IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0409

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KATHERINE ANNE PROCTOR,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, the Honorable Kathy Seeley, Presiding

APPEARANCES:

TAMMY HINDERMAN
Division Administrator
ALEXANDER H. PYLE
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
alexpyle@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
P.O. Box 201401
Helena, MT 59620-1401

KEVIN DOWNS
Lewis and Clark County Attorney
MARY BARRY
JESSICA BEST
Deputies County Attorney
228 Broadway - Courthouse
Helena, MT 59601

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Authorities

Other Authorities

STATEMENT OF THE ISSUES

1. To be admissible under Mont. R. Evid. 702, proffered scientific expert testimony must be grounded in reliable science. Shaken baby syndrome (SBS) is not grounded in reliable science. Did the trial court err by admitting SBS testimony?

2. A warrant must particularly state what there is probable cause to search and seize, and a general warrant is unconstitutional. The State obtained a warrant employing terms broadly encompassing essentially all the data on Appellant's smartphone. Did the trial court err by not suppressing prejudicial evidence obtained under a general warrant?

3. The State argued Appellant was guilty because she sought and acquired legal counsel, because the prosecutor's character was better than Appellant's character, and because Appellant putting on evidence contradicting the State's case was a "circus" and "buy[ing] the truth." Did the State compromise the trial's fairness?

STATEMENT OF THE CASE

This is an appeal of a wrongful conviction grounded in unreliable science and prosecutorial overzealousness and overreach.

When Katherine and Tim Proctor took their four-month-old, PP, to the ER, imaging showed acute brain damage consistent with strokes and reduced blood or oxygen flow. (Trial 470, 610-11, 618.) PP was transferred to a second hospital where doctors quickly settled on a shaken baby syndrome (SBS) diagnosis.[1] (Trial 766-67.) Though the State conceded its case was "entirely circumstantial" (11/2 Tr. at 40), the State charged Katherine with assault on a minor resulting in serious bodily injury or accountability for the same. (Doc. 154.)

Katherine moved to exclude the State's proffered SBS testimony as inadmissible under Rule 702 because the SBS hypothesis is scientifically unverified and unreliable. (Doc. 15.) The District Court denied Katherine's motion. (9/20 Tr. at 145-46 (App. A).) Katherine also moved to suppress smartphone date evidence obtained through a data warrant that was general, overbroad, and unparticular to probable cause. (Docs. 7, 21, 66.) The warrant authorized the State to "extract[]

[1] The doctors primarily used the terms abusive head trauma and nonaccidental trauma. (Trial 766-67, 932.) These terms encompass suspected injuries from both the head impacting something else and the head shaking without impact. (9/20 Tr. at 85.) Because no evidence suggested PP's head impacted something else (Trial 403, 1477), this brief uses the term shaken baby syndrome (SBS) as it is more specific to the doctors' theory of injury.

and download . . . all data . . . related to [Aggravated Assault, § 45-5-202]"—a phrase that the warrant defined as "including, but not limited to" a list of essentially all possible smartphone data (*e.g.*, "[m]etadata," "credit card accounts," "IP addresses," etc.) with the only exception being counsel and clergy communications. (8/26 Hr. Ex. 27 (App. B).) The District Court denied the motion to suppress and asserted there was probable cause to search and seize all of that smartphone data. (Doc. 215 (App. C) at 22.) At trial, the State introduced and argued evidence obtained through the warrant. (Trial 314-17, 1519-29, 2105-08, 2170-71; Exs. 42-61, 120-21 (admitted, Trial 305, 1365, 1519-27).)

Doctors who reviewed PP's file opined that she was misdiagnosed by doctors who failed to conduct tests necessary to rule out or confirm other possible diagnoses. (Trial 1608-09, 1758, 1871, 1875, 1931-32.) The State presented testimony that this defense "would set a precedent that such a severe and obvious case . . . can be overturned in court" and that it "stood out" that Katherine sought legal counsel while she was being investigated. (Trial 499, 1528.)

In closing arguments, the prosecutor argued Katherine's solicitation and acquisition of legal counsel was evidence of bad

character and guilt. (*See* Trial 2171 ("[Y]ou know what the defendant did. She looked for a defense attorney. . . . And what does she use those resources for? She uses them for herself to get a defense attorney.") (App. D).) The prosecutor compared Katherine's allegedly tainted character to the prosecutor's own, assertedly good character. (Trial 2170-71 ("That's my character. That's what the state is bringing to this. . . . And you know what the defendant's character is?").) The prosecutor told the jury the defense was a "circus," a "sham," and an attempt to "buy the truth." (Trial 2122, 2168, 2172.) The jury returned a guilty verdict. (Doc. 280.)

Katherine moved for a new trial based in part on the prosecutor's legal counsel-based attacks. (Doc. 288.) The court denied the motion. (Doc. 309 (App. E).) The court sentenced Katherine to twenty years in prison. (Doc. 319 (App. F).)

STATEMENT OF THE FACTS

I. Katherine is a loving and attentive mother.

All her life, Katherine has been known to be nonviolent and even keeled. (Trial 1687, 1820.) She grew up on a ranch where she took care of animals and younger brothers. (Trial 1682, 1818.) She became an

attorney and joined the Attorney General's Medicaid Fraud Control Unit. (Trial 1800-01.)

Katherine was in her mid-30s when, in 2019, she met Tim, a highway patrolman. (Trial 996, 1004, 1052.) They both dreamed of having children and living on acreage. (Trial 1057.) They got married in May 2020 and began trying to get pregnant. (Trial 1139-40.) Because they were on the older side for pregnancy—and because Tim has an initially-misdiagnosed neuropathic condition that they were concerned about passing on—they scheduled a conception consultation. (Trial 1004-05, 1040, 1051.) At the consultation, they were delighted to learn that Katherine was already pregnant. (Trial 1041, 1058.)

In spring 2021, Katherine and Tim bought a house on acreage near Choteau and contracted to sell their Helena house. (Trial 1129-30.) Katherine yet lacked approval to work remotely, so she and Tim temporarily leased an apartment in Helena. (Trial 1131-34.) Tim spent more time at the Choteau property because his work moved up to Great Falls. (Trial 1000-01.)

PP was born in May 2021. (Trial 1001.) She was a sound sleeper and joyful and relatively easy baby. (Trial 1135, 1143.) Grandparents

scheduled long stays in Helena to lend a hand. (Trial 1146, 1672, 1675, 1784, 2009.) Katherine and Tim were prompt with scheduled checkups. (*See* Trial 552, 557.) For peace of mind at night, they got an Owlet sock baby monitor to track PP's heart rate and oxygen level and alert if those left the device's preset range. (Trial 1012-13, 1041, 1128.)

Like Tim, PP had fair and sensitive skin that marked easily. (Trial 2001-02, 2014-15.) PP liked to root her face into things. (Trial 897, 1158, 2015-18.) She was often on a blanket, in a detachable car seat, or in a sleep sack with Velcro restraints. (Trial 1027, 1142.) She was observed with face irritation immediately after tummy time. (Trial 2015-17.) PP nicked herself with her nails, so Katherine and Tim got her protective mittens. (Trial 1154-55.)

In early July, Tim slipped while holding PP in the car seat. (Trial 1011.) Concerned, they took PP to the ER but learned PP was fine. (Trial 1151.) They were reassured that a facial discoloration on PP was nothing to worry about because babies get bumps and bruises. (Trial 1153.) At PP's two-month checkup several weeks later, the pediatrician found PP in good health and offered reassurance that redness in PP's eye was not concerning. (Trial 554-55.)

In August, PP began attending 3Rs Daycare. (Trial 809.) 3Rs noted a few times PP's face had small discolorations or rug burns. (Trial 829.) 3Rs is a mandatory reporter, so it must report suspected child abuse to law enforcement. (Trial 828.) 3Rs did not suspect abuse and did not report. (Trial 829.) PP never acted as if she had internal injuries. (Trial 869, 1824.)

People observed Katherine's happiness as a mother and her love, gentleness, and attentiveness toward PP. (Trial 1135, 1145-46, 1792, 2010.) When Katherine returned to work and PP started daycare, Katherine considered counseling because she was sad to be apart from PP. (Trial 1187.) "With every fabric of [Katherine's] being," Katherine loved, and continues to love, PP. (Sent. 99.)

II. PP was very sick.

In early September 2021, Katherine, Tim, and PP attended Katherine's brother's wedding with hundreds of attendees. (Trial 1821.) Attendees held and interacted with PP, who had marks on the forehead and cheek. (Trial 1821-23.) After the wedding, several attendees came down with Covid. (Trial 1825.)

The third week of September, PP had a fever, a dark colored diaper, and was not feeding normally. (Trial 1165, 1167, 1173.)

On September 23, Tim heard PP cry and discovered their puppy and older dog had gotten in while PP was on the floor. (Trial 1169-70.) Tim didn't see any immediate injuries. (Trial 1170.)

Katherine's dad came to town from September 23 to September 26 to help with moving out of the Helena house. (Trial 1675.) Katherine's dad had recently seen other grandkids sick with Covid, and he felt sick himself, so he tried to keep distance from PP. (Trial 1678, 1692-93.) As beds got packed up, Katherine slept at night in the nursery with PP and did not use the Owlet monitor those nights. (Trial 1678; Trial Ex. 24-26 (admitted, Trial 304).)

Around September 24, discolorations appeared below one of PP's eyes and on the forehead. (Trial 1686-87.) Katherine thought they looked like had PP nicked herself with fingernails. (Trial 1686-87.) Katherine and Tim thought maybe PP had hit herself with a toy. (Trial 1018, 1197.) Tim had observed PP holding toys around that time. (Trial 1018-19.) 3Rs employees noticed the discoloration on September

27 and 28, and Katherine and Tim said they thought PP probably bonked herself. (Trial 821.)

On September 28, PP seemed off to a 3Rs employee. (Trial 863.) Tim picked up PP from daycare. (Trial 1026.) Usually, PP would fuss when Tim put her into the car. (Trial 1026.) Tim noticed PP did not fuss when he put her in the car that evening. (Trial 1026.)

Back at the house, Katherine and Tim were handling final moving-out tasks, and they planned to sleep that night at their apartment. (Trial 1027-30.) Tim reported PP drank a full bottle around 6:00 pm. (Trial 1027-28.) PP was not seeming to open her eyes as wide as normal. (Trial 756.)

Around 8, Tim reported PP was awake on the floor, and Tim's supervisor stopped by and heard music and normal-sounding baby crying inside. (Trial 1483.) Tim and the supervisor went out to the driveway to exchange some items and chat. (Trial 1029-30.) The conversation was sometime between five and twenty-five minutes. (Trial 1029-30, 1483, 1488.)

At some point, the supervisor recalled seeing Katherine "pull into" the driveway. (Trial 1488.) The supervisor and Katherine exchanged a

quick pleasantry as Katherine went into the house. (Trial 1485-86.) Tim and the supervisor were wrapping up their conversation and Tim went into the house right behind Katherine. (Trial 1487.) Tim testified PP was asleep in the detached car seat on the floor when he went into the house. (Trial 1030.)

Tim eventually took PP to the apartment and gave PP an evening bottle. (Trial 1030-31.) Tim reported PP drank only part of the bottle and didn't wake up for the feeding. (Trial 1031.) Katherine arrived later, and they put the Owlet sock monitor on PP around 11 p.m. (Trial 1033, 52.) The Owlet monitor considers 60 to 220 heartbeats per minute to be normal, and the monitor did not alert that night. (*See* Trial 1041-42, 1314, 1555-56.) But when Katherine and Tim got up in the morning, PP was not seeming to wake up. (Trial 1042.)

Katherine called an on-call pediatrician and was told that if PP had a fever, they could wait for medical care until PP had her four-month wellness check scheduled for later that day, but if PP did not have a fever, they should go to the ER. (Trial 1043-44.)

Katherine and Tim brought PP to the ER. (Trial 1044.) At the ER, Katherine and Tim explained that, upon looking at the Owlet

monitor's readings, they saw PP's heart rate had dropped to around 70 beats per minute during the night, and that they observed PP twitching on the way to the ER. (Trial 581-82, 703.)

The doctor's examination at St Peter's Hospital revealed PP's skull was tense where it should have been soft while her neck and other body parts did not show signs of injury. (Trial 597-98, 613-14.) PP was sporadically seizing. (Trial 600.) Physicians worked to control the seizures while they conducted tests and scans. (Trial 600- 09.)

A CT scan of PP's brain showed she had a large hypoxic ischemic injury, meaning brain damage from lack of oxygen or blood flow. (Trial 601, 610.) There are many possible causes for such injury, ranging from thrombosis, to infection, to metabolic issues, to seizures. (Trial 619-20.) Whatever the cause, PP was very sick. (Trial 611.) Physicians at St. Pete's got PP in stable but still critical condition and scheduled a transfer to Logan Hospital in Kalispell because that hospital has a pediatric neurosurgeon. (Trial 602-03.) After a few tries, doctors got PP intubated for travel to Kalispell. (Trial 604-07.)

III. Some doctors decided PP was shaken without fully exploring other diagnoses.

In the mid-20th Century, Dr. Norman Guthkelch proposed a hypothesis called shaken baby syndrome. (Trial 1395-96.) The theory is that manually shaking an infant might generate equivalent force to car crashes causing the "triad" of symptoms of brain bleeding, bleeding in the eye, and neurological impairment. (9/20 Tr. at 82; Doc. 15, Ex. K.) Decades later, Dr. Guthkelch cautioned that his hypothesis still was not scientifically validated. (Trial 457, 1395-96.)[2] While the hypothesis is rooted in biomechanics (the study of external forces on the body), repeated biomechanical testing has shown manual shaking alone cannot generate the force required to cause the triad of symptoms. (*See* Trial 457, 1463.) In 2009, the American Academy of Pediatrics acknowledged that there are other causes for SBS's symptoms, so—even assuming SBS exists—validly diagnosing SBS requires ruling out other

[2] *See* A.N. Guthkelch, *Problems of Infant Retino-Dural, Hemorrhage with Minimal External Injury*, 12 House. J. Health L & Pol'y 201, 207 (2012) ("SBS and AHT are hypotheses that have been advanced to explain findings that are not yet fully understood. There is nothing wrong in advancing such hypotheses; this is how medicine and science work. It *is* wrong, however, to fail to advise parents and courts when these are simply hypotheses, not proven medical or scientific facts, or to attack those who point out problems with these hypotheses or who advance alternatives.") (emphasis original).)

possible diagnoses. (9/20 Tr. at 84; Trial 1852-53.) Misdiagnose of serious medical problems in any situation is not uncommon and is a recognized problem in medicine. (Trial 1757.)

Doctors treating PP at St. Peter's Hospital did not list SBS among the possible diagnoses. (Trial 471-72.) But Logan Hospital doctors diagnosed SBS quickly after PP's arrival there. (Trial 766-67.)

Dr. Timothy Stidham coordinated PP's care at Logan. (Trial 669.) When Stidham received chest x-ray results suggesting PP had rib fractures, he decided PP had been abused and shaken because such fractures may correlate with where a person would squeeze when shaking an infant. (Trial 709, 766-67, 1463.) Stidham saw confirmation in other findings. (Trial 709.) An ophthalmology consultation found extensive hemorrhages in both of PP's eyes. (Trial 1078-80.) A brain MRI confirmed a large hypoxic ischemic injury along with a small subdural hemorrhage and a cleft[3] in the cerebellar. (Trial 628-37.) A bone scan was interpreted as showing several fractures. (Trial 417-31.)

[3] The SBS doctors imputed violence to the cleft and described it as a "laceration." (Trial 1709-10.)

Even though Stidham later admitted there were other possible explanations, Stidham didn't order tests or receive feedback challenging his quick SBS/AHT diagnosis. (*See* Trial 766-67, 773-74.)

Dr. Julie Mack, a pediatric radiologist who teaches at Penn State University, and Dr. Joseph Scheller, a pediatric neurologist with expertise in brain and spine imaging, reviewed PP's brain imaging before this trial. (Trial 1695-99, 1926-29.) They observed "definitive" or "very suspicious" evidence of thrombosis—blood clotting that everyone agrees could cause the sort of hypoxic ischemic injury observed in PP. (Trial 1727-28, 1732, 1942-52.) The way to see how extensive thrombosis is, or to rule it out, is through a venogram (an MRV or CTV), which gives contrast to the brain's veins. (Trial 500, 1732, 1947-48.) Stidham did not order a venogram for PP. (Trial 767.) Having not done that, Stidham admitted he and his team "certainly could not rule out [thrombosis]." (Trial 773-74; *accord* Trial 653, 1948.)

Stidham was unaware of PP's Covid exposure earlier in September. (Trial 750.) A nose swab at the hospital was positive for the common cold but negative for Covid. (Trial 619.) Stidham did not order a second Covid swab test to rule out the risk of a false negative,

nor did Stidham order a blood test to see if PP had Covid-antibodies evincing an earlier infection. (Trial 750-51.) Emerging literature links the aftermath of Covid infections to thrombosis. (Trial 1452.)

Dr. Christopher Sullivan, the Chief Pediatric Orthopedic Surgeon at the University of Chicago, reviewed imaging of PP's body before this trial. (Trial 1574-79.) He saw evidence of vitamin D deficiency and Rickets (a childhood disease of soft bones). (Trial 1581-82, 1606, 1609.) Earlier doctors misdiagnosed several bones with fractures that were in a state of vitamin D deficiency without fracture. (Trial 1589-95, 1609.) Vitamin D deficiency and Rickets nonetheless make bones susceptible to fractures even in normal conditions, and PP had several fractures consistent with that—specifically, one older rib fracture, two newer rib fractures, and newer fractures in the right foot and thumb. (Trial 1602-04, 1612-14.) Given the observed evidence of vitamin D deficiency, PP's several fractures, and her elevated level of alkaline phosphatase observed in labs, it would have been "common practice" and should have been "obvious" for Stidham to have tested PP's vitamin D levels. (Trial 1584-85.) But Stidham did not order vitamin D labs. (Trial 752.) Other labs that Stidham did order do not rule out vitamin D deficiency.

(Trial 1636-37.) And even as Stidham didn't order vitamin D labs, he gave PP vitamin D supplements in the hospital. (Trial 1655-56.)[4]

Peers have voted Dr. Michael Laposata—a clinical pathologist[5] and Chairman of the Pathology Department at the University of Texas in Galveston—as America's most influential pathologist. (Trial 1844-48.) Laposata reviewed PP's file and testified about several known coagulation disorders that could have caused PP's brain injuries and were consistent with discolorations around her head. (Trial 1854-57.) Testing was necessary to rule out such disorders. (Trial 1857.) But Stidham didn't order the tests. (Trial 1857.) Stidham ordered only one coagulation test, and even though that test came back with a high result, he didn't further explore the issue. (Trial 1858.) Stidham's failure to order appropriate tests meant there was "no way" to rule out a coagulation disorder. (Trial 1857.)

Finally, the level of external force required to produce PP's brain injuries would be expected to break her neck. (Trial 932, 1610-11.) PP

---

[4] Katherine tested as vitamin D deficient in October 2021. (Trial 1583.) If Katherine's levels were similar while pregnant, it would indicate PP was severely vitamin D deficient at birth. (Trial 1584-87.)

[5] A medical professional specialized in diagnosing diseases by analyzing bodily fluids. (Trial 1847.)

had no neck fractures, even in her likely state of vitamin D deficiency. (Trial 1610.) The SBS doctors suggested fluid near where PP's neck connected to her skull was indicative of ligamentous disruption. (Trial 407-08.) But MRIs can show ligamentous disruption, and PP's imaging did not show that. (Trial 1747-48.) Soft tissue elsewhere in PP's body similarly exhibited excess fluid, and the strokes PP indisputably suffered can cause soft tissue to retain excess fluid. (Trial 1746-47.) The site of the fluid in the neck was also near where fluid draining from the brain might pool if impeded by a blood clot. (Trial 1749-50.)

IV. Investigation and warrant

On September 29 at 11:45 a.m., Katherine called 3Rs. (Trial 1530-31.) Her voice shaking, she explained the situation and asked whether anything had happened at daycare the day prior. (Trial 887, 892-93.) The employee who took the call immediately met with her supervisor and 3Rs's owner. (Trial 889.) According to Child Protective Services (CPS) records, at 12:40 p.m. on September 29, 3Rs's owner called CPS to report previously observed discolorations on PP. (Trial 1323). The documented timing of the calls refutes testimony from 3Rs's owner that she called CPS before Katherine called 3Rs. (Trial 834-38.)

Also on September 29, Stidham gave his SBS diagnosis to Katherine and Tim. (Trial 1232-33.) Stidham said PP was unlikely to survive and, if she did survive, she was unlikely to meaningfully interact with her environment ever again. (Trial 759, 947-48, 987, 1114-15, 1559.) Stidham encouraged a do-not-resuscitate order. (Trial 754, 1180.) After the conversation with Stidham, Katherine and Tim were contacted by CPS. (Trial 1312.)

Katherine and Tim opposed giving up on PP and remained by her bedside. (Trial 759, 1181.) In early October, a procedure drained fluid from PP's skull. (Trial 483-84.) In mid-October, an initial extubation attempt resulted in PP breathing on her own for a couple hours but, ultimately, she had to be re-intubated. (Trial 724-26.) After seeing PP continuing to fight, Katherine and Tim smiled and held hands. (Trial 1240). The hospital's social worker reported this as "alarm[ing]" behavior. (Trial 1238, 1248, 1512.) A couple days later, another extubation attempt succeeded, and PP began breathing without assistance. (Trial 729, 1988.) Around then, Katherine nicked one of PP's fingers while clipping PP's fingernails. (Trial 1241.) Tim testified

he had previously done the same thing. (Trial 1185.) The hospital's social worker reported the nicked finger to CPS. (Trial 1250-54.)

Detective Joshua Van Dyke began the State's investigation on September 29. (Trial 1496.) He called Tim, a fellow cop, and notified him of the investigation. (Trial 1552.) 3Rs's owner was permitted to sit in on interviews with employees who had been with PP on September 27 and 28. (Trial 1536.) Van Dyke did not get video footage from 3Rs. (Trial 1536-37.)

Van Dyke obtained Katherine's and Tim's smartphones and applied for a warrant for the phones' data. (Trial 1513.) Van Dyke wanted to search the phones "because cell phones nowadays typically store all communication - or a lot of communication, pictures, medical histories, pretty much everything these days." (8/26 Tr. at 170.)

Van Dyke's warrant application claimed probable cause for aggravated assault under Mont. Code Ann. § 45-5-202 but did not specify a particular timeframe, action, or injury. (8/26 Hr. Ex. 27, Application at 1-6.) The affidavit averred three facts possibly relating to the phones: (1) Katherine's call to a pediatrician the morning of September 29; (2) a CPS employee seeing Katherine and Tim using

their phones in the hospital; and (3) that Katherine and Tim at some point saw PP's low heart rate, presumably on the Owlet monitor's connected phone application. (Id. at 2, 3, 5.) Without supporting facts specific to the case, the affidavit broadly asserted "[c]riminals will often use . . . wireless communication methods to facilitate their crimes," and "[c]ellular telephones often hold video, text, pictures, applications and other data pertaining to the health and wellbeing of the phones owner, their children and family members." (Id. at 7-8.) The affidavit specified the requested "cell phone extraction and search" would "be done by a third party to remove conversation[s] with legal counsel and clergy." (Id. at 6.)

A judge issued a warrant ordering a "[c]ell phone extraction and download to obtain . . . [a]ll data currently stored in [Katherine's and Tim's smartphones] related to [Aggravated Assault, § 45-5-202], including but not limited to" a list of all the kinds of data one could conceive of as being on a smartphone (e.g., social media profiles, browsing and search history, metadata, contact forwarding data, credit card accounts, etc.). (App. B at 1.) The only data the warrant excluded

were communications with legal and religious counsel—an exclusion negotiated by Tim's counsel. (App. B at 2.)

Because Tim knew his smartphone data would show an affair, he decided to reveal the affair to Katherine before the State did. (Trial 1139.) Katherine was previously unaware of the affair. (Trial 1139.)

V. Evidence and arguments

The State charged Katherine with assault on a minor resulting in serious bodily injury, occurring from late June through mid-October 2021. (Doc. 154.)

By the time of the trial, PP was 18 months old and was significantly outperforming the SBS doctors' prognoses. (Trial 1115, 1120.) While her eyesight remained limited, she was progressing rapidly, forming words, eating by herself, learning to walk, and interacting with her environment. (Trial 1120-21, 1795-96, 2019-20, 2032.) Children with brain injuries from internal processes tend to recover better than those with brain injuries from external trauma. (Trial 1977.)

The State's theory was that being a mother and an attorney while Tim was often in Choteau overwhelmed Katherine, so she abused and

shook PP. (*See* Trial 2112.) The prosecutor explained to the jury how she "imagine[d]" PP's brain injuries occurred while Tim was talking to his supervisor in the driveway on September 28. Speaking as if she were Katherine,[6] the prosecutor said, "I got this high stress job, and I'm holding it all together. And I've got no one in town to help me, and now [PP] is crying. (Makes motion.) And now she's quiet." (Trial 2112.)

To counter the State's theory, Katherine presented evidence under Mont. R. Evid. 405(a) that she was nonviolent, truthful, and even keeled even under stress. (Trial 1658, 1687, 1819-20.) Katherine's defense argued three sequential points of weakness in the State's case: (1) the lack of verification of the SBS hypothesis generally; (2) the failure of the SBS doctors to conduct tests necessary to either rule out or confirm other diagnoses; and (3) even assuming PP was shaken, the lack of proof that Katherine was the culprit. (Trial 2124-59; *see also* 11/2 Tr. at 40 (State's acknowledgment that the case against Katherine was "entirely circumstantial").)

The State presented testimony that rejecting the State's theory "would set a precedent that such a severe and obvious case like this can

[6] Katherine did not testify.

be overturned in court." (Trial 448-49.) The State introduced twenty photos of PP—cherry-picked from thousands of photos on Katherine's phone—all but the first introduced photo showing some sort of discoloration on PP's face, dating back to June 2021. (Trial Exs. 42-61; Trial 1540.) After PP's pediatrician testified to seeing a mark on PP at a checkup that she didn't find problematic, the State showed the pediatrician one of the photos and elicited that the pediatrician had "never seen a one-month-old present with this type of an injury . . . . I would likely have admitted this child for an abuse workup." (Trial 566.) The State referenced the photos in opening statements and displayed them in closing arguments. (Trial 314-17; Trial 2105-07 ("[T]his beautiful skin is shredded and her eye is bloodied. . . . [T]his is June 28th. . . . This is September 2nd. . . .") The State argued the jury could find Katherine guilty based on the marks in the photos and could use the photos also as evidence of a "pattern" to infer Katherine shook and caused PP's brain injuries in late-September. (Trial 314-17, 2116.)

The State additionally introduced two text messages with photos from when PP was in the process of being transported to Kalispell. (Trial Exs. 121-A, B.) Katherine, staying positive, texted Tim, "They

said she's doing great. I'm back in the room and meeting the flight crew," and, "[PP] is getting a little sunshine. They said it will be 1 hour 5 min to Kalispell." (Trial Exs. 120-21.) The photos show PP intubated with her eyes closed. (Trial Exs. 120-21.)

Van Dyke was the State's final case-in-chief witness and, as the last matter addressed in his direct examination, the State elicited that it "stood out" that, on September 29, Katherine's phone data had "Pinterest searches," and, on September 30, Katherine's phone data had "[s]earches for defense attorneys." (Trial 1528.)

In closing arguments, the prosecutor explained that "what happened" at trial with the defense "parading in doctors"[7] was "a circus." (Trial 2122.) In rebuttal closing arguments, the prosecutor told the jury "it doesn't get more clear than this," "[t]his is how you prove these cases," and the defense was "a sham," and "not the truth. You can't buy the truth." (Trial 2168, 2172.) Referring to the alleged assault, the prosecutor asserted that if she could put the jury "there when this happened, we wouldn't be here." (Trial 2173.)

[7] The State called three more doctor witnesses than the defense called. (Trial 350, 544, 591, 622, 661, 777, 919, 1279, 1573, 1695, 1844, 1872, 1926.)

The prosecutor explained to the jury how she investigated the case and explained, "That's my character. That's what the state is bringing to this." (Trial 2170.) The prosecutor pivoted, "And you know what the defendant's character is?" (Trial 2170.) The prosecutor answered her question first by pointing to Katherine's positive texts to Tim while PP was being transported to Logan: "That's messed up. It's like, [']stay with me Tim, we're in this together.[']" (Trial 2170.) The prosecutor next answered her question about Katherine's character by discussing Katherine seeking legal counsel: "[Y]ou know what the defendant did. She looked for a defense attorney. That's what she did. No one had said she did this, and she's looking for a defense attorney while her daughter is dying. . . . And all you've heard about . . . how resourceful she is. And what does she use those resources for? She uses them for herself to get a defense attorney." (Trial 2171.) "She gets a defense attorney who contacts an expert and says get me a defense because that's what all of those experts do." (Trial 2171-72.)

After the verdict, it came to light that the State's second chair was posting on Facebook throughout the trial, using PP's name, and quoting the proverb "The battle belongs to the Lord." (Doc. 302 at 8.)

STANDARDS OF REVIEW

This Court applies de novo review to questions of law, *State v. Pelletier*, 2020 MT 249, ¶ 12, 401 Mont. 454, 473 P.3d 991; to whether a search warrant is unconstitutionally overbroad or unparticular, *State v. Graham*, 2004 MT 385, ¶ 11, 325 Mont. 110, 103 P.3d 1073; *State v. Seader*, 1999 MT 290, ¶ 4, 297 Mont. 60, 990 P.2d 180; and to whether counsel was ineffective, *State v. Weber*, 2016 MT 138, ¶ 11, 383 Mont. 506, 373 P.3d 26. Evidentiary rulings, and rulings on motions for new trials, are generally reviewed for an abuse of discretion. *Pelletier*, ¶ 12; *State v. Reinert*, 2018 MT 111, ¶ 12, 391 Mont. 263, 419 P.3d 662.

This Court may review unpreserved errors that implicate fundamental rights where failure to review "may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996).

SUMMARY OF THE ARGUMENT

Katherine's conviction is tainted by scientifically unreliable testimony and the State's overzealousness and overreach.

Over half a century ago, SBS was proposed as a hypothesis grounded in biomechanics. Despite significant scientific advancement in the years since, biomechanical testing and models have not validated the hypothesis. To the contrary, testing and modeling has shown that manual shaking of an infant does not produce the level of force required to cause the sorts of brain injuries that SBS hypothesizes are a result of manual shaking. To be admissible under Rule 702, putatively scientific evidence must be reliable. With the defense presenting evidence that SBS is not reliable science in light of biomechanical principles and experiments, and the State not presenting evidence showing SBS is reliable and anything other than a speculative hypothesis, the District Court abused its discretion by permitting the State to introduce unreliable expert evidence.

Additionally, the State's investigation and prosecution was characterized by overzealousness and overreach. The State flouted constitutional privacy protections by getting a general warrant for essentially all of Katherine's smartphone data. The particularity requirement exists to keep warrants and searches tailored to their justifications—especially warrants and searches of places, like

smartphones, apt to contain vast quantities of highly private information. This Court has previously held a warrantless search unconstitutionally by going beyond its justifications when an officer searched a photo app despite the search's justification being limited to a Facebook messenger app. This search and seizure authorized by this warrant similarly stretched beyond any probable cause justification, but in a way that is significantly more threatening to privacy, as it encompassed an essentially limitless search and seizure of smartphone data. Without an extraordinarily broad showing of probable cause, many courts have found similar warrants unconstitutional. The Montana Constitution demands the same as the State's probable cause justification did not even approach justifying the scope of the general warrant. The warrant required suppression. The District Court erred by permitting the State to introduce and rely upon pictures, texts, download histories, and web search histories obtained through the general warrant.

The State's overzealousness is most strikingly illustrated by arguments that Katherine was guilty because she sought and acquired legal counsel while under investigation. Many courts have reversed

when considering less blatant attacks on a defendant seeking or acquiring legal counsel—including in cases without a contemporaneous objection—because such arguments fundamentally undermine a trial's fairness. Here, the State paired its attack on Katherine seeking legal counsel with slashes at Katherine's character, a bizarre comparison between the prosecutor's character and Katherine's, and repeated attacks on Katherine exercising her rights to put on witnesses and challenge the State's case. Where the State's entire case was dubious and circumstantial, the State's egregious misconduct demands reversal.

ARGUMENT

I. The shaken baby syndrome expert testimony was scientifically unreliable and inadmissible

Under Rule 702, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

Rule 702 requires proposed scientific expert testimony to be grounded in a reliable scientific foundation. *See State v. Clifford*, 2005 MT 219, ¶ 28, 328 Mont. 300, 121 P.3d 489 (explaining that "[q]uestions

concerning expert testimony's reliability . . . under Rule 702" include a court's determination that "the expert field is reliable"); *Clifford*, ¶ 33 ("To restate [Rule 702], *if* a reliable field helps the trier of fact, *and* the court deems the witness qualified as an expert, *then* he may testify.") (emphasis in original). This entails determining "whether the reasoning or methodology behind the testimony is scientifically valid." *Wheaton v. Bradford*, 2013 MT 121, ¶ 17, 370 Mont. 93, 300 P.3d 1162 (citation omitted). For example, in *State v. Strizich*, 286 Mont. 1, 12, 952 P.2d 1365, 1372 (2003); *State v. Weldele*, 2003 MT 117, ¶¶ 57-58, 315 Mont. 452, 69 P.3d 1162; and *State v. Crawford*, 2003 MT 118, ¶ 13, 315 Mont. 480, 68 P.3d 848, this Court ruled preliminary breath test results were inadmissible because there was not a sufficient showing that the devices used to obtain the results were scientifically reliable. For admission, possibly guilt-determinative expert evidence must be scientifically reliable and "demonstrably accurate." *Weldele*, ¶ 57.

The reasoning and methodology supporting shaken baby syndrome is not scientifically reliable or accurate. The SBS hypothesis was proposed over fifty years ago and was based on taking biomechanical principles and tests regarding the correlation of car

crashes to brain injuries and speculating the same sort of force and injuries might correlate to forceful manual shaking. (Doc. 15, Ex. L.) Despite significant scientific advancement in the decades since SBS was proposed, the hypothesis "remains unsupported and in fact disproven experimentally." (Doc. 15, Ex. M.) Biomechanics is the subspecialty focused on the study of physical forces acting on the body. (9/20 Tr. at 87-88.) Biomechanical studies have shown the sorts of brain injuries thought indicative of SBS "cannot be generated" through shaking alone. (Doc. 15, Ex. M; accord 9/20 Tr. at 83-84, 88-89.) It also been shown that, given the physiology of a child, shaking would be likely to cause significant neck injuries before reaching the level of force required for brain injuries. (Doc. 15, Ex. L.) All this and more renders SBS "contrary to the laws of injury biomechanics as they apply specifically to the infant anatomy" (Doc. 15, Ex. L), and means "shaking hypothesis has not been validated." (Doc. 15 at 83-94.) *See New Jersey v. Nieves*, 302 A.3d 595, 652-54 (N.J. Super. App. Div. 2023) (concluding "biomechanical testing has never proven the premise of SBS[], despite the hypothesis being grounded in biomechanical principles," and "the lack of biomechanical support renders the theory scientifically

unreliable"), certification granted, 256 N.J. 451; *see also Cavazos v. Smith*, 565 U.S. 1, 13 (2011) (Ginsburg, J., dissenting, with Breyer, Sotomayor, JJ., joining) ("What is now known about shaken baby syndrome (SBS) casts grave doubt on the charge . . . .").

At the Rule 702 hearing, the State's expert referenced biomechanics because, indeed, the SBS hypothesis requires the application of biomechanics. (8/26/22 at 84.) What the State didn't do was offer any evidence that biomechanics actually supports the SBS hypothesis. Indeed, the State's expert indicated the lack of such support in predicting that "*once* we get a model that can really demonstrate this that's what we're going to see that there's some level of sort of increased force or whatever." (Trial 1463 (emphasis supplied).) The prediction is "more an article of faith than a proposition of science." *Del Prete v. Thompson*, 10 F. Supp. 3d 907, 957 n. 10 (N.D. Ill. 2014). On these facts, the State did not present evidence establishing the reliability of SBS, just as the State failed to present sufficient evidence of the reliability of expert evidence in *Strizich*, *Weldele*, and *Crawford*. Because Rule 702 requires a sufficient showing

of reliability, the District Court abused its discretion in admitting the expert evidence. This Court should reverse.

II. The District Court erred by not suppressing prejudicial evidence obtained under a general warrant.

A. Smartphone data warrants must be carefully particularized to prevent unreasonable intrusions into massive amounts of highly private information.

Unreasonable searches and seizures are unconstitutional. U.S. Const. amend. IV; Mont. Const. art. II, § 11. A warrant is generally required for search or seizure to be constitutional. *State v. Mefford*, 2022 MT 185, ¶ 16, 410 Mont. 146, 517 P.3d 210. Not any warrant will do. The warrant must be "upon probable cause . . . and particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV; *accord* Mont. Const. art. II, § 11.

The particularity requirement "prevent[s] general searches," *Maryland v. Garrison*, 480 U.S. 79, 84 (1987), and forbids "general warrant[s]" that authorize "general, exploratory rummaging in a person's belongings," *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). A warrant's authorization to search and seize must be "specific and accurate." *State ex rel. King v. District Court,* 70 Mont. 191, 198, 224 P. 862, 865 (1924). The warrant must limit the "search to the

specific areas and things for which there is probable cause to search," thereby "ensur[ing] that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Garrison*, 480 U.S. at 84.

For example, in *Seader*, a warrant authorized the seizure of "anything else of value" connected to drug offenses. *Seader*, ¶ 7. That violated the particularity requirement by effectively giving officers "unbridled discretion" to rummage through belongings and decide what was "of value" to seize. *Seader*, ¶ 14. Another example is *Graham*, where a warrant based on probable cause to search a property's detached garage nonetheless authorized a search in the property's house. *Graham*, ¶ 13. A warrant's "command to search can never include more than is covered by the showing of probable cause to search," and this is especially true with warrants touching the home insofar as the home has historically been "the *raison d'être*" for Fourth Amendment protection. *Graham*, ¶¶ 17, 22. Because no specific facts extended probable cause from the detached garage to the house, the warrant was unparticular and overbroad. *Graham*, ¶ 27.

Nowadays, smartphone data searches may "expose to the government far *more* than the most exhaustive search of a house" because "[a] phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." *Riley v. California*, 573 U.S. 373, 396-97 (2014) (emphasis original). In *Riley*, the U.S. Supreme Court held smartphone data searches require a warrant and rejected permitting police to search smartphones incident to arrest. *Riley*, 573 U.S. at 401. Smartphone data searches carry heightened privacy implications, as they regularly contain vast quantities of private and qualitatively distinguishable information, whether photographs, communications, browser histories, location histories, or apps revealing "all aspects of a person's life." *Riley*, 573 U.S. at 394-96. The Court rejected permitting officers to search smartphones upon reasonable suspicion because "[i]t would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone." *Riley*, 573 U.S. at 398-99.

Given the scale of the privacy invasion involved, smartphone data warrants require careful application of the particularity requirement. When a warrant "involves an intrusion on privacy that is broad in scope," the "need for particularity" is "especially great." *Berger v. New York*, 388 U.S. 41, 56 (1967). And "[t]he greatest care in description is required when the consequences of seizure of innocent articles by mistake is most substantial, as . . . where the place to be searched is a cell phone . . . ." 2 Wayne R. LaFave, *Search and Seizure* § 4.6(a) (5th ed. 2012 & Supp. 2017).

Such care is especially necessary in Montana. Article II, Section 10 of the Montana Constitution provides a heightened right to privacy to guard against threats to privacy in an "advanced technological society." 2 Montana Constitutional Convention, Committee Report 632. And Montanans have amended Article II, Section 11 of the Montana Constitution to explicitly prohibit unreasonable searches and seizures of "electronic data and communications."

This Court has already recognized searches of smartphones must be carefully tailored to their justifications. In *Mefford*, a probation officer had consent and reasonable suspicion for a smartphone's recent

Facebook messages, but the officer proceeded to search the phone's photos. *Mefford*, ¶¶ 3-4. Noting the "unique privacy implications of modern smartphones," *Mefford*, ¶ 15, this Court held the search was unreasonable and unconstitutional because it went beyond its justifications, *Mefford*, ¶¶ 22, 43, 45. This analysis replicated what the particularity requirement also entails in ensuring a warrant's search "will be carefully tailored to its justifications." *Garrison*, 480 U.S. at 84.

Many courts have found particularity or overbreadth violations in sloppy warrants for smartphone data. *See, e.g.*, *U.S. v. Winn*, 79 F. Supp. 3d 904, 920-22 (S.D. Ill. 2015); *Wheeler v. Delaware*, 135 A.3d 282, 304-07 (Del. 2016); *Georgia v. Wilson*, 884 S.E.2d 298, 299-301 (Ga. 2023). Such warrants are prone to (1) encompass "all" data;[8] (2) list virtually all conceivable categories of smartphone data;[9] (3) state the authorized search and seizure is "not limited to" even the types of data

[8] *See Winn*, 79 F. Supp. 3d at 918-222; *Buckham v. Delaware*, 185 A.3d 1, 18-19 (Del. 2018); *Burns v. U.S.*, 235 A.3d 758, 769, 774-75 (D.C. 2020); *Wilson*, 884 S.E.2d at 299-301; *Michigan v. Carson*, No. 355925, ___ N.W.3d ___, 2024 WL 647964, at *8 (Mich. Ct. App. 2024).

[9] *See Winn*, 79 F. Supp. 3d, at 919-22; *Colorado v. Coke*, 461 P.3d 508, 516 (Co. 2020); *Burns*, 235 A.3d at 769, 774-75; *Wilson*, 884 S.E.2d at 299-301; *New Jersey v. Missak*, 299 A.3d 821, 826, 831-33 (Sup. Ct. N.J. App. Div. 2023); *Carson*, at *8.

identified; [10] (4) fail to specify the suspected crime beyond a generic citation to a statutory offense;[11] (5) fail to place other reasonable limitations—like time limitations corresponding to probable cause—on the data to be searched and seized;[12] and (6) authorize searches of categories of data based on general surmises about how people use smartphones.[13] Warrants characterized by these excesses do not prevent the sort of "wide-ranging exploratory searches the Framers intended to prohibit." *Garrison*, 480 U.S. at 84.

B. The State's warrant violated the particularity requirement and authorized an overbroad and general search and seizure.

The smartphone warrant in this case authorized the following:

> Cell phone extraction and download to obtain the following information:
> All data currently stored in [Katherine's and Tim's smartphones] related to [Aggravated Assault, § 45-5-202], including but not limited to:
> - Global or regional navigation satellite system data, including data from the Global Positioning System (GPS), Global Navigation Satellite System (GLONASS), BeiDou Navigation Satellite System (BOS), and similar systems;

---

[10] *See Winn*, 79 F. Supp. 3d, at 919-22; *Wilson*, 884 S.E.2d at 299-301.

[11] *See Winn*, 79 F. Supp. 3d at 921; *Oregon v. Bock*, 485 P.3d 931, 935-36, (Or. Ct. App. 2021).

[12] *See Connecticut v. Smith*, 278 A.3d 481, 497 (Conn. 2022); *Winn*, 79 F. Supp. 3d at 921; *Massachusetts v. Snow*, 160 N.E.3d 277, 288 (Mass. 2021).

[13] *See Buckham*, 185 A.3d at 17; *Pennsylvania v. Ani*, 293 A.3d 704, 727-28 (Penn. Sup. Ct. 2023).

- Latitude and longitude data;
- Location history,
- IP addresses;
- Activity history or logs;
- Address book or calendar data;
- Contact forwarding data;
- Photographs, audio or video files;
- Metadata;
- Email messages and attachments;
- Documents or other text-based files;
- Timeline history;
- Public profiles;
- Login history;
- Browsing or search history;
- Visited websites;
- Text messages (SMS);
- Media messages (MMS);
- Instant messages;
- Privacy settings;
- Social media profiles, conversations, pictures and media;
- Account information, including any linked financial or credit card accounts;
- Any data on a linked social media or communication account or application.
- Any data pertaining to the Owlet baby monitoring application.
-Any data, text, photographs, videos, documents or emails pertaining to [PP]'s health, injuries or circumstances surrounding the injury.

(App. B at 1-2.) The only data the warrant excluded were communications with counsel and clergy. (App. B at 2.) The warrant's broad "all data" and "including but not limited to" language, explicit listing of virtually all smartphone data, and explicit exclusion of only a

narrow subset of data all combine to impart authorization for an essentially limitless search and seizure of massive amounts of private information. Other courts lacking Montana's heightened privacy protections have nonetheless concluded smartphone data warrants with similar terms violated the particularity requirement and authorized unconstitutionally overbroad, general searches. *See, e.g., Winn*, 79 F. Supp. 3d at 910-11, 918-20; *Burns*, 235 A.3d at 774-75; *Wilson*, 884 S.E.2d at 299-302; *Buckham*, 185 A.3d at 15, 18-19.

The District Court's reasoning was weak in denying that this was a general warrant. The court asserted "there was probable cause that the categories of data to be searched contained evidence of the crime of aggravated assault," yet offered no analysis supporting that ipse dixit conclusion. (*See* App. C at 22.) So let's examine it.

As *Mefford* illustrates, a search is unreasonable if it stretches beyond its justifications as to a specific sort of smartphone data and extends to other data without sufficient justification. *Mefford*, ¶¶ 22, 43, 45. Here, the warrant application's most concrete facts for a probable cause nexus to Katherine's smartphone data were that Katherine and Tim used an Owlet monitor and Owlet data is viewed

through a phone app. Consistent with those facts, the State's warrant could have simply authorized a search and seizure of Owlet application heart rate data from around September 28 and 29. Instead, the warrant authorized a search and seizure of "all" data on the phone, "including, but not limited to" "[a]ny data on a[n]. . . application" of any sort, whether Owlet related or not, and "[a]ny data pertaining to the Owlet baby monitoring application," without limitation by type or date. (App. B.) Because the State's arguable probable cause justification was a sliver of the data the warrant authorized searching and seizing, the warrant was not "carefully tailored to its justifications." *Garrison*, 480 U.S. at 84.

The District Court also reasoned the warrant, while "allow[ing] the search of numerous areas of information," was sufficiently limited because it "limit[ed] the search to data 'related to the crimes of offenses identified [Aggravated Assault].'" (App. C.) But the terms of the warrant did not stop there. The warrant not only authorized a search for "all data . . . related to [aggravated assault]," it also defined that phrase—i.e., the data that was assertedly related to aggravated assault—as including essentially all conceivable categories of

smartphone data without limitation. (App. B at 1-2.) As the Georgia Supreme Court explained when examining similar warrant language, the simple reference to a generic offense cannot, in such a context, "plausibly be read . . . to limit the otherwise limitless authorization to search for and seize any and all data that can be found." *Wilson*, 884 S.E.2d at 300-01.

What's more, authorizing a search for and seizure of non-descript "evidence" of generic crime "certainly will not satisfy the Fourth Amendment's particularity requirement when the police could have more precisely described the evidence they were seeking or included other limiting features." *Winn*, 79 F. Supp. 3d at 921. In *Seader*, this Court concluded an authorization to seize "anything else of value" connected to drug offenses violated the particularity requirement by giving officers "unbridled discretion" to rummage through items. *Seader*, ¶ 14. The same analysis applies here. Particularly identifying the "place to be searched" and "things to be seized" that are consistent with the probable cause justification, as the constitutions demand, almost always requires more particularity than a general allusion to

evidence of a generic offense and statutory citation. *See Winn*, 79 F. Supp. 3d at 921. The latter is not particular at all.

Finally, the State's affidavit was not sufficient to establish probable cause to authorize a search and seizure of "data, text, photographs, videos, documents or emails pertaining to [PP]'s health, injuries or [surrounding] circumstances." (App. B at 1-2.) The affidavit included no facts particularized to the case to establish the existence of such data. Instead, the affidavit asserted a generalized and unparticularized belief that people generally have data pertaining to the health of family members in their phones. (Warrant Application at 7-8.) This is precisely the sort of generalized reasoning that the *Riley* Court identified as a threat to privacy, as "[i]t would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone." *Riley*, 573 U.S. at 398-99. Such generalized and unparticularized thinking would be insufficient even to establish reasonable suspicion. *See State v. Hoover*, 2017 MT 236, ¶ 18, 388 Mont. 533, 402 P.3d 1224 ("[p]articularized suspicion requires more than mere generalized suspicion . . . ."). The standard for probable

cause is substantially higher. *State v. Martinez*, 2003 MT 65, ¶ 48, 314 Mont. 434, 67 P.3d 207.

The State's data warrant was a general warrant, authorizing a general, top-to-bottom search and seizure of Katherine's smartphone data when there was probable cause for only a sliver of that data. Accordingly, the warrant was unconstitutional.

C. The violation required suppression.

The exclusionary rule requires suppressing evidence obtained through unconstitutional means. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *accord State v. Dickinson*, 2008 MT 159, ¶ 19, 343 Mont. 301, 184 P.3d 305.

The State below asserted the inevitable discovery exclusionary rule exception applied, arguing that if the State had not obtained evidence through an unconstitutional warrant, it would have obtained the same evidence through a valid, constitutional warrant. (Doc. 45.) The argument that "police would have done it right had they not done it wrong" is "less than compelling" and cannot establish inevitable discovery. *State v. Ellis*, 2009 MT 192, ¶ 46, 351 Mont. 95, 210 P.3d 144 (citation omitted).

The State below also argued the warrant was severable. (Doc. 45.) Under the severability doctrine, a court may strike a clause from a warrant without suppressing evidence collected under the warrant's remaining, valid portion. *Hauge v. District Court*, 2001 MT 255, ¶ 19, 307 Mont. 195, 36 P.3d 947. But the doctrine's application presupposed the warrant is otherwise "lawfully issued and . . . sufficiently particularized." *Hauge*, ¶ 19. The doctrine does not apply to a general warrant or to a warrant where overbreadth and lack of particularity predominates over the warrant's valid portions. *U.S. v. Sells,* 463 F.3d 1148, 1158-59 (10th Cir. 2006); *U.S. v. Kow*, 58 F.3d 423, 428 (9th Cir. 1995). The severability doctrine does not apply to save evidence obtained through a warrant that permitted a "general, exploratory rummaging in a person's belongings" because that is the chief evil that the Fourth Amendment was intended to prevent. *Sells*, 463 F.3d at 1158 (quoting *Coolidge*, 403 U.S. at 467).

The warrant here specified as its object "all" and essentially every conceivable type of smartphone data without meaningful limitation. (App. B.) Because this was a general warrant, it was not otherwise "sufficiently particularized," *Hauge*, ¶ 19, and the severability doctrine

does not apply. Even the warrant's two more specific clauses, relating to Owlet data and "data, text, photographs, videos, documents or emails pertaining to [PP's] health, injuries, or circumstances surrounding the injury" were subsumed within (and therefore not separate from) broader, unspecific clauses permitting the search and seizure of *all* application data, photographs, videos, text messages, and all data of any sort. "The principal means of effectuating the [particularity] requirement is to suppress all evidence seized pursuant to an overbroad, general warrant." *Coke*, 461 P.3d at 517 (citation omitted). Montanans' right to privacy demands suppressing all the evidence obtained through the State's unconstitutional warrant.

D. The District Court's error was prejudicial.

At trial, the State called three witnesses to explain their roles in extracting Katherine's smartphone data. (Trial 527, 798, 1514-19.) The State used that testimony to introduce evidence from Katherine's smartphone that included twenty photos, two text messages with two additional attached photos, and testimony from Van Dyke that what "stood out" in reviewing Katherine's phone was that she searched the

web for a defense attorney on September 30. (Trial 1528; Exs. 42-61, 120-21.)

The State must show the evidence was harmless under *State v. Van Kirk*, 2001 MT 184, 306 Mont. 215, 32 P.3d 735. The State "must demonstrate that the fact-finder was presented with admissible evidence that proved the same facts as the tainted evidence proved and, qualitatively, by comparison," there is "no reasonable possibility that the [tainted evidence] might have contributed to the defendant's conviction." *Van Kirk*, ¶¶ 43-44. The State cannot carry that burden here.

The State argued the jury should convict Katherine based on the suspected injuries in the smartphone photos. The State also argued the jury should use the photos as evidence of a pattern to infer Katherine shook PP on September 28. (Trial 314-17, 1519-29, 2105-08, 2170-71.) The State referred to the photos in opening statements, elicited damaging testimony from PP's pediatrician through the photos, and redisplayed and graphically described the photos in closing arguments. Because the State did not introduce other photos depicting the same suspected injuries, the State cannot demonstrate that "admissible

evidence . . . proved the same facts as the tainted evidence proved." *Van Kirk*, ¶ 43. Plus, qualitatively, when viewed through the lens of the State's allegations that the marks on PP, an infant, were intentionally inflicted, the photos carried significant emotional impact. The impact of photos showing PP's skin "shredded," as the State argued, was different from most of the State's evidence, which relied on dry, difficult-to-understand medical imaging. "It is hard to imagine that," after repeatedly seeing photos of PP with suspected injuries on her face, "a juror would not be more convinced" of the State's case that Katherine abused PP, and that necessitates reversal. *State v. Reichmand*, 2010 MT 228, ¶ 26, 358 Mont. 68, 243 P.3d 423.

The State used other evidence from Katherine's phone to smear Katherine's character and argue her guilt. Van Dyke told the jury it "stood out" that Katherine searched for a defense attorney on September 30, and the prosecutor brought the implication home in rebuttal closing argument, arguing Katherine's search for an attorney showed her bad character and guilt. (Trial 2171 ("And you know what the defendant did. She looked for a defense attorney.") The State also argued that two text messages Katherine sent to Tim trying to stay

positive in a terrible situation were evidence of Katherine's "messed up" character. The State's use of the tainted evidence to assassinate Katherine's character carried immense undue prejudice. *See State v. Lake*, 2022 MT 28, ¶ 32, 407 Mont. 350, 503 P.3d 274. The State cannot carry its burden to demonstrate no reasonable possibility that the tainted evidence influenced the jury's verdict. "[R]eversal is compelled." *Reichmand*, ¶ 27 (citation omitted)

III. The State's exploitation of Katherine seeking legal counsel, and other bizarre State misconduct, fundamentally compromised the trial's fairness.

A. Prosecutorial exploitation of a defendant's solicitation or acquisition of legal counsel is illegal and highly prejudicial.

This Court reviews prosecutorial misconduct for the denial of due process and a fair trial. *State v. Polak*, 2021 MT 307, ¶ 18, 406 Mont. 421, 499 P.3d 565. This Court takes "special care" to "assure that prosecutorial conduct in no way impermissibly infringes" on constitutional guarantees such as the right to counsel. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see Polak*, ¶ 18.

Prosecutorial exploitation of a defendant's solicitation or acquisition of legal counsel is illegal, whether under Sixth Amendment

or due process principles. The "vast majority" of courts to have considered the issue have concluded it is improper and highly prejudicial for a prosecutor to introduce evidence and make arguments that suggest guilt based on the defendant's solicitation of legal counsel—even when solicitation occurs before the initiation of criminal proceedings. *Connecticut v. Angel T.*, 973 A.2d 1207, 1219 (Conn. 2009) (collecting cases); *see also Hunter v. Maryland*, 573 A.2d 85, 89 (Md. Spec. App. 1990) ("[T]he rule seems well-established that it is impermissible for the State to offer evidence of, or comment upon, a criminal defendant's obtention of counsel or his attempt, request, or desire to obtain counsel in order to show a consciousness of guilt.").

Some courts have situated the holding under the Sixth Amendment right to counsel. *See U.S. ex rel. Macon v. Yeager*, 476 F.2d 613, 615-17 (3rd Cir. 1973); *see also Zemina v. Solem*, 438 F. Supp. 455, 465-66 (D.S.D. 1977), aff'd, 573 F.2d 1027 (8th Cir. 1978). For instance, in *Washington v. Espey*, the court concluded the government "strikes at the core of the right to counsel when it seeks to create an inference of guilt out of a defendant's decision to meet with counsel, even if the

defendant meets with counsel shortly after the alleged crime takes place." 336 P.3d 1178, 1182 (Wash. Ct. App. 2014) (cleaned up).

Other courts situate the holding under the rights to due process and to a fundamentally fair trial. For instance, in *Angel T.*, the prosecution—without contemporaneous objection—elicited evidence about, and commented upon, the defendant's pre-arrest consultation with an attorney. *Angel T.*, 973 A.2d at 1215-16. The Sixth Amendment right to counsel generally does not attach until the commencement of adversarial judicial proceedings. *Angel T.*, 973 A.2d at 1220-21. "Nevertheless," from evidence and arguments about a defendant's early solicitation of counsel, "a juror might easily draw the inference that it was the defendant's idea to seek counsel because he had done something for which he needed a lawyer to defend him." *Angel T.*, 973 A.2d at 1221. Such evidence and arguments compromise the right to a fair trial and are "highly prejudicial, as [they are] likely to give rise to the improper inference that a defendant in a criminal case is, or at least believes himself to be, guilty." *Angel T.*, 973 A.2d at 122 (quoting *Martin v. Maryland*, 775 A.2d 385 (Md. 2005)); *see also Kansas v. Dixon*, 112 P.3d 883, 904 (Kan. 2005) (concluding due process

precludes prosecutors from "eliciting testimony of a defendant's contacting an attorney and commenting on it on account of the potent tendency of the evidence and comment to serve improperly as the basis for an inference of guilt"). Another example is *Pennsylvania v. Lang*, 275 A.3d 1072, 1084 (Sup. Ct. Penn. 2022), where the court concluded evidence of a defendant's internet searches for legal counsel occurring before arrest violated the defendant's right to due process and to a fair trial.

In addition to constitutional principles, courts have concluded testimony and commentary on a defendant seeking or obtaining legal counsel is inadmissible under evidentiary principles. Under Mont. R. Evid. 403, the highly prejudicial implication of guilt arising from such evidence substantially outweighs the evidence's probative value because the evidence is, rightfully, "not probative in the least of guilt or innocence," *Massachusetts v. Person*, 508 N.E.2d 88, 91 (Mass. 1987). Thus, even "[o]n pure evidentiary grounds, [such evidence] is inadmissible." *Hunter*, 573 A.2d at 91.

B. The State's misconduct was egregious.

Here, the State attacked Katherine's character and innocence because she sought legal counsel.

First, the State elicited from Van Dyke that it "stood out" that Katherine searched for legal counsel while PP was in the hospital. (Trial 1528.) The State situated the evidence prominently, as the last matter addressed in direct examination of its last case-in-chief witness. *See* H. Mitchell Caldwell et al., *Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communication into the Direct Examination*, 76 Notre Dame L. Rev. 423, 437 (2001) (explaining recency bias and how "jurors' attention improves as they perceive that the end of testimony is near," recommending advocates situate matters they want jurors to focus upon at the end of direct examination). The likely implication from the testimony was that, to a trained professional at ferreting out crime, Katherine seeking legal counsel jumped out as indicating consciousness of guilt. In *Lang*, 275 A.3d at 1084, the court concluded almost identical testimony about a defendant conducting an internet search for legal counsel violated the defendant's right to due process and a fair trial.

Next, the State's "rebuttal" closing arguments again called jurors' attentions to Katherine's pursuit and acquisition of legal counsel. The prosecutor invoked "defendant's character" and argued Katherine was a bad person and guilty because, in the hospital, "you know what the defendant did? She looked for a defense attorney. That's what she did. No one had said she did this,[14] and she's looking for a defense attorney while her daughter is dying." (Trial 2170-71.) The prosecutor noted Katherine's "resources" and "what does [Katherine] use [her] resources for? She uses them for herself to get a defense attorney." (Trial 2171.) She "gets a defense attorney who contacts an expert and says get me a defense because that's what all of those experts do." (Trial 2171.) These comments attacked Katherine both for seeking an attorney before the initiation of legal proceedings, in violation of the right to due process and a fair trial, *see Angel T.*, 973 A.2d at 1221, and for getting an attorney and putting on a defense, in violation of Sixth Amendment rights, *see Macon*, 476 F.2d at 615-17.

[14] To be clear, Katherine looked for legal counsel after CPS had already contacted her (Trial 1312) and likely after Van Dyke had already contacted Tim about the State's investigation (*see* Trial 1496, 1552).

The State's arguments trafficked in two highly prejudicial threads of reasoning. One likely inference from the State harping on Katherine getting legal counsel was "the improper inference that [Katherine] is, or at least believes h[erself] to be, guilty." *Angel T.*, 973 A.2d at 1221. The prosecutor additionally proposed that Katherine seeking legal counsel showed her bad character, which would raise an inference that Katherine acted in conformity with her allegedly bad character to commit the charged crime or that she, as a bad person, was worthy of punishment regardless. *See Lake*, ¶ 32 (discussing prejudicial inferences from character evidence).

The prosecutor's broad-brush character attack was improper, regardless of Katherine offering evidence of particular character traits (honesty, calmness and capability under stress, and nonviolence) under Mont. R. Evid. 405(a). As this Court recognized in reversing in *State v. Kramp*, 200 Mont 383, 390, 651 P.2d 614, 618 (1982), Mont. R. Evid. R. 404(a)(1) rebuttal evidence to Rule 405(a) evidence must be "pointed to" the same character traits to which Rule 405(a) evidence has opened the door; "is not permissible" for supposed Rule 405(a) rebuttal evidence to go beyond those specific character traits. Katherine offering evidence of

particular character traits permitted the State to rebut those same character traits. But the State did not do that. Instead, the State engaged in general character assignation. (Trial 2171 ("And you know what the defendant's character is?").) Such argumentation was inadmissible under the rules of evidence and carried a high risk of considerable unfair prejudice. *See Lake*, ¶ 32.

To be sure, this Court reviews potential misconduct in closing arguments in the context of the State's entire argument and the trial itself. *State v. Byrne*, 2021 MT 238, ¶ 18, 405 Mont. 352, 495 P.3d 440; *State v. Smith*, 2021 MT 148, ¶ 42, 404 Mont. 245, 488 P.3d 531. And here, that additional context confirms that the State substantially undermined Katherine's right to a fair trial.

The State paired its character attack on Katherine with a bizarre comparison to the prosecutor's own, assertedly good character. The prosecutor explained, "That's my character. That's what the State is bringing to this," before asking, "And you know what the defendant's character is?" (Trial 2170.) Because the prosecutor's character, of course, was not at issue, the prosecutor's invocation of her own character, and comparison to Katherine's, invited the jury to decide the

case on an irrelevant and improper basis and improperly bolstered the State's other arguments and assessments to the jury.

The State also repeatedly toed or crossed the line with bolstered arguments and assessments misrepresenting the trial's function and penalizing Katherine for exercising her rights. From its very first witness, the State established a theme that Katherine's defense was untoward and "would set a precedent that such a severe and obvious case like this can be overturned in court." (Trial 448-49.) The implication was that doctors had already decided the case, and the jury was to rubberstamp it. It is improper to so "insinuate that factual issues have already been authoritatively determined." Bennett L. Gershman, Prosecutorial Misconduct § 11:33 (2d ed.). The prosecutor picked up the theme in closing arguments, referring to Katherine calling multiple witnesses who disagreed with the State's theory as "buy[ing] the truth," "a sham," and "a circus." (Trial 2121, 2168.) Yet, by all appearances, Katherine calling witnesses challenging the State's case was a straightforward exercise of a defendant's right to challenge the government's case. The prosecutor telling the jury it was a "circus" attacked and taxed the very notion of a fair trial.

The prosecutor also leveraged her suggested expertise in similar matters, effectively testifying to the jury that "[t]his case is never clearer than this," and "[i]t doesn't get more clear than this. It doesn't. This is it. This is how you prove these cases." (Trial 2170.) Additionally, the prosecutor asserted personal knowledge that, "[i]f I could put you there when this happened, we wouldn't be here." (Trial 2171.) A prosecutor may not so "assert or attest to personal knowledge of a pertinent fact." *State v. Miller*, 2022 MT 92, ¶ 23, 408 Mont. 316, 510 P.3d 17.

In total, the prosecution trafficked in highly improper attacks on Katherine's rights to contest the charge through witnesses, legal counsel, and a fair trial.

The District Court nonetheless denied awarding Katherine a new trial in the interests of justice, reasoning the prosecutor's comments were "to establish that Defendant, when informed that doctors believed her child's condition was the result of non-accidental trauma, did not research the child's medical condition or explanation therefore, but searched for defense attorneys." (Doc. 309 at 6.) The District Court failed to recognize and acknowledge the State's explicit use of

Katherine's defense attorney search as evidence of bad character—an entirely improper and inadmissible argument. *See Lake*, ¶ 32. Moreover, what "stood out" to Van Dyke was not that Katherine didn't conduct independent medical research, it was that Katherine searched for legal counsel. (Trial 1528.) If all the State sought to argue was Katherine—who is not a medical professional—didn't independently research PP's medical conditions at the hospital, the State could have introduced evidence and made arguments precisely on that weak point. Instead, the prosecutor attacked Katherine for "look[ing] for a defense attorney," using her resources "to get a defense attorney," and "get[ting] a defense attorney." (Trial 2171.) The conduct was unconstitutional, inadmissible, and highly prejudicial. *See Angel T*, 973 A.2d at 1219.

C. The denial of a fair trial requires reversal, including under plain error review and through ineffective assistance of counsel.

Generally, this Court does not review errors lacking a contemporaneous objection. *State v. Lawrence*, 2016 MT 346, ¶ 6, 386 Mont. 86, 385 P.3d 968. But this Court may exercise plain error review over errors that call into question a trial's fairness and the violation of fundamental rights. *Lawrence*, ¶¶ 6, 9. And the prosecutorial

misconduct in this case violated Katherine's fundamental rights and right to a fair trial.

The misconduct in this case was exceptional and bizarre. This Court has never previously addressed such blatant attacks on a defendant's right to pursue counsel and put on a defense, plus a prosecutor's explicit invocation of her own personal character. No one has dared make these arguments in a Montana courtroom. Until now.

Courts addressing prosecutorial exploitation of a defendant's solicitation of legal counsel have concluded such misconduct is egregious and prejudicial enough to require a new trial on its own, even in the absence of a contemporaneous objection. *See Macon*, 476 F.2d at 614-17; *Angel T.*, 973 A.2d at 1225-28; *Espey*, 336 P.3d at 1182-83; *Lang*, 275 A.3d at 1078-81. The exploitation carries a high risk of significant prejudice. *Angel T.*, 973 A.2d at 1221. Seemingly only in cases where the defendant's guilt was obvious, based on overwhelming evidence and credible eyewitnesses, have courts declined to order new trials based on such misconduct. *See Marshall v. Hendricks*, 307 F.3d 36, 72-75 (3d Cir. 2002); *Riddley v. Mississippi*, 777 So.2d 31, 35-36 (Miss. 2000).

This is not a case of obvious guilt, overwhelming evidence, or eyewitness support. The State admitted its case was "entirely circumstantial." (11/2 Tr. at 40.) There are significant questions about whether SBS is a valid diagnosis in any case, as it is scientifically unverified and unreliable. Further, there was substantial evidence that other possible causes of PP condition were not appropriately explored. Even Stidham admitted he "certainly could not rule out" thrombosis as an explanation for PP's acute brain injuries. (Trial 773-74.) And, even accepting the SBS diagnosis, Katherine was far from the only person around PP during the timeframe in which PP's injuries might have been inflicted. Both daycare employees and Tim were with PP alone on September 28. Yet, for example, law enforcement did not even bother to interview 3Rs employees in isolation. Finally, while the State's case against Katherine was speculative, the subject matter of the trial was often complex and difficult to comprehend. In this context, jurors may well have latched onto the inferences and arguments proposed in the State's misconduct. *See, e.g.*, *Person*, 508 N.E.2d at 92 ("We cannot overestimate the effect on the jury of . . . [the] argument tending to show consciousness of guilt."). The circumstances require a new trial.

Defense trial counsel's failure to guard the right to a fair trial from the State's misconduct additionally warrants reversal. The accused has a right to counsel's effective assistance. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing U.S. Const. amend. VI); *Weber*, ¶ 21 (citing Mont. Const. art. II, § 24). A violation of the right occurs when counsel's performance falls "below an objective standard of reasonableness" and, absent the unreasonable performance, there is a reasonable probability of a different outcome. *Strickland*, 466 U.S. at 688, 694. "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. On direct appeal, this Court may review a claim of ineffective assistance of counsel where counsel's performance below lacks "plausible justification." *Weber*, ¶ 22.

Here, defense counsel failed to object as the State repeatedly trafficked in evidence and arguments recognized for their impropriety and prejudice. When the State brought up Katherine searching for legal counsel, it should have been subject to immediate objection based on violating constitutional rights and carrying a high potential for prejudice with low probative value. Likewise, the State's closing

arguments using that fact, comparing the prosecutor's character to the Katherine's, and attacking Katherine for calling witnesses challenging the State's case were all ripe for objection as improper and prejudicial. Under the circumstances, defense counsel's failure to object was objectively unreasonable and lacks plausible justification. And, given the nature of the improper evidence and arguments, plus the State's doubtful case, defense counsel's deficient performance was prejudicial and undermined the fundamental fairness of the proceedings.

Finally, "cumulative error doctrine mandates reversal of a conviction where numerous errors, when taken together, have prejudiced the defendant's right to a fair trial." *State v. Smith*, 2020 MT 304, ¶ 16, 402 Mont. 206, 476 P.3d 1178 (citation omitted). The prosecutorial misconduct addressed in this section was particularly prejudicial when assessed in relation to the other errors that occurred below. The State's case relied on inadmissible expert evidence regarding a scientifically unreliable theory. The State was permitted to introduce prejudicial evidence from a general warrant. The State made wild arguments, committed egregious misconduct, and undermined a fair trial. In an "entirely circumstantial" case (11/2 Tr. at 40) with

many reasons to question the charge, the combined prejudicial effect of all the errors below requires a new trial.

CONCLUSION

This Court should reverse.

Respectfully submitted this 16th day of December, 2024.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Alexander H. Pyle
ALEXANDER H. PYLE
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 12,460, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Alexander H. Pyle
ALEXANDER H. PYLE

APPENDIX

CERTIFICATE OF SERVICE

I, Alexander H. Pyle, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-16-2024:

Mary Leffers Barry (Govt Attorney)
228 Broadway
Lewis & Clark County Attorney Office
Helena MT 59601
Representing: State of Montana
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Kevin Downs (Govt Attorney)
228 E. Broadway
Helena, MT MT 59601
Representing: State of Montana
Service Method: eService

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: American Civil Liberties Union
Service Method: eService

Karl Pitcher (Attorney)
PO Box 7842
Missoula MT 59802
Representing: The Innocence Network
Service Method: eService

Electronically signed by Kim Harrison on behalf of Alexander H. Pyle
Dated: 12-16-2024