

**MOTION FOR NEW TRIAL
WITH INCORPORATED MEMORANDUM IN SUPPORT**

The defendant moves, pursuant to Mass.R.Crim.P. 30 (b) that he be granted a new trial on the above-entitled matter.

In support of this motion, the defendant states that justice may not have been done because his trial attorney did not furnish him with the effective assistance of counsel in violation of the defendant's right to counsel under both the Sixth Amendment to the United States Constitution and article 12 of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts.

In further support of this motion the defendant states the following:

1) On May 3, , the defendant, after a jury trial, was convicted of Assault and Battery on a Child Causing Serious Injury (his 8-month-old daughter,). On May 7, 2002 he was sentenced to four to six years in state prison.

2) The Commonwealth's theory of prosecution was that the child, who suffered brain injuries and retinal hemorrhages, was the victim of intentionally inflicted injury: so-called "shaken baby syndrome", while in the care and sole custody of the defendant.

3) The theory of defense, as presented by trial counsel was incoherent and not fully formed. It consisted of a general denial of the charges and an assertion that the Commonwealth could not meet its burden of proof.

4) Trial counsel failed to appreciate the medical complexity of the Commonwealth's theory of prosecution and consequently, failed to adequately prepare the defendant's case for trial. Because of his inadequate pre-trial preparation, trial counsel failed to present an effective defense at trial.

5) Trial counsel's serious inattention to the preparation and presentation of the trial deprived the defendant of an otherwise available, substantial ground of defense. Commonwealth v. Saferian 366 Mass. 89, 96 (1974)(the standard of review in Massachusetts for determining claims of ineffective assistance of counsel involves a two-stage test- first, the reviewing court must conduct a "discerning examination and appraisal of the specific circumstances of the given case to see whether there has been serious incompetency, inefficiency or inattention of counsel... falling measurably below that which might be expected from an ordinarily fallible lawyer" and second, "whether [counsel's conduct] has likely deprived the defendant of an otherwise available, substantial ground of defense").

6) If trial counsel had adequately prepared the defendant's case for trial, he would have been able to present, through cross-examination of the Commonwealth's witnesses and presentation of his own witnesses, including expert witnesses, an effective and consistent theory of defense, namely that there was an alternative and medically reasonable and innocent explanation for N s injuries.

7) A shaken baby case presents highly complex and sophisticated medical, scientific and legal issues. Commonwealth v. Woodward, 427 Mass. 659 (1998).

8) The universe of issues involved in shaken baby cases are highly controversial and defense of such a case should be undertaken only after extensive medical and legal research into the literature and after consultation with experts fully cognizant of the issues. See, Andrews v. Maryland, 372 Md. 1; 811 A.2d 282 (2002); People v. Basuta, 114 Cal. Rptr. 2d 285; 2001.

9) Trial counsel did not adequately investigate and research the complex medical and scientific literature relative to the validity of the so-called "shaken baby syndrome", nor did he consult with experts who were thoroughly familiar with the literature and research.

10) Trial counsel retained a single medical expert, a forensic pathologist, to review the medical records and to offer an opinion as to the cause of [redacted]'s injuries.

11) Trial counsel was seriously inattentive to the need to properly prepare the expert to present effective expert testimony to refute the prosecution's expert testimony. Consequently, trial counsel deprived the defendant of an otherwise available area of defense. Commonwealth v. Haggerty, 400 Mass. 437 (1987)(counsel's failure to investigate and pursue by use of an expert witness, the issue of causation amounted to ineffective assistance of counsel).

12) Trial counsel did not furnish the forensic pathologist with all the necessary medical records and legal documents in order for the pathologist to formulate a fully informed opinion relative to the cause of N [redacted] s injuries. Commonwealth v. Alvarez, 433 Mass. 93, 102 n.9 (2000)(motion for new trial allowed and upheld by SJC because counsel failed to furnish his expert with all the underlying available medical records – “[c]ompetent preparation of one’s own expert witness includes, at a minimum, providing the expert with all the underlying data that are being reviewed by the opposing expert”).

13) Trial counsel did not meaningfully consult with the pathologist until the week before trial and, thereafter, did not furnish the pathologist with the additional data or consult with the pathologist again.

14) Trial counsel did not attempt to consult with any experts other than the one forensic pathologist who had no particular expertise in the area of pediatric head injury and shaken baby syndrome.

15) Consequently, trial counsel did not introduce any expert testimony to counter the expert testimony of the Commonwealth relative to the cause of the child's injuries.

16) Trial counsel's conduct evidenced serious inattention to the most important area of the trial: the challenge to the Commonwealth's theory of prosecution and the presentation of a

coherent and consistent theory of defense that included expert testimony relative to alternative causes for _____'s injuries. Gennetten v. Missouri, 2003 Mo. App. LEXIS 118 (2203)(counsel's failure to investigate and call an expert witness who would have testified that the child's injuries were not consistent with intentional injury was ineffective).

17) If trial counsel had consulted with experts who had particular expertise in the area of pediatric head injury and shaken baby syndrome and had conducted a thorough investigation of the medical and scientific literature he would have discovered that there is significant controversy in the field of pediatric head injuries, and especially in connection with whether shaking alone, without impact of the head on a hard surface, can cause the brain and eye injuries that are consistent with shaken baby syndrome. In this case, there was no medical evidence that Natanya had suffered any head impact injuries. The Commonwealth's theory was that violent shaking alone caused the child's brain and eye injuries.

18) If trial counsel had conducted adequate research into the availability of experts he would have found available experts whose testimony:

- (A) would have cast significant doubt on the Commonwealth's theory of prosecution, namely that the child's brain and eye injuries were the result of intentionally inflicted trauma and
- (B) would have set forth an alternative explanation for the child's injuries; namely that the child's brain and eye injuries were the result of a medical condition and not the result of inflicted trauma.

(See letters setting forth the opinions of John Plunkett, M.D. and Ronald Uscinski, M.D., two medical experts, attached to the affidavit of counsel in support of this motion).

19) If trial counsel had introduced this expert testimony he would have struck at the heart of the Commonwealth's theory of prosecution and would have supported the testimony of the defendant who consistently denied that he intentionally injured his daughter.

20) Trial counsel's serious inattention to the area of pediatric head injuries and shaken baby syndrome was apparent when he cross-examined the Commonwealth's expert, A N, M.D.

21) On cross-examination, trial counsel did not undercut or challenge any of Dr. N's expert's opinions. Trial counsel did not obviate the need for a defense expert because he successfully cross-examined the prosecution's expert. Jones v. Smith, 772 F.2d 668, 674 (11th Cir. 1985)(holding that defense counsel's failure to offer opinion of qualified expert as to unreliability of eyewitness testimony did not constitute ineffective assistance of counsel where counsel pointed out the likelihood of mistaken identification during cross-examination).

22) Trial counsel did not ask Dr. N whether she was relying on any scientific studies for her opinion that N's brain and eye injuries were caused by shaking alone and that N was the victim of intentionally inflicted trauma.

23) Trial counsel did not ask Dr. N for the scientific or medical bases for any of her opinions.

24) Trial counsel did not ask Dr. N if she was aware of studies that showed that shaking alone without impact could not cause the injuries to the brain that Natanya had.

25) In fact, trial counsel's cross-examination of Dr. N had the effect of eliciting more damaging evidence as evidenced in the following exchange:

DEFENSE COUNSEL: "Well, there was nothing to suggest that Mr. D was not being honest with you, am I correct?"

DR. [REDACTED]: "Somebody wasn't being honest with me because the child had a diagnosis that conveys an inflicted injury that was never talked about."

Defense counsel did not move to strike the pediatrician's answer.

Then, the following exchange:

DEFENSE COUNSEL: “ Was he forthright with you?

DR. [REDACTED]: “ I don’t know if he was forthright.”

Then, another exchange:

DEFENSE COUNSEL: “Did you have any reason to doubt that Mr. D was not being honest with you when he answered your questions?”

DR. [REDACTED]: “Yes”.

On re-direct examination the following exchange took place between the prosecutor and Dr. N:

PROSECUTOR: “In response to a question by defense counsel, I think you said, in substance, someone wasn’t being truthful with you. Is that essentially what you said?

PEDIATRICIAN: “Yes... What I mean is that this child had medical findings that showed that she had an inflicted injury. Somebody had hurt her. Nobody came forth with information that they had shaken her. I know that she was in the custody of father. I have great concern about him. I don’t know whether some —“

THE COURT: “I think you gave your answer.¹”

On its own, the Court then struck the last part of the pediatrician’s answer as to whose custody she was in and the pediatrician’s concern. Trial counsel did not request any curative instructions and no further instructions were given to the jury.

The effect of the Dr’s testimony as described above was to render an improper opinion on the credibility of the defendant and, most importantly, to render an improper opinion on the ultimate issue in the case; i.e., “[T]his child had medical findings that showed that she had an

inflicted injury. Somebody had hurt her.” Commonwealth v. Colin C., 419 Mass. 54 (1994)(expert testimony that victims were sexually abused was essentially a statement vouching for their credibility).

26) Trial counsel could have accomplished much more on cross-examination.

27) Trial counsel could have, but did not challenge Dr. 's opinions by reference to learned scientific and medical articles that would have shown that:

- a) there are little or no scientific studies that prove that intracranial injuries can be produced by rotational displacement of the head on the neck alone, without significant direct head impact.
- b) that the child in this case exhibited no evidence of direct head impact;
- c) that retinal hemorrhages may be seen with a variety of conditions, including accidental trauma, resuscitation, increased intracranial pressure, increased venous pressure, subarachnoid hemorrhage, sepsis, coagulopathy, certain metabolic disorders, systemic hypertension and other conditions.

28) Trial counsel never brought out that Dr. N had not read the medical records of the child's treating pediatrician or the medical records relative to the birth of the child. Those records showed that, at least on one occasion, the child's mother told the treating pediatrician that the child was suffering seizure like activity. Defense counsel never directed Dr. N to this document. Those records also showed that the child had significant respiratory problems at the time of her premature birth.

29) Trial counsel failed to use the same important medical records to impeach the credibility of the child's treating pediatrician, [REDACTED], M.D.

30) On direct examination, [REDACTED] testified that the [REDACTED] never told her that the child had experienced any prior seizure-like symptoms. (Tr. Vol. II; p.22). Both the defendant

and his wife testified that the child had experienced seizure-like symptoms prior to the date of the incident and that they had reported the same to Dr. (Tr. Vol. II; pp. 126-127; 152).

31) Trial counsel possessed a pediatric medical record, written by [REDACTED], and dated September 18, 2001, indicating that the parents had brought the child to the doctor's office because mother believed that the child had had a seizure. At trial, counsel never asked Dr. about this document. He never showed this document to Dr., or to Dr. N nor did he highlight it to the jury during his closing argument.

32) If trial counsel had shown Dr. W the document, and if Dr. W had admitted writing the document, trial counsel would have significantly impeached the credibility of her testimony; i.e. that [REDACTED] was a healthy child until the date of the injuries. Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989)(counsel ineffective for failing to impeach witness with important prior inconsistent statement).

33) Furthermore, trial counsel could have shown that Dr. [REDACTED] did not order an EEG after the reported seizure. If he had done so, he could have argued that Dr. [REDACTED] entire testimony was tainted by personal interest because she could be considered negligent for failing to order tests that could have confirmed the existence of a seizure disorder.

OMITTED

38) Trial counsel also failed to object and/or strike the inadmissible testimony of the Commonwealth's expert, [REDACTED] M.D. when she exceeded the scope of permissible medical opinions.

39) Dr. [REDACTED] exceeded the scope of permissible medical opinions when she testified that:

(a) child was the victim of shaken baby syndrome (II-47);

(b) she believed the defendant was not being honest with her because the child had a diagnosis of inflicted injury and did not tell the doctor he had shaken the child (II-67; 74);

(c) that the seizure activity followed the violent shaking; that it was very likely that the aspiration occurred after the child's seizure activity;

(d) that evidence of several old fractures was "clearly evidence of a history of physical abuse".

OMITTED

44) The bottom line is that the kind of research, preparation and self-education required to address the complex medical, scientific and legal issues involved in a so-called "shaken baby" case is nowhere reflected in the conduct of the trial.

45) Trial counsel's serious incompetence and inattention fell measurably below the conduct of an ordinary fallible lawyer and deprived the defendant of an otherwise available and substantial ground of defense. Commonwealth v. Saferian, 373 Mass 109 (1979).

46) Consequently for the reasons stated above, the defendant is entitled to a new trial.

47p) The defendant requests an evidentiary hearing in connection with this motion. Commonwealth v. Caban, 48 Mass.App.Ct 179 (1999).