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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 162

ALMA CALDAVADO,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
October 15, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start  
2 with number 162, People v. Caldavado.

3 Counsel.

4 MR. BAKER: May it please the court, I  
5 request two minutes rebuttal.

6 CHIEF JUDGE LIPPMAN: Two minutes, you have  
7 it. Go ahead.

8 MR. BAKER: Good afternoon, Your Honors.  
9 My name is Mark Baker, and I'm here on behalf of Alma  
10 Caldavado. Your Honors, in a 2009 trial which was  
11 conducted eleven years after a fierce debate began in  
12 the meadow community - - - in the medical community -  
13 - -

14 CHIEF JUDGE LIPPMAN: Tell us, counsel,  
15 what was the - - - the - - - the mistake that defense  
16 counsel made? Is it - - - is it totally impossible  
17 to represent the defendant without calling experts on  
18 this particular issue?

19 MR. BAKER: Absolutely.

20 CHIEF JUDGE LIPPMAN: Why?

21 MR. BAKER: We're talking about a area of  
22 medicine that for twenty-five years was predicated  
23 upon a triad set of findings of retinal hemorrhage,  
24 cerebral edema, subdural hematoma.

25 CHIEF JUDGE LIPPMAN: When did it start to

1 change?

2 MR. BAKER: 1998, when - - -

3 CHIEF JUDGE LIPPMAN: 1998, the - - - the  
4 scientific view of this changed, and at the time that  
5 the defense attorney was representing your client,  
6 what was going through his head about the scientific  
7 evidence, or what should have been going into his  
8 head?

9 MR. BAKER: What should have been going  
10 through his head was what he was told by Dr. David  
11 Klein, who he had consulted, who told him that in  
12 fact there was chronic blood that could have caused  
13 these seizures and could have caused - - -

14 JUDGE PIGOTT: More - - - more than once in  
15 trials, you - - - you retain an expert that you don't  
16 intend to put on the stand for a host of reasons.

17 MR. BAKER: That's correct.

18 JUDGE PIGOTT: But you use their knowledge  
19 and - - - and - - - to cross-examine the - - - the  
20 prosecution's - - - in this case it'd be a  
21 prosecution witness. Would that be a reasonable  
22 tactic or strategy in some cases?

23 MR. BAKER: Not in a case such as this.  
24 We're talking about a very intense debate that  
25 commenced with the Boston Nanny Trial, Louise

1 Woodward, in 1998, got a lot of publicity. We're  
2 talking about a situation where for many reasons a  
3 whole body of medical literature had started to be  
4 published, and certainly for eleven years, because  
5 the triad findings were found to be owing to many,  
6 many causes. For instance - - -

7 JUDGE ABDUS-SALAAM: Counsel, with respect  
8 to those findings and articles, the articles that  
9 different counsel came up with, the ones from Dr.  
10 Uscinski, 2004, and 2008, those were - - - are you  
11 saying those came after the debate and so they  
12 weren't available at the time of trial, or what are  
13 you saying about that?

14 MR. BAKER: I am saying that if the defense  
15 attorney spent twenty seconds on the Internet in  
16 2009, he would have seen that the testimony being  
17 offered by the People in this case had become subject  
18 to challenge in many cases -- the Edmunds case, Louis  
19 case, and - - -

20 CHIEF JUDGE LIPPMAN: But was the only way  
21 to meet that challenge - - -

22 MR. BAKER: Is to bring the - - -

23 CHIEF JUDGE LIPPMAN: - - - was to have an  
24 expert on his part?

25 MR. BAKER: The only way, Judge. The - - -



1 Klein, I didn't think, was quite as definitive or  
2 helpful for the defendant, it was better than Dr.  
3 Chutorian's. But if Dr. Klein, of course, had  
4 testified, then Dr. Chutorian's report would have  
5 ended up coming in.

6 MR. BAKER: Dr. Klein was stating that,  
7 "Once subdural hematomas are present, there may be  
8 spontaneous episodes of fresh bleeding into these  
9 areas produced by little or no available new trauma."  
10 Now, if I'm a defense attorney and I'm told that - -  
11 -

12 JUDGE FAHEY: Um-hum.

13 MR. BAKER: - - - and then I hear all these  
14 witnesses -- twelve of them, one after another,  
15 saying no, that's not what happened here --

16 JUDGE FAHEY: But he - - - but you're  
17 saying - - -

18 MR. BAKER: -- this was diluted.

19 JUDGE FAHEY: - - - he should - - - he  
20 should have used Dr. - - - is it Dr. Uscinski's  
21 theory of BESS, the B-E-S-S syndrome, is that Dr.  
22 Uscinski?

23 MR. BAKER: Yes, benign enlargement of the  
24 subdural space.

25 JUDGE FAHEY: If he - - - he should have

1           been aware of that and should have used that theory  
2           to counter them. Isn't that correct?

3                     MR. BAKER: Absolutely.

4                     JUDGE FAHEY: So has there ever been a Frye  
5           hearing that's confirmed the - - - that this evidence  
6           would be admissible or it's generally accepted in New  
7           York?

8                     MR. BAKER: The district attorney suggests  
9           there was no Frye hearing. This court has held  
10          repeatedly - - -

11                    JUDGE FAHEY: Um-hum.

12                    MR. BAKER: - - - there's no Frye hearing  
13          required when an expert gets up and gives his own  
14          personal opinions about his experiences in this  
15          particular area of medicine.

16                    JUDGE FAHEY: So your argument is no Frye  
17          hearing would be necessary?

18                    MR. BAKER: None, none at all.

19                    JUDGE FAHEY: There's no controversy in the  
20          medical community that way? This is generally  
21          accepted, this theory?

22                    MR. BAKER: No, that's the whole debate,  
23          that's the fact. The - - -

24                    JUDGE FAHEY: That's my problem.

25                    MR. BAKER: Look - - - look what the - - -

1 look - - -

2 JUDGE FAHEY: I'm wondering - - - I'm  
3 wondering - - - I'm wondering how you get around the  
4 requirement for some kind of a Frye hearing, at least  
5 a request for one.

6 MR. BAKER: Because you call a Dr.  
7 Uscinski, you call a Dr. Scheller.

8 JUDGE FAHEY: Um-hum.

9 MR. BAKER: You have - - - you ask them,  
10 what have you seen? Well, I've read all of the  
11 reports, I've looked at all the images, I see no  
12 problem - - -

13 JUDGE FAHEY: Yeah.

14 MR. BAKER: - - - in terms of what happened  
15 here. The fact is, this child had benign external  
16 hydrocephalus, an enlarged head, which means there's  
17 a lot of fluid, and that in turn could cause the re-  
18 bleed, which in turn cause the seizures, which in  
19 turns cause the hypoxic, ischemic injuries that my  
20 learned adversary's going to be telling you about.

21 JUDGE ABDUS-SALAAM: What about the point,  
22 I think, that your adversary makes in his brief that  
23 - - - or it may not be in his brief, but the - - -  
24 the argument is that he could only afford maybe one  
25 expert, and there were twelve experts testifying on



1           behalf of the People, and so it may not have made  
2           that much of a difference to have one expert come in?

3                       MR. BAKER: That's an excellent question.  
4           I refer you to People v. Ackley, decided by the  
5           Michigan Supreme Court in June 29th of this year. I  
6           sent it up to the court when I learned about it. May  
7           I quote, "The prosecution's voluminous expert  
8           testimony made the need for an effective response by"  
9           - - - they had five witnesses in that trial - - -  
10          "made the need for an effective response by defense  
11          counsel particularly apparent and strong, and it  
12          rendered counsel's failure to offer expert testimony  
13          particularly glaring and harmful to the defendant.  
14          Because of counsel's omissions and the resulting  
15          absence of suitable expert assistance, the  
16          prosecution's expert testimony appeared uncontested  
17          and overwhelming." We had twelve here lockstep. And  
18          then you have Dr. Alexander, the paid consultant from  
19          Florida. He gets up and talks about the triad - - -  
20          which my good friend, Mr. Castellano's going to call  
21          the constellation, but that's just nomenclature, it's  
22          the triad of symptoms - - - and he's talking about,  
23          we have the subdural hematoma; we have the edema, the  
24          swelling or else it can also be conceived as the  
25          encephalopathy, which is the hypoxic, ischemic

1 injuries that result, the - - - the global injuries;  
2 and we had the retinal hemorrhaging. And what do you  
3 have as a result of that? He showed an anatomical  
4 doll shaking - - -

5 JUDGE PIGOTT: What's - - - what's the - -  
6 -

7 MR. BAKER: - - - like this to the jury.

8 JUDGE PIGOTT: What's the rule you're  
9 looking for here? I mean, does this mean that - - -  
10 that all shaken baby convictions after 1998 have to  
11 be set aside? Does it mean that every time someone  
12 doesn't call an expert with respect to weapons and -  
13 - - and things like that where you don't call an  
14 expert saying that the striations are different, or  
15 the things like that have to be set aside all because  
16 we didn't have an expert?

17 MR. BAKER: Yes, I am saying in a case such  
18 as this, where - - -

19 JUDGE PIGOTT: That's a pretty big - - -

20 MR. BAKER: I think I'm backed by the  
21 medical research. The fact of the matter - - - let  
22 me put it - - -

23 JUDGE PIGOTT: You're saying there - - -  
24 there - - - there can be no conviction in the state  
25 of New York after 1998 where there isn't an expert?

1 MR. BAKER: I am saying that in a case such  
2 as this, where the prosecution relies upon a triad  
3 which has been come to be subject to so much dissent  
4 by so many different medical - - - experienced  
5 medical practitioners, that is it ineffective  
6 assistance of counsel per se not to allow the jury to  
7 be told there's another side to the story and you  
8 haven't heard it, because they were absolutely sold,  
9 overpoweringly sold, by the fact of this testimony.  
10 They had no choic - - - this was an inquest, this was  
11 an inquest.

12 Now, counsel talks about all the cross-  
13 examination that had to be done, but the fact - - -

14 JUDGE PIGOTT: Well, that's the other part  
15 of it because what you're essentially saying is that  
16 all the People's witnesses lied.

17 MR. BAKER: No, I'm not saying the - - -  
18 the - - - the People's witnesses lie. I'm saying  
19 they are wedded to a - - - a doctrine that has come  
20 to be disputed, because each of these causes - - -  
21 for instance, the - - - the acute hematoma, that has  
22 been demonstrated to be owing in - - - in the  
23 articles that we've submitted to you, as has amicus  
24 Innocence Network, to benign external hydrocephalus,  
25 the very fact of my - - - of what happened in this

1 case.

2 And I'll tell you something, Judge Pigott,  
3 I know this personally. My grandson was born with  
4 this and my daughter was given a letter by her  
5 pediatrician to hold which says basically if she had  
6 to go to the emergency room with a head injury, that  
7 this child has benign external hydrocephalus and so  
8 you have to look for non - - - for other than non-  
9 accidental causes; this is well studied and well  
10 supported.

11 JUDGE ABDUS-SALAAM: I'd like to ask, too,  
12 something that Judge Pigott just mentioned. You said  
13 only in situations like this, are you saying that  
14 this rule would only apply in medical cases like  
15 this? What about the other cases that there might be  
16 some dispute about whether there's a - - - a syndrome  
17 or some other kind of theory that has been generally  
18 accepted prior to some new theory coming up? Are we  
19 now saying that you have to have an expert in every  
20 one of those cases?

21 MR. BAKER: How can an attorney represent  
22 somebody - - -

23 JUDGE PIGOTT: This sounds like a yes.

24 MR. BAKER: Well, it is a yes. I'm sorry.  
25 I should have said that first. I usually do. Yes,



1 know he didn't do it?

2 MR. BAKER: Because - - -

3 JUDGE STEIN: He - - - he hasn't offered  
4 anything about what he did or didn't do in  
5 preparation for this trial. So - - -

6 MR. BAKER: The motion papers that I  
7 drafted demonstrate that. When I called him up to  
8 ask him, and I sent him the letter asking to explain  
9 - - -

10 JUDGE STEIN: But - - -

11 MR. BAKER: - - - there was no response.

12 JUDGE STEIN: He refused to expl - - - well  
13 that - - - that doesn't - - -

14 MR. BAKER: Okay. So - - - so order an  
15 evidentiary hearing.

16 JUDGE STEIN: Maybe he didn't want to get  
17 involve - - - well, okay, so that's my question.

18 MR. BAKER: Let me put him on the stand.

19 JUDGE STEIN: Would - - - would that be  
20 appropriate?

21 MR. BAKER: I got a lot of questions for  
22 him.

23 JUDGE STEIN: Would that be appropriate?

24 MR. BAKER: That would be appropriate. Why  
25 didn't you? In a case such as this, there was no

1           excuse not to, and he won't have any.

2                   JUDGE STEIN: Well, maybe there was. Maybe  
3 he thought - - - maybe it was a - - - not the best  
4 choice, certainly looking back.

5                   MR. BAKER: Judge Stein, he has - - - he  
6 has an expert who wrote him a letter telling him - -  
7 - giving him the defense and when it comes to cross-  
8 examination, he doesn't even go to the other issue  
9 that Dr. Uscinski talks about; this child had no neck  
10 injuries. Now, if he would have done his homework  
11 and realized that's one of the reasons why the triad  
12 has come to subject - - - subject to so much  
13 question, there's no neck injuries.

14                   Now, the witness, the one witnesses who  
15 discussed it for the People said that only happens in  
16 lethal cases. Well, that's not true. That happens  
17 in cases just like this and he - - -

18                   JUDGE ABDUS-SALAAM: Counsel, what type of  
19 hearing are you suggesting? Because you - - - you've  
20 asked for a hearing on actual innocence, but it  
21 sounds like the - - - in response to Judge Stein's  
22 question, that would be just a regular 440.10.

23                   MR. BAKER: That's correct.

24                   JUDGE ABDUS-SALAAM: So you're - - - you're  
25 saying a regular 440.10?

1 MR. BAKER: On - - - on ineffective  
2 assistance of counsel, what - - - that's what this  
3 court has always said. Why do I not bring it up on  
4 direct appeal? Because we don't have enough of a  
5 record to make an appropriate disposition. If that's  
6 your remedy, that's fine. I obviously think if you  
7 accept the actual innocence proposition that we  
8 propound along with the ami - - - amici, that you can  
9 make a determination in and of itself based upon my  
10 experts, who were unassailed, who say - - - and  
11 they've looked at all this and say there was BEH that  
12 caused this acute trauma and there was no neck injury  
13 and therefore, this child could not have been shaken.  
14 I think you have enough to throw out the indictment,  
15 but if that's - - - if Judge Stein's position is the  
16 one that holds force and we have to hear what the  
17 lawyer says, then an evidentiary hearing is an  
18 appropriate remedy.

19 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's  
20 hear from your adversary and you'll have your  
21 rebuttal.

22 MR. BAKER: Thank you very much.

23 CHIEF JUDGE LIPPMAN: Thanks, counsel.

24 MR. CASTELLANO: May it please the court,  
25 my name is John Castellano for the Office of Richard



1 A. Brown. Your Honors, defense counsel in this case  
2 was not required to consult with a third and fourth  
3 medical expert after he had already consulted - - -

4 CHIEF JUDGE LIPPMAN: Counsel, that's not  
5 the issue. Should he have called an expert to the  
6 stand to - - - to give rep - - - proper  
7 representation to defendant?

8 MR. CASTELLANO: He was not required to do  
9 that. Now, there's different - - -

10 CHIEF JUDGE LIPPMAN: How could he not be  
11 required in this kind of case where you bring in  
12 twelve experts? What could be the rationale of why  
13 any kind of halfway effective counsel would not  
14 provide an expert on this at a time, as your  
15 adversary says, where the science of this is very  
16 much, you know, up in the air?

17 MR. BAKER: First of all, eleven of the  
18 physicians were treating physicians, so they were  
19 being called in any event. But what he says and what  
20 he tells the family - - - there are two reasons.  
21 Number one, what he tells the - - -

22 CHIEF JUDGE LIPPMAN: And do we - - - and  
23 do we know - - - apropos Judge Stein's question, do  
24 we know what his reason is?

25 MR. CASTELLANO: Well - - - well, we do.

1 In - - - in fact, in his - - -

2 CHIEF JUDGE LIPPMAN: How? Go ahead.

3 MR. CASTELLANO: - - - submission - - - in  
4 - - - in fact of his submission by defense counsel of  
5 the sister's affidavit. She says what they tol - - -  
6 what the attorney told her which is this, I can never  
7 match them expert-for-expert, twelve to one, twelve  
8 to two, twelve to three, I can't do it.

9 CHIEF JUDGE LIPPMAN: Yeah, but zero - - -  
10 but zero to twelve. Does that make - - -

11 MR. CASTELLANO: But - - - but what - - -  
12 what he says is what I'm going to do is this, turn  
13 the experts on themselves. They have twelve; the  
14 more experts they call, the more contradictions I  
15 get, the more concessions I get, the more reasonable  
16 doubt that I make.

17 CHIEF JUDGE LIPPMAN: Is that what you  
18 would do in this case?

19 MR. CASTELLANO: Absolutely, Your Honor.

20 CHIEF JUDGE LIPPMAN: As the defense  
21 attorney, you would have said to yourself, oh, I'm  
22 not going to call an expert; I'm going to turn these  
23 guys against themselves?

24 MR. CASTELLANO: Absolutely, this was a  
25 very smart defense, it was also smart for another

1 reason, because - - -

2 JUDGE RIVERA: Why - - - why - - - why  
3 would that exclude calling an expert too? Why is  
4 that mutually exclusive?

5 MR. CASTELLANO: It's - - - it's not  
6 mutually exclusive, but this is the advantage that it  
7 has. The advantage is that he does not have to call  
8 someone like Dr. Klein, because Dr. Klein, in his  
9 letter, in addition to the quoted portion I think  
10 from before, he says that the standard diagnosis in  
11 this situation is shaken baby syndrome. And any  
12 doctor is going to have to essentially testify to  
13 that or testify to the fact that their views are  
14 distinct minority views, really outlier views,  
15 although maybe they may just call them distinct  
16 minority views, and - - - and that bears the  
17 potential for reconfirming the prosecution case.  
18 Now, he can put on his defense - - -

19 JUDGE STEIN: But how could that be worse  
20 than have nobody say it at all?

21 MR. CASTELLANO: I'm sorry? I'm sorry?

22 JUDGE STEIN: How could that be worse than  
23 having nobody say it at all? In other words, if  
24 you're - - - if you're the juror, you know, you're  
25 looking for is there any - - - is there any doubt, is

1           there any reasonable doubt?  Maybe in the end you'll  
2           find that yes, the majority view is - - - is the one  
3           that I think is - - - is more persuasive, but if you  
4           don't even present the minority view - - -

5                       MR. CASTELLANO:  But - - - well, I guess  
6           there are two - - - multiple things going on.  One is  
7           - - - is there an expert in support of the re-bleed  
8           defense, and that's what Dr. Klein gives to defense  
9           counsel based on a well-established medical  
10          phenomenon, and he pursues that.  He pursues it  
11          doggedly, he pursues it at every turn during the  
12          trial, during every cross-examination.  And he sums  
13          up on it by saying this -- he turns the numbers game  
14          around, what he says is, instead of twelve experts -  
15          - - he said - - - first he says the - - - the - - -  
16          if this is so open and shut, how come they need  
17          twelve experts to show - - - to tell you so?  I don't  
18          need twelve experts, I need one reasonable doubt.  
19          And then he blows up the MRI reports and the CAT  
20          scans and the testimony, the actual testimony where  
21          there are concessions by the witnesses, and he even  
22          makes a chart of contradictions of the People's  
23          witnesses.  The chart doesn't eventually - - - he  
24          doesn't get to use it, judge doesn't let him use it,  
25          but he has all of this and he literally points to the

1 reasonable doubt, here it is, here it is, here it is.

2 And the advantage of it is he doesn't have  
3 to put a witness on the stand who says, my view is a  
4 minority view; yes, the standard diagnosis in this  
5 situation is shaken baby syndrome. And all of the  
6 witnesses that we're talking about would suffer from  
7 that - - - that problem.

8 JUDGE STEIN: You - - - you don't think the  
9 jury wondered why he didn't have an expert to - - -  
10 to come and - - - and present this view?

11 MR. CASTELLANO: Well, he - - - he  
12 addresses that in the summation and he specifically  
13 says, if they - - - if this is so open and shut, how  
14 come they need twelve experts? They tripped all over  
15 themselves, let - - - literally let defense counsel -  
16 - - let - - - let the - - -

17 JUDGE STEIN: But that's different - - -  
18 but if he had had one expert and -- he could have  
19 made that argument even stronger. They have twelve,  
20 I only need one, all you have to do is believe my  
21 one.

22 MR. CASTELLANO: The - - - but the problem  
23 is that one is now confirming the prosecution case,  
24 or potentially so. It bears a risk, and here's the  
25 thing, as - - -

1 JUDGE ABDUS-SALAAM: Well, if that one,  
2 counsel - - - if that one were Dr. Uscinski who's the  
3 expert on the BS - - - ESS, then he wouldn't be  
4 conceding anything. His - - - his view is the  
5 majority view for that theory.

6 MR. CASTELLANO: No, it's not the majority  
7 view at all, actually - - -

8 JUDGE ABDUS-SALAAM: Of the minority view.

9 MR. CASTELLANO: - - - for that theory. In  
10 fact, here's the problem with Dr. Uscinski - - -

11 JUDGE FAHEY: Well, no, what you mean it's  
12 not the majority view in the scientific community.

13 MR. CASTELLANO: Correct.

14 JUDGE FAHEY: He's - - - he's the main  
15 proponent of that point of view, but he's not - - -  
16 but it's not the majority view in the scientific  
17 community, which, you know - - -

18 MR. CASTELLANO: Right, absolutely, he's  
19 not the majority view. And here's the problem with  
20 the BESS defense when it comes down to as far as  
21 counsel - - - from the point of view of counsel  
22 trying to put on such a defense; it is medically  
23 unsupported. The first question on cross-examination  
24 is this: Doctor, has there ever been a case of  
25 benign external hydrocephalus that has produced these

1 injuries, the brain damage, the extent of brain  
2 damage that this child had? And the answer to that  
3 question is no, there has never been such a case. So  
4 that - - - that bears a potential for hugely  
5 backfiring, and instead, he has this very well  
6 thought out, very well-planned defense which he sums  
7 up nicely for the jury by saying this, there's - - -

8 JUDGE RIVERA: Isn't there still a need at  
9 least for a hearing, apropos of Judge Stein's  
10 questions before?

11 MR. CASTELLANO: No, because on the trial  
12 record and the submissions, this issue can be  
13 resolved, and that's the standard that this court set  
14 forth in People v. Satterfield. Can an objectively  
15 reasonable attorney spec - - - I'm sorry,  
16 specifically on ineffective assistance of counsel in  
17 a 440.10 motion, the standard's in Satterfield, and  
18 it says, viewed objectively, could a reasonably  
19 competent attorney have a trial strategy that would  
20 produce this result, and that is absolutely the case  
21 here; a reasonably - - - a - - - a reasonable,  
22 objective attorney could have such a strategy, and  
23 this is the strategy.

24 And the - - - the other thing that's  
25 important to remember is that I don't have to show

1           that it's the best strategy, I don't even have to  
2           show that it's a good strategy.

3                        CHIEF JUDGE LIPPMAN:  Can't be an absurd  
4           strategy, can it?

5                        MR. CASTELLANO:  No.  It - - - it has to be  
6           a reasonable strategy, but - - -

7                        CHIEF JUDGE LIPPMAN:  Yeah, well - - -  
8           well, it - - - it - - - to the - - - viscerally it  
9           would seem to be an absurd strategy.

10                       MR. CASTELLANO:  Not at all, Your Honor.

11                       CHIEF JUDGE LIPPMAN:  Viscerally.  I know  
12           you're trying to explain it, but it really seems odd.

13                       MR. CASTELLANO:  Not at - - - not at all,  
14           Your Honor.  First of all, as I say, you've got - - -

15                       CHIEF JUDGE LIPPMAN:  Well, to - - - to you  
16           it doesn't seem odd.

17                       MR. CASTELLANO:  You've got - - - you've  
18           got the num - - - you've got the numbers game that  
19           he's worried about, he turns it around, he presents  
20           the defense as a reasonable doubt defense.  It's like  
21           this, if I may; it's as if a - - - a defense attorney  
22           has a choice between attacking the reliability of an  
23           identification and putting on an alibi witness.  I  
24           can put on an alibi witness, but the alibi witness  
25           can backfire, that's the problem that I'm having.  If



1 the alibi witness backfires, they're not even  
2 listening to my - - - the rest of my defense because  
3 if the alibi witness is not - - -

4 CHIEF JUDGE LIPPMAN: I - - - I gather your  
5 view is what it is because you don't believe that  
6 there is a serious debate scientifically about this  
7 issue? I mean, I could understand that. If you go  
8 from the premise that there's no real debate here,  
9 this is all made up scientific mumbo jumbo and I have  
10 no real case, so therefore, I'm not going to put on  
11 an expert. But if hypothetically you believed that  
12 there was a serious scientific dispute, as your  
13 adversary says, that in recent years there had been a  
14 whole school of thought that comes into play  
15 different than the old view of shaken baby syndrome  
16 in - - - in this particular context. If that were  
17 the case, would you still say that not putting one  
18 expert on was a brilliant strategy or an okay  
19 strategy?

20 MR. CASTELLANO: Well, it depends on the  
21 degree to which the science has been overturned. If  
22 you have a case - - -

23 CHIEF JUDGE LIPPMAN: Huh-uh, I'm giving  
24 you my hypothetical that in recent years, serious  
25 doubt has been put about the old way that we

1 determine what were the signs of shaken baby  
2 syndrome. If you accepted that that there was a very  
3 serious school of thought that it put into at least  
4 serious question the old way of looking at that,  
5 would you still say, I'm not going to put a - - - a -  
6 - - an expert on is an acceptable strategy?

7 MR. CASTELLANO: It is an acceptable  
8 strategy - - -

9 CHIEF JUDGE LIPPMAN: Even in that  
10 hypothetical?

11 MR. CASTELLANO: Even in that hypothetical  
12 because the serious doubts isn't alone enough to  
13 overcome what would be potentially a confirmation of  
14 the People's case. But it doesn't matter, the - - -  
15 the - - - what - - - what we're talking about here -  
16 - - and I encourage the court to look at the  
17 statement of the American Academy of Pediatrics in  
18 2015 which goes through all of this, summarizes all  
19 of this complicated medical literature, and tells us  
20 what the state of the medical knowledge is at this  
21 time, and it's in no uncertain terms. It says there  
22 is - - -

23 CHIEF JUDGE LIPPMAN: Yeah, yeah, but I'm  
24 asking you a hypothetical. If we don't agree that  
25 that's what it says, you still would say this is an

1 acceptable strategy?

2 MR. CASTELLANO: I - - - it's - - - it's an  
3 acceptable - - - it's a strategy, yes, how much - - -  
4 how dangerous is it to put that person on - - -

5 JUDGE FAHEY: Well, wouldn't the strategy  
6 have been different if his first expert had - - - had  
7 helped him? He goes to Chutorian, that doesn't help  
8 him, does it?

9 MR. CASTELLANO: It doesn't help him at  
10 all, no.

11 JUDGE FAHEY: What does it do to him? What  
12 does it do to the defense's case, Chutorian? He says  
13 the People are right, right?

14 MR. CASTELLANO: He absolutely says the  
15 People are right.

16 JUDGE FAHEY: All right.

17 MR. CASTELLANO: Yes.

18 JUDGE FAHEY: So - - - so what if he had  
19 found somebody else? He went to Klein and actually  
20 Klein had two reports; the original report actually  
21 wasn't that helpful to him.

22 MR. CASTELLANO: Um-hum.

23 JUDGE FAHEY: And then there was a second  
24 report. And then I think you're - - - where - - -  
25 where Judge Lippman is - - - is referring to. Why -

1           - - why aren't you going there then? I - - - I don't  
2           get it.

3                       MR. CASTELLANO: Why don't you go in - - -

4                       JUDGE FAHEY: Why isn't it ineffective  
5           assistance of counsel to put somebody on at that  
6           point?

7                       MR. CASTELLANO: Why was it necessary to  
8           consult another expert at that point?

9                       JUDGE FAHEY: Yeah.

10                      MR. CASTELLANO: The - - - because he  
11           doesn't have to second-guess his own expert.

12                      JUDGE FAHEY: So - - - so you're saying, he  
13           talked to two experts, that's enough, he - - - he saw  
14           that he didn't have a winning case that way so he had  
15           to attack their experts?

16                      MR. CASTELLANO: Well, it's not that he  
17           didn't - - -

18                      JUDGE FAHEY: Or your experts.

19                      MR. CASTELLANO: He - - - it's not that he  
20           didn't see - - - not that he saw that he didn't have  
21           a winning case, he had a defense and he pursued that  
22           defense, and he pursued it doggedly and relentlessly  
23           during the course of the trial.

24                      JUDGE FAHEY: If you argue that theory,  
25           then he should have put an expert on.

1 MR. CASTELLANO: No, absolutely not, Your  
2 Honor. Because he's - - - he - - - what he's doing  
3 is creating a reasonable doubt defense just like a -  
4 - - a defense attorney in an ID case attacks the  
5 reliability of the identification without putting on  
6 the alibi witness. You could say in hindsight, well,  
7 he should have put that alibi witness on because the  
8 reliability, the reasonable doubt that he was trying  
9 to inject into the identification wasn't good enough  
10 so you had to put that alibi witness on, except that  
11 he made a strategic choice at the time. Maybe he - -  
12 -

13 JUDGE RIVERA: But - - - but - - -

14 MR. CASTELLANO: Yes.

15 JUDGE RIVERA: - - - but through that  
16 choice, how are the People's experts going to say  
17 anything better or worse than what his own expert  
18 would say? Doesn't that get you, again, at equal  
19 poise - - - he's got an expert that says there are  
20 issues that - - - that this is not - - - potentially  
21 not the reason for the baby's death, he's going to  
22 cross-examine all of the People's experts, and then  
23 the People are going to cross-examine his expert and  
24 again, the jury will make its decision?

25 MR. CASTELLANO: Right.

1 JUDGE RIVERA: So how was he - - - I guess  
2 the question - - - how is he put in a worse place - -  
3 -

4 MR. CASTELLANO: The - - - the - - -

5 JUDGE RIVERA: - - - by calling that  
6 expert?

7 MR. CASTELLANO: The - - - the worst place  
8 is the failed defense. It's like putting on a failed  
9 alibi or an alibi for the wrong date.

10 JUDGE RIVERA: This is what I'm saying; how  
11 - - - how can that possibly be? All you're saying is  
12 that the - - - you're going to cross-examine his  
13 expert and raise some questions. Well, he's doing  
14 that with your experts.

15 MR. CASTELLANO: But it - - - but - - - but  
16 it's much more than that because there is no  
17 scientific basis for it. It's going to fall so flat  
18 that it's going to be the equivalent of - - - of a -  
19 - -

20 JUDGE RIVERA: Well, then what's his basis  
21 for the cross?

22 MR. CASTELLANO: I'm sorry?

23 JUDGE RIVERA: What's his basis for the  
24 cross?

25 MR. CASTELLANO: The basis for the cross is

1 the re-bleed defense. It's what Dr. Klein gives him  
2 and it's - - - here's the difference also, the re-  
3 bleed defense, as Dr. Klein tells him, is well  
4 recognized in the medical profession, so he can work  
5 with that, as opposed to a defense where he's got to  
6 take on the whole medical establishment. Whatever  
7 else you want to say about it, he's got to take on  
8 the rest of the medical establishment. It is - - -  
9 he is behind the eight ball from the outset. So he  
10 can either do that and take on the whole medical  
11 establishment or he can go with a defense that is  
12 well recogni - - - based on a principle - - -

13 JUDGE ABDUS-SALAAM: We don't know that he  
14 did that, though, do we, counsel, because he did  
15 consult Dr. Klein but we don't know that he consulted  
16 any of these other - - - we don't know what other  
17 research he did.

18 MR. CASTELLANO: That's true.

19 JUDGE ABDUS-SALAAM: Because he decided  
20 that he didn't need an expert, so we don't know if he  
21 could have come up with a better defense than the re-  
22 bleed defense.

23 MR. CASTELLANO: Well, we - - - we do know  
24 what he did. He did consult two experts, he did - -  
25 - they were two independent experts, two specialists

1 in their field, in the field of shaken baby syndrome,  
2 and he was entitled to rely on that. It was  
3 reasonable to rely on them.

4 JUDGE PIGOTT: Maybe - - - I just - - -  
5 maybe she's guilty. I mean it - - - it - - - it  
6 seems to me that maybe the defense looked at - - - as  
7 I understand it, most of your experts were fact  
8 witnesses, they were - - - they were treating  
9 physicians.

10 MR. CASTELLANO: Correct.

11 JUDGE PIGOTT: And they said I saw this and  
12 this means that and - - - and there's not a lot you  
13 can do against fact witnesses who say I was there, I  
14 saw this, this is what my findings were, et cetera.  
15 He opened, I - - - I think, insinuating that yeah,  
16 she shook the baby and - - - but she shook the baby  
17 to see if it was okay or something. I mean, it - - -

18 MR. CASTELLANO: Well - - - well, what - -  
19 -

20 JUDGE PIGOTT: Am I incorrect in that?

21 MR. CASTELLANO: What - - - what his  
22 defense really was was this, and he sums it up very  
23 nicely in his summation, he says they're trying to  
24 pin this on my client for the timing because she was  
25 there when all these symptoms developed, but what we



1 know, he says, is that there was a prior - - - what  
2 he calls a prior brain injury - - - not really so  
3 much an injury, there was a condition, but he says  
4 there's a prior brain injury and that means that my  
5 client is not responsible for it. Let them explain  
6 it away.

7 He puts a huge burden practically on the  
8 prosecution by saying, let them explain it away. He  
9 literally says, they tripped all over each other, let  
10 her explain that. That's a difficult burden in a  
11 medically dense case for the prosecution to shoulder.  
12 We shoulder it, we shoulder it by witness after  
13 witness, but - - - but that's not his fault.

14 JUDGE ABDUS-SALAAM: Didn't you also - - -  
15 didn't you also put on one treating physician, I  
16 think it was Dr. Chan in the emergency room, who saw  
17 - - - he - - - he testified that he saw the defendant  
18 shake the baby in the emergency room?

19 MR. CASTELLANO: Absolutely. Twice, Your  
20 Honor. Twice, Your Honor. And I - - - I think  
21 that's important to take into account as well in this  
22 picture, because he's doing really a yeoman's job in  
23 a very, very difficult case. He's got the shaken  
24 baby syndrome diagnosis, eleven treating physicians,  
25 he's got his own doctor telling him, this is a shaken

1 baby case, classic case of shaken baby syndrome, and  
2 then he gets a doctor who gives him a wedge, who  
3 says, you know, standard diagnosis is shaken baby  
4 syndrome and by the way, as he says, "this is  
5 strongly supported by clinical experience, it's well  
6 documented in the medical literature, and the  
7 babysitter has acknowledged shaking the baby." He  
8 doesn't even know about the - - - the incident at the  
9 hospi - - - double incident at the hospital. He's  
10 got all of - - - he's got all of that, facing all of  
11 that, and he's now got a wedge, though, from Dr.  
12 Klein - - -

13 CHIEF JUDGE LIPPMAN: Okay, counsel.  
14 Thanks.

15 MR. CASTELLANO: - - - and he took it.

16 CHIEF JUDGE LIPPMAN: Thank you. Thank  
17 you, counsel.

18 MR. CASTELLANO: Thank you.

19 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

20 MR. BAKER: First of all, Judge Abdus-  
21 Salaam, that - - - that testimony about what happened  
22 in the hospital was not supported by the parents who  
23 were right next to the gurney. So - - -

24 JUDGE PIGOTT: What you're - - - yeah, but  
25 you can - - - you - - - I - - - I get that you're

1           trying to pick this apart, but that's what the  
2           defense was trying to do as well.

3                     MR. BAKER: I understand.

4                     JUDGE PIGOTT: And - - - and, you know, we  
5           can do that all day.

6                     MR. BAKER: I don't think that's pertinent  
7           to the - - - to the - - - what's before the court  
8           right now. What I - - - what I am telling you is  
9           that Mr. Castellano's argument is completely  
10          unburdened by all the case law that has developed in  
11          the last - - -

12                    JUDGE PIGOTT: Well, yeah, but you - - - I  
13          - - - I took this note; Uscinski, one of yours,  
14          "opined that" - - - that "humans are incapable of  
15          inflicting a subdural hematoma on an infant by  
16          shaking the infant."

17                    MR. BAKER: Right, that's his position.

18                    JUDGE PIGOTT: Scheller opined that - - -  
19          that's yours - - - "that Fiona's" (ph.) subd - - -  
20          "subdural hematoma was activated by her bouncing in a  
21          walker or being bumped on the head."

22                    MR. BAKER: Correct, because of the BEH.

23                    JUDGE PIGOTT: Isn't there a little  
24          inconsistency within the two of them, one says you  
25          can't do it and the other one says that's something

1           that could happen?

2                       MR. BAKER:  No, they - - - actually, they  
3           consulted - - - they read each other's letters and  
4           they - - - they felt they were not inconsistent.

5                       JUDGE PIGOTT:  But isn't that - - - isn't  
6           that why we get down to tactics?  In other words, I -  
7           - - I'm just wondering why this - - - this lawyer was  
8           so incompetent when - - - when we've got, you know,  
9           experts who testified and opined and decisions made.  
10          I - - - I - - - I tend to agree with the - - - the -  
11          - - the People in many cases where rather than - - -  
12          rather than risk putting somebody on that's going to  
13          sink your client, you - - - you - - - if they've got  
14          - - - some of the biggest mistakes the People can  
15          make is putting on too many experts or put - - - too  
16          many witnesses, because then you just - - -

17                      MR. BAKER:  Well, then they put on Dr.  
18          Alexander, who just blew everybody away with his  
19          demonstrations and his saying that this is definitely  
20          a shaken baby and he takes an anatomical doll - - -

21                      JUDGE PIGOTT:  Right.

22                      MR. BAKER:  - - - and goes like that.

23                      JUDGE PIGOTT:  Right.

24                      MR. BAKER:  When my experts would have  
25          said, that just couldn't have happened because

1           there's no neck injury, because the head is bouncing  
2           up and down in an undeveloped seven-month-old infant.  
3           It could not have happened. That had to be  
4           addressed.

5                         JUDGE PIGOTT: But that's a - - - that's -  
6           - -

7                         MR. BAKER: There wasn't enough cross-  
8           examination about that, and he's relying upon cross-  
9           examination as the valid defense that was supposedly  
10          put in here.

11                        JUDGE PIGOTT: I - - - I just wonder why,  
12          you know, in - - - in the next burglary case, say,  
13          you know, they never looked in the living room and  
14          there could have been fingerprints of somebody else  
15          in the living room and they didn't call an expert on  
16          - - - on fingerprints to say that, you know,  
17          fingerprints can be found in other places and the  
18          timing is bad.

19                        MR. BAKER: We - - -

20                        JUDGE PIGOTT: I don't know where we draw  
21          the line on what - - - what - - - what you say is  
22          incompetence of counsel and where - - - and where the  
23          - - - you know, tactic, strategy.

24                        MR. BAKER: Judge Pigott, we have a case  
25          where twelve expert - - - and - - - and I think

1 People v. Ackley is really on point in all the  
2 measures and all the arguments that I'm making today.  
3 We have twelve experts essentially in lockstep.

4 JUDGE PIGOTT: Twelve witnesses.

5 MR. BAKER: Twelve - - - twelve witnesses.  
6 But they were - - - nine of - - -

7 JUDGE PIGOTT: Mostly professional, I  
8 agree.

9 MR. BAKER: - - - nine of them were - - -  
10 were experts and then you have Dr. Alexander, the  
11 coup de grace.

12 JUDGE PIGOTT: But fact witnesses, you have  
13 to admit, right? I mean they - - - they were there.

14 MR. BAKER: Well, they were talking about  
15 what their findings were but the findings were the  
16 triad. That's what they based their shaken baby sys  
17 - - -

18 JUDGE PIGOTT: But they saw it, that's my  
19 point.

20 MR. BAKER: - - - finding on. Yes.

21 JUDGE PIGOTT: I mean they were there, they  
22 were treating this child.

23 MR. BAKER: So - - -

24 JUDGE PIGOTT: They weren't - - - they  
25 weren't - - - they weren't there saying I've got to

1 find a way to convict this lady; they were there  
2 trying to - - - trying to help this baby.

3 MR. BAKER: Well - - -

4 JUDGE PIGOTT: And they were doing what  
5 they thought was - - -

6 MR. BAKER: And not one of them was cross-  
7 examined, if we want to rely upon that, about isn't  
8 it a fact that your assessment of this is subject to  
9 great dispute? Isn't it a fact that a benign  
10 external hydrocephalus - - -

11 JUDGE PIGOTT: I wouldn't ask that - - -

12 MR. BAKER: - - - could result the same - -  
13 -

14 JUDGE PIGOTT: - - - unless I was sure  
15 they're going to say yes, and I'm not at all sure  
16 that these people were go - - - they were just - - -

17 MR. BAKER: You ask them if they read this,  
18 this, this.

19 JUDGE PIGOTT: What they would have said is  
20 I was there, I saw this, this is what I - - - what I  
21 concluded and I - - - and - - - and it's the truth.  
22 Now what are you going to - - -

23 MR. BAKER: But you had Dr. Esernio who's -  
24 - - Jenssen who's basing her testimony on the reports  
25 alone.

1 CHIEF JUDGE LIPPMAN: Counsel - - -

2 JUDGE PIGOTT: Okay.

3 MR. BAKER: And the fact of the matter is  
4 on all the cases, Ackley says you must respond. The  
5 - - - the - - - the Senkowski case, the Federal  
6 Circuit, you must respond.

7 CHIEF JUDGE LIPPMAN: Counsel, what is the  
8 state in - - - from your view today of the science on  
9 this issue?

10 MR. BAKER: I'm sorry, Judge?

11 CHIEF JUDGE LIPPMAN: What is the state of  
12 the science today, from your perspective, on this  
13 issue - - -

14 MR. BAKER: That - - -

15 CHIEF JUDGE LIPPMAN: - - - in a nutshell?

16 MR. BAKER: That there are many different  
17 causes for the triad symptoms, many of them  
18 nonviolent, many of them demonstrating that there are  
19 lucid periods, that there could be seventy-two hours  
20 between an event and the manifestation of that event,  
21 which means that the last person with the child is  
22 not the one who's guilty, and there are other aspects  
23 of this that you can't have - - -

24 JUDGE PIGOTT: That's the old - - - that's  
25 the old bleed defense, right?



1                   MR. BAKER: That's - - - they - - - the  
2 testimony in this case was had to be Alma because she  
3 was the last person with the baby.

4                   JUDGE PIGOTT: Right.

5                   MR. BAKER: And this new science is saying,  
6 wait a minute - - -

7                   CHIEF JUDGE LIPPMAN: Okay.

8                   MR. BAKER: - - - there's a lucid period  
9 here up to perhaps seventy-two hours, so maybe the  
10 last person is not the one who caused it.

11                   CHIEF JUDGE LIPPMAN: Okay, counsel. Thank  
12 you both. Appreciate it.

13                   MR. BAKER: Thank you very much.

14                   CHIEF JUDGE LIPPMAN: Thanks.

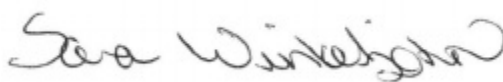
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Alma Caldavado, No. 162 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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