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| IN THE \_\_\_\_\_\_\_DISTRICT COURT, \_\_\_\_\_\_\_\_\_ DEPARTMENT IN AND FOR THE [COUNTY], STATE OF UTAH | |
| STATE OF UTAH,  Plaintiff,  vs.  [DEFENDANT],  Defendant. | **STATE’S MOTION IN LIMINE**  Case No.  Judge |

THE STATE OF UTAH, by and through its counsel, [DA], District Attorney for Salt Lake County, and [ADA], Deputy District Attorney, hereby submits the

State’s Motion in Limine and requests this Court to rule that evidence of older, healing injuries suffered by X.T., the 12 month-old victim of fatal head injuries caused on December 30, 2013, are admissible at the trial of the Count of Murder against the Defendant. Rather than attempt to admit the evidence relating to the victim’s prior injuries under the rubric of “prior misconduct” pursuant to Rule 404(b) of the Utah Rules of Evidence, the State is instead contending that under the case law cited herein, it is appropriate to admit the evidence of those prior injuries to the victim as part of the context in which the final, fatal injuries were caused and to establish that the fatal injuries were not the result of accident, but were the result of some person’s intentional or knowing conduct. The State is not conceding inability to prove by a preponderance of evidence

that the Defendant, [DEFENDANT], caused the prior injuries to X.T., but is merely arguing through this Motion and memorandum that evidence relating to the prior injuries of the victim, and expert testimony from expert witnesses, including [STATE’S EXPERT] , Child Abuse

Pediatrician with the Safe and Healthy Families Team at Primary Children’s Hospital that X.T.’s injuries both before and at the time of his fatal injuries were part of a pattern of child abuse and that the victim fit the medical definition of the “battered child syndrome”, are relevant to show that the final, fatal injuries inflicted upon the victim while he was in the exclusive care and custody of the Defendant, were not the result of any accident or natural cause but were more likely the result of abuse. By not proceeding under Rule 404(b), the State contends admission of the evidence does not relate to the character of the Defendant or any other person, and is not being used for the purpose of showing identity of the Defendant as to the acts that resulted in the fatal injuries to X.T. If this Motion is granted, the State will propose an appropriate limiting jury instruction which makes clear that the jury is not to use this evidence in a way that would relate to the character or past conduct of the Defendant nor to show the identity of the Defendant as the person who inflicted the fatal injuries upon X.T.

The State relies upon the case of *Estelle v. McGuire*, 502 U.S.62 (1991), and the explanations offered in the recent case of *State v. Lucero*, 2014 UT 15, 328 P.3d 841 by the Utah Supreme Court, for the contention that Rule 404(b) is not the sole vehicle for considering the admissibility of evidence of a child homicide victim’s prior injuries which support a medical diagnosis of ‘battered child syndrome’ (hereafter BCS) and that a particular child victim’s injuries were caused by *someone else’s abusive conduct* even in the absence of proof of the identity of the person who caused the prior injuries to the victim. Thus, the State is not proposing to admit evidence of the victim’s older, healing injuries for the purpose of showing the

identity of the perpetrator of the fatal injuries, or for any purpose that would invoke the character analysis under Rule 404(b), but merely to show the lack of accident or innocent cause in relation to the victim’s fatal injuries, because they are part of a pattern of escalating child abuse which culminated in the fatal injuries suffered by X.T. Although almost all case law in the State of Utah and throughout the country which relates to this area has evolved in the specific context of prior uncharged misconduct, and because of that focus the emphasis is usually on the “prior acts” of the defendant, the State in this case avers that evidence of a child homicide victim’s prior injuries has relevance independent of the conduct or acts of the person who may have caused those prior injuries.

The statement of facts set out in the State’s previous Memorandum in Opposition to Motion to Quash Bindover is relied upon for the purposes of this motion and incorporated in this Memorandum by reference in addition to the following statement of facts pertinent to this Motion.

# STATEMENT OF FACTS

[INSERT STATEMENT OF FACTS]

# ARGUMENT

**EVIDENCE CONCERNING THE VICTIM’S PRIOR AND HEALING INJURIES DISCOVERED AT THE TIME OF HIS HOSPITALIZATION FOR THE FATAL INJURIES IS ADMISSIBLE AND PROBATIVE TO SHOW THE CONTEXT IN WHICH THE ULTIMATELY FATAL INJURIES WERE CAUSED, TO SHOW THAT THE FATAL INJURIES WERE NOT LIKELY THE RESULT OF ACCIDENT, BUT INSTEAD WERE THE RESULT OF THE ACTIONS OF SOME OTHER PERSON**

Utah’s appellate courts have a long history of ruling that prior acts of child abuse are admissible even if they were uncharged in a case involving child abuse or child homicide.

Because child abuse occurs in secrecy without eye-witnesses and because the child victims are usually either too young to testify or unwilling to provide information harmful to their abuser, evidence of a pattern of abusive injuries to a child is admissible in Utah. *See State v. Tanner*, 675 P.2d 539 (Utah 1983), *State v. Killpack*, 191 P.3d 17, 2008 UT 49, *State v. Widdison*, 28 P

3d 1278, 2001 UT 60. As the Supreme Court stated in *State v. Watts*, 675 P.2d 566, 569 (Utah 1983): “[W]e cannot ignore that the pernicious acts of the child abuser are always attended by secrecy, denied by protestations of innocence, and peculiarly identified by the marked discrepancy between the clinical or physical findings and the historical data provided by the caretaker.”

In *State v. Tanner*, the Utah Supreme Court noted that evidence from expert witnesses of the medical diagnosis of “battered child syndrome” was well-recognized in the medical field, and allowed the medical expert to identify that an injury or set of injuries to a child “is not accidental

. . . but is instead the result of physical abuse by a person of mature strength.” 675 P.2d at 542.

The victim in that case was three years of age when she was killed, but there was evidence introduced that she had several prior injuries, including fractures of the clavicle, right eleventh rib, the right tibia and the left humerus. There was also evidence that she had sustained a bite mark and other bruises. The Utah Supreme Court clearly drew a distinction between admission of evidence of the victim’s older and healing injuries and evidence of prior *acts* of child abuse by a caretaker. “When an expert testifies as to the existence of the battered child syndrome, he expresses no opinion regarding a defendant’s culpability, but rather . . .’simply indicates that a child found with the type of injuries outlined above has not suffered those injuries by accidental means. This conclusion is based upon an extensive study of the subject by medical science.’” 675 P.2d, 542 (citing *People v. Jackson,* 18 Cal App. 3d 504, 95 Cal. Rptr. 919 (1971)). The *Tanner* Court went on to note from *Jackson* that admissibility of the evidence of injuries to the victim which occurred prior to the fatal injuries “does not depend on connecting either defendant to the infliction of the injury. It is independent, relevant circumstantial evidence tending to show that the child was intentionally, rather than accidentally injured on the day in question.” *Id.* at

543. In holding that expert opinion evidence about the fact that the victim in *Tanner* fit the diagnosis of the battered child syndrome had been properly admitted, the Supreme Court

identified that such evidence is relevant to show “absence of accident”:

# Expert testimony as to types of injuries, their size, location and severity, together with evidence of their varying age and progress in healing, allows the lifeless or preverbal victim to testify in the only way possible…We therefore conclude that in appropriate factual circumstances, testimony regarding the battered child syndrome is admissible when given by a properly qualified expert witness.

*Id.* at pp. 543-544. In reaching this holding, the *Tanner* court cited to several other cases from other jurisdictions which had reached similar conclusions, all of which held that expert evidence relating to the battered child syndrome and evidence of the child’s older injuries were relevant to

show absence of accident as to the charged crime of abuse or child homicide, but that such evidence did not identify that the injuries were caused by any particular person. Most significantly, the *Tanner* court keeps separate from the holding regarding admissibility of the victim’s prior injuries their discussion of whether evidence of the prior abusive acts of the defendants was properly admitted under Rules 47 and 55 of the Utah Rules of Evidence, the precursors to Rules 403 and 404(b). That is the approach the State urges this Court to take in deciding whether the evidence of X.T.’s older and healing injuries found on or about October 3, 2014 and again on December 30, 2014 are admissible in the trial of the charge of Murder against the Defendant, even if not connected to any particular person’s conduct or acts of abuse.

The United States Supreme Court case of *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475 (1991) has been widely cited in child physical abuse and child homicide cases, and is extensively discussed by the Utah Supreme Court in their recent *Lucero* decision. In *McGuire*, the victim was 6 months old when her parents brought her unresponsive body into the hospital in California. Efforts to revive her were unsuccessful and an autopsy revealed not only recent injuries, including over 36 discrete bruises or contusions, but also a lacerated liver, lacerated pancreas, lacerated small intestine, damage to her heart and damage to one of her lungs. In addition, she had suffered rectal tearing which experts testified was about 6 weeks old and a partially healed rib fracture, which was thought to be about 7 weeks old. McGuire’s state appeals were denied so he filed a federal writ of habeas corpus, which was denied by the District Court, but that ruling was reversed by the 9th Circuit Court of Appeals. The United States Supreme Court reversed the appellate court ruling, finding among other things that evidence that the victim fit the diagnosis of the battered child syndrome was properly admitted:

# “The demonstration of battered child syndrome simply indicates that a child found with serious, repeated injuries has not suffered those

**injuries by accidental means [citing *Jackson*]. The evidence demonstrating battered child syndrome helps to prove that the child died at the hands of another and not by falling off a couch, for example; it also tends to establish that the ‘other’, whoever it may be, inflicted the injuries intentionally. When offered to show that certain**

**injuries are a product of child abuse, rather than accident, *evidence of prior injuries is relevant even though it does not purport to prove the identity of the person* who might have inflicted those injuries…We conclude that the evidence of prior injuries presented at McGuire’s trial, whether it was directly linked to McGuire or not, was probative on the question of the intent with which the person who caused the**

# injuries acted.”

*Id.* at p. 480, emphasis added. The remainder of the *McGuire* case deals with a discussion of the jury instruction used, which was based on the theory that the defendant had committed the acts which resulted in the victim’s prior injuries. The Supreme Court, though, made this very helpful comment about the function of a finding that the victim fit the battered child syndrome:

# “The proof of battered child syndrome itself narrowed the group

**of possible perpetrators to McGuire and his wife, because they were the only two people regularly caring for Tori during her short life. [citation omitted]. Only someone regularly ‘caring’ for the child has the continuing opportunity to inflict these types of injuries; an isolated contact with a vicious stranger would not result in this pattern of successive injuries stretching through several months.”**

*Id.* at p. 483. This helps to illustrate the probative value of evidence of prior injuries to a child, even when they are not directly connected to the abusive acts of a particular person, since the diagnosis of battered child syndrome logically limits those who could have caused the pattern of child abuse injuries to those who are “regular caregivers” for the child. The evidence of those prior injuries and the expert diagnosis of battered child syndrome, however, does not in itself identify the person who caused them.

Several of the cases relied upon by the United States Supreme Court in the *Estelle v.*

*McGuire* case also support the State’s contention that evidence of prior injuries to a child abuse or child homicide victim have independent relevance besides showing the acts or conduct of any

particular person. In other words, “prior uncharged misconduct” is not the only avenue for introduction of evidence that the child abuse victim has older injuries besides those which are the basis of the charges against a defendant. The most commonly cited case is *People v. Jackson*, 18 Cal. App.3d 504, 95 Cal. Rptr. 919 (Ct App Cal 1971), where the California Court of Appeal explained that the battered child syndrome, “means that a child has received repeated and/or serious injuries by non-accidental means; characteristically, these injuries are inflicted by someone who is ostensibly caring for the child.” *Id.* at p. 506. The Court explained that diagnosis of the child as a victim of battered child syndrome does not identify any particular person as having done anything to cause those injuries, but “simply indicates that a child found with the type of injuries outlined above has not suffered those injuries by accidental means.” *Id.* at p. 507. The *Jackson* court found that such evidence was admissible and that it did not improperly invade the province of the jury. Similarly, the Supreme Court of North Carolina held in *State v. Wilkerson*, 247 S.E.2d 905 (1978) that expert opinion evidence of the battered child syndrome and explaining that it applied to children who suffer multiple injuries inflicted by others, with a “classic finding” being a child with multiple fractures of varying ages, was appropriately admitted. In *Wilkerson*, a father was convicted of homicide of his two year-old son, who died from abdominal bleeding and a lacerated liver, but who also had evidence of older bruises and older, healing fractures. The North Carolina Supreme Court found that expert testimony of the battered child syndrome did not identify any particular perpetrator or class of perpetrators did not amount to an opinion as to the issue of the guilt or innocence of the defendant, but was properly admitted to show the fatal injuries were not the result of accident.

*Id.* at p. 912 (citing *Jackson).* To the same effect is the holding in the later North Carolina case of *State v. Elliott*, 475 S.E.2d 202 (N.C. 1996) where the mother’s boyfriend was convicted of

first-degree murder and felony child abuse for the mother’s two year-old daughter. The victim died from massive blunt force trauma to her head, but there was also evidence of other injuries not related to her death, including injuries to her chest, back, buttocks, arms and legs and an older fracture of her wrist. The child abuse expert testified that the victim’s injuries fit the battered child syndrome. On appeal, the defendant argued that the expert opinion about battered child syndrome should not have been admitted, because it was irrelevant and prejudicial. The Court commented that “in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible” and rejected the argument that the evidence was unfairly prejudicial, after citing to *Wilkerson, Estelle v. McGuire, and People v. Jackson*.

The North Carolina Supreme Court decided that evidence of the prior injuries to the victim was relevant and admissible to show that the victim was killed by intentional means and not by accidental means and its admission was not unfairly prejudicial to defendant. The defendant had claimed that the victim rolled off a bed.

In the case of *State v. Smolinski*, 401 N.W.2d 182 (Wis. App. 1986), the Wisconsin Court of Appeals affirmed the conviction of the defendant for second degree murder of his girlfriend’s three and a half year-old daughter. The blunt force head injuries that resulted in the child’s death happened while the defendant was alone with the child, but she also had older injuries including a fractured right leg, burns on her back and arm, and numerous bruises on her buttocks, shoulder blades and face. The Court of Appeals discussed the battered child syndrome, saying that:

# “Much of the evidence that can be gathered to show an instance of ‘battered child syndrome’ is circumstantial. In allowing such evidence to support a conviction, this court has recognized that those felonious assaults are in a unique category. Most cases of felonious assault tend to occur in a single episode to which there are sometimes witnesses.

**By contrast, cases that involve battered child syndrome occur in two or more episodes to which there are seldom any witnesses. In addition, they usually involve harm done by those who have a duty to**

**protect the child. The harm often occurs when the child is in the exclusive control of a parent. Usually the child is too young or intimidated to testify as to what happened . . .That a child does not survive strengthens, rather than diminishes, the law’s concern for the special problems of prosecuting a defendant in a battered child case.”**

For those reasons, the Court concluded, evidence of earlier harm to the child is admissible as part of an ongoing pattern of child abuse. Although *Smolinski* is decided under the analysis of prior bad acts, the Court ultimately held that the seven separate incidents of injury to the child before

the fatal injuries were caused were “conceptually similar” to the ultimately fatal injuries and that “the prosecutor did not abuse his discretion by charging child abuse as a continuing crime.” *Id.* at p. 26 of 1986 Wisc App LEXIS 4111.

In 1997, the Supreme Court of Tennessee ruled that evidence of a child homicide victim’s prior injuries was relevant and admissible and the State’s 404(b) Rule of Evidence did not even apply when the purpose of introducing such evidence was to show that the fatal injuries were intentional rather than accidental. Thus, in *State v. Dubose*, 953 S.W.2d 649 (1997), the 16 month-old victim was killed by a forceful blow(s) to his abdomen and the autopsy revealed evidence of older, scarred abdominal trauma to the victim. The Court decided that since the evidence of the victim’s older injuries was not offered under Rule 404(b) as evidence of prior uncharged misconduct, the relevant inquiry related to whether the evidence was properly admitted under Rules 401 and 402 relating to relevance. The defendant claimed that evidence of prior injuries could only be admissible if it was shown that he caused those prior injuries to the victim. The Supreme Court rejected that contention, finding that “since the evidence admitted did not show the identity of the person who caused the prior abdominal injuries sustained by the victim, it was not inadmissible under Rule 404(b).” *Id.* at p 653. In fact, the decision was that Rule 404(b) did not even apply to that analysis. The Court stated that the prior injuries “tended

to prove that the injuries were caused by someone intentionally and not accidentally.” *Id.*. at p. 654. The Supreme Court concluded that the evidence was probative and that its probative value was not outweighed by the danger of unfair prejudice to the defendant. The only slight difference between the facts of *Dubose* and the facts of this case is that in the Tennessee case, the medical examiner testified that the older and healing abdominal injuries may have been causally related to the cause of the toddler’s death, although there were also older head injuries noted in the victim which were not causally related to his death. (See *State v. Dubose*, 1995 Tenn. Crim. App. LEXIS 712 for a more thorough statement of the expert testimony). With X.T., the prior injuries have not been identified as being causally related to his death, but the expert witnesses have identified them as part of an ongoing pattern of inflicted injuries caused by some other person.

In the case of *State v. Worthen*, 765 P.2d 839 (Utah 1988), the Utah Supreme Court addressed the issue of whether a letter addressed to the court from the prosecutor relating to the strength of the State’s evidence was admissible in the jury trial where the defendant was a father accused of murder of his 3 year-old daughter. As part of the analysis, the Supreme Court said:

# “In the absence of a reasonable explanation for the injuries, the evidence of injuries showing battered child syndrome is admissible to rebut a claim of accidental injury. However, evidence regarding the child’s physical condition does not directly indicate the culpability of any particular defendant. [citing to *State v. Tanner*]

*Id.* at p. 846. Again, this statement was made not in the context of Rule 404(b), but as a general statement that evidence of prior abusive injuries to a child is admissible to show lack of accident, even though they are not tied to the acts of any particular person. Another basis for admitting the evidence of the homicide victim’s older inflicted injuries is that it “completes the story of the charged abuse”, in other words because it is part of the *res gestae* of the charged crime, which in

this case is Murder. *State v. Killpack*, 191 P.3d 17, ¶46 (Utah 2008). It would be artificial to limit the medical examiner and other medical expert witnesses to testifying only about the medical findings that are directly related to the cause of X.T.’s death, and not mention the other injuries documented during the October 3, 2013 admission and again on December 30, 2013 while X.T. was hospitalized and which were verified during the autopsy. The medical experts’ opinions are that the entire pattern of injuries and the escalating pattern of child abuse assists them to say the final, fatal injuries were inflicted by some other person and not the result of accident or some other innocent cause. Those opinions do not depend upon connecting any particular person to having been the cause of the injuries, but would be offered under the rationale of the cases relating to the battered child syndrome.

Although the recent Utah Supreme Court case of *State v. Lucero*, 2014 UT 15, 328 P.3d 841 was decided based on the focus of admissibility of evidence of the defendant’s prior acts of child abuse under Rule 404(b) and the Supreme Court made clear in the case that the prosecution must establish the prior injuries were caused by the defendant by a preponderance of evidence to meet the requirements of Rule 404(b), the Supreme Court spent a significant amount of their decision discussing *Estelle v. McGuire* and other similar cases regarding the battered child syndrome. In *Lucero*, a teenage mother was convicted of Murder for the death of her two year- old son caused by bending him backward and severing his spine and rupturing his aorta. The

State’s motion to admit evidence of a prior similar injury to the same area of the victim found during autopsy was held properly admitted because it was adequately shown that the acts or conduct of the defendant were the cause of the prior injury. As is true of a majority of the case law in this area, the Utah Supreme Court analyzed the issue solely in the context in which it was

presented – evidence of prior uncharged misconduct of the defendant, rather than evidence offered simply to show the absence of accident relating to the final, fatal injuries to the victim.

After their analysis of the admissibility of evidence under Rule 104 and Rule 404(b), the

*Lucero* Court then comments that

# “[T]his conditional relevance analysis differs in several important respects when the State seeks to establish battered child syndrome (BCS) to disprove claims that a child’s prior injuries were accidental. BCS is a widely accepted medical description that indicates a pattern of abuse by a caretaker. . .

**While the State must connect prior child abuse to a defendant by a preponderance of the evidence when doing so to establish identity, it need not connect child abuse to a defendant if the prior abuse is being introduced solely to establish BCS in order to prove intent. . .**

**Though evidence of BCS will by its very nature limit the possible perpetrators to the child’s caretakers, it does not bear directly on the issue of identity, which is a separate element of the crime that must then be proven**

**independently…**

**[I]f the State decides to establish BCS, it may do so *only* to establish intent (or lack of accident/mistake) and it may be introduced only through expert testimony.”**

*Id.* at ¶¶21,22,23. In footnotes, the Court cites *Estelle v. McGuire* and its holding that evidence of prior injuries to the victim is relevant even though evidence of BCS does not purport to connect the cause of those injuries to any particular person. Because *Lucero* was decided in the context of a motion to admit evidence of prior child abuse pursuant to Rule 404(b), the Utah Supreme Court did not specifically comment about the use of evidence of the victim’s prior injuries outside the 404(b) rubric, as the State is urging in this case. The *Lucero* Court did, however, state that there is nothing to “prevent trial courts from admitting evidence of the prior acts under Utah Rule of Evidence 104, *or alternatively, our BCS framework.* In fact, it is particularly important that the State be permitted to introduce evidence of prior uncharged instances of child abuse, regardless of a bindover decision, since this is often the only way to complete the story of the charged abuse.” *Id.* at ¶34 (emphasis added). This appears to

recognize that 404(b) is not the only means to analyze admissibility of evidence of a child abuse or child homicide victim’s prior injuries, but rather such evidence can be analyzed as “part of our BCS framework” – meaning the *Tanner*, *Killpack* and other cases which have been cited above.

In this case, the State is simply arguing that evidence that X.T.’s prior injuries which were causally unrelated to his death in early January of 2014 is relevant under Rules 401 and 402 of the Utah Rules of Evidence based on the expert testimony that all of the injuries leading up to and including the fatal injuries suffered by the child were part of an escalating pattern of child abuse, that he was a victim of BCS, and that their expert opinions as to the cause of the final, fatal injuries are significantly contributed to by the consideration of the entire constellation of injuries suffered by X.T. on or about October 3, 2013 through his hospitalization on December 30, 2013. Even though the evidence of the prior injuries and the BCS does not identify any particular person as the cause of those prior injuries, it is relevant and probative of the fact that the final, fatal injuries caused to X.T. were not the result of accident or some other innocent cause, but were the result of inflicted injury or child abuse. The State is not seeking to use the evidence of the prior injuries of the victim as evidence of the Defendant’s identity as the person who committed the fatal injuries upon X.T., and will prove that issue through independent evidence, as was suggested in *Lucero*.

[STATE’S EXPERT] preliminary hearing testimony outlined above has already established the basics of the diagnosis of “battered child syndrome” even though she did not specifically use that construct in her testimony. She did, however, make clear that the older, healing injuries to X.T., including the injuries that were suspected to be from child abuse but not definitive of abuse identified on October 3, 2013, were all in her opinion, the result of inflicted injury or child abuse by a caretaker. She testified that “injuries are often repetitive and ongoing” in child abuse, and

“you have to look at the collective picture” to make a diagnosis. PH 1, p. 123. After detailing all of the bruises and bite marks found on X.T. on both December 30 and previously on October 3, 2013, and testifying about the significance of the two collarbone fractures, posterior rib fracture and wrist fracture, and then explaining the severe head injuries which caused X.T.’s death, [STATE’S EXPERT] then testified: “So he’s got multiple injuries of different types and different ages, some stemming back to, in retrospect, October 3rd, I think those were abusive. Someone was biting him and continued to do that. We found more bite marks when he came in in December. So, I think he was the victim of physical abuse.” PH 1, p. 158. That is a good summary of an opinion that X.T. fit the medical diagnosis of BCS, even though that phrase was not specifically used.

And, it is significant to note that her expert opinions were couched in terms of “someone” having hurt or abused X.T., not attempting to identify any particular person. The State proffers that if questioned further, [STATE’S EXPERT] and probably also [THE MEDICAL EXAMINER] would state that the existence of the prior abusive injuries to X.T. strengthens their opinion that the final, fatal injuries were not the result of accident or some other innocent cause, but were inflicted by some other person and that in their medical opinion, X.T. fit the medical diagnosis of battered child syndrome.

In this case, evidence relating to the death of X.T., including the circumstances surrounding his death and the nature and cause of the injuries which resulted in his death would be admissible in a separate trial on the four Counts of Child Abuse. This is because there is really no issue as to the identity of the person who was alone with X.T. over the few minutes of time when the baby went from “fine” to unresponsive and fatally injured. The Defendant was the only person with X.T. from the time his mother left him in the crib drinking a bottle to the

time she found the baby unresponsive with his eyes rolling back in his head and not breathing. The State will proceed with the trial of the Murder charge first, but reserves the chance in the future to make a full argument if the trial of the four counts of Child Abuse go to trial separately that the evidence relating to the fatal injuries and the conduct of the Defendant on or about December 30, 2013 would be admissible under Rules 104 and 404(b) in that separate trial.

# CONCLUSION

Based on the authorities and legal analysis set out in this Motion and Memorandum, the State requests that this Court grant the State’s Motion in Limine to permit evidence relating to the prior injuries of X.T. which were unrelated to the cause of his death under the framework of the battered child syndrome diagnosis and with an appropriate limiting jury instruction that such evidence is to be considered solely as bearing on whether the final fatal injuries to X.T. were caused by someone’s abuse of the baby or the result of accident. The State is not seeking to admit this evidence to prove the acts or conduct of any particular person and is not invoking the analysis of Rule 104 and 404(b). The State submits that it is not required to prove by a preponderance of evidence the identity of the person who caused X.T.’s prior abusive injuries and that evidence of the entire picture of the child’s injuries is probative of the contention that the final, fatal injuries to X.T. were not the result of accident or any innocent cause, but were rather the result of child abuse and were inflicted upon him by another person.

Dated this 22nd day of October, 2015.

Deputy District Attorney