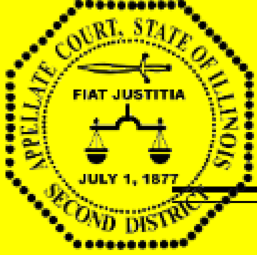

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In the

Appellate Court of Illinois

Second Judicial District

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

MELISSA CALUSINSKI,

Defendant-Appellant.

Appeal from the Circuit Court of the Nineteenth Judicial Circuit,
Lake County, No. 09 CF 252.
The Honorable **Daniel Shanes**, Judge Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT
MELISSA CALUSINSKI

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I. THE TRIAL COURT IMPROPERLY DENIED DEFENDANT'S CLAIM UNDER *BRADY V. MARYLAND* BECAUSE THE X-RAYS THAT FORM THE BASIS OF THE CLAIM WERE WITHHELD FROM THE DEFENSE BEFORE TRIAL

The United States Supreme Court has made it clear that exculpatory evidence need not be evidence that would have produced an acquittal. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Rather, the evidence must be "material" in that had the evidence been disclosed to the defense there is a reasonable probability that the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 681 (1985). "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . ." *Kyles*, 514 U.S. at 434 (citing *Bagley*, 473 U.S. at 682). In determining if a reasonable probability of a different outcome has been demonstrated, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*

THE TRIAL COURT ERRONEOUSLY FOUND THAT THE STATE DISCLOSED THE AT-ISSUE X-RAYS PRIOR TO TRIAL

The State contends that it has found "no case involving a *Brady* claim that did not also involve a failure to disclose." (State's Br. at 4). Based on this premise, the State argues, "Where it is undisputed that an assistant State's Attorney gave the defense 'a compact disk with three x-rays', (C. 1496, 1527), that should be the end of the inquiry." (State's Br. at 4).

The State ignores *the* central issue in the case, which is whether the failure to produce legible x-rays in the uncompressed TIFF format, which existed at the time of disclosure, is a *Brady* violation. (Def. Ex. 9) (R. 5039-44). Defendant agrees that if three *legible* x-rays had been produced in uncompressed TIFF format, there would be no *Brady* violation. However, this is not what happened. Instead, three *illegible* x-rays were produced in compressed JPEG format. This constitutes a clear *Brady* violation.

In essence, the State's argument is that partial disclosure immunizes it from its disclosure obligations under *Brady*, even if the disclosure is incomplete and misleading. This argument is a non-starter. In *Bagley*, the United States Supreme Court held that an incomplete disclosure of information can constitute a *Brady* violation, particularly where the disclosure misleads the defense. Specifically, in *Bagley*, the prosecution provided affidavits from key witnesses stating that they had received no promises of a reward in return for the information and testimony they provided. *Bagley*, 473 U.S. at 670. However, the affidavits made no mention of contracts that existed between the witnesses and the government promising compensation following their testimony. *Id*. at 671. The *Bagley* Court determined that the incomplete affidavits were misleading about the fact that inducements had been offered, and therefore constituted a *Brady* violation. *Id*. at 682-683.

Similarly, in the instant case, the disclosure of illegible x-rays to trial defense counsel was misleading in that those compressed JPEG images failed

to clearly identify the absence of a skull fracture, as the uncompressed TIFF images would have. The absence of a skull fracture was critical exculpatory and/or impeaching evidence for trial defense counsel that would have refuted the State's theory.

Another analogous case is *United States v. Yevakpor*, 419 F.Supp 2d 242 (N.D. N.Y. 2006). In *Yevakpor*, the district court found that the government violated *Brady* when it failed to preserve the entirety of a surveillance video. Instead of tendering the whole video to the defendant, the government cherry-picked and preserved only three sections of the video. In doing so, the government intentionally deleted 87.5% of the video. The court reasoned that the government would have preserved the deleted portions of the video if they were favorable to the government; therefore, the court found that the deleted portions of the video were at least neutral, and at best favorable, to the defendant. *Id*. at 249-252.

In the case at bar, the prosecution tendered three images, purported to be x-rays created on January 15, 2009 at Ben Kingan's autopsy. As did the government in *Yevakpor*, the State withheld the overwhelming majority of the data when it compressed these images, prior to production to trial defense counsel. In *Yevakpor*, the government gave defense counsel 12.5% of the video. In the instant case, the three x-ray images produced to trial defense counsel before trial were compressed to merely 1.01%, 1.61%, and 3.57% of their original sizes, respectively. Put another way, the State withheld 98.99% of the

data from the first x-ray image, 98.49% of the data from the second x-ray image, and 96.43% of the data from the third x-ray image. Defendant submits that the State breached its duty to disclose when it withheld the uncompressed, original TIFF x-ray images and instead tendered inferior and — most importantly — illegible compressed JPEG x-ray images.

In *United States v. Stellato*, 74 M.J. 473, 487 (C.A.A.F. 2015), the prosecution violated *Brady* when it partially disclosed documents stored on a flash drive. The flash drive contained documents that belonged to the alleged victim, including a note about the victim's recantation of certain allegations. *Id.* The defense did not learn that the flash drive did not contain the entire contents of the box until after trial. *Id.* The court found that because the State only disclosed a portion of the documents, it failed to meet its disclosure obligations under *Brady*. *Id.*

In the instant case, the partial disclosure of the x-ray images is analogous to the partial disclosure of the box of documents in *Stellato*. As in *Stellato*, defense trial counsel was not aware that the x-ray images tendered before trial were compressed from a TIFF to a JPEG format. Further, the State represented to trial defense counsel that the x-ray images were unreadable; trial defense counsel bore no burden to further investigate the legibility of the x-ray images after the State represented to him that they were illegible. Additionally, the compressed, inferior, and unreadable JPEG x-rays tendered by the State before trial are similar to the incomplete flash drive of documents

in *Stellato*. In both *Stellato* and the instant case, the government represented to the defense that it was tendering complete files. In both instances, the government disclosed only a portion of the relevant file.

The State cites with approval the trial court's reliance on the testimony of Eric Stauffacher ("Stauffacher"), the Televere Systems employee. However, the State fails to address the following admissions made during Stauffacher's testimony: a) he admitted he lacked the qualifications to render an opinion on the quality of the images or the differences in the quality of the images; b) when asked if a JPEG file format would maintain image quality, he conceded, "[m]y opinion doesn't really matter" and "you would really have to ask . . . an expert on that" (R. 5330-31; 5348); and, c) he admitted that files were automatically saved on the Coroner's computer in a TIFF format. (R. 5306; 5331). Most importantly, the trial court barred Stauffacher from offering an expert opinion as to the quality of the images, explaining that "if you are asking any kind of opinion, it has to be within the scope of what the [trial court] finds the witness is able to discuss." (R. 5357).

The State's reliance on the trial court's conclusion that "Stauffacher conclusively refute[d] Defendant's claim" because he was able to "adjust the variables and the jpg images to brighten and display more bone detail" fails. (State's Br. at 4) (C. 1525). With all due respect, the trial court failed to grasp Defendant's argument that it is the underlying undisclosed TIFF images that created the *Brady* violation. No matter what adjustments were made to

brighten the JPEG images, the testimony of both the State's expert and Defendant's expert irrefutably establishes that the JPEG images were inferior to the TIFF images. (R. 5331-32; 5346-48; 5401-02).

The State completely ignores and fails to refute the testimony of Defendant's expert Jeffrey Mueller ("Mueller"), who was accepted by the trial court without objection as an expert in software engineering with a subspecialty in imaging. (R. 5398-99) (C. 1509). Mueller offered the following opinions while performing a comparison of the JPEG and TIFF images for the trial court:

1. Mueller performed a comparison of the images produced to trial defense counsel in Def. Ex. 8 and metadata of those images (Def. Ex. 25) with the three TIFF images saved on the Coroner's computer in 2009 and recovered in 2015 (Coroner's Images 48, 49, 50). Mueller, in referring to the Coroner's computer images 48, 49, and 50, offered his expert opinion that there was "absolutely no evidence of [any file being saved in the JPEG format] on the entire hard drive." (R. 5409). Therefore, all of the files were saved in the TIFF format in 2009, including Coroner's Images 48, 49, and 50. (R.5406-08).

2. The 2008 TigerView software in operation in 2011 allowed the user to choose to export the images in either TIFF or JPEG format. (R. 5415-18).
3. The three images the State produced to trial defense counsel were in JPEG format, meaning they had been compressed "significantly." (R. 5401-02). "BenKingan1," which is an outline of Ben's skull, is a JPEG image compressed to 267 kilobytes. (R. 5403) (Def. Ex. 25). "BenKingan2," which is an image of Ben's upper torso and skull, is a JPEG image compressed to 411 kilobytes. (R. 5403) (Def. Ex. 25). "BenKingan3" is an outline of Ben's lower torso. (R. 5400).
4. However, Mueller, using the 2008 Tigerview software, was not able to improve the JPEG image BenKingan1, which is the same image as the Coroner's Image 50. (R. 5418-20). Mueller explained that he could not improve the quality of the images actually disclosed to trial defense counsel for a number of reasons, "most specifically [because the file] was exported as a very very low quality JPEG as well as being blanked out like that." (R. 5419). Mueller testified that, in addition to being exported as a JPEG, another modification

was made to the image prior to being exported. (R. 5421-22)

5. Mueller testified that those three Dr. Teas x-rays were in the JPEG format. (R. 5450) (Def. Group Ex. 31.) Like the images trial defense counsel received, the file size had been reduced on those images. (R. 5451). In fact, the BenKingan2 image that Dr. Teas reviewed actually had a lower file size (200 kilobytes) than the BenKingan2 image trial defense counsel received (411 kilobytes). (R. 5442-43).
6. All three of the TIFF images had been on the Coroner's computer since 2009, and none of them were produced to trial defense counsel before Defendant's trial. (Def. Ex. Group 29) (R. 5409-10). Coroner's Image 48 is an "uncompressed and highest quality" TIFF image of the lower torso and was acquired on January 15, 2009, and was a file with 17.8 megabytes (R. 5406-407, 5491-92). Coroner's Image 49 is an "uncompressed and highest quality" TIFF image of Ben's skull also acquired on January 15, 2009, and was a file size of 16.6 megabytes. (R. 5407, 5491). Coroner's Image 50 is an "uncompressed and highest quality" TIFF image of Ben's head that was created

on January 15, 2009, and had a file size of 17.2 megabytes. (R. 5407-408).

7. Using the 2008 TigerView software which was available in 2011, Mueller was able to improve the quality of Coroner's TIFF Image 50 of Ben's skull, which was saved on the Coroner's computer on January 15, 2009. (R. 5414-15).
8. Mueller demonstrated to the trial court how the very poor quality of the disclosed image was created prior to being exported as a JPEG. Mueller was able to modify Coroner's Image 50, the 2009 TIFF image with 17.2 uncompressed megabytes (R. 5423) to the DeLuca BenKingan1 Image with 267 kilobytes, by adjusting the window width to three, so that there were "three shades of grey, so we have basically pure grey or pure white." (R. 5426). Mueller then demonstrated that he could choose the JPEG option and could export the file as a JPEG. (R. 5425). In order for Mueller to obtain the image Mr. DeLuca received with the same file size of 267 kilobytes, Mueller had to "reduce the quality down as low as [he could]" and export in JPEG. (R. 5425).
9. Mueller was able to adjust the brightness and contrast of the DeLuca JPEG image Ben Kingan 2, but he was not able

to alter the underlying metadata of that image. (R. 5442-43). In order for Mueller to recreate the image provided to trial defense counsel, Mueller exported the image in JPEG "at very low quality JPEG ... then [one] had to use photoshop to darken the image." (R. 5443).

10. Mueller concluded that "to a reasonable degree of software engineering certainty and imaging certainty," in addition to being exported in a JPEG format, modifications were made to the BenKingan2 image (Image 49) on another computer. According to Mueller, someone opened Photoshop to recreate the darkness level and reduce the quality by exporting it into a JPEG format again and sliding down the quality to 411 kilobytes. (R. 5445). Those deliberate adjustments were the only way Mueller could recreate that image from the 2009 original TIFF file. (R. 5445). With those deliberate adjustments, Mueller was able to reduce the file size to match the size of the BenKingan2 image. (R. 5445-46).

11. Mueller explained that if one could have accessed the Coroner's computer in 2011 and adjusted the TIFF image saved in 2009, the image could have been made more clear. (R. 5447). Mueller was able to make those adjustments in

> less than 10 seconds. (R. 5447). Even if the image was "totally darkened in TIFF format," as long as it was in TIFF format it would be "extremely simple" to clarify the image "very quickly." (R. 5448). However, Mueller explained, he could spend his "entire life" trying to make the darkened JPEG image, given to trial defense counsel, of the same quality as the TIFF image and he could not do so. (R. 5447-48).

Mueller offered the undisputed opinion that the Ben Kingan skull images had been deliberately manipulated based upon his examination of the 718 other images on the Coroner's computer, which did not reveal a single image that had been reduced as severely as the Ben Kingan skull image 50. (R. 5427, 5431) (Def. Ex. 45). The Ben Kingan skull image 50 had been modified more than any of the other 718 images on the Coroner's computer by reducing the window width to three. (R. 5427). While the Ben Kingan image had a window width of three, "the window width of the other 718 file images [was] in the thousand[s]." (R. 5428). Mueller testified that Ben Kingan skull image 50 had a potential window width maximum of 65,532. (R. 5434-35) Mueller testified that the window width maximum for image 50 was reduced to "the minimum that the [graphical user interface] allowed, which was three, [and] that result[ed] in the blank outline." (R. 5435).

The only issue raised by the State is the trial court's statement that Mueller "inexplicably and inexcusably trampled on the evidence by exposing the coroner's computer to potential contamination from the internet, accessing the county network, and ultimately saving another modified x-ray image in the Kingan folder, all after the computer itself had been admitted into evidence during the hearing." (C. 1527).

Here, the trial court erroneously referred to the Coroner's computer being subjected to "potential contamination" during Mueller's examination of the Coroner's computer. There is no support in the record for the trial court's conclusions. The State's witness Dean Kharasch ("Kharasch") never testified that the Coroner's computer was "contaminated" by Mueller. Kharasch never described any damage that resulted from Mueller accessing the internet. Kharasch testified that the proper procedure for Mueller to follow was to copy the Coroner's files and that he observed Mueller copying those files. (R. 5557). Kharasch's testimony was severely undermined on cross-examination when he testified to the following:

1. His highest level of education was a bachelor's degree with a major in theater and music, so he did not have a degree in software engineering and did not know what an "imaging expert" was. (R. 5563-64).
2. He admitted that he did not know what the issues were in the Calusinski case (R. 5565);

3. He admitted that there were originally three images saved on the Coroner's computer in a TIFF format on January 15, 2009, and those images were still present on the computer (R. 5568);
4. He admitted that there were five images present *prior* to Mueller's examination, and those additional images were created on "different dates" and that he had taken screen shots of these images on a prior date (R. 5566-68; Exhibit 47);
5. He admitted that between January of 2015 and Mueller's visit, the Ben Kingan images had been accessed numerous times and an additional two images were created prior to Mueller's examination (R. 5570-71);
6. He admitted the Tigerview 2013 program created additional images but could not alter the original image (R. 5569);
7. He admitted that Mueller did not modify any of the images but had simply created an additional sixth image (R. 5573);
8. He admitted that Mueller did not delete, remove, alter, or replace any of the original images (R. 5574-75, 5580);
9. He identified the image that he claimed was newly created as the second image from the right on the top row on People's Exhibit 56 (R. 5577); he admitted that the image was an additional image which did not replace the other images (R. 5577);

10. He could not identify a forensic standard that had been violated by the creation of the sixth image (R. 5584).

The trial court expressed its awareness that there was a difference between altering an original image and making a copy of that image. (R. 5585-86). The trial court stated, in regards to the computer examination of Mueller, "I'm not saying that anybody did anything wrong." (R. 5590). Defense Counsel noted for the record that the Kingan images had been accessed 42 times, and of those 42 times, 5 times were attributed to Mueller's examination. (R. 5590).

Mueller testified that it was his understanding that he had permission to copy files pertaining to the Kingan autopsy from the Coroner's computer. (R. 5438). Further, Mueller testified that "[t]hey consented downloading pertaining to analyzing the Ben Kingan images." (R. 5438). Ostensibly, it was the assembled representatives of the Lake County Coroner and the Lake County State's Attorney's Office who consented to Mueller's copying files from the Coroner's computer. (R. 5564-65).

It is undisputed that, had Mueller altered any images on the Coroner's computer, there would be a record of the alteration. (R. 5460, 5490). There is no such record. (R. 5460, 5490). It is undisputed that Mueller simply copied images from the Coroner's computer without editing, modifying, or otherwise altering any of the images previously saved thereon. The trial court's finding that Mueller "trampled on the evidence" during his computer examination is

without support in the record from either side's experts, and therefore is manifestly erroneous.

THE TRIAL COURT IMPROPERLY FOUND THAT THE DISK IMAGES DID NOT CONSTITUTE MATERIAL EVIDENCE UNDER *BRADY*

Contrary to the trial court's finding, the uncompressed TIFF x-ray images were material because they show that Ben Kingan's skull was not fractured. This information not only undermines the State's theory that Ben Kingan sustained a skull fracture when Defendant allegedly threw him to the floor, but also impeaches the testimony of Dr. Montez, Dr. Choi, and Dr. Greenbaum about the existence of a skull fracture. The trial court relied on the trial testimony as follows:

> Defendant's post-conviction theory is that the June 2015 x-ray images show that Ben's skull was not fractured. At trial, Dr. Choi testified that he observed, with his naked eye, a fracture that went completely through the skull, and identified that fracture to the jury on autopsy photographs. Dr. Greenbaum similarly identified a fracture on the autopsy photographs of both inside and outside the skull, describing it as a through-and-through fracture. Dr. Montez also showed the jury a fracture on autopsy photographs of both inside and outside the skull. Dr. Montez further testified that he physically touched and manipulated a through-and-through fracture with his hands. Even defense expert Dr. Leestma presumed the existence of a fracture in his testimony.
>
> That said, the jury also heard testimony suggesting that a fracture did not exist. Dr. Choi himself admitted he could not see a fracture in the x-ray image. And Dr. Teas could not definitively say whether a fracture existed; confronted with autopsy photographs, she indicated that additional testing (which Dr. Choi did not perform) would be needed to determine whether the described defect was a fracture or a suture. (C. 1529).

The trial court's ruling is manifestly erroneous because the trial court ignored the undisputed testimony of Dr. Zimmerman at the post-conviction hearing "that no fracture could have existed" because he did not see a fracture on the TIFF-formatted x-rays. (C. 1529). The trial court attempted to step into the shoes of an expert who is board certified in radiology, diagnostic radiology, and neuroradiology and is Chief of Pediatric Neuroradiology at the Children's Hospital of Philadelphia. (R. 5114). The trial court stated: "As so many factors can affect whether a fracture would be visible on an x-ray, it does not necessarily follow that it is impossible for an x-ray *not* to show a fracture." (C. 1530). The trial court thus concluded that Dr. Zimmerman's testimony failed to demonstrate that the x-rays "could reasonably be taken to put the whole case in a different light." (C. 1530). Perhaps because the State had no expert witness to refute Dr. Zimmerman, the trial court decided to lend a helping hand and assumed the role of a neuroradiologist advocating for the State. Clearly, the trial court abused its discretion by assuming this role and abandoned its proper role as a neutral and impartial arbiter of fact. *People v. Jackson*, 409 Ill. App. 3d 631, 647 (1st Dist. 2011); s*ee*, *People v. Murray*, 194 Ill. App. 3d 653, 658 (1st Dist. 1990).

Moreover, "[o]ur supreme court has clearly indicated that in Illinois a finder of fact may not simply reject unrebutted testimony." *Sweilem v. Illinois Dept. of Revenue*, 372 Ill. App. 3d 475, 485 (2007) (citing *Bucktown Partners v. Johnson*, 119 Ill. App. 3d 346, 353-55, 75 Ill. Dec. 20, 456 N.E.2d 703 (1983).

Elsewhere, the Illinois Supreme Court has found that although "the credibility of witnesses and the weight to be accorded their testimony are typically jury considerations [citations omitted], a jury cannot arbitrarily or capriciously reject the testimony of an unimpeached witness [citations omitted]." *People ex rel. Brown v. Baker*, 88 Ill. 2d 81, 85, 58 Ill. Dec. 875, 430 N.E.2d 1126 (1981).

Defendant submits that the trial court acted as an advocate for the State when it arbitrarily rejected the unrebutted testimony of Dr. Zimmerman and abused its discretion in so doing. The trial court and the State improperly dismissed the opinions of Dr. Zimmerman, who was a consultant to the American Academy of Pediatrics Subcommittee on Head Injury, about whether the trauma to Ben was accidental or abusive. (R. 5117-18). It is the undisputed testimony of Dr. Zimmerman that establishes the materiality of the skull fracture. Dr. Zimmerman testified as follows:

1. A linear fracture in the occipital parietal area of the skull is associated with an "impact injury" where the occiput is hit against the ground in a forceful manner. (R. 5118). Abusive head traumas cause fractures. (R. 5118). The absence of a fracture would "go against" a diagnosis of abusive head trauma. (R. 5118). The lack of a skull fracture points to a self-inflicted or accidental head trauma. (R. 5118).

2. Dr. Zimmerman reviewed Defendant's videotaped confession prior to the evidentiary hearing. (R. 5119). He explained that Defendant's reenactment on the video is not consistent with a linear skull fracture. (R. 5119-20). The occiput (back) of the head did not hit the ground in the reenactment. (R. 5120). Had Ben been thrown as depicted on the video, Dr. Zimmerman explained, the fracture would have been in the front of the head. (R. 5120).
3. Dr. Zimmerman reviewed People's Ex. 1 and explained that the JPEG image would not allow him to diagnose a skull fracture. (R. 5121). He could make no determination from the poor quality of the JPEG image. (R. 5121-22). Lightening up the image would not aid in interpretation of that poor image. (R. 5123). But upon viewing the TIFF image (Def. Ex. 9), Dr. Zimmerman was able to testify to a reasonable degree of radiological certainty that no fracture of the skull was present. (R. 5123-24).
4. Dr. Zimmerman further explained that subgaleal, subarachnoid, and subdural hemorrhages were not exclusively indicative of abusive head trauma. (R.

5130). Subgaleal, subarachnoid, and subdural injuries are common in accidental falls of children and can occur in self-inflicted head banging. (R. 5130).

5. Dr. Zimmerman had authored medical studies and articles that noted that a linear skull fracture is a significant finding pointing toward abusive head trauma. (R. 5131). He testified unequivocally that it would have been impossible for someone to have examined Ben's skull and touched a fracture because no fracture was present on the TIFF x-rays. (Def. Ex. 9) (R. 5131).

Dr. Zimmerman's testimony at the hearing established both exculpatory and impeachment evidence that would have so eroded the jury's confidence in the State's case that the outcome at trial probably would have been different. *People v. Harris*, 206 Ill. 2d 293, 311 (2002).

Contrary to the State's position and the trial court's findings, the readable TIFF x-rays would have had a significant effect on the jury's verdict. (State's Br. at 6) (citing the trial court's opinion at C. 1528).

As described in Defendant's opening brief, the alleged skull fracture became a focal point of the State's case at trial. In total, at Defendant's trial, the words "skull fracture" were uttered 93 times; the word "fracture" alone was mentioned 275 times. Dr. Montez testified that the supposed presence of a

skull fracture indicated the manner of death was a homicide because violent force would have been necessary to fracture Ben Kingan's skull. The State should not now be permitted to present an argument completely contrary to the position it took at trial. *See, People v. Smith*, 352 Ill. App. 3d 1095, 1102 (1st Dist. 2004) (the State is not permitted to rely heavily on evidence at trial, then claim in a later proceeding the evidence was immaterial to the conviction).

If trial defense counsel had the benefit of the readable TIFF x-rays (and, consequently, the knowledge that Ben Kingan's skull was not fractured), he could have effectively gutted the State's case. After all, the skull fracture was the only evidence corroborating Defendant's confession and that the manner of death was homicide.

II. THE TRIAL COURT IMPROPERLY REJECTED DEFENDANT'S CLAIM THAT HER CONVICTION RESTED ON PERJURED TESTIMONY

The State erroneously claims that the evidence failed to support Defendant's perjury claim because of conflicting testimony regarding whether Deputy Coroner Paul Forman ("Deputy Forman") had "stitched the child's skull together at the first autopsy on January 15, 2009." (State's Br. at 12). Deputy Forman testified that when Dr. Choi started his second examination, the child's skull was still stitched together. (C. 1518). The trial court ruled that the specific testimony of Deputy Forman was "directly refuted" by relying upon the testimony of Officer David Thomas ("Officer Thomas"), who attended the second examination with Deputy Forman and Dr. Choi on January 16,

2009. (C. 1519). Officer Thomas testified that when he first saw the body, the skull cap was not stitched to the head. (C. 1519). The trial court focused only on whether the skull was stitched in denying the perjury claim. The trial court ignored the admissions of Officer Thomas that:

1. The photographs that the trial court relied upon were not time and date stamped. (R. 5693).
2. Officer Thomas was not present at the beginning of the autopsy. (R. 5706).
3. Officer Thomas admitted that he did not look closely at Ben's skull during the examination. (R. 5703-704).
4. Officer Thomas admitted that he had never sewn up a body after an autopsy and he was unaware of applicable protocols. (R. 5705).
5. Officer Thomas did know that once an autopsy is completed, a skull cap would be sewn on. (R. 5705).
6. Officer Thomas admitted that unlike Deputy Forman, since he was not present for the first autopsy, he did not know whether the skull cap was sewn on. (R. 5705).

The trial court also failed to take into account the following undisputed trial testimony of Dr. Montez:

1. Dr. Montez's trial testimony that he observed blood over the surface of Ben's brain during his alleged

examination of the body is flatly contradicted by the undisputed fact that brain had been dissected and placed in a viscera bag prior to Dr. Montez's examination. (Def. Ex. 17). Dr. Montez never mentioned the dissected brain or removing it from the viscera bag in his trial testimony. (R. 4519).

2. Dr. Montez's trial testimony that he "was able to take [his] hand and touch this portion of the scalp, and it was consistent with a fresh injury. It was thickened, and packed, and loaded with flesh blood layer after layer in the subgaleal tissues below the scalp," is flatly contradicted by Deputy Forman's testimony that he had washed the skull after Dr. Choi scraped the skull. (R. 4541-42) (Def. Ex. 16) (R. 5084).

THE TRIAL COURT IMPROPERLY FOUND THAT THE EVIDENCE FAILED TO SUPPORT DEFENDANT'S PERJURY CLAIM

The trial court erred in discarding the testimony of Deputy Forman and Dr. Zimmerman. In addition to Deputy Forman's eyewitness testimony, Dr. Zimmerman provided expert testimony that Ben did not have a skull fracture. Dr. Zimmerman testified that if Ben had a skull fracture, it would have appeared on the TIFF image x-ray that Dr. Zimmerman reviewed. Dr. Zimmerman's testimony that Ben absolutely did not have a skull fracture

refutes Dr. Montez's testimony about touching and manipulating a fracture and supports Deputy Forman's testimony that Dr. Montez never examined Ben's body on January 16, 2009. Therefore, Dr. Zimmerman provides unrebutted evidence that Dr. Montez committed perjury in his trial testimony about the existence of a fracture in Ben Kingan's skull. The trial court overlooked the undisputed fact that Dr. Zimmerman's testimony corroborated Defendant's claim that Dr. Montez committed perjury in his trial testimony.

CONCLUSION

For the reasons stated herein, Defendant, Melissa Calusinski, respectfully asks trial court to reverse the trial court's order dismissing her post-conviction petition, and/or grant her any other relief deemed appropriate.

Respectfully submitted,

Melissa Calusinski

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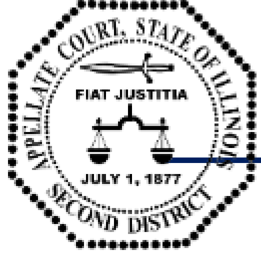
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in Rule 341(d) cover, the Rule 341(c) certificate of compliance and the certificate of service, is 5,150 words.

/s/ Kathleen T. Zellner
Kathleen T. Zellner



NOTICE OF FILING and PROOF OF SERVICE

In the Appellate Court of Illinois
Second Judicial District

E-FILED 5
Transaction ID: 2-16-0825
File Date: 1/11/2018 2:44 PM
Robert J. Mangan, Clerk of the Court
APPELLATE COURT 2ND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	
v.	)	No. 2-16-0825
MELISSA CALUSINSKI,	)	
Defendant-Appellant.	)	

The undersigned, being first duly sworn, deposes and states that on the 11th day of January, 2018, the Reply Brief of Defendant-Appellant was electronically filed and served upon the Clerk of the above court and that on the same day, a pdf of same was e-mailed to the following counsel of record:

Mr. Lawrence Bauer
Deputy Director
State's Attorney Appellate Prosecutor
2032 Larkin Avenue
Elgin, Illinois 60123
2nddistrict.eserve@ilsaap.org

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Kathleen T. Zellner
Kathleen T. Zellner