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<td>DISTRICT COURT, BROWN COUNTY,
STATE OF COLORADO

410 Clermont St.,
Denver, CO 80220
<hr>PLAINTIFF: PEOPLE OF THE STATE OF COLORADO

v.

DEFENDANT: JOHN SMITH
<hr>Attorney for Defendant:

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<td>▲ COURT USE ONLY ▲
<hr>Case Number:17CR256</td>
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<td colspan="2">DEFENDANT'S MOTION TO VACATE CONVICTION
AND SENTENCE PURSUANT TO RULE 35(c)</td>
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INTRODUCTION

This is a Shaken Baby Syndrome case. It is sad and difficult. An adorable 15-month old girl named Sarah Jones died. But this case is not only about the tragic loss of a child. It is also about the wrongful conviction of a man for a crime he did not commit.

Four years ago, Defendant John Smith, while looking after his girlfriend's daughter, placed little Sarah on a 40-inch-high countertop at the store where he worked. Then, unfortunately, he turned his back on Sarah while he swept the floor, and several minutes later, she rolled off the counter and landed on her head.

Mr. Smith ran to Sarah as soon as he heard the thud and a cry. But it was too late. Even though Mr. Smith had Sarah to the hospital within minutes, the damage to her brain was irreversible. She died two days later.

Mr. Smith explained to the doctors exactly what happened. But they didn't believe him. Like the Vatican once refused to believe Galileo, insisting against science that the Earth (not the sun) was the center of the universe, these doctors clung to an outdated and erroneous theory of child abuse called Shaken Baby Syndrome ("SBS"). SBS theory posits that injuries like Sarah's cannot be caused by a short fall, but only by a violent and abusive shaking. Thus, Mr. Smith was charged with murder.

To defend him, Mr. Smith enlisted the help of a brand name law firm in Denver, Hutton Kline, P.C. – specifically, Charles Hutton, the firm's founder, and a newer partner, Bill Walker .

Mr. Hutton and Mr. Walker put together a veritable dream-team of doctors to prove Mr. Smith's innocence. Specifically, they hired six different experts from six different disciplines, each of whom planned to testify at trial that SBS theory is fundamentally flawed and that Sarah's injuries were consistent with a short fall and inconsistent with any type of shaking, no matter how violent. Importantly, these doctors were no hacks. They were instead educated at, and now affiliated with, many of the most prestigious academic institutions in the world – places like Harvard, Johns Hopkins, Berkley, and Vanderbilt University. Thus, the moniker "dream-team" is not hyperbole. It is, put simply, fact.

Yet despite this fact, Mr. Smith pled guilty to Attempted First Degree Murder, and he was sentenced to 26 years in prison.

How this happened is the subject of this brief. But the simple answer is this. Mr. Hutton and Mr. Walker, by their own admission, withheld from Mr. Smith the fact that he had a dream-team of experts supporting his defense. Thus, when the prosecution offered a deal, Mr. Smith had no idea of the tremendous weight and credibility of the defense he could have mounted at trial.

That this failure to advise occurred is surprising. It's like the discovery of an alibi and then withholding it from one's client, or interviewing the only eye-witness and failing to tell the client that he fingered another guy.

Why did this happen? Why did Greg Norman, one of the greatest golfers ever, flub a seemingly insurmountable lead in the final round of the Masters in 1996? We are all human, no matter how great. And sometimes we just blow it.

Here, the evidence will show that when the prosecution's offer came in, just one month before trial, Mr. Hutton and Mr. Walker were unprepared for trial. They had not interviewed, or attempted to interview, even one of the prosecution's many expert witnesses. Nor had they yet put in the work necessary to understand the science of the case so that they could effectively cross-examine the state's experts and directly examine their own. As a result, their email correspondence will show that they were planning to ask for a continuance of the trial – a continuance to which, emails will show, the prosecutor was planning on objecting to strenuously. But then the prosecutor made an offer. Mr. Hutton and Mr. Walker advised Mr. Smith to take it. Which he did. Then the problem of the contested continuance suddenly disappeared.

Regardless of the reason why, however, the fact remains that Mr. Smith did not make a knowing, voluntary, and intelligent plea. Therefore, he now seeks to withdraw that plea, and this court should grant the request for three reasons. First, the entirety of the prosecution's case against Mr. Smith was based on SBS theory, which itself is based on a foundation of sand that, over the last twenty years, has slowly disappeared like time through an hourglass. Second, Mr. Smith's guilty plea is fundamentally flawed because he was not advised properly. Third, had Mr. Smith been advised properly, had he been properly informed of the weight and credibility of the defense he could have mounted at trial, he never would have pled guilty.

To be clear, this is not your typical postconviction case. It's not about Monday morning quarterbacking with the hindsight knowledge of a failed defense at trial, or about buyer's remorse once the defendant meets his big, bad cellmate and sleeps in a prison cell for the first time. No, this case is different. It is instead about a complete breakdown of the adversarial mechanism of the criminal justice process, without which there can be no true and just result.

Justice requires that this court grant Mr. Smith relief. Otherwise would be for this court to sanction knock-off representation by name brand lawyers who should have known better. Otherwise would be to disrespect our entire notion of an adversarial system of justice by continuing to let stand the clear violation of Mr. Smith's constitutional right to effective assistance of counsel.

Surely, we can do better.

THE HISTORY OF SBS THEORY

Stand too close to a painting by Monet, and it is impossible to see what the brushstrokes show. Step back, however, and the whole of it comes into focus. So too with an SBS case. You have to first step back and see it in the broader context of history. Only then is it possible to get at the truth.

THE ORIGINS OF SBS THEORY: Nearly fifty years ago to the day, A. Norman Guthkelch, a celebrated pediatric neurosurgeon in Britain, authored a medical paper in which he theorized that shaking a baby – a common form of punishment in England – might tear blood vessels inside a child's head and behind its eyes, resulting in brain swelling that could cause severe injury or death.[1] This paper was merely a hypothesis. It was unproven and untested.[2] Yet its intuitive sway – imagine the yolk of a shaken egg bouncing around inside its shell – spawned the term Shaken Baby Syndrome ("SBS"). It spawned as well a dogmatic belief amongst pediatricians and child abuse experts alike that a constellation of three specific injuries, commonly called "the triad," necessarily means that a child has been abusively shaken absent proof of an extremely traumatic accident, such as a car crash.[3] This dogmatic belief that the triad equals abuse, over the next five decades, would result in thousands and thousands of murder and abuse charges leveled against parents and caretakers around this country, most of whom suffered felony convictions and lengthy prison sentences as a result.[4] Now, however, a growing number of these parents and caretakers have been exonerated in the light of advancing medical technology and evidence-based research that fundamentally undermine the tenets upon which Shaken Baby Syndrome is based.[5]

THE TRIAD DEFINED: The constellation of three specific injuries that comprise the triad are: (1) a brain bleed, commonly called a subdural hemorrhage ("SDH") or

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[1] *See* Randy Papetti, THE FORENSIC UNRELIABILITY OF THE SHAKEN BABY SYNDROME, 15-17 (2018) (Exhibit B).
[2] *Id.* at 16.
[3] *See* Deborah Tuerkheimer, FLAWED CONVICTIONS: "SHAKEN BABY SYNDROME" AND THE INTERTIA OF INJUSTICE, xi (2014) (Exhibit A); *see also* Exhibit B: Papetti, SHAKEN BABY SYNDROME, *supra* note 1, at 22-29, 145-152.
[4] *Id.* at xii, n.1.
[5] *See e.g. Commonwealth v. Epps,* 53 N.E.3d 1247 (Mass. 2016) (holding that change in SBS theory such that short, accidental fall can now cause triad constitutes newly discovered evidence that justifies a new trial); *People v. Bailey,* 144 A.D.3d 1562 (N.Y. Sup. Ct. 2016) (same); *Ex Parte Henderson,* 384 S.W.3d 833 (Tex. Crim. App. 2012) (same); *State v. Edmunds,* 746 N.W.2d 590 (Wis. Ct. App. 2008) (shift in mainstream medical opinion on SBS constitutes newly discovered evidence that justifies a new trial); *Del Prete v. Thompson,* 10 F.Supp.3d 907 (N.D. Ill 2014) (same).

subarachnoid hemorrhage ("SAH"), (2) bleeding behind the eyes, commonly called retinal hemorrhage ("RH"), and (3) brain swelling, commonly called cerebral edema or diffuse axonal injury ("DAI").[6]

SHORT FALLS CAN'T CAUSE THE TRIAD: One of the fundamental tenets of Shaken Baby Syndrome is that a short fall (i.e. five feet or less) cannot cause the triad.[7] This premise is not only elegant in its simplicity. Its utility in the hands of a prosecutor is a virtual panacea against every claim of a dropped or fallen child who arrives at the hospital suffering from the triad. So, in recent decades, virtually every caretaker who arrived at the hospital with a dropped or fallen baby, later determined to have the triad, was accused not only of child abuse, but of lying about it as well by fabricating the story of a drop or a fall.[8] In many cases, the caretaker, under the pressure of interrogation, would admit to shaking or jostling the child in a revival attempt, only to have this admission characterized in court as a confession to shaking, albeit one that minimizes degree on account of a guilty conscience.[9]

BUT WAIT. . . SHORT FALLS CAN CAUSE THE TRIAD: In 2001, however, something interesting happened. Dr. John Plunkett, a forensic pathologist, published a study of 18 cases in which children fell short distances under witnessed circumstances that proved the falls were accidental.[10] In the Plunkett study, all the children died from the triad, which had until then been associated exclusively with SBS.[11] In the most compelling case, a two-year-old toddler fell just over two feet from a play gym onto a padded carpet, hit her head on the ground, and became severely symptomatic five minutes later. The child later died from the triad, and if the child's grandmother hadn't been videotaping the child at the time of the fall, thus proving the accident, the grandmother most certainly would have been charged with murder as a result of SBS theory.[12]

THE AAP CHANGES ITS POSITION ON SHORT FALLS: Dr. Plunkett's 2001 study of children's short falls proved that it is possible for a short fall to cause the triad, and by doing so, it fundamentally undermined one of the foundational tenets of the SBS theory.

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[6] *See* Exhibit A: Tuerkheimer, FLAWED CONVICTIONS, *supra* note 3, at xi.
[7] *Id.* at 22-23, 129; *see also* Exhibit B: Papetti, SHAKEN BABY SYNDROME, *supra* note 1, at 91.
[8] *See* Exhibit A: Tuerkheimer, FLAWED CONVICTIONS, *supra* note 3, at 97-99; *see also* Exhibit B: Papetti, SHAKEN BABY SYNDROME, *supra* note 1, at 65.
[9] *Id.*
[10] *See* John Plunkett, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls,* 22 AM. J. FORENSIC MED. PATH. 1 (2001) (Exhibit C).
[11] *Id.*; *see also* Exhibit B: Papetti, SHAKEN BABY SYNDROME, *supra* note 1, at 91-95.
[12] *See* Plunkett, *Short-Distance Falls, supra* note 10, at 4 (Case 5).

As a result, the American Academy of Pediatrics ("AAP"), in 2009, changed its official policy position on SBS to delete the claim that short falls cannot cause the triad.[13]

YET SOME DOCTORS KEEP SAYING THAT SHORT FALLS CAN'T KILL: One might think that the above would stop pediatricians and child abuse experts from testifying in criminal trials that short falls can never cause the triad. But such thinking is wrong. Despite the Plunkett study, and despite several additional studies conducted by other experts in the field, all of which yield the same conclusion[14] – that short falls can cause the triad and kill – some pediatricians and child abuse experts still routinely testify that short falls cannot cause the triad and/or kill a child. That this is the case is as shocking as it is wrong. Yet, as the present case demonstrates, it remains a fact. And why the medicolegal system has been so tragically slow to incorporate the finding of the Plunkett study and its progeny is now the subject of two entire books, one published by The Oxford University Press and the other by Academic Forensic Pathology International, which is the official publication of The National Association of Medical Examiners (i.e. "NAME").[15]

SCIENCE AND TECHNOLOGY CATCH UP TO SBS THEORY: The Plunkett study is not the only seminal development in the story of the dominance and subsequent deterioration of SBS theory. Two other critical developments have also served to undermine SBS theory and enhance our understanding of the constellation of injuries typically associated with SBS. First, in the early 2000s, a movement toward evidence-based medicine revealed fatal flaws in the published studies upon which SBS theory was based.[16] Second, at the turn of the century, magnetic resonance imaging ("MRI") revolutionized doctors' ability to evaluate, study and determine the cause of brain injuries. Compared to its precursor, computed tomography ("CT"), MRI scans allowed for much more detailed assessments of the nature and timing of injuries.[17] As Deborah Tuerkheimer writes in her book, attached as Exhibit A, "New radiological findings challenged what had been akin to scientific gospel revealing the presence of triad symptoms in the so-called 'mimics' of

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[13] *Compare* Exhibit D (2001 AAP Policy Paper) to Exhibit E (2009 AAP Policy Paper); *see also* Exhibit B: Papetti, SHAKEN BABY SYNDROME, *supra* note 1, at 196-197.

[14] *See* Exhibit B: Papetti, SHAKEN BABY SYNDROME, *supra* note 1, at 93-95 (collecting studies in footnotes 257-260).

[15] *See* Exhibit A: Deborah Tuerkheimer, FLAWED CONVICTIONS: "SHAKEN BABY SYNDROME" AND THE INTERTIA OF INJUSTICE (2014); Exhibit B: Randy Papetti, THE FORENSIC UNRELIABILITY OF THE SHAKEN BABY SYNDROME (2018).

[16] *See* Exhibit A: Tuerkheimer, FLAWED CONVICTIONS, *supra* note 3, at 18; *see also* Exhibit B: Papetti, SHAKEN BABY SYNDROME, *supra* note 1, at 152-171.

[17] *See* Exhibit A:Tuerkheimer, FLAWED CONVICTIONS, *supra* note 1, at 19.

abuse. Thus, it became apparent that accidental injury and medical disorders could indeed manifest as SBS."[18]

BIOMECHANICAL STUDIES UNDERMINE THE SHAKING THEORY: As a result of the above developments, in the years since Dr. Plunkett first published his study on short falls, several other foundational tenets of SBS theory have also been disproved.

For example, many biomechanical studies now show that an adult cannot shake a child hard enough to cause the triad.[19] Moreover, these studies show that if a child falls upon a hard surface, the sudden impact can generate forces great enough to cause the triad.[20] In fact, these biomechanical studies demonstrate that the forces generated by a fall from as little as three feet far exceed the forces generated by shaking, which is exactly the opposite of what was previously believed (i.e. that only shaking generates enough force to cause the triad and not a short fall).[21]

CELLULAR STUDIES PROVE BRAIN DEATH IS CAUSED BY OXYGEN DEPRIVATION, NOT SHAKING, THUS REVEALING "MIMICS" OF SBS: Another foundational tenet of SBS theory that has been disproved is the belief that shaking a child creates whiplash-like forces that tear membranes inside the skull, thus causing the brain to bleed and die, a process called Diffuse Axonal Injury ("DAI").[22] Now, cellular studies conducted on the brains of children, believed to have been killed by SBS, prove that the damage to their brain cells was not caused by shearing or whiplash forces but instead by oxygen deprivation.[23]

The importance of this finding cannot be overstated. It is critical for two reasons. First, if cellular (i.e. axonal) damage to the brain (which is what kills the child) is caused by oxygen deprivation instead of whiplash forces that rupture brain tissue, then the previous belief is wrong that axonal damage to the brain necessarily means the child suffered from a violent acceleration-deceleration event, such as shaking.[24] Second, if axonal/cellular damage is merely secondary to oxygen deprivation, then there are numerous possible non-abusive explanations for why the brain might have been deprived of oxygen. This is so because many different non-abusive or naturally occurring conditions can cause oxygen deprivation to the brain. These other non-abusive causes are too numerous to list here, but they are now understood to include accidental falls, bleeding

[18] *Id.*
[19] *See* Exhibit B: Papetti, SHAKEN BABY SYNDROME, *supra* note 1, at 81-90.
[20] *Id.* at 91-95.
[21] *Id.* at 93-94, n. 258.
[22] *Id.* at 104-105.
[23] *Id.* at 105-107.
[24] *Id.* at 108-110.

disorders, prenatal and perinatal conditions, metabolic disorders, infectious disease, vasculitis, autoimmune conditions, various cancers, toxins and poisons, nutritional deficiencies, and complications from medical or surgical procedures.[25]

This non-exhaustive list of possible causes of oxygen deprivation to the brain are now referred to as "mimics" of SBS because we now know that they can cause the triad.[26] Obviously, all of these "mimics" are non-abusive in nature, and because we now know they can cause the triad, we now also know that numerous individuals have been wrongfully convicted of child abuse based on the erroneous belief that the triad means abuse occurred.

STUDIES SHOW RETINAL HEMORRHAGES ARE CAUSED BY BRAIN SWELLING, NOT SHAKING: Yet another foundational tenet of SBS that has now been disproved, and which is directly relevant to the present case, is the belief that shaking a child inflicts such powerful forces upon the eyes that it tears ocular tissue, thus causing bleeding behind the eyes (i.e. retinal hemorrhages or "RH").[27] Yet study after study conducted in the last two decades prove that bleeding behind the eyes is not the result of direct trauma inflicted upon the eyes via shaking.[28] Bleeding behind the eyes is instead secondary to brain swelling.[29] In other words, retinal hemorrhages are caused by brain swelling, which in turn can be caused by numerous different abusive or non-abusive conditions.[30]

To put this in context for the present case, SBS theory dictates that when Sarah was allegedly shaken, she was shaken so violently that the whiplash forces inflicted upon her eyes tore vessels behind her eyes and caused retinal hemorrhaging. But we know this theory fails because when Sarah first arrived at the hospital, CT scans show that she had no retinal hemorrhages. She did, however, develop severe retinal hemorrhages about eight hours after being admitted to the hospital when her brain had swollen so much that she was effectively dead. Put simply, the facts of this case alone disprove one of the foundational tenets of SBS theory – namely, that retinal hemorrhages occur during the alleged shaking episode via whiplash forces inflicted upon the eyes.

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[25] *Id.* at 65-66; *see also* Keith A. Findley et. al., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting it Right,* 12 HOUS. J. HEALTH L. & POL'Y, 214 (2012).
[26] *See* Exhibit A: Tuerkheimer, FLAWED CONVICTIONS, *supra* note 3, at 19.
[27] *See* Exhibit B: Papetti, SHAKEN BABY SYNDROME, *supra* note 1, at 120-126.
[28] *Id.*
[29] *Id.* at 127-142.
[30] *Id.*

The Triad Does Not Equal Abuse: As the above demonstrates, the last two decades of scientific and technological evolution have not been kind to SBS theory.[31] Today, as stated by one the most important treatises in forensic neuropathology, "Virtually all the hallowed tenets of SBS have been challenged on the basis of scientific principles and been found wanting or wrong."[32]

Former Proponents Of SBS Theory Reverse Course: Given the above, numerous former proponents of SBS theory – most of whom have testified as expert witnesses for the prosecution – have reversed course so that they now testify for defendants who appear to be wrongly accused of abuse. Chief among these experts is A. Norman Guthkelch – the pediatric neurosurgeon from Britain who first developed the SBS theory. In 2015, *The Washington Post* published a lengthy expose on the controversy around SBS, which was the result of a year-long investigation conducted with Northwestern University and which profiled many experts who were previously proponents of SBS but who are now skeptics. In this article, Dr. Guthkelch is quoted as saying, "I am doing what I can so long as I have breath to correct a grossly unjust situation. I think they [i.e. the proponents of SBS theory] have gone much too far."[33]

A Sea Change Has Occurred Regarding SBS Theory: Today there has been a sea change amongst scientists and researchers about the reliability of SBS theory.[34] Three justices from the Supreme Court of the United States have acknowledged as much.[35] Moreover, a recent survey of forensic pathologists found that just 41% of the respondents deemed SBS a reliable diagnosis.[36] This survey thus suggests that 59% of forensic pathologists, whose job it is to study and research cause and manner of death, believe that SBS theory is either invalid or unreliable. Twenty years ago, there were almost no forensic pathologists publicly doubting SBS theory, and those that did were written off by the medical establishment as fringe denialists.[37]

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[31] For a complete list of foundational tenets of SBS that have been disproved since 2001, *see* Exhibit B: Papetti, Shaken Baby Syndrome, *supra* note 1, at 249-251.

[32] Jan E. Leestma, Forensic Neuropathology 642 (3d ed. 2014). It should be noted that Dr. Leestma, the author of the quoted text, was one of the original proponents of SBS theory, and as such, testified as an expert for the prosecution in the famed "Boston Nanny case" in which Louise Woodward was convicted of murder based on SBS theory.

[33] *See* Exhibit F.

[34] *See* Exhibit B: Papetti, Shaken Baby Syndrome, *supra* note 1, at 171-174.

[35] *See Cavazos v. Smith*, 565 U.S. 1, 8 (2011) (Ginsburg, J., joined by Breyer, J. and Sotomayor, J., dissenting).

[36] *See* Sandeep K. Narang et. al., *Acceptance of Shaken Baby Syndrome and Abusive Head Trauma as Medical Diagnoses,* 177 J. Pediatr. 273, 277 (2016).

[37] For a more complete discussion of SBS today, *see generally* Exhibit B: Papetti, Shaken Baby Syndrome, *supra* note 1, at 199-252.

WHY SOME DOCTORS STILL SAY THE TRIAD EQUALS ABUSE: All of this begs the question why several doctors from Children's Hospital Colorado were going to testify against Mr. Smith that the triad equals abuse. This question is deeply complicated and far beyond the scope of this brief. But a couple initial observations do at least shed some light on this issue.

First, it is helpful to understand the profound and lasting impact of a true paragon in the field of child abuse and neglect – Dr. C. Henry Kempe. Dr. Kempe founded the Kempe Center for the Prevention and Treatment of Child Abuse and Neglect, which is located at Children's Hospital Colorado.[38] He was a singular pioneer in the identification, diagnosis, reporting and prevention of child abuse at a time (approximately fifty years ago) when child abuse was largely ignored and when neither child protection agencies, nor mandatory reporting laws, even existed.[39] Because of his work in this area, Dr. Kempe was nominated for a Nobel Prize. His work and his legacy have no doubt saved and/or vastly improved the lives of countless children. And his approach to the problem of unexplained injuries in children, which was unique at the time, is what must be understood to see why his legacy today helps to explain the entrenchment of SBS theory in the minds of the doctors who would have testified against Mr. Smith .

Fifty years ago, because child abuse was largely ignored, poorly understood, and woefully underreported, Dr. Kempe urged that doctors must presume child abuse from particular medical findings, even if those findings could have other, innocent explanations.[40] For example, "according to Kempe, when certain injuries are present in young children – such as certain bony lesions or fractures, subdural hematoma, or soft tissue swelling – a physician should proceed with 'a high initial level of suspicion' and 'a bias in favor of the child's safety.'"[41] This meant that when it came to suspicious injuries, caretakes and parents were presumed guilty until proven innocent.

Dr. Kempe's approach of presuming abuse in cases of suspected abuse – this Golden Rule, if you will – helps to explain why doctors at Children's Hospital Colorado have been so tenacious in preserving the SBS belief system, even in the face of dramatic evidence proving that it is wrong. Dr. Kempe's legacy is woven into the fabric of Children's Hospital Colorado. And his approach of presuming abuse in cases of suspected abuse dovetails

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[38] *See* Exhibit B: Papetti, SHAKEN BABY SYNDROME, *supra* note 1, at 10-14.
[39] *Id.*
[40] *Id.* at 13.
[41] *Id.* at 11-12 (citing C. Henry Kempe et. al., *The Battered Child Syndrome,* 181 JAMA 17 (1982)).

neatly with the approach of SBS theory, which is to presume abuse from the presence of the triad. An age-old adage comes to mind here. It's hard to teach an old dog new tricks.

Which brings us to a second point in trying to shed light on why some pediatricians and child abuse experts still espouse SBS theory, despite strong evidence showing that it is profoundly flawed. As Randy Papetti so aptly notes in his book on SBS, "Child abuse is a deeply emotional subject. Our desire to protect children from abuse is strong and instinctive, as is our desire to punish those who would hurt them."[42] Given this truism and how appropriately fixed it is in our most basic instincts, it is difficult for people, especially pediatricians and child abuse experts, whose job it is to protect the most vulnerable among us, to change their perspective.

DR. KEMPE'S APPROACH VIOLATES THE PRESUMPTION OF INNOCENCE: As a final note on this topic, it is important to note that none of the above is meant to blame Dr. Kempe for anything other than having the best of intentions. Nor is any of the above intended to make a value judgment about whether Dr. Kempe's approach is right or wrong. But it must be noted that Dr. Kempe was operating in a medical and social context where he was trying to protect children and combat abuse. Yet, by contrast, this is a criminal case. And it must be noted that Dr. Kempe's approach of presuming abuse in cases of suspected abuse flies in face of constitutional guarantees such as the presumption of innocence and due process.

THE FACTS OF THIS CASE

Now we can zoom in. Now we can examine the brushstroke that is this case and see it for what it is.

On the evening of March 29, 2017, John Smith came home from his job as the manager of the NAPA Auto Parts store in Wray, Colorado. His girlfriend, Heather Jones, who lived with Mr. Smith , was home with her 15-month old daughter, Sarah.

Heather Jones that day was suffering from a migraine, so when Mr. Smith returned home, she went to bed, leaving Sarah in Mr. Smith's care. After eating dinner, while Heather was still asleep, Mr. Smith decided to return to the NAPA store to complete some cleaning he had been unable to finish earlier that day. Since his girlfriend, Heather, was still sleeping, he took Sarah with him to look after her while he worked.

[42] *Id.* at 1.

Shortly after arriving at the NAPA store, which was just a few minutes from his home, Mr. Smith laid Sarah down upon a 40-inch high countertop. He made a makeshift bed for her out of his winter coat. Then he gave her a bottle of warm milk to drink.

What Mr. Smith then did next was both absent-minded and tragic. He turned his back on Sarah and left her unattended while he went about sweeping the store.

A few minutes later, Sarah rolled off the counter and fell 40 inches to the ground. Mr. Smith heard a thud as she landed upon the concrete floor, which was covered only with a half-inch thick pad of rubber.

Mr. Smith sprinted to Sarah immediately. When he arrived, he could tell right away that something was terribly wrong. Sarah's breathing was labored, and she seemed partially unconscious. In a state of abject panic, Mr. Smith picked up Sarah and shook her to try to revive her while he simultaneously exclaimed, "What's wrong? What's wrong?"

Knowing that Sarah needed to get to a doctor immediately, Mr. Smith called his sister, who lived with him, to get her to come take him and Sarah to the hospital. Mr. Smith called his sister instead of an ambulance because he knew, given his sister's location and the location of the hospital, both of which were close to the NAPA store, that she could get him and Sarah to the hospital more quickly than if they had to wait for an ambulance.

When Mr. Smith and his sister arrived to the hospital, Sarah was no longer breathing. Hospital personnel began CPR, and they were able to get Sarah's heart beating again. Yet she was not able to breath on her own, so she was placed on a ventilator to keep her alive.

Given Sarah's critical condition, the doctors decided Sarah needed to be flown to Children's Hospital Colorado in Denver, which occurred not long after her arrival to the hospital in Wray.

Once at Children's Hospital, doctors there performed a full battery of scans upon Sarah. Within twelve hours, they determined that she suffered from the triad. Thus, they concluded – in accordance with their training pursuant to SBS theory – that Mr. Smith's explanation of a short fall was a lie. In their view, the fall, as reported, could not possibly have caused the triad. They then informed the police and Sarah's mother that they believed Mr. Smith had shaken Sarah and concocted the story of the fall.

Three days later, Sarah died. Shortly thereafter, Mr. Smith was arrested and charged with First Degree Murder.

A year later, Mr. Smith, facing the possibility of spending the rest of his life in prison if convicted of murder, pled guilty to Attempted First Degree Murder based on the advice of his counsel. In exchange for his guilty plea, the prosecutor stipulated to a sentencing range of 16 to 32 years. At sentencing, Mr. Smith received 26 years in prison.

ARGUMENT

I. Mr. Smith's trial counsel were ineffective because they failed to tell him of the strong merits of his medical defense to SBS when they advised him to plead guilty. As such, Mr. Smith did not make a knowing, voluntary and intelligent guilty plea.

A. Applicable law.

When a defendant pleads guilty to a crime, he is entitled to effective assistance of counsel,[43] and if the defendant enters a guilty plea based on legal representation that is later deemed ineffective, the plea is involuntary.[44]

To sustain his claim of ineffective assistance, Mr. Smith must prove (1) that his trial counsel's performance was deficient, and (2) that a reasonable probability exists that, but for his counsel's errors, he would have refused to plead guilty and instead gone to trial.[45]

Here, Mr. Smith claims that, even though his trial counsel investigated and understood that he had a strong medical defense to the allegation of Shaken Baby Syndrome, they nevertheless failed to inform him of this when they advised him to plead guilty.

Thus, this case is closely akin to a failure to investigate case in which the client makes an ill-informed choice to plead guilty.[46] In a failure to investigate case, counsel is

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[43] U.S. Const. Amend. VI; Colo. Const. Art. II §16; *Hill v. Lockhart,* 474 U.S. 52, 58 (1985); *Juarez v. People,* 2020 CO 8, ⁋ 10.
[44] *Hill,* 474 U.S. at 56 ("The voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.").
[45] *Id.* at 59.
[46] *See e.g. Hill v. Lockhart,* 474 U.S. 52 (1985) (recognizing that failure to investigate is a valid basis upon which to find counsel ineffective in the context of a guilty plea); *Dando v. Yukins,* 461 F.3d 791 (6th Cir. 2006) (Defense counsel found ineffective for advising client to plead guilty without having investigated the merits of a duress defense based on Battered Woman's

unable to effectively advise his client because (via his failure to investigate) he has not informed himself of the merits of possible defenses. Counsel being ill-informed himself, the client is thus ill-informed too. Here, counsel did inform themselves of the merits of possible defenses. But then, by their own admission, they failed to give this information to Mr. Smith when they advised him to plead guilty. The result, thus, is the same as a failure to investigate case – namely, the client is ill-informed, and as such, he makes an ill-informed decision to plead guilty.

B. Trial counsel's performance was deficient because, when they advised Mr. Smith to plead guilty, they withheld from him that six defense expert witnesses, each from a different medical discipline, and each with superb credentials, could testify that the medical evidence was consistent with the reported accidental fall and inconsistent with the alleged abuse.

From the beginning, Mr. Smith was adamant that he did not abuse Sarah, and he hired attorneys Dan Hutton and Bill Walker with the law firm Hutton Kline P.C. to defend him at trial.

MR. SMITH'S LAWYERS ARE INEXPERIENCED WITH SBS CASES: Though Mr. Hutton and Mr. Walker are experienced lawyers, they were not very experienced with handling SBS cases. Aside from understanding that SBS theory was controversial, they did not know the foundational tenets of SBS theory, the limits to the studies purporting to support the theory, the studies and papers disproving the theory, the types of experts needed to attack the theory, or the names of the experts willing to testify and rebut the theory. Nor did they know the complex vocabulary of medical terms needed to understand and rebut SBS theory. As such, they did not know how to approach the huge volume of medical records in the case. In other words, they didn't know what was relevant in the records and what was not.

Syndrome); *Taylor v. State,* 497 S.W.3d 342, 350 (Mo. Ct. App. 2016) ("Where a defendant can show that plea counsel's failure to conduct an adequate investigation affected the voluntariness and understanding with which the plea of guilty was made, the defendant may state a viable claim for postconviction relief."); *MacKinnon v. State,* 39 So.3d 537 (Fla. 5th DCA 2010) ("A trial attorney's failure to investigate a factual defense or a defense relying on the suppression of evidence, which results in the entry of an ill-advised plea of guilty, has long been held to constitute a facially sufficient attack upon the conviction."); *State v. Hunter,* 143 P.3d 168, 176 (N.M. 2006) (Plea counsel's failure to inform defendant that he could enter a conditional plea and still preserve his right to appeal the denial of his motion to dismiss deemed ineffective).

MR. SMITH'S LAWYERS CONSULT ATTORNEY SHANNON DOE BECAUSE OF HER EXTENSIVE EXPERIENCE ON SBS CASES: Given the above, Mr. Hutton and Mr. Walker hired criminal defense attorney Shannon Doe to consult with them on the case. Ms. Doe, by contrast to Mr. Hutton and Mr. Walker, is very experienced in handling SBS cases. She has successfully litigated many such cases, and the above list of information that Mr. Hutton and Mr. Walker did not know, Ms. Doe knew virtually off the top of her head.

Mr. Hutton and Mr. Walker thus hired Ms. Doe on a limited basis to teach them how to litigate Mr. Smith's case. To do this, Ms. Doe reviewed the discovery and the medical records. Then she wrote a detailed outline for Mr. Hutton and Mr. Walker which was effectively a roadmap of potential medical defenses, how to investigate those defenses, which experts to use to investigate those defenses, and which scientific studies would be useful to undermine the state's theory that Mr. Smith abused Sarah.

MR. SMITH'S LAWYERS HIRE MS. DOE TO HANDLE THE EXPERT WITNESSES AT THE PRELIMINARY HEARING: After receiving Ms. Doe's outline, Mr. Hutton and Mr. Walker were impressed. They were so impressed, in fact, that they asked Ms. Doe to handle all the expert witnesses who would testify at the preliminary hearing, feeling that her depth of knowledge and experience was so far superior to their own that she could do a better job than they could. Ms. Doe agreed to this, and she handled all expert witnesses at the preliminary hearing.

MR. SMITH'S LAWYERS HIRE MS. DOE TO HANDLE ALL EXPERT WITNESS PREPARATION FOR TRIAL: After the preliminary hearing, Mr. Hutton and Mr. Walker again sought to expand the scope of Ms. Doe's responsibilities on the case. Again, due to Ms. Doe's superior depth of knowledge and experience on SBS cases, they asked Ms. Doe to be responsible for all expert witness issues necessary to prepare for trial. This would involve contacting all expert witnesses in the various disciplines needed to rebut SBS theory (i.e. pediatric radiology, forensic pathology, pediatric ophthalmology, general pathology, and biomechanical engineering), providing those experts with the case materials, interviewing the experts, gathering reports from the experts, and then educating Mr. Hutton and Mr. Walker on how to examine these experts at trial.

MS. DOE PUTS TOGETHER A DREAM-TEAM OF EXPERTS: Ms. Doe agreed to the above arrangement, and during the fall of 2017 and winter of 2018, she hired and worked with six different expert witnesses who evaluated Mr. Smith's case and agreed to testify on his behalf at trial. Those witnesses and a brief summary of their expected testimony are summarized below.

a. **Dr. Kenneth L. Monson**: Dr. Monson obtained his Ph.D. in biomechanical engineering from one of the most prestigious universities in the county – i.e. the University of California at Berkley. He is an Associate Professor of Mechanical Engineering at the University of Utah and an Adjunct Professor of Bioengineering, also at the University of Utah. He runs the Head Injury and Vessel Biomechanics Laboratory at the University of Utah, and his research there focuses on how cerebral blood vessels are affected by traumatic brain injuries. Dr. Monson's numerous publications and presentations are outlined in his resume, which is attached as Exhibit G.

    i. Through the use of biomechanical and mathematical concepts, Dr. Monson was able to determine a minimum and maximum force with which Sarah's head struck the ground when she fell (assuming that nothing broke her fall). He did this by considering her height, the height of the counter from which she fell, and the properties of the rubber mat upon which she fell (i.e. about ½ an inch). The results of Dr. Monson's evaluation were that Sarah's head hit the ground with a force of at least 79 Gs and at most 103 Gs.

    ii. Dr. Monson would have testified that studies using crash test dummies and the cadaver heads of dead children have concluded that skull fracture and brain injuries, such as Sarah's, can occur with a head impact of 52 Gs. Thus, Dr. Monson would have concluded that the 79-103G impact that Sarah likely experienced when her head hit the ground exceeded the known brain injury threshold of 52 Gs. Put simply, the fall that Sarah experienced, as reported by Mr. Smith , could have caused the brain injury that was responsible for Sarah's death.

    iii. Dr. Monson also would have testified about the numerous biomechanical studies that indicate a person cannot shake a child hard enough, no matter how violent, to cause the sort of brain injury that killed Sarah. He would have testified about how these studies demonstrate that, in fact, short falls onto hard surfaces create forces many times greater than those produced by shaking (which is the exact opposite of what SBS proponents theorize to be true). In other words, he would have testified that a fall was far more likely than a shaking episode (as theorized by the prosecution) to have caused Sarah's fatal head injuries.

iv. Dr. Monson also would have testified about the apparent paradox between the conclusion that short falls can cause skull fracture and/or fatal brain injury and the reality that, in fact, children rarely suffer these kind of injuries from short falls. As his report indicates (attached as Exhibit H), he would have testified that "One logical explanation for the apparent contradiction between the potentially significant severity or a short fall and the low frequency of serious injuries in such cases is that children most often do not fall in such a way as to expose their heads to the full energy of a fall." In other words, when children fall, the fall is usually broken by, for example, an extended arm.

b. **Dr. Michael Laposata**: Dr. Laposata is a pathologist who specializes in bleeding disorders known as coagulopathies. He obtained his M.D. from Johns Hopkins University School of Medicine. He then went on to have a clinical and teaching practice at several prestigious universities, including the University of Pennsylvania (4 years), Harvard Medical School (19 years), and Vanderbilt Medical School (6 years). He is currently the Chairman of the Pathology Department at the University of Texas Medical School. He has been ranked by his peers as the most influential pathologist in the United States and the third most influential pathologist in the world. Dr. Laposata would have testified that he only works on cases like this one when the evidence indicates the defendant is wrongly accused of a crime, and he only works on such cases for free.

i. Dr. Laposata would have testified that shortly after Sarah was admitted to Children's Hospital Colorado, repeated blood tests clearly show that she developed a bleeding disorder called "DIC," which stands for Disseminated Intravascular Coagulopathy. Children's Hospital doctors also diagnosed Sarah with DIC. Dr. Laposata would have testified that a common cause of DIC is an impact injury to the head, which was presumably the cause in this case. Dr. Laposata would have explained that DIC occurs when, due to injury, the body over-activates its clotting response, which exhausts the body's reserves of clotting factors. This then tips the scale on the body's reaction to bleeding from a process that is mostly clotting to a process that is mostly bleeding.

ii. Dr. Laposata would have testified that a fall from a 40-inch high countertop, like the one reported by Mr. Smith, could definitely cause

the sort of brain injury that may result in the bleeding disorder seen in Sarah's case.

iii. Dr. Laposata would have testified that when a person has a bleeding disorder, such as DIC, they will bleed and bruise very easily, both internally and externally. He would have testified that Sarah's bleeding disorder presumably explains the large amount of blood found at autopsy behind Sarah's eyes, in the subdural and subarachnoid spaces of her brain, and in the subdural and subarachnoid spaces in her spinal column. This testimony would have rebutted testimony from the state's medical examiner, Dr. Ben Billingsly, who testified at the preliminary hearing that the large quantity of bleeding in Sarah's brain, eyes, and spine mean that she must have suffered some kind of violent and abusive trauma to her head and spine. Dr. Laposata would have testified that a major problem with Dr. Billingsly's theory of abuse is that (aside from scalp swelling to the back of Sarah's head, which is consistent with the reported fall)[47] Sarah suffered no external injury to her body that is consistent with the kind of abuse that would be necessary to cause the sort of bleeding found in Sarah's brain, eyes, and spinal column.

c. **<u>Dr. Khaled Tawansy</u>**: Dr. Tawansy is a pediatric ophthalmologist who leads the retinal disorders group at the Children's Hospital in Los Angeles. He is a world-renowned retinal surgeon and a professor of ophthalmology, having taught at the Keck School of Medicine at the University of Southern California and the Vanderbilt University School of Medicine. He obtained his M.D. at the University of Michigan Medical School, and he has completed several different ophthalmological fellowships at the University of British Columbia, Vanderbilt University School of Medicine and Harvard Medical School. He is a recognized national authority on the cause of retinal hemorrhages in children, and he serves nationally as an expert witness in cases of suspected child abuse.

i. Dr. Tawansy would have testified at trial and disagreed with the preliminary hearing testimony of the state's medical examiner, Dr. Ben Billingsly, as well as the anticipated testimony of an expert from Children's Hospital Colorado, that Sarah's retinal hemorrhages were caused by abuse. Dr. Tawansy would have testified that Sarah's retinal hemorrhages were extreme and that they were caused by a combination of brain swelling and her bleeding disorder (i.e. the DIC).

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[47] *See* Exhibit I.

ii. Dr. Tawansy would have drawn attention to the fact that the state's expert witnesses believed that Sarah's retinal hemorrhages were caused by trauma and developed when she was allegedly being abused by Mr. Smith (i.e. when he was supposedly shaking her). Dr. Tawansy would have then pointed out that the state's expert's theory was impossible given that a CT scan of Sarah's eyes taken at the Douglas Hospital, shortly after the alleged abusive episode, showed no retinal hemorrhages behind Sarah's eyes. Yet a CT scan of Sarah's eyes taken seven hours later at the Children's Hospital showed extensive retinal hemorrhages behind Sarah's eyes. Dr. Tawansy would have testified that the only conclusion to draw from this is that Sarah's retinal hemorrhages developed while she was in the hospital, after her brain swelled substantially and after she developed the severe bleeding disorder. Thus, Dr. Tawansy would have testified that there was no way some abusive episode that occurred prior to Sarah's admission to the Douglas Hospital caused her retinal hemorrhages, as claimed by the state's experts.

iii. Dr. Tawansy would have testified that nothing in Sarah's medical records, or retinal or neuroimaging, would have caused him to believe that Sarah had been shaken and/or abused. He would have testified that nothing in Sarah's medical records, or retinal or neuroimaging, contradicts Mr. Smith's explanation that Sarah fell from a 40-inch high countertop. In other words, he would have testified that the fall, as reported by Mr. Smith, could explain Sarah's brain injury, which in turn could have caused a severe bleeding disorder and brain swelling, which in turn presumably caused the extensive retinal hemorrhages behind Sarah's eyes.

d. **<u>Dr. Ljubisa Dragovic</u>**: Dr. Dragovic is a board certified forensic pathologist who has been the Chief Medical Examiner in Oakland County, Michigan (near Detroit) for over 30 years. He is also a board certified neuropathologist, which means he specializes in the cause of injury to brain and spinal tissue. He received his M.D. from the University of Toronto and primarily testifies for the prosecution.

i. Dr. Dragovic would have testified that Sarah's fatal injuries were inconsistent with any type shaking episode, no matter how violent, yet consistent with the fall reported by Mr. Smith.

ii. He also would have testified that he conducted postmortem microscopic analysis of Sarah's brain cells and determined that her brain cells died because of oxygen deprivation, not from being torn. This testimony would have fundamentally undermined one of the basic tenets of SBS theory, as well as the state's experts' theory, about the mechanism of Sarah's brain injury – namely, that her brain cells died from being torn while she was being shaken by Mr. Smith.

iii. Dr. Dragovic would have testified that Sarah's brain cells died from oxygen deprivation because Sarah stopped breathing, presumably due to a brain bleed or swelling related to the bleed. He would have testified that the most likely cause of Sarah's injury was a sudden impact with a hard surface.

e. **Dr. Julie Mack**: Dr. Mack is a board certified pediatric radiologist who got her M.D. at Harvard Medical School. She then did her residency at Baylor and a fellowship at the Children's Hospital in Dallas. She currently has a diagnostic radiology practice at Penn State Health. In addition to her clinical practice, she has an academic and research practice that focuses on the causes of bleeding in the brain, both with and without trauma.

i. Dr. Mack would have testified that the subdural and subarachnoid hemorrhages in Sarah's brain were consistent with the short fall reported by Mr. Smith and inconsistent with any type of shaking episode, no matter how violent.

ii. She would have testified that Sarah's CT scans clearly show scalp swelling on the back left side of Sarah's head,[48] which is consistent with an impact injury like the short fall reported by Mr. Smith.

iii. She would have testified that while short falls that result in death or serious injury are very rare, numerous reliable studies have proven that they can cause the triad and be fatal.

f. **Dr. Joseph Scheller**: Dr. Scheller is a board certified pediatric neurologist with a specialty in neuroimaging, which means he regularly studies and interprets brain and spinal CT and MRI scans. He got his M.D. at the University of Illinois Medical School, and he did his residency at the University of Michigan

[48] *See* Exhibit I.

Children's Hospital. He then completed a two-year fellowship in epidemiology at the National Institute of Health ("NIH"). He currently works at several different hospitals in the Baltimore, Maryland area.

i. Dr. Scheller would have testified, much as Dr. Mack would have, that Sarah's fatal brain injury was consistent with the short fall reported by Mr. Smith and inconsistent with any type of shaking episode, no matter how violent.

ii. He also would have testified that Sarah's CT scans clearly show scalp swelling on the back left side of her head,[49] which is consistent with an impact injury like the short fall reported by Mr. Smith .

iii. He would have testified that while short falls that result in death or serious injury are very rare, numerous reliable studies have proven that they can cause the triad and be fatal.

MS. DOE REGULARLY APPRISES MR. SMITH'S LAWYERS OF HER PROGRESS: As Ms. Doe gathered the above expert witness information, she regularly provided updates to Mr. Hutton and Mr. Walker. For example, she would email Mr. Hutton and Mr. Walker the resumes of the experts as well as her notes and summary memos from her phone calls with them. Or she would call Mr. Hutton and Mr. Walker to apprise them of her progress on the case. And, as written reports from the above experts arrived, she promptly provided them to Mr. Hutton and Mr. Walker so that in a timely fashion they were fully apprised of how her work was developing.

MS. DOE'S DREAM-TEAM OF EXPERTS PROVIDE A STRONG DEFENSE TO MR. SMITH : Importantly, as the above expert summaries show, all the news was good. Every expert who evaluated the case independently concluded that Sarah's injuries were consistent with the reported fall and inconsistent with the allegation of an abusive shaking episode. Put simply, every new development in the defense investigation suggested a strong defense to the claim that Mr. Smith murdered Sarah or otherwise knowingly or recklessly harmed her in an abusive manner.

MR. SMITH'S LAWYER'S NEVER TELL HIM HOW FAVORABLY THE DEFENSE INVESTIGATION IS EVOLVING; NOR DO THEY COMMUNICATE WITH HIM MUCH AT ALL SINCE HE IS IN CUSTODY THREE HOURS AWAY: Remarkably, despite the development of a strong defense, Mr. Hutton and Mr. Walker never informed Mr. Smith

[49] *See* Exhibit I.

about how favorably the defense investigation was evolving. Mr. Smith, during the entire pendency of his case, was incarnated at the Brown County Jail. And, according to Mr. Walker, he and Mr. Hutton were unwilling to talk to Mr. Smith about his case over the phone because they suspected that District Attorney Amber Lewis might be recording Mr. Smith's phone calls (even those protected by attorney-client privilege). Mr. Hutton and Mr. Walker were also disinclined to correspond with Mr. Smith by mail, believing that it too was not a confidential way to communicate. As a result, Mr. Hutton and Mr. Walker only communicated with Mr. Smith by visiting him in person or drafting letters to him that were personally couriered to the Brown County jail by their paralegal. Obviously, this was a very difficult way to communicate with one's client, especially since the drive time from Denver, where Mr. Hutton and Mr. Walker worked, to the Brown County Jail is almost six hours roundtrip.

Given these circumstances, one must evaluate the disincentives to communication with Mr. Smith to try to understand why there was so little of it. First, for an attorney (or two) to drive six hours roundtrip just to talk to a client is uncomfortable, boring, and an inefficient use of time. Second, as a lawyer with a busy practice, giving up one's paralegal for a day so that she may drive six hours roundtrip just to deliver a letter to a client is, at best, inconvenient, and at worst, a major sacrifice to the smooth operation of a legal practice. Third, putting into writing in a letter to a client a detailed summary of all the above expert information is difficult, if not impossible, for an attorney who has not himself been conducting the medical investigation because he has outsourced it to another lawyer at a different law firm, as was the case here with Ms. Doe. Finally, and perhaps most importantly, the financial motives must be understood. The fee agreement in this case provides that Mr. Smith would pay a flat fee of $200,000 for Mr. Hutton and Mr. Walker to try Mr. Smith's case. This flat fee agreement did not include the cost of expert witnesses or the cost of Ms. Doe's fees for her work on the case. A flat fee, of course, by its very nature, incentives less work, not more. In other words, the less work a lawyer does on a flat fee case, the more profitable the case becomes. This obviously created a substantial disincentive for Mr. Hutton or Mr. Walker to drive six hours roundtrip to see Mr. Smith when they could otherwise be billing $500 per hour each (which is their rate) on some other case. From an opportunity cost perspective (i.e. the money sacrificed by not working on a different case), a six hour roundtrip drive to see Mr. Smith cost Mr. Hutton and Mr. Walker each $3,000 per visit.

Whatever the reason, the fact is that Mr. Hutton and Mr. Walker rarely visited Mr. Smith. In the five months leading up to his guilty plea, Mr. Hutton and Mr. Walker visited Mr. Smith just once.[50] On January 30, 2018, Mr. Hutton and Mr. Walker travelled to

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[50] This excludes their visit to Mr. Smith the day before he pled guilty (i.e. on March 12, 2018 when they, for the first time, told Mr. Smith about the District Attorney's offer and advised him

Douglas to view the evidence in the case, and afterwards, they visited Mr. Smith in the Brown County Jail. Their memo to the file about that visit indicates that they told Mr. Smith they had outsourced all the medical investigation and expert witness preparation to Ms. Doe. But the memo suggests that because of this, they were either unprepared or unable to share with Mr. Smith any substantive information about how favorably the defense investigation was developing.

Moreover, in all the months leading up to Mr. Smith's guilty plea, neither Mr. Hutton, nor Mr. Walker, used any other means to inform Mr. Smith how favorable the investigation of his case was turning out to be. They never wrote a letter to Mr. Smith providing a detailed summary of which experts Ms. Doe had retained, what specifically those experts were going to say at trial, or how that testimony would rebut the prosecution's case against him. Neither did Mr. Hutton or Mr. Walker ever request or allow Ms. Doe to visit Mr. Smith so that she could explain to him how favorably her investigation was progressing. In fact, the evidence at hearing will show that Mr. Hutton was trying to limit as much as possible Ms. Doe's contact with Mr. Smith or with his mother, Amy Smith, who was paying all the legal bills. In an email that Mr. Hutton sent to Mr. Walker, he wrote, "My thought is she [Ms. Doe] should have only the most limited communications with client or Amy Smith."

MR. HUTTON SHIELDS MS. DOE FROM MR. SMITH, PREVENTING HER FROM ADVISING HIM ABOUT THE STRENGTH OF HIS DEFENSE: A reasonable inference to be drawn from the above is either (a) that Mr. Hutton was trying to avoid looking to his client like he was less experienced and less qualified to be handling the case than was Ms. Doe, and/or (b) that he was trying to keep his client from realizing that Ms. Doe was doing the entirety of the important work of the case (i.e. the experts), and at a much cheaper cost than the $200,000 he had required as a flat fee.

At a minimum, it is clear that Mr. Hutton was trying to minimize Ms. Doe's fees as much as possible. He emailed her at one point to try to limit her fees to $10,000 and directed her to notify him if she neared that amount. "I want to emphasize," he wrote, "that the family has limited resources."

This claim about the family's limited resources was untrue, which creates the inference that Mr. Hutton was seeking to shield Ms. Doe from Mr. Smith and his mother, not because he was protecting Mr. Smith's best interests (financial or otherwise), but because he was protecting his own pecuniary interest in an important client with generous resources – a client who was paying his Rolls Royce fee for work he had largely outsourced to a more experienced and less expensive lawyer at a different firm than his own.

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to accept it.)

ON A SATURDAY, THE DA MAKES AN OFFER OF 16 - 32 YEARS THAT WILL EXPIRE IN 72 HOURS: Regardless of Mr. Hutton's intentions, on Saturday, March 10, 2018, District Attorney Amber Lewis emailed Mr. Hutton and Mr. Walker with an offer to have Mr. Smith plead guilty to Attempted Murder with a stipulated sentence of 16 to 32 years. This offer came in just three days before a lengthy motions hearing was scheduled to begin the following Tuesday, and the District Attorney made it clear that the offer would be withdrawn if Mr. Smith did not accept it before the motions hearing began.

MR. SMITH'S LAWYERS ARE NOT PREPARED FOR TRIAL, SO THEY ASK MS. DOE TO TRY THE CASE WITH THEM: The above plea offer also came in just one month before the trial was scheduled to begin, which is important because the evidence at hearing will show that Mr. Hutton and Mr. Walker were not prepared for trial, thus making the pressure to accept a plea much higher. Given their lack of preparation for trial, Mr. Hutton and Mr. Walker had by this time yet again tried to expand the scope of Ms. Doe's responsibilities on the case by asking her to join their team full time to help try the case. But Ms. Doe was unable to join the case for trial because she was soon going to have a baby, and she had a scheduling conflict due to a terrorism case soon going to trial for several weeks in federal court.

That counsel was unprepared for trial is evidenced by the following. <u>First</u>, they had not yet interviewed, or even attempted to interview, the prosecution's numerous experts who were endorsed to testify at trial. <u>Second</u>, because Ms. Doe had thus far done all the work interviewing, prepping, and gathering reports from the defense medical experts, Mr. Hutton and Mr. Walker were not yet prepared either to cross-examine the prosecution's experts or directly examine their own. <u>Third</u>, Mr. Hutton and Mr. Walker had not yet even scheduled their own experts to testify at trial. In other words, they had not reserved on the experts' calendars the dates when the experts would be needed for trial. Nor had they booked flights or hotel accommodations for the experts. That this had not been done, just one month before trial, is surprising. Given how prominent and busy each of the defense experts is, it is improbable that Mr. Hutton and Mr. Walker would have been able to secure all of the experts' necessary to mount a complete defense at trial.

MR. SMITH'S LAWYERS NEED A TRIAL CONTINUANCE THAT THE DA WILL OBJECT TO: Given the above, defense counsel were under an enormous amount of pressure. Email correspondence between Mr. Hutton and Mr. Walker will establish at hearing that they were planning to ask for a continuance of the trial. Moreover, email correspondence between counsel and District Attorney Amber Lewis will establish that she would have strenuously objected to the requested continuance. If the requested continuance had been denied, Mr. Hutton and Mr. Walker faced the very real possibility of going to

trial underprepared, without Ms. Doe to help them, and probably without all the experts necessary to put on a complete defense to SBS theory. This no doubt dramatically increased the risk of Mr. Smith being convicted of murder.

MR. SMITH'S LAWYERS, WITHOUT CONSULTING MS. DOE, CONVINCE MR. SMITH TO ACCEPT THE DEAL: It is against this backdrop that DA Amber Lewis's March 10 offer arrived, and Mr. Hutton and Mr. Walker wasted little time in recommending to Mr. Smith that he should accept the deal. Recall – the offer came in on a Saturday with a deadline to accept by Tuesday morning. Thus, that Monday, Mr. Hutton and Mr. Walker drove to the Yuma County Jail to talk to Mr. Smith about the deal.

What they did not do is surprising. They did not ask Ms. Doe – the attorney by far most qualified to explain to Mr. Smith the details and merits of his defense – to come with them to help Mr. Smith sort through his prospects at trial and, thus, the pros and cons of taking the deal. Nor did they ask Ms. Doe whether she thought the offer was favorable or not given the facts of the case and the medical defenses. In fact, Mr. Hutton and Mr. Walker did not even tell Ms. Doe about the offer.

Instead, Mr. Hutton and Mr. Walker pursued a course of action that excluded Ms. Doe entirely from the decision-making process. On the Monday morning after the offer came in, Mr. Hutton and Mr. Walker travelled to the Brown County Jail by themselves. When they arrived, they conveyed the offer to Mr. Smith, which came as a surprise to him because he had until then only expected to go to trial. Then they told Mr. Smith that he had less than a day to decide whether or not to plead guilty to Attempted First Degree Murder. Then, by emphasizing the risk of a murder conviction (and a resulting mandatory life sentence), Mr. Hutton and Mr. Walker convinced Mr. Smith to plead guilty, which he did at 9 a.m. the next morning. Only after the deal was done and the judge had accepted the plea did Mr. Hutton and Mr. Walker inform Ms. Doe, by email, that their mutual client had just pled guilty.

MR. SMITH'S LAWYERS GIVE HIM A LOPSIDED ADVISEMENT THAT EXCLUDES ANY INFORMATION ABOUT THE STRENGTH OF HIS DEFENSE: What is remarkable about this process is not only the speed and pressure under which Mr. Smith was required to make such a life-altering decision, but also the lopsided nature of the information he was given by his lawyers in order to make that decision. Mr. Smith will testify at hearing that when Mr. Hutton and Mr. Walker convinced him to plead guilty, they emphasized only the downside of going to trial (i.e. the risks of losing on the murder charge and the consequence being a mandatory life sentence). He will testify that neither Mr. Hutton, nor Mr. Walker, ever discussed with him the other side of the coin – namely, what the pathway to a favorable result would look like if he went to trial. In other words, Mr. Smith will testify that Mr.

Hutton and Mr. Walker never disclosed to him how many defense experts they had retained, the names and superb credentials of those experts, the specifics of what those experts would say at trial, or how their testimony would rebut every aspect of the state's case. Importantly, Mr. Walker, at hearing, will not contradict this testimony. To the contrary, he will testify that Mr. Smith is correct, that he and Mr. Hutton never disclosed to Mr. Smith any of the above information about the defense experts.

COMMON SENSE AND THE ABA STANDARDS DICTATE THAT THE CONDUCT OF MR. SMITH'S LAWYERS WAS NOT REASONABLE: That Mr. Hutton and Mr. Walker failed to advise Mr. Smith about the above expert witness information is unreasonable, and it is conduct that falls below the standard of care required by *Strickland v. Washington.*[51] In *Strickland,* the United States Supreme Court held that a defense attorney is ineffective if it is shown by a preponderance of evidence that his acts or omissions fall "outside the wide range of professionally competent assistance" which is reasonably demanded of counsel "under prevailing professional norms."[52]

Here, expert testimony at hearing will establish that prevailing professional norms dictate that a defense attorney must advise his or her client about the merits of his defenses in order for him to make a knowing and intelligent decision about whether or not to waive his right to trial and to instead plead guilty. Common sense dictates as much, and so does experience. One simply cannot make an informed and intelligent choice between Option A (trial) and Option B (pleading guilty) if he is told only what Option B looks like. This is not only dictated by common sense, it is also dictated by the ABA standards for criminal justice in the context of guilty pleas, which read as follows:

> To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision.[53]

The comments to this section of the ABA standards further enforce the above point and read, in relevant part, as follows: "[a] defendant needs to know, for example, the probability of conviction in the event of trial. Because this requires a careful evaluation of problems of proof and of possible defenses, few defendants can make this appraisal without

[51] 466 U.S. 668 (1984).
[52] *Id.* at 690; *See also People v. Duke*, 36 P.3d 149 (Colo. App. 2001) (holding that burden of proof is by a preponderance of evidence).
[53] ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY, Standard 14-3.2(b) (3d ed. 1999).

the aid of counsel."[54] Importantly, the ABA standards are not just normative suggestions. In fact, the United States Supreme Court has stated that they are "important guides" in determining whether defense counsel's performance was constitutionally sufficient.[55]

That prevailing professional norms require a complete advisement on all options is especially so in a case as medically and scientifically complex as this one. Expert testimony at hearing will establish that in a case like this one, prevailing professional norms dictate that a defense attorney – in order to help his client evaluate his options – must, at a minimum, disclose to him the number of expert witnesses who will testify on his behalf, the names and credentials of those witnesses, the details of what each witness will say, and how the testimony of each witness will or will not rebut the state's case.

Yet this did not happen here, so Mr. Smith pled guilty, having no idea how strong his defense actually would have been if he had chosen to go to trial.

MR. SMITH LEARNS FOR THE FIRST TIME, AT SENTENCING, HOW STRONG HIS DEFENSE COULD HAVE BEEN: Mr. Smith , ironically, only learned for the first time how strong his defense could have been at trial when he appeared before this court for sentencing. After Mr. Smith pled guilty, Mr. Hutton and Mr. Walker decided that the best way to try to obtain the lowest possible sentence for Mr. Smith was to try to prove to this court at sentencing that Sarah died as a result of an accidental fall (as reported by Mr. Smith) and not as a result of an abusive shaking episode. Thus, Mr. Hutton and Mr. Walker yet again sought to expand the scope of Ms. Doe's responsibilities on the case by asking her to prepare a video that they could show this court at sentencing. More specifically, they asked Ms. Doe to videotape each of the six expert witness she had retained as they talked about their background, training, and credentials as well as what they would have testified to had they been called at trial on Mr. Smith's behalf. Ms. Doe agreed to this arrangement and generated nearly six hours of raw footage of these experts effectively testifying for Mr. Smith. This raw footage was then edited down to a 29-minute video that Mr. Hutton and Mr. Walker played for this court at sentencing.[56]

This sentencing video, put simply, is a stunner. It highlights six remarkably credentialed experts, several of them world-renowned in their field, testifying that Sarah

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[54] *Id.,* Standard 14-3.2, Commentary at 118.
[55] *See Missouri v. Frye,* 566 U.S. 134, 145 (2012) (citing ABA Standards for Criminal Justice, Please of Guilty); *Padilla v. Kentucky,* 559 U.S. 356, 366 (2010) ("We have long recognized that 'prevailing norms of practice as reflected in the American Bar Association Standards and the like' . . . may be valuable measures of the prevailing professional norms of effective representation.").
[56] *See* Exhibit J (flash drive with video).

Jones's fatal injuries were inconsistent with an abusive shaking episode and instead consistent with the reported accidental fall. When Mr. Smith saw this video at his sentencing hearing – a hearing at which the prosecutor openly accused him of murdering Sarah – he had the following devastating thought immediately after the video's conclusion: "If I had known this information earlier, I never would have pled guilty."

C. Trial counsel's deficient performance prejudiced Mr. Smith because, if he had been told about the weight and credibility of the defense expert testimony available to him, he would not have pled guilty.

To establish prejudice on his claim of ineffective assistance, Mr. Smith's burden of proof is less than the "preponderance" standard required by the first prong of the *Strickland* test.[57] Instead, the defendant must only show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In this context, a reasonable probability means a probability sufficient to undermine confidence in the outcome."[58]

Here, prejudice exists because there is a reasonable probability that Mr. Smith would not have pled guilty if he had known the details of who his experts were, what they were going to say, and how their testimony would rebut every aspect of the state's case. Put another way, prejudice exists because an objective assessment of the defense expert testimony yields the conclusion that there is a "reasonable probability" it would have altered the outcome of the trial.[59]

To see how the defense expert witness information likely would have altered the outcome of the trial, we must consider what the trial would have looked like both with and without this information. This process necessarily begins with looking at the elements of the two crimes Mr. Smith was charged with.

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[57] *See Ardolino v. People,* 69 P.3d 73, 76 (Colo. 2003) (" . . . a defendant, however, need not show that counsel's deficient conduct *more likely than not* altered the outcome of the case.) (emphasis added).

[58] *Id.*

[59] *See Hill,* 474 U.S. at 59 (stating that in the context of a guilty plea, when the alleged error is a failure to investigate, or a failure to advise about important information, the determination of prejudice will hinge, in large part, on an objective determination of whether the information likely would have affected the outcome of the trial).

First, he was charged with Murder under C.R.S. § 18-3-102(1)(f), and if he had been convicted of this offense, he would have faced a mandatory life sentence without the possibility of parole. The elements of this crime are:

1. The defendant
2. Knowingly
3. Caused the death of a child
4. Who was not yet 12 years old
5. And the defendant was in a position of trust with respect to the victim.

Second, he was charged with Knowing or Reckless Child Abuse Resulting in Death under C.R.S. § 18-6-401(1)(a), 7(a)(I). If he had been convicted of this offense, he would have faced a mandatory prison sentence of 16 to 48 years. The elements of this crime are:

1. The defendant
2. Knowingly or recklessly
3. Caused the death of child
4. By unreasonably placing the child in a situation that posed a threat to the child's life or health.

We also need to understand the definition of the mens rea elements for the above crimes. Under Colorado law, "a person acts 'knowingly' with respect to a result of his conduct when he is aware that his conduct is practically certain to cause the result."[60] And, "a person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists."[61]

Now we can evaluate Mr. Smith's prospects at trial, both with and without the defense expert testimony.

If Mr. Smith had gone to trial without the defense expert testimony (which effectively was his assumption when he pled guilty, since counsel withheld from him what the defense experts would say), the trial would have looked as follows. Doctors from Children's Hospital Colorado would have testified in a manner consistent with the testimony given at the preliminary hearing by medical examiner, Dr. Ben Billingsly. In other words, the doctors would have testified that Sarah's injuries (i.e. the triad) were unique because they only are caused by just one mechanism of injury – that is severe, violent and abusive shaking. They also would have testified that a short fall, like the one Mr. Smith reported, is not consistent with the injuries that killed Sarah. But the doctors

[60] C.R.S. § 18-1-501(6).
[61] C.R.S. § 18-1-501(8).

from Children's would have known of the 2001 Plunkett study. As discussed previously, this study highlighted, amongst other short fall fatalities caused by the triad, a videotaped case of a toddler falling just two feet from a play gym and then dying from the triad. Faced on cross examination with this incontrovertible evidence that a short fall can cause the triad and kill, the doctors would have testified – as doctors from Children's have done in the past[62] – that, while a short fall can cause the triad and kill, it is so exceptionally rare as to be negligible, such that Mr. Smith's story of a short fall should not be believed. Finally, the doctors would have testified that the bleeding in Sarah's brain and behind her eyes occurred contemporaneously with, and as a result of, an abusive shaking episode, which tore blood vessels in her brain and behind her eyes.

Without credible defense expert testimony (again, which was Mr. Smith's assumption), the above expected testimony from Children's Hospital doctors would have effectively gone unrebutted. As such the jury would have likely found that Mr. Smith abusively shook Sarah and that he then tried to conceal it by concocting the story of the fall. Given this, the jury would have likely found that when Mr. Smith shook Sarah, he was "practically certain" that she would die (i.e. that he acted "knowingly"). Or, alternatively, they would have likely found that when he shook Sarah, he perceived a substantial risk that she would die, but that he consciously disregarded this risk (i.e. that he acted "recklessly"). In the case of the former finding, Mr. Smith would have been convicted of Murder and sentenced to prison for life. In the case of the latter, he'd have been convicted of Reckless Child Abuse Resulting in Death and sentenced to 16 to 48 years in prison.

Under these circumstances, it is no surprise that Mr. Smith accepted the plea offer to a sentence of 16 to 32 years. If his best-case scenario, without credible experts on his side, was a Reckless Child Abuse conviction yielding a 16 to 48 year sentence, then a 16 to 32 year sentence via a plea agreement looks favorable.

But when we look at what Mr. Smith's trial would have looked like with the defense expert testimony, the likelihood of a favorable verdict at trial increases dramatically.

First, all six defense experts would have testified (a) about the numerous biomechanical studies that show a person cannot shake a toddler hard enough to cause the

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[62] *See* Exhibit K (Transcript of Dr. Shannon Wells testifying in a short-fall case like this one and relying on the data-flawed Chadwick paper claiming that short falls are only fatal at a rate of one in a million. Dr. Wells is a child abuse and neglect physician at the Kempe Center at Children's Hospital Colorado.); *see also* Exhibit B: Papetti, SHAKEN BABY SYNDROME, *supra* note 1, at 95 (noting that child abuse experts now routinely rely on the flawed Chadwick paper to emphasize how rarely short falls cause the triad, and, thus, to rebut the Plunkett study showing that short falls can cause the triad and can be fatal).

triad and/or kill them, and (b) about how those studies actually show that short, unbroken falls inflict far greater forces upon the head than does any kind of shaking, even extremely violent shaking. In fact, a nationally renowned biomechanical engineer who runs a research laboratory that focuses on exactly these kinds of issues would have testified that the short fall reported by Mr. Smith is a far more realistic explanation for Sarah's fatal injuries than any kind of shaking episode, no matter how violent.

Second, Dr. Tawansy, a world renowned pediatric ophthalmologist, would have rebutted the state's experts' claim that Sarah's retinal hemorrhages were caused by, and contemporaneously with, an abusive shaking episode. As discussed previously, he would have testified about how Sarah's CT scans conclusively disprove this theory and show instead that Sarah's retinal hemorrhages were caused by brain swelling and her bleeding disorder. Moreover, Dr. Tawansy would have testified that the short fall reported by Mr. Smith was consistent with Sarah's injuries but inconsistent with an abusive shaking episode.

Third, Dr. Laposata, who is voted the most influential pathologist in the nation and the third most in the world, would have rebutted the state's experts' claim that the amount of bleeding in Sarah's brain, eyes, and spine means she was violently abused. He would have testified that Sarah's bleeding disorder (i.e. the DIC) easily could have been caused by the short fall reported by Mr. Smith . Moreover, he also would have testified that the bleeding disorder, not abuse, explains the widespread bleeding in Sarah's brain, eyes, and spine.

Fourth, Dr. Dragovich, a nationally recognized forensic pathologist, would have rebutted the state's experts' claim that Sarah's fatal brain injury was caused by the tearing of cellular tissue during an abusive shaking episode. He would have testified that he conducted microscopic analysis of Sarah's brain cells after she was dead and that that analysis showed that Sarah's brain cells died from oxygen deprivation, not from being torn. This would have been critical testimony because it, like Dr. Tawansy's testimony about the CT scans of Sarah's eyes, would have completely disproven the state's theory that Sarah sustained her brain injury contemporaneously with, and because of, being shaken.

Finally, it is important to note that all of the details of the defense experts' testimony cannot be summarized here. But suffice it to say that their testimony, collectively, would have rebutted every aspect of the state's case.

And, importantly, the defense expert testimony would not have merely been hollow words offered by a series of talking heads saying whatever they were paid to say. To the contrary, the team of six experts aligned with Mr. Smith amounted to a veritable dream-

team of doctors educated at, and now affiliated with, many of the most prestigious academic institutions in the world. Put simply, the weight and credibility of their testimony would have been profound.

In fact, the collective effect of this dream-team of doctors would have been at least sufficient to cause reasonable doubt about the state's theory that Mr. Smith treated Sarah in a manner in which he was "practically certain" she would die. This would have defeated the "knowing" element of both offenses he was charged with, and it would have necessarily required acquittal on the murder count.

But what about the charge of Reckless Child Abuse Resulting in Death, which, as a class two felony, carried 16 to 48 years? Might the jury have still found Mr. Smith guilty of reckless conduct, despite the defense expert testimony? What this question is really getting at is this – might the jury have believed that Sarah accidentally fell off the counter, but might they have still found that Mr. Smith recklessly caused her death by leaving her on the counter to begin with? The answer to this question is no; or at least a finding of recklessness would have been improbable.

It would have been improbable because a finding of recklessness would require that the jury unanimously conclude that Mr. Smith "consciously disregarded a substantial and unjustifiable risk" that Sarah could die or be seriously injured by falling off the counter. But every single expert at trial – both for the prosecution and for the defense – would have testified that it is very rare for a child to fall from a height of 3.5 feet and either die or suffer serious injury.[63] Of course, the prosecution experts would have testified that it is so rare that Mr. Smith's story of a fall had to be a lie.[64] By contrast, the defense experts would have testified that, while it is rare, it is well-documented that it happens, and the resulting cascade of injuries typically looks just like what happened to Sarah . The point is this. Since all the experts would have agreed on what life experience tells us to be true, namely, that short falls rarely kill or cause serious injury, then, given the rarity of this occurrence, Mr. Smith cannot be blamed for having perceived, and then ignored, a substantial risk of a catastrophic fall. This necessarily would have precluded a finding of recklessness.

At best, it must be conceded, the prosecution may have obtained a guilty verdict for the lesser included offense of Negligent Child Abuse Resulting in Death if the jury believed that Mr. Smith was negligent for leaving Sarah unattended on the counter.[65] If the jury had convicted on this offense, it would have resulted in a mandatory sentence of 10 to 32 years.

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[63] *See* footnote 62 of this brief.
[64] *See* footnote 62 of this brief.
[65] *See* C.R.S. § 18-6-401(1)(a), 7(a)(II).

But two important points related to the issue of prejudice must be made about a potential finding of negligence. First, a sentence of 10 to 32 years is far superior to a sentence of 16 to 32 years, which is what Mr. Smith agreed to via his plea agreement. Moreover, if Mr. Smith had been facing a 10 to 32 year sentence for negligence, he presumably would have received less than the 26 years he already received since his current sentence is for "knowing" conduct related to Attempted Murder, which is far more culpable behavior than simple negligence. Second, a conviction for Negligent Child Abuse still would have been a stretch for the prosecution. This is because, for the jury to have made a finding of negligence, it would have had to unanimously agree that Mr. Smith , "through a gross deviation from the standard of care that a reasonable person would exercise, he failed to perceive a substantial and unjustifiable risk" that Sarah could die or be seriously injured by falling off the counter.[66] But again, since every expert who would have testified at trial – both for the prosecution and the defense – would have testified to how rare it is that a child will die or be seriously injured from a short fall, it is improbable that the jury would have found that Mr. Smith *grossly* deviated from the standard of care by failing to perceive a *substantial* risk that Sarah could die or be seriously injured.

To summarize, in a trial in which Mr. Smith's dream-team of experts would have testified, a conviction for Negligent Child Abuse is probably the most serious offense on which the state could have won a guilty verdict, and even then, winning on that offense would have been difficult. Therefore, the expert witness information that Mr. Smith's lawyers withheld from him is "information that likely would have altered the outcome of the trial."[67] Given this, it also would have altered the outcome of the plea negotiations such that, as Mr. Smith will testify to at hearing, he would not have pled guilty if he had known the information.

For the foregoing reasons, Mr. Smith was prejudiced by his lawyers' deficient performance.

D. Mr. Smith is entitled to a hearing on this motion.

Mr. Smith is entitled to an evidentiary hearing on this matter.[68] In order to obtain a hearing pursuant to Crim. P. 35(c), "a defendant need only assert facts that if true would

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[66] C.R.S. § 18-1-501(3).
[67] *Hill,* 474 U.S. at 59.
[68] *See Ardolino* 69 P.3d at 76 ("A motion for postconviction relief pursuant to Crim. P. 35(c) may be denied without an evidentiary hearing only where the motion, files, and record in the case clearly establish that the allegations presented in the defendant's motion are without merit and do not warrant postconviction relief.").

provide a basis for relief."[69] A defendant need not set forth evidentiary support for his allegations or be required to show how he intends to prove his allegations.[70]

CONCLUSION

We may live in a post-truth world, but this is not a post-truth court. Truth matters here. Science matters here. And the truth is this. First, science tells us that the SBS theory upon which the prosecution of Mr. Smith rested is profoundly flawed. Second, Mr. Smith's lawyers withheld from him that a dream-team of experts would say as much in his defense at trial. Third, had Mr. Smith known this, had he known the full weight and credibility of the defense he could have mounted at trial, he would not have pled guilty. Given this, Mr. Smith was denied his constitutional right to effective assistance of counsel.

Unfortunately, this case is one of many different brushstrokes that casts an unfavorable light upon our system of justice. Fortunately, however, this story of this case is not yet complete, and the color of its particular brushstroke is for this court to decide.

Will it be dark? Or will it be light?

Respectfully submitted,

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[69] *People v. Simpson* 69 P.3d 79 (Colo. 2003).
[70] *White v. Denver District Court*, 766 P.2d 632, 634 (Colo. 1988).

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2021 a copy of the foregoing brief was served on the below party via ICCES:

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