the above, it was deficient performance to fail to investigate what happened to the eyes after the photographs were taken by Drs. Kent and Pressman on December 27, 1996, when there was no evidence of macular folds, and the time when Dr. Crawford examined them on April 7, 1997.

Finally, the state should be judicially estopped from arguing trial counsel's investigation was constitutionally adequate here when it argued in the criminal case that the Mortuary Embalming Report could have been found with due diligence. The state argues that judicial estoppel cannot apply because Mr. Stevens has not proved what the state argued during the new trial proceedings, but that argument is too glib because the state well-knows what it argued during the appeal and is being less than entirely forthcoming in not admitting it took the position Mr. Stevens says it did. To quote from the Brief of Respondent in the criminal case: "Because the evidence ultimately used by both the detective and the court to conclude that the eyes had been taken after embalming was the Mortuary Embalming Report, which was in existence well before trial, Stevens failed to show that this allegedly newly discovered evidence could not have been discovered by due diligence." *Id*, pg. 15-16.[5] The state goes on to argue that there was

[5] A motion to take judicial notice of this document will be filed along with this Brief.

were present when Casey was an issue specifically addressed at trial[.]" *Id.* Since, due diligence is the Sixth Amendment standard for an adequate investigation, the state should not be able to argue here that the defense investigation was adequate when it argued in the criminal case that trial counsel did not exercise due diligence.

3. Mr. Stevens was prejudiced

As the state does not dispute that the evidence of the post-embalming removal of the eyes was prejudicial under *Strickland*, Mr. Stevens will rely upon his previous argument that it was. Opening Brief, pg. 34-59, 66-68.

D. *Petitioner was Denied the Effective Assistance of Counsel at Trial in Violation of the Sixth Amendment Right to Effective Assistance of Counsel Under Strickland v. Washington Due to Counsels' Failure to Discover and Present Evidence Regarding the Effects of Propulsid and Zithromax*

1. The investigation was inadequate

The state argues that trial counsel's telephone "consultation with an attorney *and then* two physicians . . . constituted adequate investigation by counsel." State's Brief, pg. 27-28 (emphasis original). What the evidence showed, however, was that trial counsel did not do the investigation suggested by the attorney and if he had done so he would have been armed with sufficient information to make later consultations with appropriate physicians meaningful.

"[T]he Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options." *Strickland*, 466 U.S. at 680. The starting point of evaluating counsel's conduct is the AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION. *Aragon v. State*, 114 Idaho 758, 761, 760

P.2d 1174, 1177 (1988). Section 4-4.1 of the Standards states: "It is the duty of [defense counsel] to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *Id; see also State v. Charboneau*, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989), *overruled on other grounds by State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991). Trial counsel here did not comply with the ABA Standard because they failed to make even rudimentary inquiries on the issue they were advised to investigate by a more experienced attorney.

When defense counsel, Mr. DeFranco, spoke to attorney Annabelle Hall on October 21, 1998, Ms. Hall informed him that Propulcid could cause heart arrhythmia and that "prescribing propulcid for an infant 'borders on malpractice.'" State's Exhibit 108. She also advised him that Propulsid had almost been taken off the market, and wondered why it was being given to a child. State's Exhibit 109. She advised him to get Casey's pharmacy records. She also advised Mr. DeFranco to ask a pediatrician how long Casey had taken Propulsid and at what dosage. Exhibit 110; TrPCP pg. 890, ln. 18-20.

Mr. DeFranco did not take her advice. Neither of the doctors Mr. DeFranco contacted were pediatricians. Dr. Vincent Di Maio and Dr. John Plunkett are forensic pathologists. TrPCP, pg. 807, ln. 15 - pg. 808, ln. 6. Mr. DeFranco admitted that he did not send any of Casey's pharmaceutical records to either doctor for review. TrPCP pg. 807, ln. 21 - pg. 808, ln. 1. Further, Mr. DeFranco's notes from his conversation with Dr. Di Maio show that the doctor was "not interested" in assisting with the case. State's Exhibit 136. Mr. DeFranco's notes also indicate he did not ask Dr. Di Maio whether the combination of Propulsid/Zithromax could cause

heart arrhythmia, but instead inquired about a link between the drugs and "DIC," a blood coagulation problem.[5] State's Exhibits 113; TrPCP pg. 878, ln. 13 - pg. 879, ln. 2. This concern is repeated in Exhibit 138 where Mr. DeFranco writes "Zitromycin / propulcid cause liver problems." Thus, consultations with the pathologist about Propulsid and Zithromax centered about blood issues, not the heart arrhythmia issue Ms. Hall advised Mr. DeFranco to investigate. Mr. DeFranco explained, "I think that's why we were trying to attack that Zithromax and Propulsid, for an explanation." The prosecutor followed up: "As to whether it caused liver problems?" And Mr. DeFranco answered, "Whether it caused liver problems." TrPCP, pg. 881, ln. 18-22.

Importantly, Mr. DeFranco's notes indicate Ms. Hall suggested he consult with the "1998 - PDR[.]" Exhibit 126. Unfortunately, Mr. DeFranco did not consult the PDR, even though he was very familiar with the reference, it is widely available and a copy was likely somewhere in his office. As he admitted, doing so "would have been a reasonable thing to do at the very least." TrPCP pg. 810, ln. 1-8. If he had looked at the PDR he would have been led to the information which showed that Propulsid combined with Zithromax was a potentially lethal combination and could have lead to Casey's death due to a cardiovascular event. He then would have asked the pathologists, or other doctors, questions about the link between Propulcid/Zithromax and fatal cardiac arrest in children. As Mr. DeFranco said, "If I had an opportunity to argue that the medications in some way caused Casey's death, I would have. . . . I don't feel like I was ever

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[5] DIC is the abbreviation for "Disseminated Intravascular Coagulation" which, according to the National Institutes of Health website, is a blood condition which "can put a person at risk for "serious bleeding, even from a minor injury or without injury." http://www.nlm.nih.gov/medlineplus/ency/article/000573.htm (Last visited 2/10/2013).

able to make a connection that I could argue to the jury legitimately . . . because I couldn't connect the dots." State's Exhibit 202 (DeFranco Deposition), pg. 55, ln. 14 -21. But had he taken the simple steps recommended by Ms. Hall, he would have able to make the connection between Propulsid and Casey's death by cardiac arrest and he would have presented that evidence at trial.

Thus, the choice to not present evidence regarding Propulsid was unreasonable because it was made after an unreasonably incomplete investigation of the link between it and heart arrhythmias. Under *Strickland*, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation[.]" *Id.* at 690–9; accord *Wiggins v. Smith*, 539 U.S. at 533. And since trial counsel failed to take the most elementary steps in investigation, *i.e.*, reviewing the easily available medical reference book, consulting with appropriate experts, asking them the right questions, and sending those experts the medical records needed to give an opinion, the choice to not put on the evidence was unreasonable. *See also Rompilla v. Beard*, 545 U.S. 374, 383 (2005) (failure to investigate material relied upon by prosecution was unreasonable); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (unreasonable failure to conduct thorough investigation).

Finally, the state's reliance upon *Harrington v. Richter*, — U.S. —, 131 S. Ct. 770 (2011), is misplaced. That case came to the Supreme Court after the Ninth Circuit ordered the district court to grant habeas relief. In a federal habeas case, relief may not be granted merely because the federal court disagrees with the state court ruling. In *Richter*, the federal court was required to find that the state court decision was "contrary to" or "an unreasonable application" of "clearly established" Supreme Court precedent. 28 U.S.C. § 2254(d)(1). In *Harrington*, all

the United States Supreme Court found was that the California Supreme Court's application of *Strickland* was not unreasonable under the facts of the case, *i.e.*, that "[i]t was at least arguable that a reasonable attorney could decide to forgo inquiry into the blood evidence in the circumstances here." 131 S.Ct. at 788. This Court, however, does not defer to the district court's application of *Strickland.* Instead, it reviews the district court's conclusions of law *de novo. Mitchell v. State*, 132 Idaho 274, 276-77, 971 P.2d. 727, 729-730 (1998). Moreover, further investigation in *Richter* held the possibility of uncovering evidence which would disprove the defense theory of the case. Thus, the Court stated, "[i]f serological analysis or other forensic evidence demonstrated that the blood came from Johnson alone, Richter's story would be exposed as an invention. An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." *Id*, pg. 789-90. Here, to the contrary, an investigation into the link between Propulsid/Zithromax and fatal cardiac arrest in infants would not have been fruitless, nor could it have uncovered any evidence harmful to Mr. Stevens. *Richter* is thus not apposite to this case.

Rompilla v. Beard, 545 U.S. 374 (2005), is closer to this case. There, the Supreme Court concluded that the state habeas courts reached "an objectively unreasonable conclusion" in ruling "that defense counsel's efforts to find mitigating evidence by other means excused them from looking at the prior conviction file." 545 U.S. at 388–89. Thus, seeking evidence by one means does not necessarily excuse defense counsel from seeking the same information by other means as well. While Mr. Rompilla's lawyers made "a number of efforts" to find mitigating evidence, the Supreme Court found it was deficient performance for trial counsel to not examine a record which was easily accessible to counsel at the courthouse. *Id.*, at 383. Likewise here, once

defense counsel was alerted that the PDR could have important information regarding the link between Propulsid and cardiac arrhythmias, the fact that defense counsel made some efforts in other directions does not substitute for the suggested investigation, especially when the PDR was easily obtained and the conversation with the pathologist concerned a different issue with Propulsid.

The deficient performance prong of *Strickland* was established and the trial court erred in finding otherwise.

2. The state does not dispute the failure to present the evidence was prejudicial

As to the second *Strickland* prong, the state on appeal does not dispute that Mr. Stevens was prejudiced by trial counsel's failure to obtain and present the evidence about Propulsid at trial. Therefore, this Court should reverse the district court and remand for a new trial. (Mr. Stevens relies upon his previous argument in this regard. See Opening Brief, pg. 76-82.)

E. *Petitioner was Denied the Effective Assistance of Counsel at Trial in Violation of the Sixth Amendment Right to Effective Assistance of Counsel Under Strickland v. Washington Due to Counsels' Failure to Discover and Present Evidence of the Size of the Skull Fracture Upon Arrival at St. Alphonsus' RMC and Evidence of Older Injuries*

1. The investigation was inadequate

Under *Strickland*, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691. Thus, "inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions." *Id.* What investigation decisions are reasonable depends critically upon information supplied by the defendant. *Elmore v. Ozmint*, 661 F.3d at 858. Here, Mr.

Stevens told the paramedics when they arrived at his home that Casey had been injured by a fall down the stairs. The main piece of evidence contradicting Mr. Steven's belief was that the skull fracture was too large, in the opinion of the state's experts, including a pediatric radiologist and a clinical professor of physics, to have been caused by a stairs fall. It was therefore important to establish the size of the skull fracture at the time of injury because the smaller the skull fracture, the greater the likelihood that it could have been caused by the stairs fall.

Instead, the defense attempted to rely upon the argument that the stairs fall could generate sufficient force to cause the fracture, a position Dr. Shabani called "hopelessly wrong" at the trial. Exhibit C, pg. 1886, ln.7. It was also a position that the defense knew, from its review of the transcript of the first trial, that all the state's witnesses would reject. Thus, it was not sufficient investigation to essentially concede the size of the skull fracture even though it had found witnesses to disagree with the state witnesses.

Defense counsel also needed to consult with a pediatric radiologist to counter the expected testimony of the state's pediatric radiologist, Dr. Wilber Smith. Ironically, the state disputes this on appeal, as at trial it got Dr. Plunkett, one of the defense witnesses, to admit that a pediatric radiologist would "be the best person to read a baby's CAT scan" and to "share that information with a jury." Plaintiff's Exhibit C, pg. 2008, ln. 22 - pg. 2009, ln. 23. Further, defense counsel's failure to consult with a pediatric radiologist was not based on any strategic consideration. Lead counsel, Mr. Odessey, frankly admitted that he did not consult with a pediatric radiologist because he "didn't appreciate the significance of it at the time." TPCP pg. 380, ln. 2-13. He also admitted that it was "unquestionably" true that Dr. Barnes was better qualified than Dr. Plunkett to review the images in the case. *Id.* Furthermore, the defense

certainly could have presented Dr. Barnes's testimony without being accused of contradiction. It could have argued that the fracture size was much smaller than claimed, but even if it was 8 cm it was still possible for it to have been caused by the stairs fall. Mr. Odessey testified that he would have presented Dr. Barnes's evidence at trial had he been aware of it. TrPCP pg. 383, ln. 20-24. Thus, the failure to present pediatric radiological evidence was a result of inadequate investigation and not a matter of trial strategy.

The cases cited by the state do not support its position here. Again, the state's citation to *Harrington v. Richter, supra,* is not apposite to this case because a consultation with a pediatric radiologist would not have possibly led to inculpatory evidence. As worst, the state's evidence would have been confirmed and trial counsel could have then quickly focused their efforts elsewhere. *State v. Payne*, 146 Idaho 548, 563, 199 P.3d 123, 138 (2008), is distinguishable because there was no evidence that the failure to call an expert on eyewitness identification was due to inadequate preparation by trial counsel. In *State v. Youngblood*, 117 Idaho 160, 165, 786 P.2d 551, 556 (1990), there was no showing that Youngblood's trial counsel failed to have physical evidence independently tested, while here the failure to consult a pediatric radiologist was admitted by trial counsel. In *Murphy v. State*, 143 Idaho 139, 146, 139 P.3d 741, 748 (Ct. App. 2006), there was no reason to consult an independent forensic pathologist prior to trial because the pathology report was favorable to the defense. (It was deficient performance, however, to fail to request a continuance to obtain a consultation when defense counsel learned "on the day of trial . . . Dr. Patterson was going to change his conclusions about [the victim's] cause of death from 'indeterminate' to 'homicide.'" *Id.*, at 146, 139 P.3d at 748.)

Finally, *State v. Porter*, 130 Idaho 772, 793, 948 P.2d 127, 148 (1997), actually supports

Mr. Stevens. In *Porter*,

> The pathologist who performed the autopsy testified that Jones died of multiple blunt trauma to the head. He also testified that his examination of the victim's skull revealed that the mark on her forehead was not a bullet wound but that he could not identify the cause of the mark. Additionally, he noted that there were between three and six areas on the victim's scalp, each approximately the size of a fifty-cent piece, where the hair appeared to have been pulled out in large clumps. The pathologist could not determine how long Jones had been dead. However, he estimated that as many as twenty-four hours had passed between infliction of the injuries that eventually caused the victim's death and her actual death.

State v. Porter, 130 Idaho 772, 780, 948 P.2d 127, 135 (1997). The Court noted that, [w]e are somewhat troubled by the fact that Porter's counsel made no attempt at all to employ a pathologist to review the autopsy and to give an independent opinion, especially since the district court had approved funds for an expert witness in pathology." 130 Idaho at 793, 948 P.2d at 148 (1997). Viewed in context, *Porter* supports Mr. Stevens's argument. The defense in *Porter* was that Dale Cooper, not Mr. Porter, committed the murder, and the evidence presented by the forensic pathology did not contradict that defense. Still, this Court found the failure to call the expert witness "somewhat troubling." *Id.* Here, by contrast, the size of the skull fracture was the single most important fact in the state's case and it went directly toward disproving Mr. Stevens's defense of accidental fall. That counsel did not investigate a fact which was both central to the state's case and highly damaging to the theory of defense takes the failure to call Dr. Barnes to testify beyond "somewhat troubling" to constitutionally deficient performance.

Finally, the state does not respond to Mr. Stevens's argument that it was deficient performance to fail to call Dr. Barnes about the timing of the head injuries. There was no other expert testimony presented by counsel on his topic and the failure to call such a witness was not a matter of trial strategy. Mr. Odessey explained at the evidentiary hearing that the information in

Dr. Barnes's 2001 affidavit would have affected his defense because "as this affidavit very clearly shows . . . that a lot of these injuries in fact could have happened days before. And that of course opens up a great time window for other intervening factors or actors to cause the injury." Tr PCP, pg. 386, ln. 1 - pg. 387, ln. 14.

2. Mr. Stevens was prejudiced by the failure to present the evidence

The state argues that "at best" Dr. Barnes's testimony would have been helpful at trial and asserts, without any analysis of the trial evidence, that no relief need be granted because the result of the trial was still reliable. State's Brief, pg. 37. Mr. Stevens relies on the detailed argument he previously made at pg. 89-95 of his Opening Brief as to why the jury would have acquitted him had it heard Dr. Barnes's testimony. In short, the state cannot now try to minimize the effect of the evidence of the 8 cm skull fracture, a fact that defense counsel admitted during the evidentiary hearing was an important part of the state's case. TrPCP, pg. 157, ln. 22. It was also a fact which the state argued *many* times at trial that proved the skull fracture was caused intentionally and not accidently.[6]

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[6] See Exhibit D (Supplemental Trial Transcript), p. 293, ln. 13-21 ("Ladies and gentlemen, the evidence in this case will show you that . . . this defendant slammed Casey on the bath tub in his home on December 27th of 1996 and he slammed him so hard that Casey Whiteside had an eight-centimeter fracture.") see also p. 309, ln. 9-12 (Dr. Kim "will also tell you that Casey had an eight-centimeter skull fracture"); p. 313, ln. 8-12 ("You will hear from many experts in this case, ladies and gentlemen, and these experts will all tell you that Casey could not have received the fatal injuries that he received from falling down these stairs."); p. 313, ln. 22-23 (Dr. Slaughter "will tell you that Casey had an eight-centimeter skull fracture") p. 315, ln. 10-12 (Dr. Brady will "tell you . . . that it takes a significant amount of force to cause the kind of fracture that Casey had."); p. 317, ln. 7-12 (repeating phrase "eight-centimeter skull fracture" twice in one paragraph); p. 318, ln. 2-8; p. 319, ln. 9-10; p. 320, ln. 5-6 (Drs. Wilber Smith, Bettis, Chadwick and Shaibani will testify that Casey could not have gotten injuries from a fall down the stairs); p. 359, ln. 6-13. ("Again, if you recall my question to – or statement to Dr. Plunkett about Casey had a massive skull fracture in his temple [sic] and he said, well, I wouldn't say massive. *Give me a break.* That was an eight-centimeter skull fracture, three to four inches,

Finally, neither the state nor the district court have addressed the argument that Mr. Stevens was prejudiced at sentencing. Justice Eismann relied upon the erroneous skull fracture evidence in sentencing Mr. Stevens to the maximum possible sentence, fixed life. The Justice concluded that the combination of the thickness of the skull at the point of impact and the size of the skull fracture proved it was an intentional murder, even though Mr. Stevens was convicted of felony-murder. See Exhibit C, pg. 2269, ln. 3 - pg. 2270, ln. 2 (finding that the force of the blow was too great to be accidental because the skull fracture was 8 cm long in the thickest bone in the skull and concluding that the murder was intentional). Had Justice Eismann heard Dr. Barnes's testimony, he would not have imposed fixed life on Mr. Stevens, a 29-year-old, first-time offender and Correctional Officer. Mr. Stevens was prejudiced under *Strickland* both at trial and at sentencing.

F. *Alternatively, the Cumulative Effect of All the Instances of Deficient Performance Prejudiced Petitioner so that He was Denied his Sixth Amendment Right to Effective Assistance of Counsel Under Strickland v. Washington*

The state does not challenge the existence of the cumulative error doctrine, but only argues that two acts of deficient performance have not been shown. State's Brief, pg. 38. That argument should be rejected because multiple instances of deficient performance have been shown, as set forth in the Opening Brief and above. Even if one of the deficiencies was not prejudicial, the sum of all of them far exceed the requirements of *Strickland*. The state's

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and that wasn't three to four inches on my head or your head. That was one-third to one-half of Casey's skull was shattered.") (emphasis added); p. 443, ln. 12-14 ("And Dr. Thibault, counsel's question was, I don't have a clue how Casey got that skull fracture. That was the end of his testimony. I don't have a clue. It didn't help you at all."); *see also* p. 362, ln. 25 - p. 363, ln. 1 ("the massive skull fracture"); p. 363, ln. 15 ("severe skull fracture").

prejudicial, the sum of all of them far exceed the requirements of *Strickland*. The state's evidence in this case was highly circumstantial and vulnerable to challenge had the proper challenges been discovered, presented and argued at trial.

IV. CONCLUSION

As shown above and in the Opening Brief, there is substantial doubt whether Casey died as argued by the state, or as result of cardiac arrest or as the result of an accidental fall. The jury, unfortunately, was deprived of the opportunity to consider important evidence showing Mr. Stevens's innocence. Had the jury heard any of the evidence above, it would have acquitted him. Consequently, Mr. Stevens asks this Court to reverse the denial of the petition, vacate the conviction, and set the matter for a new trial.

Respectfully submitted this 13TH day of February, 2013.

Dennis Benjamin
Attorney for Edward Stevens

CERTIFICATE OF SERVICE

I CERTIFY that on February 13, 2013, I caused two true and correct copies of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Kenneth Jorgensen
Idaho Attorney General
Criminal Law Division
P.O. Box 83720-0010
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Dennis Benjamin