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Hon. Marybeth Dingley
December 8, 2014, 1:00 p.m.



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2014 DEC -8 PM 3:06
SONYA KRASKY
COUNTY CLERK
SNOHOMISH CO. WASH

FILED

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

<p>STATE OF WASHINGTON, Plaintiff, vs. MICHAEL J. MORRIS, Defendant.</p>	<p>No. 09-1-01071-9 RESPONSE TO STATE'S MOTION TO TRANSFER DEFENDANT'S CrR 7.8 MOTION TO THE COURT OF APPEALS - CORRECTED 73278-1</p>
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I. INTRODUCTION

In its Motion to Transfer, the State argues Mr. Morris had not made a substantial showing that his conviction was obtained in violation of the right to effective assistance of counsel and to a fair trial. Mr. Morris had made that showing.

"[A] claim of shaken baby syndrome is more an article of faith than a proposition of science." *Del Prete v. Thompson*, 10 F.Supp.2d 907, 957 fn. 10 (2014). That claim was made here, albeit by the name of abusive head trauma (AHT). As the record establishes, Mr. Morris' conviction was obtained through the use of unreliable and misleading expert opinion purporting to diagnose abuse as the cause of a child's injuries. Per the expert's diagnosis, Mr. Morris

RESPONSE TO STATE'S MOTION TO TRANSFER CrR 7.8
MOTION FOR RELIEF FROM JUDGEMENT -
CORRECTED - 1

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231

1 abusively shook his daughter, hard enough to cause serious intracranial and retinal bleeding
2 without leaving a mark on her body.

3 The causation opinion rested on the application of a hypothesis which has weak
4 scientific support and which does not square with biomechanical principles, which rendered
5 applying it here to “diagnose” causation unreliable. As such the opinion was inadmissible under
6 Washington’s rules of evidence. Cloaked in the aura of a medical diagnosis and bolstered by
7 misleading testimony on the supposedly firm reasons the diagnosis could confidently be made
8 here, the unreliable expert opinion formed the entire basis of the State’s case against Mr.
9 Morris. Counsel’s failure to keep out the inadmissible evidence resulted in a fundamentally
10 unfair trial and confidence in the outcome is unwarranted. Additionally, the State’s introduction
11 of unreliable evidence to convict where the limits of the diagnosis are known is equally
12 problematic. Obtained with misleading and unreliable testimony the conviction violates due
13 process.
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17 II. ARGUMENT

18 A. Constitutional Errors Violating Mr. Morris’ Right to A Fair Trial Qualify for Relief 19 Under CrR 7.8(b)(5).

20 Under CrR 7.8(b)(5), a court may grant relief from judgment for “any other reason
21 justifying relief from the operation of the judgment.” Relief under this section is limited to
22 extraordinary circumstances not covered by any other section of the rule. *State v. Brand*, 120
23 Wn.2d 365, 369, 842 P.2d 470 (1992). A defendant who is denied the constitutional right to
24 effective assistance of counsel is entitled to relief under CrR 7.8(b)(5). *State v. Cervantes*, 169
25 Wn. App. 428, 282 P.3d 98 (2012) (citing *State v. Martinez* 161 Wn. App. 436, 440-441, 253
26 P.3d 445 (2011)).
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1 Mr. Morris does not need to show, as the State claims, a sudden, dramatic shift in the
2 scientific community in order to be entitled to relief. Constitutionally ineffective trial counsel is
3 a substantial irregularity in the proceedings, as are State violations of the defendant's due
4 process right to a fair trial. The Court can grant relief based upon finding his constitutional
5 rights to a fair trial and effective counsel were violated. Here, Mr. Morris has shown his
6 constitutional rights were violated.
7

8 B. Mr. Morris Has Made a Substantial Showing that Trial Counsel was Ineffective in
9 Failing to Challenge the Wholesale Admission of Misleading, Speculative and
10 Unreliable Expert Testimony that Should Have Been Excluded or Limited

11 i. Dr. Feldman Testified A.M.'s Medical Findings Were Caused by Shaking

12 The State's argument that Dr. Feldman did not testify as to how A.M. was injured
13 misrepresents the testimony. State Motion at 19. Dr. Feldman testified her injuries were the
14 result of abusive head trauma (AHT). 6/3/11 RP 13. He said he did not know the exact
15 mechanism since he was not there. 6/3/11 RP 16-17. However, Dr. Feldman explained it was
16 abusive trauma by discussing, at length, how forceful shaking causes A.M.'s exact injuries—
17 retinal hemorrhaging (RH) and subdural hemorrhage (SDH). Despite the caveat about not being
18 there, the clear message was that Dr. Feldman determined, based on the clinical picture, that
19 A.M. was abusively shaken by her last caregiver. This is exactly what the State argued in
20 closing: "What [Dr. Feldman] said is violent shaking. Possibly joined with soft impact on a soft
21 surface." 6/10/11 RP 772.
22

23 ii. The Reliability of Dr. Feldman's Causation Opinion Must be Assessed Under
24 ER 702

25 Contrary to the State's argument, considering reliability when analyzing admissibility is
26 not imposing a *Daubert* test. State Motion at 21. The Washington Supreme Court has explained
27 that ER 702 requires "an assessment of admissibility of scientific evidence under the
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1 helpfulness standard contained in the rule, thus providing in this jurisdiction the “best of both
2 worlds.” *State v. Copeland*, 130 Wn.2d 244, 259-60, 922 P.2d 1304, 1314 (1996). *See also*
3 *Reese v. Stroh*, 128 Wn.2d 300, 307-08, 907 P.2d 282, 286 (1995) (holding that where the
4 objection the expert testimony is the application of an accepted theory or methodology to a
5 particular medical condition, admissibility is weighed under the general reliability standards of
6 ER 702 and ER 703).

7
8 ER 702 has a significant role in admissibility of scientific evidence aside from *Frye*.¹
9 *Copeland*, 130 Wn.2d at 260-261. Further, Washington’s evidence rules are fully capable of
10 addressing the reliability of causation opinion. *Reese*, 128 Wn.2d at 308. When an expert’s
11 errors in applying a methodology render the testimony unreliable, a trial court may use the rules
12 of evidence, including ER 702, to exclude the testimony. *Lakey v. Puget Sound Energy, Inc.*
13 176 Wn.2d 909, 920, 296 P.3d 860 (2013).

14
15 For example, in *Lakey*, plaintiffs in a civil lawsuit proffered expert testimony that
16 exposure to electromagnetic fields (EMFs) was a possible cause of various serious diseases. *See*
17 *Id.* at 915. The expert reached his conclusions after doing a literature review but acknowledged
18 he discounted studies and data that showed no EMF-disease link and did not consider
19 toxicological studies. *Id.* at 916. The Court held the expert failed to follow proper methodology,
20 rendering his conclusions unreliable and therefore inadmissible. *Id.* at 920. Additionally, where
21 he also selectively sampled data within one of the studies, ignoring the larger pool of data
22 within the study that showed no link, the expert’s “treatment of [the] data created an improper
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27 ¹ This is not to say that reliability cannot be assessed under *Frye* as well as ER 702 or that application of one
28 excludes the other. They are related and both ultimately concerned with the reliability of the evidence. *See State v. Black*, 109 Wn.2d 336 (1987) (excluding under *Frye* evidence of rape trauma syndrome as means of proving rape because the syndrome was not a scientifically reliable means of proving a rape occurred).

1 false impression about what the study actually showed.” *Id.* at 921. His conclusions were
2 unreliable and therefore not helpful to the trier of fact. *Id.*

3 iii. Dr. Feldman’s Causation Opinion is Unreliable and Inadmissible Under ER 702

4 Dr. Feldman was tasked with diagnosing what caused A.M’s injuries; he considered
5 potential causes and ruled each one out until he landed at the cause, AHT. Logically, if the
6 landed-upon cause is not actually capable of causing the injuries, the process is flawed from
7 inception. The mere fact of rendering a “diagnosis” does not render the opinion helpful, as
8 required under ER 702, if the diagnosis was made by applying unscientific data to the case-at-
9 hand, while also ignoring data at odds with the diagnosis. As in *Lakey*, Dr. Feldman’s methods
10 render his opinion unreliable and misleading. Unlike *Lakey*, Dr. Feldman did not just render an
11 opinion as to a possible cause, but testified that abusive trauma was *the* cause.
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14 The State asserts generally that AHT is a medically valid diagnosis. State Motion 16-17.
15 For support, the State cites extensively to Dr. Sandeep Narang, an SBS/AHT advocate.
16 According to the State, Dr. Feldman simply applied the recognized differential diagnosis
17 method to arrive at the clinically valid diagnosis of AHT. *Id.* at 20-21; 27. The State also claims
18 that the diagnosis was helpful because “an analysis of the medical findings was certainly
19 beyond the understanding of the average layperson.” State Motion at 19.
20

21 Other than claiming AHT is generally accepted by others, the State’s analysis does not
22 address whether the differential diagnosis method was reliably applied. The flaw in the State’s
23 argument is that Dr. Feldman’s diagnosis was unreliably reached, for the reasons set forth here.
24

25 a. Dr. Feldman relied on an unproved hypothesis

26 Shaking as an explanation for SDH and RH began as a hypothesis, first proposed by
27 Drs. Caffey and Guthkelch, who hypothesized, based on a 1968 study by Dr. Ommaya, that
28

1 infants might sustain whiplash-type injuries, including SDH and RH, from being violently
2 shaken. *See* App. B (Guthkelch 2012); *See also* Ronald Uscinski, *Shaken Baby Syndrome: An*
3 *Odyssey*, 46 *Neurol. Med. Chir.* 57 (2006) (providing a historical account of the hypothesis and
4 research) (App. DD).² Notwithstanding that Dr. Guthkelch expressly was offering merely a
5 hypothesis about *one* possible cause of subdural hematoma in infants, and that Dr. Caffey
6 reached his conclusions based on evidence that even he acknowledged was “meager” and
7 “manifestly incomplete,” the SBS hypothesis rapidly gained “acceptance and enormously
8 widespread popularity,” **with no real investigation or even question as to its scientific**
9 **validity.”** *Id.* (emphasis added).
10

11
12 Later, Dr. Ommaya himself noted the limits of his initial research, clarifying that it
13 involved monkeys, not infants, and the monkeys had not been shaken, but instead been
14 strapped in carts and impacted from the rear in an effort to gauge human thresholds to whiplash
15 injury in car accidents. *See* App. D (Ommaya 2002 at 221-222). Dr. Ommaya further explained
16 the study actually showed that SDH was *not* easily caused by whiplash and suggested it was
17 misinterpreted by Drs. Guthkelch and Caffey in citing to it as scientific support for SBS. *Id.*
18 (“[O]ur experimental results were referenced as providing the experimental basis of the ‘shaken
19 baby syndrome’ (SBS) by Caffey, Guthkelch and others by analogy not realizing that the
20 energy level of acceleration in our work related to speeds at motor vehicle crashes at 30 mph.”).
21
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23 More than three decades later, the SBS/AHT hypothesis that shaking causes subdural
24 bleeding and/or retinal hemorrhaging remains just that, a hypothesis. In 2012, Dr. Guthkelch
25 had this to say about it:
26

27 ² References to the appendices in Mr. Morris CrR7.8(b) brief follow the same format used in the brief. Appendices
28 provided in this response are sequentially labeled starting with Appendix DD.

1 SBS and AHT are hypotheses that have been advanced to explain findings that are
2 not yet fully understood. There is nothing wrong in advancing such hypotheses;
3 this is how medicine and science progress. It *is* wrong, however, to fail to advise
4 parents and courts when these are simply hypotheses, not proven medical or
5 scientific facts, or to attack those who point out problems with these hypotheses
6 or who advance alternatives. Often, "getting it right" simply means saying, clearly
7 and unequivocally, "we don't know."

8 App. B at 207.³ Dr. Feldman's opinion was far from an acknowledgement of not knowing.
9 Instead, he presented this hypothesis as the basis of a firm medico-legal diagnosis, one
10 sufficient to identify the perpetrator and his state of mind.

11 *b. Dr. Feldman relied on a hypothesis at odds with biomechanics*

12 The SBS/AHT hypothesis is grounded in biomechanics, both because it was rooted in
13 the 1968 Ommaya study and because it describes a potential biomechanical phenomenon. *See*
14 Uscinski, 46 *Neurol. Med. Chir.* at 58 (explaining the 1968 Ommaya biomechanics study
15 provided the "sole source of experimental data from which the initial hypothetical shaking
16 mechanism was drawn."). As such, the science of biomechanics is not only relevant, it is a
17 critical part of the quest to evaluate whether shaking does in fact cause RH and SDH.

18 Yet, Dr. Feldman ignored the research, and specifically the research showing the level
19 of force generated by shaking does not support shaking as a mechanism, even with impact on a
20 soft surface. The State responds in a similar manner, arguing biomechanics does not undermine

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23 ³ Dr. Guthkelch further suggests that the primary findings be defined in terms of their medical features, which
24 "would allow us to investigate causation without appearing to assume that we already know the answer." App. B
25 at 202. He suggests that inferring abuse (and criminal intent) from the medical findings alone takes the hypothesis
26 too far. *Id.* at 202-203. He suggests that given the complexity of the neuropathology of the infant brain, "we should
27 not expect to find an exact or constant relationship between the existence or extent of retino-dural hemorrhage and
28 the amount of force involved, let alone the state of mind of the perpetrator. Nor should we assume that these
findings are caused by trauma, rather than natural causes." *Id.* at 204. He suggests that the issue of what is
supported by reliable scientific evidence "should be reviewed by individuals who . . . have a firm grounding in
basic scientific principles, including the difference between hypotheses and evidence." *Id.* at 208.

1 the “wealth of literature and clinical experience that does **accept** shaking or shaking with
2 impact as a mechanism for abusive head trauma.” State’s Motion at 24 (emphasis added).

3 The State does not dispute the research but wants to overlook it. Even if overlooking
4 on-point research were acceptable, the literature that, contrary to biomechanical data, just
5 “accepts” the opinion does not render the opinion more reliable. Additionally, the fact that
6 ““many researchers believe that shaking alone can cause SDH, retinal hemorrhage, and death””
7 is unavailing. State Motion at 9 (quoting Appendix BB). “Science is not a democracy.”⁴
8 Evidence is evaluated on its merits, not on how many people believe in it.
9

10 Here, the biomechanical evidence in support of the shaking hypothesis is scant. The
11 1968 Ommaya study itself does not actually support shaking as a viable mechanism for the
12 clinical findings. *See supra*, Section II(B)(iii)(a). Since then, many biomechanical studies have
13 attempted and failed to validate the SBS hypothesis. *See App. F (Lloyd 2011)* (summarizing the
14 research). In fact, while the findings of biomechanical studies “are consistent with the physical
15 laws of injury biomechanics,” the results “are not, however, consistent with the current clinical
16 SBS experience and are in stark contradiction with the reported rarity of cervical spine injury in
17 children diagnosed with SBS.” App. G at 71 (Bandak 2005).
18

19 The State would have the Court overlook the research that so far disproves Dr.
20 Feldman’s hypothesis. This includes the Prange 2003 study where, using a more biofidelic
21 dummy, angular accelerations from shaking were well-below injury thresholds. *See App. H.*
22 Additionally, measuring angular acceleration from drops of various heights and on various
23 surfaces, impact on a soft surface did not reach levels high enough to cause subdural bleeding
24 or axonal damage. Similarly, other researchers could not achieve injury-level accelerations by
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26
27 ⁴ Gregory A. Poland, M.D., and Robert M. Jacobson, M.D., *The Age-Old Struggle against the Antivaccinationists*,
28 364 N Engl J Med 97-99 (2011).

1 shaking without impact, even after modifying the neck in the dummy and using an exaggerated,
2 gravity-aided shaking motion. See C. Z. Cory & B. M. Jones, *Can Shaking Alone Cause Fatal*
3 *Brain Injury? A Biomechanical Assessment of the Duhaime Shaken Baby Syndrome Model*, 43
4 *Med., Sci. & Law* 317 (2003) (App. EE).

5 Even the research cited by the State does not support relying on the hypothesis in this
6 case. See State Motion at 23-24. In the 2010 Finnie study, seven anesthetized baby lambs were
7 shaken by holding “under the arms much like has been described for shaking.” See John W.
8 Finnie et al., *Diffuse Neuronal Perikaryal Amyloid Precursor Protein Immunoreactivity in an*
9 *Ovine Model of Non-Accidental Head Injury (the Shaken Baby Syndrome)*, 17 *J. Clinical*
10 *Neuroscience* 237 (2010) (App. FF). The researchers shook the lambs as hard as they could for
11 30 seconds, waited for a period of time, then shook the lambs again for another 30 seconds,
12 until they had done it ten times over 30 minutes. *Id.* at 238 (emphasis added). A small
13 subdural hemorrhage was found in two shaken lambs, and minimal retinal hemorrhage was
14 seen in only two lambs. *Id.* at 239. Thus, the only biomechanical study that could be said to
15 provide support for the general shaking hypothesis does not support applying the hypothesis
16 here, where Mr. Morris was alone with A.M. for 10 to 15 minutes.

17 The State claims Mr. Morris does not explain why an exact measure of force or injury
18 threshold is necessary to conclude the injuries are the result of abuse. State Motion at 25-26.
19 But the point is that Dr. Feldman’s vague testimony about forces, given when he explains the
20 necessarily biomechanical phenomenon he says led to A.M.’s injuries, shows the explanation is
21 not anchored to specific knowledge. Further, his own attempts to dismiss the lack of
22 biomechanical support, if agreed with, provide yet another reason to doubt the shaking
23 hypothesis. Dr. Feldman’s explanation for the failure of the hypothesis to be supported by
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1 biomechanics is that “there are ... biomechanical studies that are gradually **better defining**
2 **what the actual tissue thresholds** are, but as yet, there’s no study that defines **how infant**
3 **brain tissue responds** to repetitive sheer forces back and forth.” 6/03/11 RP 27-28 (emphasis
4 added). In other words, the failure to validate shaking is a failure of biomechanics, not of the
5 hypothesis.

6
7 For a hypothesis grounded in the results of a biomechanical study, the inability of
8 biomechanics to define how infant tissue responds to sheer forces back and forth is reason to
9 doubt the hypothesis, not to place more trust in it. Additionally, the lack of knowledge flows
10 both way. If the injury thresholds are not established and how infant tissue responds has not
11 been defined, we do not know that shaking does not cause RH and SDH, but we also do not
12 know that it does and how it does it.

13
14 Taking into account the biomechanical research, as one should, abusive shaking,
15 possibly with soft impact, does not emerge as a valid, potential explanation for A.M.’s injuries,
16 much less as *the* explanation.

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18 *c. Dr. Feldman relied on anecdotal and confessional data that does not*
19 *validate the SBS/AHT hypothesis*

20 At trial, when asked how it is that shaking is on the list of potential causes, Dr. Feldman
21 explains he is relying on clinical experience that is published and on confessional studies.
22 6/3/11 RP 28. The State too claims that clinical observations and a “considerable body of
23 literature” provide sufficient support. State’s Motion at 9-10. But reports about cases and
24 studies using confessions do not validate the hypothesis for the reasons explored here.

25
26 As discussed in the 2003 Donohoe literature review, opinions based on clinical
27 experience and descriptive reports rank the lowest in evidence-based medicine (EBM)
28 standards. Donohoe 2003 at 239-241 (App. W). Relying on this data is unsound because case

1 reports and case studies are “universally regarded as an insufficient scientific basis for a
2 conclusion regarding causation because case reports lack controls.” *Hall v. Baxter Healthcare*
3 *Corp.*, 947 F. Supp. 1387, 1411 (D. Ore. 1996) (citing case law); *see also Siharath v. Sandoz*
4 *Pharms. Corp.*, 131 F. Supp. 2d 1347, 1361 (N.D. Ga. 2001) (“Case reports are not reliable
5 scientific evidence of causation, because they simply describe[] reported phenomena without
6 comparison to the rate at which the phenomena occur in the general population or in a defined
7 control group; do not isolate and exclude potentially alternative causes; and do not investigate
8 or explain the mechanism of causation.”) (quoting *Casey v. Ohio Medical Prods.*, 877 F. Supp.
9 1380, 1385 (N.D. Cal. 1995)).

11 Additionally, the literature suffers from another problem identified by Donohoe 2003:
12 Circularity. This refers to the problem of selecting cases by the presence of the medical features
13 the study seeks to validate. “Not surprisingly, such studies tend to find their own case selection
14 criteria pathognomonic [diagnostic] of SBS.” Donohoe 2003 at 239.

16 The State points to the supposedly supporting literature but does not address that
17 circularity is an *acknowledged* problem and the reason the research turned to confessions as the
18 proxy for abuse. *See* App. X (Vinchon 2010 at 635-636) (acknowledging the circularity in most
19 studies, as well as other biases rendering the value of the studies low).⁵ Even Dr. Sandeep
21 Narang, extensively cited by the State for the proposition that the diagnosis is well-supported
22 by the literature, simply counters that circularity is inevitable. *See* State Exhibit 6 at 562. As if
23 somehow this addresses the problem of circularity, he counters that other than SBS/ATH, no
24 other explanation for the “associative findings” has been put forward.

26
27 ⁵ As addressed in the Brief in Support of CrR 7.8(b) Motion, the Vinchon 2010 study is one Dr. Feldman used at
28 trial to support the claim that A.M.’s exact combination of injuries is seen only in confirmed abuse cases, versus
accidental cases. 6/3/11 RP 16. The study relies on judicial confessions without knowing the details of the
confessions, including the mechanism of abuse. *See* Vinchon 2010 at 642 (App. X).

1 Dr. Feldman also relies on studies using confessional data. 6/3/11 RP 28. As Dr. Dias
2 acknowledges, “the evidence base for shaking *is* confessions.” App. P at 330. But the merits of
3 this data are likewise questionable. When Dr. Jan Leestma, a neuropathologist at Children’s
4 Memorial Hospital at Northwestern University, closely examined the so-called SBS confession
5 literature, he found that in the vast majority of the “confession” cases there was clear evidence
6 of impact injury to the head—*i.e.*, the child’s injuries likely had not been caused by shaking at
7 all or, at least, were likely partially attributable to an impact. He found that the confession
8 literature only recorded 11 “pure” shaking cases and several of those were questionable
9 because no details were given about the degree of shaking, for how long, or about the
10 circumstances surrounding the confession. For example in some of the cases where the
11 caretaker admitted shaking the infant, it turns out the “admission” was of bouncing the baby
12 during play or attempts to revive the baby when it was found unconscious. *See* J.E. Leestma,
13 *Case Analysis of Brain Injured, Admittedly Shaken Infants: 54 Cases*, 26 Am. J. of Forensic
14 Med. Path. 199 (2005) (Appendix EE). Dr. Leestma concluded that “confessions” did not
15 provide an adequate basis to establish the reliability of the SBS diagnosis. Yet, this is the data
16 Dr. Feldman relies on to make his diagnosis.

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20 Subsequent literature has expanded on the reasons why confessions do not scientifically
21 validate SBS/AHT. *See, e.g.*, Keith A. Findley et al., *Shaken Baby Syndrome, Abusive Head*
22 *Trauma, and Actual Innocence: Getting It Right*, 12 Hous. J. Health L. & Pol’y 209, 215 (2012)
23 (App. GG) (explaining the several reasons why confessions do not validate SBS); Waney
24 Squier, *The “Shaken Baby” Syndrome: Pathology and Mechanisms*, Acta Neuropathol. 1, 3
25 (2011) (reviewing so-called confession literature) (App. HH). *See also* *People v. Thomas*, 22
26 N.Y.3d 629, 646, 985 N.Y.S.2d 193, 202 (2014) (excluding proffered confession in SBS case
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28

1 and noting the similarity between the medical findings and the confession “can be understood
2 as a congruence forged by the interrogation.”); *Aleman v. Village of Hanover Park*, 662 F.3d
3 897, 907 (7th Cir. 2011) (describing a confession of slight shaking in an SBS case where the
4 father was told the injury must have been caused by shaking as “worthless as evidence, and as a
5 premise for an arrest.”)

6
7 Regarding the argument that confessions are unreliable as data, the State counters that
8 the researchers’ decision to rely on judicial confessions means the confessions are reliable, and
9 that it is unknown what percentage of the confessions are actually accurate. State Motion at 25.
10 First, the researchers’ decision to use certain data tells us nothing useful about the data itself. It
11 certainly does not mitigate potential problems with judicial confessions, including the known
12 problem of false confessions. Second, not knowing to what degree the confessions are accurate
13 or inaccurate is precisely the problem with relying on confessions. It is hard, if not impossible,
14 to assess the quality of this research when the researchers themselves assume, but do not know,
15 the quality of their data.⁶

16
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18 In criminal cases, confessions in other, unrelated cases are worthless evidence. The
19 State would never suggest when prosecuting a suspect that other alleged perpetrators’
20 confessions in similar cases is probative of guilt. Nonetheless, Dr. Feldman’s reliance on
21 confessions to determine what happened here is not just accepted but championed.

22
23 iv. The State’s Insistence That AHT is a Valid “Differential Diagnosis” Avoids the
24 Question of Reliability

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26
27 ⁶ The State also points to Dr. Dias’ argument that to suggest shaking cannot cause the medical findings, one would
28 have to illogically believe that all the confessed perpetrators lied. *See* State Motion at 25. The corollary is, of
course, that to suggest shaking caused the injuries in every case where the caregiver denies shaking one would
have to, also illogically, believe that every caregiver is lying.

1 The State's response that Dr. Feldman reliably applied the "differential diagnosis"
2 method to arrive at AHT, a medically valid diagnosis, is unavailing. State Motion at 20.

3 *a. The State fails to address causation entirely*

4 In response to the claim that Dr. Feldman's so-called differential diagnosis is really a
5 differential etiology, the State simply asserts that SBS/AHT is a clinically valid diagnosis and
6 that Dr. Feldman's diagnosis was meant to treat the patient. This ignores completely that Dr.
7 Feldman did not just claim to diagnose the medical conditions affecting A.M., but he claimed
8 to diagnose the cause. The term AHT clearly encompasses causation, and as such, the
9 reliability of the diagnosis hinges on whether causation was reliably determined.
10

11 Dr. Sandeep Narang does not explain causation either but assumes it also. Citing the
12 strong "association" of SDH and RH with trauma, Dr. Narang explains the "differential
13 diagnosis" approach, and arrives at SBS/AHT as the default diagnosis when the known causes
14 have been ruled out and the history given is inconsistent with the injuries. State Exhibit 6 at
15 570-572.⁷ This process assumes cause-in-fact. It also places the burden on the caregiver to
16 explain the medical findings.
17

18 The methodology used by Dr. Feldman is clearly a differential etiology, *i.e.* the process
19 of determining which of two or more causes is responsible for the patient's symptoms. *See*
20 *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183, 1195, fn. 5 (11th Cir. 2010). The first step
21 in a proper differential etiology is for the expert to compile a "comprehensive" list of causes
22 that are each *capable* of explaining the clinical findings. *Id.* at 1195 (emphasis added); *Clausen*
23 *v. M/V NEW CARISSA*, 339 F.3d 1049, 1057-58 (9th Cir. 2003). Importantly, for each such
24 potential cause the expert "rules in" at this stage, that cause "must actually be capable of
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28 ⁷ For a complete discussion of the problems with Dr. Narang's article, *see* Findley (App. GG).

1 causing the injury.” *Hendrix*, 609 F.3d at 1195 (quoting *McClain v. Metabolife Int’l, Inc.*, 401
2 F.3d 1233, 1253 (11th Cir. 2005) (excluding potential cause “ruled in” by expert because it had
3 not yet been established to be a potential cause of the injuries in question). “Expert testimony
4 that rules in a potential cause that is *not* so capable is unreliable.” *Clausen*, 339 F.3d at 1058
5 (emphasis added).
6

7 As explained, AHT via shaking, “possibly” with impact on a soft surface—the proposed
8 mechanism of abuse specifically advanced here—has not been established to be capable of
9 causing A.M.’s medical findings. Attempts to confirm the biomechanics have shown the
10 hypothesis to be “biomechanically improbable.” Appendix D (Ommaya 2002). By his own
11 testimony, to rule it in, Dr. Feldman relied on anecdotal clinical data and on confessions. The
12 researchers, in turn, do not know what the persons confessed to (is it even shaking?) and
13 whether the confessions are accurate. Concluding from this data set that shaking, even with soft
14 impact, actually caused the medical findings at issue here is a leap. As should be clear, Dr.
15 Feldman’s determination is merely a hypothesis, one that he put on the table even though it is
16 being hotly debated, has not been validated, and is at odds with biomechanics. Dr. Feldman’s
17 differential diagnosis, ruling in as the cause-in-fact a hypothesis short in scientific support, is
18 not reliable.
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21 *b. AHT is not a diagnosis just meant to treat the patient*
22

23 Despite the State’s claim that SBS/AHT is a diagnosis for treating the patient, it is
24 abundantly clear SBS/AHT has never been just a medical diagnosis. Instead, it is a diagnosis
25 used primarily for prosecution, not treatment. Even the name signals its broader function. “Of
26 the several hundred syndromes in the medical literature, almost all are named either after their
27 discoverer (*e.g.*, Adie’s Syndrome) or for a prominent clinical feature (*e.g.*, Stiff Man
28

1 Syndrome)." App. B at 202 (Guthkelch 2012). SBS, by contrast, is a name that focuses on the
2 alleged cause of certain clinical findings. *Id.* Tightly tethering the concept of abuse to the
3 medical findings has always been a focus of SBS/AHT advocates, even now that it is well-
4 accepted that there are many other causes of the medical findings associated with SBS/AHT.

5
6 For example, in 2001, the Committee on Child Abuse and Neglect of the American
7 Academy of Pediatrics (AAP) issued a policy statement that not only endorsed SBS, but said
8 that a **presumption** of abuse should exist whenever a child younger than one year presented
9 with intracranial injury and retinal hemorrhages. *Shaken Baby Syndrome: Rotational Cranial*
10 *Injuries--Technical Report*, Pediatrics Vol. 108 No. 1 (July 2001) (emphasis added). By 2009,
11 however, the shaking hypothesis had become controversial. Yet, instead of revisiting the SBS
12 hypothesis in light of the controversy over the supposedly supporting science, the Committee
13 issued another policy statement suggesting that physicians stop using the term Shaken Baby
14 Syndrome and instead use the term Abusive Head Trauma. App. E (2009 AAP policy
15 statement). This position paper, used by the State at trial, reveals that it made the name change
16 not to more accurately reflect scientific discoveries, but rather to help criminal prosecutions
17 despite mounting criticism of the scientific underpinnings of SBS: "Legal challenges to the
18 term 'shaken baby syndrome' can distract from the *more important questions of accountability*
19 *of the perpetrator* and/or the safety of the victim." *Id.* (emphasis added).⁸

20
21
22
23 The child abuse protection community has prosecuted SBS for over thirty years. So it is
24 perhaps not surprising that, at this point, there are those who staunchly resist any challenge to
25 the construct. In particular, there is a National Center on Shaking Baby Syndrome. The Center
26 advocates for SBS' reliability, trains law enforcement officers, and supports prosecutions.

27 ⁸ In contrast, the National Association of Medical Examiners (NAME) did not renew its 2001 position paper. See
28 App. GG at 232-233. The State relied on NAME's supposed support of the diagnosis even though by 2011 it was
not accurate to say or imply that the 2001 position paper still endorsed the diagnosis.

1 Every other year, the Center puts on international conferences for physicians, prosecutors and
2 social workers to discuss new SBS developments that are dedicated to castigating each new
3 batch of opposing literature as “biased,” “misleading” and “unscientific.”

4 For example, according to the Center’s website, at the Twelfth International Conference
5 one keynote address was titled: “While We Argue, Children Die: The Consequences of
6 Misinformation.”⁹ This address supposedly “set the tone for a meeting grounded in science.”
7 Other prominent presentations made were about how to respond to *Daubert* challenges and a
8 panel that discussed the circumstances of perpetrator confessions gathered from around the
9 world. The Fourteenth International Conference in 2014 had similarly focused presentations,
10 with one keynote address titled: “Exonerating” the Guilty: Child Abuse and the Corruption of
11 the False-Conviction Movement.” Well-accepted medical diagnoses, of course, do not need
12 international conferences to vouch for their existence.

13
14
15 The tethering of medicine and law is also apparent from the SBS literature. For
16 example, there are manuals for prosecuting SBS cases, which are littered with pearls of junk
17 science. *See, e.g.*, Brian Holmgren, *Prosecuting the Shaken Infant Case in The Shaken Baby*
18 *Syndrome: A Multidisciplinary Approach*, 307 (2001) (providing prosecutors with ideas for
19 physician testimony such as: the “expert can testify that the forces the child experiences [from
20 shaking] are the equivalent of a 50-60 m.p.h. unrestrained motor vehicle accident, or a fall from
21 3-4 stories on a hard surface.”). Similarly, pediatricians publish articles and book chapters
22 dealing with legal issues, such as the *mens rea* of alleged shakers. *See, e.g.*, A. Levin, *Retinal*
23 *Haemorrhages and Child Abuse*, in 18 *Recent Advances in Pediatrics* 151 (2000) (“we know
24
25
26

27 ⁹ Programs for the 12th and 14th International Conference on Shaken Baby Syndrome/Abusive Head Trauma,
28 available at www.dontshake.org.

1 that the violence which results in SBS injuries is extreme . . . [and] beyond . . . that even the
2 most distraught person would recognize as injurious.”).

3 In sum, SBS/AHT has always been a diagnosis that is not primarily medical or
4 scientific, but instead one that intertwines medicine with law and child protection policy. That
5 intertwining may be understandable, but the tendency for an unproven hypothesis to be shaped
6 and perpetuated by forces other than objective science is undeniable and cannot be ignored in
7 determining whether the diagnosis is sufficiently reliable to be admitted in a criminal case.
8

9 *c. Dr. Feldman did not reliably rule out other causes*

10 Dr. Feldman testified that part of a differential diagnosis is going through and
11 eliminating other diagnoses that might cause the medical findings. 6/2/11 RP 122. As Dr.
12 Feldman would have known, the list of diseases and conditions known to cause A.M.’s medical
13 findings is long and growing. *See* State Exhibit 6 at Appendices B&C (Narang 2012) (listing
14 the differential diagnosis of subdural and retinal hemorrhages respectively, including viral
15 meningitis);¹⁰ App. GG at 240 (explaining that by 2006 many differential diagnoses were
16 widely recognized by supporters of the hypothesis, including accidental causes and a variety of
17 illnesses and medical conditions).
18
19

20 In other words, it is known and recognized that non-abusive events can cause A.M.’s
21 medical findings, and that the findings are not unique markers of abuse. After reviewing the
22 imaging, radiologist Dr. Barnes identified several potential causes of A.M.’s medical findings.
23 6/7/11 RP 405. He could not rule out any of them based on the imagining alone. *Id.* at 401. Dr.
24
25
26

27 ¹⁰ Even though viral meningitis is a recognized differential diagnosis for RH and SDH, the prosecutor aggressively
28 cross-examined Dr. Gabaeff on whether viral meningitis could lead to the medical findings, questioning at length
Dr. Gabaeff’s explanation that this was accepted. *See* 6/8/11 602-608.

1 Gabaeff also identified potential causes including viral meningitis, which he believed was
2 consistent with the whole clinical picture. 6/8/11 RP 503-505.

3 The State argues Dr. Feldman did a differential diagnosis but does not pretend, even for
4 argument sake, that Dr. Feldman comprehensively identified and methodically ruled out other
5 potential causes. Dr. Feldman's testimony makes clear he did not, since he focused on finding
6 other injuries. He recommended lab tests that "primarily were focusing on whether there was
7 any other injuries that didn't show up based on examination signs and symptoms." 6/2/11 RP
8 121. *See also* 6/3/11 RP 59 (explaining that A.M. had screening labs for bone integrity and for
9 intra-abdominal trauma).
10

11 Relatedly, Dr. Feldman obtained a family history from the mother only (see 6/2/11 RP
12 134). He did not review A.M.'s pediatric records even though a child's history is important in
13 making a diagnosis. 6/3/11 RP 52. A.M. had decreased appetite, a loose, foul-smelling diaper
14 and congestion three days before, indicating a viral cold. *Id.* at 52;57. Notably, these and other
15 symptoms A.M. had are consistent with viral meningitis. *Id.* at 55-57. Even though "a
16 preexisting viral infection can subsequently settle in the area of the brain," and even though
17 viral meningitis is on the accepted list of differential diagnoses for both SDH and RH, Dr.
18 Feldman did not order the blood test for meningitis. *Id.* at 58-59. A.M.'s blood was drawn very
19 often, but he considered the test "stupid." *Id.* at 59.
20
21

22 v. Dr. Freeman's Report Is Not Flawed and Undermines Dr. Feldman's Diagnosis
23

24 The State argues Dr. Freeman's report does not undermine Dr. Feldman's testimony.
25 State Motion at 30. Specifically, the State claims the database does not take into account the
26 difference between general and pediatric hospitals. *Id.* at 29. The State also claims Dr. Freeman
27 failed to account for A.M.'s apnea and seizures, which other experts have found significant in
28

1 diagnosing abusive head trauma. *Id.* The State's analysis shows the purpose and point of the
2 study was largely misunderstood.

3 Dr. Freeman's study measures whether Dr. Feldman's reliance on SDH and RH as
4 indicators of abuse *when there are no other injuries indicating abuse*, as was the case here, is
5 warranted. Indeed, Dr. Feldman did not rely on the medical findings as mere indicators, but as
6 proof of abuse. To assess the validity of Dr. Feldman's assertions regarding the relationship
7 between SDH, RH and abuse, one needs to look at a large and valid data set (that includes both
8 abuse and non-abuse cases with RH and SDH) against which the accuracy of the determination
9 can be tested. When Dr. Freeman did this, he found that RH and SDH, without more, are very
10 poor proxies for abuse even when considered together. *See App. At 8-9.*

11
12
13 The Kids' Inpatient Database includes specialty hospitals. In fact, pediatricians
14 themselves have relied on the Kids' Inpatient Database to study the occurrence of serious
15 injuries due to physical abuse in hospitalized children. *See John M. Leventhal, MD et al, Using*
16 *US Data to Estimate the Incidence of Serious Physical Abuse in Children, Pediatrics 2011-1277*
17 *(App. II).* Using this database is not flawed.

18
19 Regarding apnea and seizures, these were not considered by Dr. Freeman since the
20 presence of these findings is not what Dr. Feldman relied on to suspect abuse. He thought the
21 apnea was seizure-related actually. 6/2/11 RP 131. Whether or not the presence of these findings
22 means his diagnosis is accurate depends on what other conditions, in addition to abusive head
23 injury, seizures and apnea may indicate. For example, per Dr. Feldman, seizures can be a symptom
24 of meningitis. 6/3/11 RP 57.

25
26 Dr. Feldman's claim at trial that RH and SDH are reliable indicators of abuse is wildly off
27 the mark. *See, e.g., 6/3/11 RP 12-13; RP 16.* Relying on these medical findings, where there are no
28

1 other injuries and where Mr. Morris was alone with A.M. for 10-15 minutes, to reach his diagnosis
2 of abuse was misguided. To suggest the medical findings reliably indicate abuse “is indeed a chasm
3 too wide and deep to leap.” *State v. Black*, 109 Wn.2d 336, 348 (1987) (quoting *State v. Taylor*, 663
4 S.W.2d 235, 241 (Mo. 1984) (excluding rape trauma syndrome testimony because it does not
5 reliably indicate rape).

6 vi. Counsel’s Failure to Exclude the Testimony Was Not Strategic

7
8 Counsel knew Dr. Feldman’s testimony was critical. She asked for a hearing on the
9 admissibility of Dr. Feldman’s testimony, which was settled with an agreement the State would
10 not use the term “shaken baby syndrome” (SBS). The State did not agree to refrain from
11 arguing A.M. was shaken, but simply not to use the term SBS.

12
13 The State argues counsel concluded she could not win such a motion. State’s Motion at
14 15. However, “[c]ounsel can hardly be said to have made a strategic choice when s/he has not
15 yet obtained the facts on which a decision could be made.” *Avila v. Galaza*, 297 F.3d 911, 920
16 (9th Cir. 2002) (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994). *See also Evans*
17 *v. Lewis*, 855 F.2d 631 (9th Cir. 1988) (holding that the failure to investigate possible evidence
18 cannot be deemed a trial tactic where counsel failed to view relevant, available documents).

19
20 Here, counsel’s decision to give up on the issue of admissibility altogether was
21 premature. The date of the briefing establishes the issue of admissibility was settled before
22 counsel interviewed Dr. Feldman and more than one year ahead of trial. App. J-L; 2/25/11 RP 8
23 (noting interview of Dr. Feldman is upcoming). Counsel decided not to challenge the
24 admissibility of Dr. Feldman’s testimony before she had all the information on which to make a
25 reasonable strategic decision. A decision considering admissibility under *Frye* only, more than
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1 one year ahead of trial, before interviewing the witness and before trial preparation, is not a
2 tactical decision where a maintainable challenge to the testimony remains wholly unassessed.

3 Further, there is no conceivable strategic decision that supports allowing the State to
4 introduce unreliable causation testimony where causation is the critical issue. The cases cited
5 by the State support the claim that counsel was deficient in this regard. In *State v. Nichols*, the
6 Court addressed whether trial counsel was ineffective for failing to make a motion to suppress
7 the evidence made during a pretextual stop. 161 Wn.2d 1, 162 P.3d 1122 (2007). The Court,
8 after exploring at length whether under relevant caselaw the stop was pretextual, concluded that
9 Nichols could not show it was. *Id.* at 8-14.
10

11 Thus, although counsel may legitimately decline to move for suppression on a particular
12 ground if the motion is unfounded, that is not what happened here, where a legitimate question
13 of admissibility existed. Counsel identified the State's controversial causation evidence needed
14 to be vetted but retreated from the matter after a concession inconsequential to the issue. The
15 State's argument that counsel successfully excluded potentially inflammatory evidence because
16 Mr. Morris admitted he shook A.M. after she vomited and choked fails. Shaking is only
17 "inflammatory" if one believes abusive shaking was entailed. Dr. Feldman clearly said it was
18 even though he never used the term SBS.
19

20 In *State v. McNeal*, the court addressed trial counsel's failure to object to apparently
21 inconsistent verdicts. The Court concluded the decision not to object was reasonable where the
22 judge might well have ordered the jury to resume deliberations resulting in findings that would
23 then allow the judge to impose a greater penalty. 145 Wn.2d 352, 363, 37 P.3d 280, 285 (2002).
24 The Court, therefore, found a specific reason that could have supported counsel's decision not
25 to object. Similarly, in *State v. Aho*, the Court considered trial counsel's failure to investigate
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1 the effective dates of the relevant statutes in connection with the factual charging period. 137
2 Wn.2d 736, 745-46, 975 P.2d 512, 517 (1999). The Court found there was no conceivable
3 legitimate tactic where the only possible effect of deficient performance was to allow the
4 possibility of a conviction of a crime under a statute which did not exist and could not be
5 applied during part of the charging period.

6
7 “The proper measure of attorney performance remains simply reasonableness under
8 prevailing professional norms.” *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052
9 (1984). Counsel accepted damning testimony wholesale, without any limits and without
10 ensuring the State, as the proponent of the evidence, could establish its admissibility.
11 Constitutionally effective counsel would not have so readily ceded this terrain—whether expert
12 testimony underpinning the entire case was even admissible—to the prosecution. As in *Aho*, the
13 only possible effect of deficient performance was to allow the possibility of a conviction based
14 on inadmissible testimony.

15
16 vi. Counsel’s Failure to Challenge the Admissibility of Dr. Feldman’s
17 Opinion Testimony Prejudiced Mr. Morris

18 The State claims Mr. Morris was not prejudiced by counsel’s failure to challenge
19 admissibility because such a challenge would not have been successful. For the reasons set
20 forth above, Dr. Feldman’s opinion on causation was unreliable and therefore not helpful to the
21 trier of fact. It is not admissible under ER 702 and applicable caselaw. Additionally, related
22 considerations weigh in favor of excluding the testimony, disproving the State’s claim that a
23 motion would not have been successful.

24
25 *a. The burden of proof weighs in favor of excluding the opinion*

26
27 In a criminal case, “the Due Process Clause protects the accused against conviction
28 ***except upon proof beyond a reasonable doubt of every fact necessary*** to constitute the crime

1 with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added). The
2 State thus bore the burden of proving A.M.’s medical findings were the result of abusive
3 shaking by Mr. Morris. Where, as here, the expert testimony constituted the proponent’s *only*
4 evidence of causation, the court’s admissibility determination under ER 702 and other rules of
5 evidence must consider the State’s burden of proof.

6
7 If conjecture is insufficient to help a jury determine proximate cause in a civil case, it is
8 certainly insufficiently helpful in a criminal case requiring proof beyond a reasonable doubt.
9 *See, e.g., Moore v. Hagge*, 158 Wn.App. 137, 148, 241 P.3d 787, 792 (2010) (expert’s
10 summary judgment affidavit was unfounded; conjectural theories are insufficient to establish
11 proximate cause); *Reese v. Stroh*, 128 Wn.2d at 309 (evidence establishing proximate cause in
12 medical malpractice cases must rise above speculation, conjecture, or mere possibility);
13 *McLaughlin v. Cooke*, 112 Wn.2d 829, 774 P.2d 1171 (1989) (evidence will be considered
14 insufficient to support the trial verdict if it can be said that, considering all the medical
15 testimony presented at trial, the jury must resort to speculation or conjecture in determining the
16 causal relationship).

17
18
19 Proof beyond a reasonable doubt has “traditionally been regarded as the decisive
20 difference between criminal culpability and civil liability.” *Jackson v. Virginia*, 443 U.S. 307,
21 315 (1979). Dr. Feldman’s opinion—a medico-legal hypothesis—is insufficient, since proof
22 that leaves open the real possibility that Mr. Morris did not cause the medical findings could
23 not satisfy the State’s burden of proof. Thus, Dr. Feldman’s expert opinion does not help the
24 jury determine causation to the substantive standard.
25
26
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1 Law & Hum. Behav. 436 (2009). Thus, not only does the expert designation cause jurors to
2 give the testimony an unearned air of legitimacy, but it also limits the ability of the defense to
3 counter those flaws in the jury's mind.

4 The AHT diagnosis, purporting to diagnose causation, is unreliable. That this unreliable
5 determination is presented as an expert medical "diagnosis" only serves to make it more
6 prejudicial. Thus, balancing the probative value of the opinion against its prejudicial effect, the
7 scales tip wholly towards excluding the evidence.
8

9 *c. Due process concerns weigh in favor of excluding the opinion*

10 For convictions resting on expert opinion, the unreliability of expert testimony clearly
11 implicates due process. In *Han Tak Lee v. Glunt*, 667 F.3d 397 (3d Cir. 2012), petitioner raised
12 a due process challenge to a murder conviction predicated on expert testimony regarding arson.
13 The Court held that to merit relief, petitioner must show the expert testimony at trial
14 undermined the fundamental fairness of the entire trial because the probative value of the
15 evidence, though relevant, is greatly outweighed by the prejudice. *Id.* at 403. Finding on
16 remand that the verdict rested almost entirely upon flawed and unreliable scientific evidence,
17 the court found the petitioner made this showing and granted the writ. *Han Tak Lee v. Tennis*,
18 2014 WL 3894306 at *18-19 (M.D. Pa. June 13, 2014). Thus, where the proof of guilt rests on
19 Dr. Feldman's causation opinion, and it is flawed and unreliable, preserving the fundamental
20 fairness of the trial necessitates excluding it.
21
22
23

24 vii. Dr. Herlihy's Testimony is Not Enough to Sustain the Conviction

25 The State argues that even without Dr. Feldman's testimony there was sufficient
26 evidence to conclude that A.M's injuries were caused by abuse. State's Motion at 30. This is
27 incorrect. Dr. Herlihy did not time the retinal bleeding to the 10-15 minutes Mr. Morris was
28

1 alone with A.M. or even to the day. *See* 6/10/11 RP 334-335; 355 (explaining hemorrhages
2 detected June 1, 2009 can be timed, reliably, to within one week).

3 There was evidence disputing Dr. Herlihy's conclusion that abuse caused the retinal
4 bleeding. Even if it could be said Dr. Herlihy established this, her testimony alone could not
5 establish Mr. Morris inflicted the abuse. The State clearly needed Dr. Feldman to tie the
6 medical findings together and to opine they were caused by the same event happening during
7 the very narrow window of time Mr. Morris was solely responsible for A.M.
8

9 C. Mr. Morris Made a Substantial Showing Trial Counsel was Ineffective in Failing to
10 Correct Dr. Feldman's Misleading Testimony

11 Trial counsel's strategy was to question the soundness of Dr. Feldman's opinion. Trial
12 counsel had a duty to carry out her chosen defense strategy competently. *See Alcala v.*
13 *Woodford*, 334 F.3d at 870 (holding that counsel failed in his duty to present his chosen defense
14 reasonably and competently). At trial, Dr. Feldman explained his reliance on the medical
15 literature and pointed specifically toward certain studies to support his use of RH and SDH to
16 diagnose abusive head trauma. The testimony, such as the claim that the Bhardwaj study
17 showed RH is 95% specific for head injury, appeared very strong. 6/3/11 RP 12-13. Dr.
18 Feldman used the Vinchon 2010 confessional study to similarly suggest that A.M.'s exact
19 clinical picture, including no surface evidence of trauma, pointed strongly towards abusive
20 shaking. 6/3/11 RP 16. Each of these specific claims bolstered Dr. Feldman's broad assertion
21 that based on A.M.'s medical findings alone abuse could be confidently diagnosed.
22
23

24 Circular literature and confessional studies—which both these studies are—is not
25 strongly supportive data. Trial counsel's failure to expose, or even explore, the flaws with the
26 studies and with relying on them is deficient performance. The State concludes trial counsel's
27 cross-examination omissions were strategic without articulating what conceivable strategy
28

1 would support letting this testimony go completely unchecked. There is not one. Further, in
2 addition to the above deficiencies, the large majority of biomechanical studies went completely
3 unexplored. As described above, Dr. Feldman's diagnosis in this case cannot be squared with
4 biomechanics. Accordingly, this omission cannot be considered strategic when the defense
5 strategy is to discredit the expert testimony.
6

7 For Dr. Feldman to conclude that A.M.'s injuries were the result of abuse inflicted by
8 her last caregiver when she was alone with him requires the ability to reliably time the injuries
9 to a 10-15 minute window. There is consensus, even amongst Dr. Feldman's child abuse
10 colleagues, that symptoms may be delayed and that, although rare, even prolonged lucid
11 intervals happen. See Brief in Support of CrR 7.8(b) Motion at 36-39. Given the very narrow
12 window of time in this case, this was critical. Competent counsel would have used all the tools
13 available on this topic to show the medical consensus that precisely timing injuries is not
14 justified by what is known about the onset of symptoms. Trial counsel's failure to establish this
15 allowed Dr. Feldman's narrow timing determination to be presented as sound, even though it is
16 wildly outside what agreed-upon knowledge supports.
17
18

19 Prejudice is shown when "there is a reasonable probability that, but for counsel's
20 unprofessional errors, the result of the proceeding would have been different." *Strickland v.*
21 *Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052 (1984). The Court must consider the
22 prejudicial impact of each error cumulatively. *Id.* at 695. Here, viewed individually and
23 cumulatively, given the significance of each issue to Dr. Feldman's opinion, there is a
24 reasonable probability the result of the trial would have been different but for counsel's errors.
25

26 Confidence in the outcome of the trial is unwarranted.
27
28

1
2 D. Mr. Morris Made a Substantial Showing that Dr. Feldman's Misleading and Unreliable
3 Testimony Violated His Due Process Right to a Fair Trial

4 The State does not address the claim that Dr. Feldman's testimony was misleading,
5 other than to say it was not. As described above and in the Brief in Support of CrR 7.8(b)
6 Motion, Dr. Feldman's testimony did not accurately represent the strength of the evidence-base
7 for shaking, especially as it applies in a case like this one lacking any evidence of impact or
8 other signs of abuse. Without explaining or even addressing the limits of the stated support, Dr.
9 Feldman's discussion of the medical literature created a false impression that the research
10 strongly supported a definitive diagnosis of abuse. *See Lakey*, 176 Wn.2d at 921. Due process
11 is violated when State introduces misleading testimony. *Hayes v. Brown*, 399 F.3d 972, 984
12 (9th Cir. 2005). Mr. Morris' conviction rests on Dr. Feldman's testimony, which certainly
13 affected the judgment of the jury. It cannot be said that with Dr. Feldman's testimony
14 misleadingly representing the support for his diagnosis, Mr. Morris received a fair trial. *See*
15 *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392 (1976)).

16 Further, the introduction of Dr. Feldman's unreliable testimony violated due process
17 because the probative value of the evidence was greatly outweighed by the prejudice,
18 undermining the fundamental fairness of the entire trial. *Han Tak Lee v. Glunt*, 667 F.3d 397,
19 403 (3d Cir. 2012).

20
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24 **III. CONCLUSION**

25 For all the foregoing reasons, this Court should not transfer Mr. Morris' CrR 7.8(b)
26 Motion to the Court of Appeals. The Court can address the merits of the motion and grant relief
27 based upon the constitutional violations infecting Mr. Morris' trial. Mr. Morris has made a
28

1 sufficient showing warranting relief based on the record before the Court. However, if there are
2 factual questions that need to be resolved to reach the merits, such as the extent to which Dr.
3 Feldman's testimony should have been excluded or limited, this Court can hold a factual
4 hearing and transfer is inappropriate.
5

6
7 Respectfully submitted this 8th day of December 2014

8 INNOCENCE PROJECT NW CLINIC

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12 M. Fernanda Torres, WSBA #34587
13 Attorney for Mr. Morris
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CERTIFICATE OF SERVICE

I certify that I hand-delivered a copy of the foregoing Response to State's Motion to Transfer—Corrected directly to

Kathleen Webber, Deputy Prosecuting Attorney
Office of the Snohomish County Prosecuting Attorney
3000 Rockefeller, M/S 504
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