

## Criminal Convictions Vacated Due to Expert Testimony

By Hillary A. Frommer

In the recent months, two courts vacated criminal convictions and ordered new trials, ordered based on the testimony of expert witnesses. Actually, it is more appropriate to say that those convictions were vacated based on the lack of expert testimony at trial. A criminal defendant seeking to vacate a judgment of conviction pursuant to CPL § 440.10 bears a very heavy burden. More often than not, whether the application is made based on ineffective assistance of counsel, the discovery of new evidence, or an error by the trial court in precluding or admitting certain evidence or testimony, criminal defendants are not successful in winning new trials. For example, in *People v Billups*,<sup>1</sup> the Appellate Division rejected the defendant's argument that the trial court erred in precluding the defendant's expert witness from testifying, because the record established that the expert would offer nothing more than speculation. Similarly, in *People v Demetsenare*,<sup>2</sup> the court denied the defendant's motion to vacate his conviction upon concluding that the defense counsel's decision not to retain a specific expert witness did not constitute ineffective assistance.<sup>3</sup> However, Lydia Ann Salce of Saratoga County and Rene Baily of Rochester, New York, were indeed successful.

Lydia Salce was convicted of the attempted murder and assault of her husband in April 2012, and was sentenced to 16 years in prison plus five years of post-release supervision.<sup>4</sup> The defendant's claim was that her intoxicated husband attacked her with a knife, which he dropped while he was hitting her. The defendant claimed that she picked up the knife, started swinging it at him and ultimately stabbed him several times. According to the prosecution and the victim, the victim had a ver-

bal altercation with the defendant who then stabbed him the back.

Other evidence introduced at trial included medical evidence that the victim had stab wounds to his back and chest which were 1 to 1 ½ inches deep and not life threatening; and testimony from the police who believed the victim's story and decided to charge the defendant, based on the extensive nature of the victim's wounds. However, the trial court refused to allow the defendant to present expert testimony that the nature of the husband's wounds "were not inconsistent with defensive action by defendant."<sup>5</sup> The Appellate Division disagreed with that preclusion, and determined that given the sharply contrasting versions of events, coupled with the testimony that the nature of the wounds was a determining factor in the decision to charge the defendant with the crimes, the defendant's expert witness should have been permitted to testify. The trial court's refusal to allow that testimony was an error warranting a new trial.

Judge James Piampiano of the Criminal Court in Rochester vacated the murder conviction of Rene Baily in December 2014, who was convicted of killing Brittney Sheets, a two and a half year old in her care.<sup>6</sup> During the 2001 murder trial, the defendant claimed that the child sustained a head injury (which eventually resulted in her death), when she fell 18 inches from a chair. The prosecution charged that the victim's injuries resulted from Shaken Baby Syndrome and it presented medical testimony to that effect. The jury ultimately agreed with the prosecution and found the defendant guilty of murder.

Fourteen years later, the defendant moved to vacate her conviction pur-



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suant to CPL § 440.10(1)(g) on the grounds that new medical and scientific evidence concerning Shaken Baby Syndrome had evolved since the defendant's conviction undermined the jury's verdict. In other words, the defendant asserted that she had new expert testimony supporting

her version of events. In order to vacate a conviction under CPL § 440.10(1)(g), the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) must have been discovered since the trial; (3) could not have been discovered before the trial through the exercise of due diligence; (4) is material to the issue; (5) cannot be cumulative of other evidence; (6) cannot be merely impeachment evidence; and (7) must be admissible.<sup>7</sup> A hearing was held at which the defendant presented several different experts in the fields of general and forensic pathology, biomechanical engineering, radiology, pediatrics, ophthalmology, and pediatric neuroradiology. The court found that the defendant's new expert testimony satisfied the aforementioned criteria to constitute newly discovered evidence warranting a new trial. The court was particularly persuaded by expert testimony that since the defendant's trial in 2001, there had been significant changes in medical and scientific communities concerning Shaken Baby Syndrome. For the court, the most significant changes included the way the medical community viewed the causes of retinal hemorrhages (an important factor in determining whether an injury resulted from Shaken Baby Syndrome), and the fact that unlike in 2001, the medical community now accepted the possibility that a short fall (such as what the defendant claimed happened to the victim) could be fatal. The court credited the testimony of the defen-

dant's experts who testified as to case studies demonstrating that children had died from short falls. The court concluded that the evidence was "of such character as to create a possibility that it would change the result" in a new trial because given that new medical and scientific evidence, "it is unlikely that the Prosecution's experts at a new trial would testify as adamantly, if at all, as they did in 2001 that [the victim's] injuries were the type caused by shaking, and that they were not the type caused by a short fall."<sup>8</sup>

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<sup>1</sup> 132 AD2d 612 [2d Dept 1987].

<sup>2</sup> 14 AD3d 792 [3d Dept 2005].

<sup>3</sup> See also *People v Powell*, 83 AD2d 719 [3d Dept 1981] [testimony of two expert psychologists did not constitute newly discovered evidence].

<sup>4</sup> This decision was reported in the New York Law Journal. See *People v Salce*, 105516, NYLJ 120271765192, at \*1 [3d Dept Jan. 8, 2015].

<sup>5</sup> *Id.* at \*4.

<sup>6</sup> This decision was reported in the New York Law Journal. See *People v Baily*, 2001-0490, NYLJ 1202712899799, at \*1 [Co., MO, Decided December 16 2014].

<sup>7</sup> *Id.*; CPL § 440.10(1)(g);

<sup>8</sup> *Id.* at \*26.