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Fourteenth Amendment--Admitting Evidence of Battered Child Syndrome to Prove Intent

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FOURTEENTH AMENDMENT—ADMITTING EVIDENCE OF BATTERED CHILD SYNDROME TO PROVE INTENT

Estelle v. McGuire, 112 S. Ct. 475 (1991)

I. INTRODUCTION

In *Estelle v. McGuire*,[1] the United States Supreme Court held that a state court's admission of evidence of prior injuries to an abused child was constitutional under the Due Process Clause of the Fourteenth Amendment, even though those injuries could not be attributed to the defendant. The Court found that this evidence was relevant to prove "battered child syndrome," a medical diagnosis which uses proof of past injuries to show that a child's present injuries did not occur accidentally.[2] According to the Court, the prior injury evidence helped to prove that the child's present injuries were the result of the defendant's intentional act because it showed that the injuries were intentionally inflicted by *someone*.[3] In addition, the Court upheld the trial court's jury instructions on the prior injury evidence, despite the defendant's protestations that the instructions magnified the prejudicial impact of that evidence.[4] Applying the "reasonable likelihood" test of *Boyde v. California*,[5] the Court concluded that there was no reasonable likelihood that the jury applied the instruction in a way that violated the Constitution.[6]

This Note argues that the Court, by failing to clearly distinguish between the prior injury evidence and the battered child syndrome diagnosis, provided a misleading and simplistic analysis of the evidentiary questions presented. While battered child syndrome is

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1 112 S. Ct. 475 (1991).

2 McGuire v. Estelle, 902 F.2d 749, 754 (9th Cir. 1990); *see also* Landeros v. Flood, 551 P.2d 389, 393 (Cal. 1976); People v. Jackson, 18 Cal. App. 3d 504, 506 (4th Dist. 1971).

3 *Estelle*, 112 S. Ct. at 480.

4 Brief for Amici Curiae the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association Supporting Respondent at 21, 112 S. Ct. 475 (1991) (No. 90-1074) [hereinafter Brief Supporting Respondent].

5 494 U.S. 370 (1990).

6 *Estelle*, 112 S. Ct. at 484.

purely a medical diagnosis,[7] evidence of past injuries is actually evidence of the defendant's prior bad acts, the consideration of which may lead the jury to improperly infer that the defendant has a propensity or a character trait for committing wrongful acts. This Note argues that the prior injury evidence was wrongly used to prove intent because it was not linked to the defendant in a meaningful way and its probative value was substantially outweighed by its prejudicial effect. Further, this Note argues that Justice O'Connor, in her dissent to Part II of the Court's opinion, correctly asserted that the jury instruction on the prior injury evidence allowed the jury to misuse that evidence, rendering the trial fundamentally unfair. Finally, this Note suggests that the Court's decision reflects a result-oriented approach to evidentiary questions that poses a dangerous threat to the time-honored prohibition against character evidence.

II. BACKGROUND ON BATTERED CHILD SYNDROME

Child abuse, although a horrifying social epidemic, is a difficult crime to prove. The victim, if alive, is often too young or lacks the psychological capacity and/or the courage to testify.[8] Of those children who take the stand, some, due to their age, are ineffective witnesses.[9] Further, the prosecution can rarely find an eyewitness to testify, and the accused is often able to fabricate a plausible explanation for the child's injuries.[10] The resulting evidentiary void is compounded by the fact that many jurors are unable to accept the idea that a parent or guardian would intentionally hurt a child.[11] Moreover, in many instances, there exists very little physical evidence of the abuse.[12]

In response to these problems, prosecutors have turned to expert medical testimony.[13] Today, physicians may be allowed to testify as to whether the injured child shows signs of "battered child syndrome," a medical diagnosis based on evidence indicating that the child has been subjected to a pattern of serious and unexplained

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7 John E.B. Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479, 537.

8 Michael S. Orfinger, *Battered Child Syndrome: Evidence Of Prior Acts In Disguise*, 41 FLA. L. REV. 345, 346 (1989); Myers, *supra* note 7, at 479-80.

9 Myers, *supra* note 7, at 480.

10 Orfinger, *supra* note 8, at 346; Myers, *supra* note 7, at 480.

11 Orfinger, *supra* note 8, at 346.

12 This lack of physical evidence is particularly a problem when the accused is charged with sexual abuse, because such abuse seldom results in physical injury. Myers, *supra* note 7, at 480.

13 Orfinger, *supra* note 8, at 346.

abuse.[14] The term "battered child syndrome" was coined by Dr. C. Henry Kempe and his colleagues in a landmark article published in 1962.[15] The syndrome does not establish the culpability of any particular person; rather, it simply indicates that a child found with serious, repeated injuries has not suffered those injuries by accidental means.[16] Evidence of battered child syndrome is used to make the logical inference that only someone who is regularly caring for the child would have occasion to inflict these types of injuries, as an isolated act by a stranger would not result in a pattern of successive injuries over an extended period of time.[17] Thus, evidence of battered child syndrome tends to narrow the group of possible child abusers in a criminal proceeding.

Under California law, the prosecution may attempt to prove battered child syndrome through the introduction of expert testimony and evidence related to a child's prior injuries.[18] *People v. Jackson*[19] is the first case in which such evidence was given appellate approval. In Jackson, the court affirmed a conviction of child abuse, holding that it was not error for the trial court to have allowed a doctor to testify that the child suffered from battered child syndrome.[20] The court listed several indicators of the syndrome. First, the child is usually under three years of age. Second, there is evidence of bone injury at different stages of healing. Third, there are subdural hematomas with or without skull fractures. Fourth, there is a seriously injured child who does not have a medical history that readily explains the injuries. Fifth, there is evidence of soft tissue injury. And finally, there is evidence of neglect.[21]

The *Jackson* court opined that the battered child syndrome had become an accepted medical diagnosis.[22] Subsequent decisions have confirmed the court's dictum. Since its emergence, expert testimony on the battered child syndrome has been held admissible in

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14 *Id.* at 346-47.

15 *Id.* (citing Dr. C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 17 (1962)).

16 Estelle v. McGuire, 112 S. Ct. 475, 480 (1991); *see also* Landeros v. Flood, 551 P.2d 389, 409 (Cal. 1976); People v. Jackson, 18 Cal. App. 3d 504, 506 (4th Dist. 1971).

17 *Jackson*, 18 Cal. App. 3d at 507.

18 *Estelle*, 112 S. Ct. 475 at 480.

19 18 Cal. App. 3d at 506-08.

20 *Id.* at 508.

21 The physician in *Jackson* found all of these indicia to be present in the victim's history. This led the doctor to remark that "it would take thousands of children to have the severity and number and degree of injuries that this child had," over the span of time in which he had them, by accidental means. *Id.* at 506-07.

22 *Id.* at 507.

every jurisdiction that has considered such evidence.[23]

III. Summary of Facts

On the night of July 7, 1981, Defendant-Respondent Mark Owen McGuire and his wife brought their six-month-old daughter, Tori, to the emergency room of a California hospital.[24] The baby was bluish in color, was not breathing, and had no vital signs.[25] She had a large and relatively recent bruise on her chest with multiple bruises around it, as well as black and blue marks on her ears.[26] The doctors were unable to revive Tori, and she died forty-five minutes after being brought to the hospital.[27] An autopsy revealed seventeen contusions on her chest, twenty-nine contusions in her abdominal area, a split liver, a split pancreas, a lacerated large intestine, and damage to her heart and one of her lungs.[28] In addition, the autopsy uncovered evidence of rectal tearing at least six weeks old and several partially healed rib fractures approximately seven weeks old.[29]

The police questioned McGuire and his wife, Daisy.[30] McGuire initially stated that Tori's injuries were caused by a fall from the family's couch.[31] He told the police that while his wife was out, he left his daughter on the couch and went upstairs; he later heard Tori crying and came back downstairs to find her lying on the floor.[32] When a police officer challenged this explanation, McGuire responded that "maybe some Mexicans came in" while he was upstairs.[33] During separate questioning, McGuire's wife said she had not hit Tori and did not know whether McGuire had done so.[34] Daisy McGuire also told a detective that she had noticed bruises on Tori's body during bathings. When asked how Tori might have gotten those bruises, Daisy responded that she didn't know and stated,

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23 Orfinger, *supra* note 8, at 347.

24 Estelle v. McGuire, 112 S. Ct. 475, 478 (1991); McGuire v. Estelle, 902 F.2d 749, 751 (9th Cir. 1990).

25 *Estelle,* 112 S. Ct. at 478; McGuire v. Estelle, 902 F.2d at 751.

26 *Estelle,* 112 S. Ct. at 478.

27 *Id.* The doctors felt they had a chance to resuscitate Tori because, upon her arrival, irreversible brain swelling had not yet begun. This indicated that she had been beaten very recently. McGuire v. Estelle, 919 F.2d 578, 584 (9th Cir. 1990) (Kozinski, J., dissenting).

28 *Estelle,* 112 S. Ct. at 478.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

"I am not the only one who is taking care of [Tori]. . . . My husband, too, takes care of her."[35]

McGuire was charged with second-degree murder.[36] At trial, the prosecution introduced the statements McGuire made to the police, as well as medical evidence that included both the rectal tearing[37] and the rib fractures.[38] There was no direct evidence linking McGuire to these prior injuries.[39] Nevertheless, two physicians relied on these injuries, as well as the more recent injuries, in testifying that Tori was a battered child.[40] The doctors further testified that the injuries that caused Tori's death could not have been produced by a fall from the couch.[41]

The prosecution also called a witness who overheard a conversation between McGuire and his wife in the emergency room of the hospital.[42] The witness testified that Daisy McGuire had repeatedly asked her husband "what really happened," and at the end of the conversation had blamed him for Tori's death.[43] In addition, McGuire's neighbor testified that the defendant had treated Tori roughly in the past.[44] According to her, McGuire had carried the baby to the car by "one of her arms," had pinched her cheeks when she cried, and had done other "bad things."[45] The witness further stated that McGuire's wife, a "very caring mother," had expressed fear at leaving Tori alone with McGuire.[46]

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35 McGuire v. Estelle, 919 F.2d 578, 584 n.7 (9th Cir. 1990) (Kozinski, J., dissenting).

36 Estelle v. McGuire, 112 S. Ct. 475, 478 (1991).

37 The examining physician, Dr. Levine, testified that the rectal tear was not caused by constipation or fecal impactment. Rather, the scarring around Tori's anus probably resulted from the forceful insertion of a finger or some other object. McGuire v. Estelle, 902 F.2d 749, 751 (9th Cir. 1990).

38 *Estelle,* 112 S. Ct. at 478.

39 *Id.* at 480. McGuire made timely objections to all evidence of prior injuries; all such objections were overruled by the court. McGuire v. Estelle, 902 F.2d at 751.

40 *Estelle,* 112 S. Ct. at 478.

41 McGuire v. Estelle, 902 F.2d at 751-52.

42 *Id.* at 751.

43 Chief Justice Rehnquist described the testimony as follows: "According to the witness, McGuire's wife several times insistently asked, 'What really happened?' McGuire replied that he 'didn't know,' and that he 'guessed' the baby fell off the couch. His wife continued to press for an answer, stating, 'I am very patient. I can wait a long time. I want to know what really happened?' Finally, she told McGuire that 'the baby was alright when I left. You are responsible.' " *Estelle,* 112 S. Ct. at 479. McGuire apparently made no reply to this last statement. McGuire v. Estelle, 919 F.2d 578, 583 (9th Cir. 1990) (Kozinski, J., dissenting).

44 *Estelle,* 112 S. Ct. at 478-79.

45 *Id.*; McGuire v. Estelle, 919 F.2d at 584 (Kozinski, J., dissenting).

46 *Estelle,* 112 S. Ct. at 479; McGuire v. Estelle, 919 F.2d at 584 (Kozinski, J., dissenting).

Daisy McGuire was called as a witness for the prosecution.[47] Under a grant of transactional immunity, she surprisingly testified that she, and not her husband, had beaten the baby.[48] According to Daisy's confused testimony, she struck Tori on the afternoon of July 7, 1981, before her husband arrived home; the baby did not move, cry, or cough thereafter.[49] She then left the house for ten minutes and returned to find that the baby was not breathing.[50] At that time, McGuire informed her that Tori had fallen from the couch and struck the walker.[51]

McGuire's wife was ultimately unconvincing.[52] After deliberating for three days, the jury convicted McGuire of second-degree murder.[53]

IV. PROCEDURAL HISTORY

The California Court of Appeal affirmed McGuire's conviction.[54] The court concluded that the evidence of prior rib and rectal injuries was properly admitted to establish "battered child syndrome."[55] The California Supreme Court denied McGuire's petition for review without any citation or comment.[56]

McGuire then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254(a)[57] in the United States District Court for the Northern District of California.[58] After ruling that McGuire had exhausted his state remedies, the court denied his petition, holding

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47 *Estelle*, 112 S. Ct. at 479.

48 *Id.*

49 *Id.*; McGuire v. Estelle, 902 F.2d 749, 751 (9th Cir. 1990).

50 McGuire v. Estelle, 902 F.2d at 751-52.

51 McGuire's wife also testified that several weeks prior to Tori's death, she inserted her finger in the baby's rectum in an effort to relieve her of constipation. *Id.* at 752.

52 Judge Kozinski described Mrs. McGuire's testimony as "halting and tentative, marked by evasion and lapses of memory, . . . internally inconsistent, contradicted by her earlier statements to the police and at the preliminary hearing and by Mr. McGuire's own statements to the police, and inconsistent with the weight of the medical evidence." McGuire v. Estelle, 919 F.2d 578, 584 (9th Cir. 1990) (Kozinski, J., dissenting) (citations omitted).

53 Estelle v. McGuire, 112 S. Ct. 475, 486 (1991) (O'Connor, J., concurring in part and dissenting in part). McGuire did not testify on his own behalf. McGuire v. Estelle, 902 F.2d at 752.

54 *Estelle*, 112 S. Ct. at 479.

55 *Id.*

56 McGuire v. Estelle, 902 F.2d 749, 752 (9th Cir. 1990).

57 28 U.S.C. § 2254(a) (1966) reads: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

58 *Estelle*, 112 S. Ct. at 479.

that both the admission of prior injury evidence and the jury instruction related to that evidence were proper.[59] The court further found that this evidence was relevant to contradict McGuire's statement, offered by the prosecution at trial, that Tori's injuries were caused by a fall from the couch.[60]

The Court of Appeals for the Ninth Circuit reversed and granted McGuire habeas corpus relief.[61] The court ruled that the admission of the prior injury evidence constituted a deprivation of due process because the evidence was not connected to the defendant and no claim was made at trial that the baby died accidentally.[62] In addition, the court held that the trial court's jury instruction was erroneous because it allowed the jury to find McGuire guilty based simply on a determination that he had committed prior bad acts.[63] The United States Supreme Court granted certiorari to decide whether either the admission of the prior injury evidence or the trial court's jury instruction on that evidence rose to the level of a due process violation.[64]

V. SUPREME COURT OPINIONS

A. MAJORITY OPINION

Writing for the majority, Chief Justice Rehnquist[65] reversed the decision of the Ninth Circuit and held that neither the admission of the prior injury evidence nor the instruction as to its use violated McGuire's federal due process rights.[66] In so holding, the Court ruled for the first time that evidence of battered child syndrome can be properly admitted to show that a child's death was the result of an intentional act. Part I of the opinion addresses the question of whether the admission of the prior injury evidence justifies habeas relief.[67] Part II examines the constitutionality of the trial court's

59 McGuire v. Estelle, 902 F.2d at 752.

60 *Id.*

61 *See* McGuire v. Estelle, 902 F.2d at 751.

62 *Id.*

63 The Ninth Circuit found that, "The trial court instructed the jury to use [highly prejudicial] evidence in the most improper way possible. . . . [The instruction] permits the jury to make a direct determination of guilt by concluding that appellant committed prior bad acts." *Id.* at 754-55.

64 Estelle v. McGuire, 111 S. Ct. 1071 (1991).

65 Chief Justice Rehnquist delivered the opinion of the Court, in which Justices White, Blackmun, Scalia, Kennedy, and Souter joined. Justices O'Connor and Stevens concurred in Part I of the opinion, but dissented to Part II. Justice Thomas took no part in the decision.

66 Estelle v. McGuire, 112 S. Ct. 475, 484 (1991).

67 *Id.* at 479-81.

jury instructions.[68]

The majority began by defining the Court's scope of review in examining state court decisions. Chief Justice Rehnquist restated the Court's position that "it is not the province of a federal habeas court to reexamine state court determinations on state law questions."[69] As such, the Ninth Circuit Court of Appeals was wrong to partially rely on its conclusion that the prior injury evidence was improperly admitted under California law.[70] When conducting habeas review, a federal court is confined to deciding whether a state conviction violated the Constitution, laws, or treaties of the United States.[71]

Chief Justice Rehnquist then addressed the question of whether the admission of the prior injury evidence violated McGuire's due process rights under the Fourteenth Amendment.[72] The Court explained that evidence of battered child syndrome serves two functions: first, it helps to prove that the child died at the hands of another and not, for example, by falling off a couch, and second, it shows that the "other," whoever it might be, inflicted the injuries intentionally.[73] Thus, evidence showing battered child syndrome is relevant to establish that certain injuries are the product of child abuse, rather than accident, even though such evidence does not purport to prove the identity of the person who inflicted those injuries.[74] The Court noted that since the prosecution had charged McGuire with second-degree murder, it had the burden of proving that Tori's death was caused by McGuire's intentional act.[75] According to Chief Justice Rehnquist, proof that Tori was a battered child helped to do this by demonstrating that her death was caused by the intentional act of *someone*.[76] Regardless of whether the evidence could be linked to McGuire, it "was probative on the question of the

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68 *Id.* at 481-84.

69 *Id.* at 480. *See, e.g.*, Lewis v. Jeffers, 497 U.S. 764, 780 (1990) ("federal habeas corpus relief does not lie for errors of state law").

70 *Estelle*, 112 S. Ct. at 480. The Court of Appeals wrote: "The trial court incorrectly admitted the evidence *pursuant to California law* allowing past injury evidence to establish the 'Battered Child Syndrome.' " McGuire v. Estelle, 902 F.2d 749, 754 (9th Cir. 1990) (emphasis added).

71 *Estelle*, 112 S. Ct. at 480.

72 The Fourteenth Amendment provides that the states shall not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

73 *Estelle*, 112 S. Ct. at 480.

74 *Id.*; *see also* People v. Bledsoe, 681 P.2d 291 (Cal. 1984); People v. Jackson, 18 Cal. App. 3d 504 (4th Dist. 1971).

75 *Estelle*, 112 S. Ct. at 480; *see* CAL. PENAL CODE §§ 187-189 (West 1988) (malice aforethought is the requisite intent for second-degree murder).

76 Chief Justice Rehnquist felt this argument had escaped the Court of Appeals. The Ninth Circuit stated that "evidence cannot have probative value unless a party connects

intent with which the person who caused the injuries acted."[77]

Next, the majority addressed the defendant's argument that the prior injury evidence was unnecessary because the defense did not claim that Tori's death was accidental. It was the prosecution, not the defense, who introduced McGuire's pretrial statement that the baby fell off the couch.[78] The defense's theory was that Daisy McGuire deliberately beat her daughter.[79] Nevertheless, the Court reasoned that the prosecution was not relieved of its burden to prove all of the essential elements of second-degree murder by the defendant's tactical decision not to contest an essential element of the offense.[80] By eliminating the possibility of accident, the battered child syndrome evidence was probative of intent. And, according to the Chief Justice, "nothing in the Due Process Clause of the Fourteenth Amendment requires the State to refrain from introducing relevant evidence simply because the defense chooses not to contest the point."[81] The Court thus held that McGuire's due process rights were not violated by the admission of the prior injury evidence.[82]

The majority then turned to the question of whether the trial court's jury instruction caused the jurors to misuse the battered child syndrome evidence in a way that violated McGuire's due process rights.[83] The trial court instructed the jury as follows:

> Evidence has been introduced for the purpose of showing that the Defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you, to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:

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it to the defendant in some meaningful way." McGuire v. Estelle, 902 F.2d 749, 753 (9th Cir. 1990).

77 *Estelle,* 112 S.Ct. at 480.

78 Brief Supporting Respondent, *supra* note 4, at 20.

79 McGuire v. Estelle, 902 F.2d at 754.

80 *Estelle,* 112 S. Ct. at 481; *see* Mathews v. United States, 485 U.S. 58, 64-65 (1988) ("A simple plea of not guilty puts the prosecution to its proof as to all elements of the crime charged").

81 *Estelle,* 112 S. Ct. at 481; *see* Spencer v. Texas, 385 U.S. 554, 563-64 (1967) ("Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. . . . But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure") (citations omitted).

82 Having found the prior injury evidence to be relevant, the Court did not reach the question of whether the Due Process Clause is violated by the admission of irrelevant evidence in a criminal trial. *Estelle,* 112 S. Ct. at 481.

83 *Id.*

1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the Defendant,
2. To establish the battered child syndrome, and
3. Also a clear connection between the other two offenses and the one of which the Defendant is accused, so that it may be logically concluded that if the Defendant committed other offenses, he also committed the crime charged in this case.

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider evidence for any other purpose.[84]

McGuire argued that the above instruction told the jury to find that he had caused the rib and rectal injuries, despite any evidence of this.[85] McGuire further argued that the instruction was a propensity instruction, allowing the jury to mistakenly base its finding of guilt on a belief that he had previously harmed Tori and thus had a disposition to do so.[86]

Before addressing these contentions, the Court laid out its standard of review. According to the majority, an opinion that the trial court erred under California law would not dictate a reversal of McGuire's conviction.[87] The only question facing the Court was "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process."[88] Furthermore, the Court said it must view the challenged instruction in light of the trial record and the jury instructions as a whole; it could not be viewed in "artificial isolation."[89] Chief Justice Rehnquist then approved of the "reasonable likelihood" standard for reviewing ambiguous jury instructions.[90] Under this standard, the Court evaluates "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.[91]

Applying the reasonable likelihood test, the Court first rejected McGuire's claim that the trial court's instruction directed the jury to find that he had caused the prior injuries.[92] Chief Justice Rehnquist

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84 *Id.* at 479 n.1.

85 *Id.* at 481.

86 *Id.*

87 *Id.* at 482.

88 *Id.* (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)).

89 *Id.*

90 *Id.*

91 *Id.* (quoting Boyde v. California, 494 U.S. 370 (1990)). The Court reaffirmed the standard of review for jury instructions set out in *Boyde* and disapproved the standard of review language used in Cage v. Louisiana, 498 U.S. 39 (1990) and Yates v. Evatt, 111 S. Ct. 1884 (1991). *Id.* n.4.

92 *Estelle*, 112 S. Ct. at 483.

concluded that this possibility was clearly foreclosed by the inclusion of the words "if the Defendant committed other offenses,"as this phrase left to the jury the decision as to whether McGuire had committed the prior acts.[93] The instruction also made clear to the jury that it was not to use the prior injury evidence as a factor in its deliberation unless it believed McGuire was the perpetrator of the earlier injuries.[94] The majority held that to the extent the jury believed McGuire caused the rib and rectal injuries, there was sufficient evidence to support that conclusion.[95] After all, the Court reasoned, the battered child syndrome evidence essentially narrowed the group of possible perpetrators to McGuire and his wife;[96] a neighbor had testified as to McGuire's rough treatment of Tori; and Daisy McGuire had told police that she had observed bruises on Tori's body in the past.[97]

Next, the Court rejected McGuire's argument that even if the trial court's instruction did not identify him as the perpetrator of the prior injuries, it was a propensity instruction that allowed the jury to improperly use McGuire's prior acts against him. While Chief Justice Rehnquist acknowledged that the instruction was ambiguous, he did not think there was a "reasonable likelihood" that, when read in the context of other instructions, it authorized the use of propensity evidence.[98] According to the Court, the more likely reading by the jury was that if it found McGuire had committed the prior injuries, and if there was a "clear connection" between those injuries and the present ones, the evidence of prior injuries could be used to determine whether McGuire committed the crime charged.[99] The Court stated that this use of evidence of prior offenses paralleled the familiar use of prior acts to prove intent, identity, motive, and plan.[100] Moreover, the Court found that the trial court specifically guarded against misuse by advising the jury that the prior injury evidence, if believed, could not be considered to prove that McGuire "is a person of bad character or that he has a disposition to commit crimes."[101] The Court thus concluded that the jury instruction was

93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.* (citing People v. Jackson, 18 Cal. App. 3d 504, 507 (4th Dist. 1971)).
97 *Id.* Judge Kozinski added another consideration: one of the injuries to Tori—rectal tearing—is sexual in nature and, in the judge's opinion, of a type more likely to be made by a man than a woman. McGuire v. Estelle, 919 F.2d 578, 584 n.7 (9th Cir. 1990) (Kozinski, J., dissenting).
98 *Estelle*, 112 S. Ct. at 483.
99 *Id.*
100 *Id. See also* FED. R. EVID. 404(b).
101 *Estelle*, 112 S. Ct. at 483-84.

not a propensity instruction and that its use did not violate McGuire's due process rights.[102]

B. CONCURRING AND DISSENTING OPINION

Justice O'Connor, joined by Justice Stevens, agreed that the evidence of battered child syndrome was relevant to the issue of intent.[103] Since the State had the burden of proving that McGuire intentionally killed his daughter, and since Justice O'Connor felt that the evidence of Tori's battered child status was probative of causation and intent, Justice O'Connor joined Part I of the Court's opinion.[104]

Justice O'Connor dissented to Part II of the opinion because she felt there was a reasonable likelihood that the jury had misapplied the prior acts instruction.[105] Justice O'Connor noted the need for a jury instruction clarifying the limited probative value of the battered child syndrome evidence, particularly because that evidence was not in any way tied to the identity of the abuser.[106] She then pointed out that the trial court's instruction limited the use of evidence of McGuire's prior bad *acts*, instead of limiting the use of evidence of Tori's prior *injuries*.[107] In giving such an instruction, the trial judge himself apparently assumed that McGuire had inflicted the earlier injuries.[108] The jury instruction referred to "acts similar to those constituting a crime other than that for which [McGuire] is on trial," but it failed to distinguish between the acts for which McGuire was positively identified, carrying the child by one arm and roughly pinching her cheeks, and the far more brutal acts for which no actor was identified, the fractured ribs and rectal tearing.[109] Justice O'Connor felt the grouping of these very different classes of evidence created a reasonable likelihood that the jury would understand the instruction to mean that McGuire had already been identified as the prior abuser.[110]

Justice O'Connor next argued that Section 3 of the challenged instruction compounded the trial court's error of implying that McGuire had been identified as the prior abuser.[111] The jury was in-

102 *Id.* at 484.
103 *Id.* (O'Connor, J., concurring in part and dissenting in part).
104 *Id.* (O'Connor, J., concurring in part and dissenting in part).
105 *Id.* (O'Connor, J., concurring in part and dissenting in part).
106 *Id.* (O'Connor, J., concurring in part and dissenting in part).
107 *Id.* (O'Connor, J., concurring in part and dissenting in part).
108 *Id.* at 484-85 (O'Connor, J., concurring in part and dissenting in part).
109 *Id.* (O'Connor, J., concurring in part and dissenting in part).
110 *Id.* at 485 (O'Connor, J., concurring in part and dissenting in part).
111 *Id.* (O'Connor, J., concurring in part and dissenting in part).

structed to "consider" the evidence that McGuire had "committed acts similar" to the crime charged and then "determine" whether there was a "clear connection" between the prior acts and the ones resulting in Tori's death "so that it may be logically concluded that if the Defendant committed other offenses, he also committed the crime charged in this case." According to Justice O'Connor, the trial court did not instruct the jury that it must first "determine" that McGuire had in fact inflicted the prior injuries before considering that evidence.[112] Thus, it was unclear if it was the jury's role to decide whether or not McGuire caused the rib and rectal injuries.[113] It is reasonably likely that the jury thought McGuire had already been linked to those injuries and that its role was merely to decide if there was a "clear connection" between Tori's prior injuries and the injuries that killed her.[114]

Justice O'Connor then turned to the question of whether the jury's possible misapplication of the instruction violated McGuire's due process rights. She agreed with the majority that the Supreme Court has narrowly defined the category of infractions that violate fundamental fairness.[115] However, she argued, the Court has held that "mandatory presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of the offense."[116] In Justice O'Connor's opinion, the prior acts instruction was a mandatory presumption that did just that. While the trial court may have intended to allow the jury to infer that whoever inflicted Tori's past injuries also inflicted the ones that caused her death, it did not make clear that "the State first had to prove the predicate facts from which the inference was to be drawn."[117] Further, the wording of the instruction may have convinced the jury that it had no choice but to "logically conclude" that McGuire murdered his daughter once it found a "clear connection" between the prior injuries and the fatal ones.[118]

Thus, in Justice O'Connor's view, the instruction encouraged jurors to assume that McGuire had inflicted the prior injuries; it then directed them to conclude that the prior abuser was the murderer.[119] The instruction was reversible error because it relieved

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112 *Id.* (O'Connor, J., concurring in part and dissenting in part).
113 *Id.* (O'Connor, J., concurring in part and dissenting in part).
114 *Id.* (O'Connor, J., concurring in part and dissenting in part).
115 *Id.* (O'Connor, J., concurring in part and dissenting in part).; *see* Dowling v. United States, 493 U.S. 342, 352 (1990).
116 *Estelle*, 112 S. Ct. at 485 (O'Connor, J., concurring in part and dissenting in part).
117 *Id.* at 485-86 (O'Connor, J., concurring in part and dissenting in part).
118 *Id.* at 486 (O'Connor, J., concurring in part and dissenting in part).
119 *Id.* at 484 (O'Connor, J., concurring in part and dissenting in part).

the State of its burden of proving the identity of Tori's murderer beyond a reasonable doubt.[120] Justice O'Connor concluded that the case should be remanded to determine whether the erroneous jury instruction was harmless.[121]

VI. ANALYSIS

A. BATTERED CHILD SYNDROME USED TO NEGATE ACCIDENT

Chief Justice Rehnquist determined that the prior injury evidence was relevant both to prove battered child syndrome and to establish the intent of Tori's abuser. However, his opinion fails to make clear the important distinction between the battered child syndrome diagnosis and the prior injury evidence used in making that diagnosis. The diagnosis of battered child syndrome itself is not evidence of prior bad acts of the defendant; it is a medical opinion, based upon a physician's perceptions and expertise, that a child has been seriously and repeatedly beaten.[122] Prior injury evidence may support this opinion. Such evidence, however, is not opinion testimony but rather, it is uncharged misconduct evidence that threatens to allow the jury to improperly find that the defendant has a propensity to abuse his or her child.[123]

As the battered child syndrome diagnosis and the evidence of prior injuries fall into different evidentiary classes, they should be analyzed differently. In *Estelle v. McGuire*, the medical diagnosis of battered child syndrome helped to establish that the child died as a result of an aggressive human act. No one, including the defendant, questioned the validity of this diagnosis.[124] Thus, the question for the Court regarding *actus reus* was not whether Tori's status as a battered child helped the jury to determine the cause of her death; the real question was whether the prior rib and rectal injuries were relevant to the battered child syndrome diagnosis.

A careful analysis indicates that the rib and rectal injuries were not needed to establish battered child syndrome or to convince the jury that Tori's death was non-accidental. There are several reasons for this. First, the examining physician made her diagnosis that Tori was a battered child even before she was aware of the prior rib inju-

120 *Id.* at 486 (O'Connor, J., concurring in part and dissenting in part).

121 *Id.* (O'Connor, J., concurring in part and dissenting in part).

122 Orfinger, *supra* note 8, at 347.

123 Admittedly, a prior injury is not actually a prior bad act but is the result of such an act. However, when evidence of past injuries is used to show motive, intent, identity, or plan, such evidence is actually prior bad act evidence. Orfinger, *supra* note 8, at 347.

124 Brief Supporting Respondent, *supra* note 4, at 19.

ries.[125] Second, the State's expert was prepared to testify about battered child syndrome and the lack of an accident without relying upon the previous injuries.[126] While experts must certainly provide justification for their opinions, there is no requirement that they testify to each and every underlying fact. Under the Federal Rules of Evidence, "the expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data . . . ."[127] Here, the State's experts could have testified that Tori was a battered child without disclosing the prior injury evidence. Third, the sheer number and extent of Tori's injuries at the time of her death essentially precluded the jury from believing that they were caused by accident. Finally, no defense of accident was raised at trial. The prosecution attempted to prove that McGuire intentionally killed Tori, while the defense argued that his wife, Daisy, intentionally did it.[128] The prosecution, not the defense, made cause of death an issue by introducing McGuire's out-of-court statement that the baby fell off the couch.[129] Thus, the very diagnosis of battered child syndrome was of limited worth.

But, while the prior injury evidence was of limited probative value to show lack of accident, it cannot be said that the evidence was irrelevant. The fact that Tori had suffered injuries indicative of previous beatings did increase the likelihood, to some extent, that the injuries which caused her death were inflicted intentionally.[130] As the majority points out, "the prosecution must prove all the elements of a criminal offense beyond a reasonable doubt," and the evidence of battered child syndrome did aid the prosecution by eliminating the possibility of accident.[131] The defense's decision not to argue that Tori's death was accidental did not relieve the prosecution of its burden. If the defense had wanted to remove this issue from the case, it could have stipulated that the child's death was non-accidental. It chose not to do so, however, and the admissibility of the rib and rectal injuries should not turn on this choice. A ruling to the contrary would present prosecutors with the dilemma

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125 *Id.*

126 *Id.*

127 FED. R. EVID. 705; *see* CAL. EVID. CODE § 802 (West 1965) for the corresponding state statute ("A witness testifying in the form of an opinion *may* state on direct examination the reasons for his opinion and the matter . . . upon which it is based.") (emphasis added).

128 McGuire v. Estelle, 902 F.2d 749, 754 (9th Cir. 1990).

129 Brief Supporting Respondent, *supra* note 4, at 20.

130 FED. R. EVID. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

131 Estelle v. McGuire, 112 S. Ct. 475, 480 (1991).

identified by Judge Kozinski in his dissent to the Ninth Circuit's decision:

> What are state prosecutors in the Ninth Circuit supposed to do when presented with a situation such as that here? On the one hand, they face the possibility of a directed verdict or unfavorable jury instructions if they fail to prove an element of the case that somehow seems "obvious." On the other hand, under today's precedent, they face the possibility that a federal court—with the benefit of hindsight—will conclude that the evidence was not really necessary because that particular element of the crime was not contested by the defense. . . .[E]ven with today's precedent in hand, no prosecutor will know when to withhold evidence or when to include it until he sees the defendant's evidence, by which time it will be too late. In common parlance, this is known as a Catch-22.[132]

Judge Kozinski's argument is persuasive. A tactical decision by the defense not to challenge an essential element of the prosecution's case should not render evidence pertaining to that element irrelevant. Assuming that the probative value of the rib and rectal injuries outweighed their prejudicial effect,[133] the trial court properly admitted this evidence to show that Tori's death was not the result of an accident.

B. PRIOR INJURY EVIDENCE AS PROOF OF INTENT

Admitting evidence to prove the absence of accident, however, is different from admitting evidence to prove intent on the part of the defendant. Using prior injury evidence to negate the defense of accident does not implicate any particular actor (although it may narrow down the field of possible perpetrators).[134] In contrast, using such evidence to establish the defendant's intent is by definition accusatory. In child abuse cases, the expert testifying on the existence of battered child syndrome describes injuries he or she has observed and any further evidence supporting the conclusion that the child has been beaten by someone. That conclusion, however, is meaningless unless the prosecution can convince the jury that the defendant is the expert's "someone."[135] Accordingly, the true purpose of offering battered child syndrome evidence is to prove that the defendant "committed a series of prior acts, manifested by a se-

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132 McGuire v. Estelle, 919 F.2d 578, 581-82 (9th Cir. 1990) (Kozinski, J., dissenting).

133 *See infra* Part C.

134 Eric D. Lansverk, *Comment: Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 WASH. L. REV. 1213, 1229 (1986) ("even anonymous instances of similar conduct can be probative to negate accident").

135 Orfinger, *supra* note 8, at 358.

ries of prior injuries."[136]

Under the Federal Rules of Evidence, the admissibility of prior act evidence is governed by Rule 404(b). This rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or malice.

Until recently, most federal courts required that the other crime, wrong or act be proven by clear and convincing evidence, out of the hearing of the jury, before the trial court admitted the evidence.[137] However, in *Huddleston v. United States*,[138] the Supreme Court set forth a far less stringent standard of proof for the admissibility of prior act evidence. In *Huddleston*, the defendant was charged with the knowing possession and sale of stolen video tapes.[139] At his trial, the district court allowed the government to introduce evidence of the defendant's involvement in a series of sales of allegedly stolen televisions and appliances from the same source as the tapes, on the theory that such evidence was relevant to the defendant's knowledge that the tapes were stolen.[140]

The Court unanimously held that a trial court need not make a preliminary finding that the government has proved the prior act by a preponderance of the evidence before it submits prior act evidence to the jury.[141] However, writing for the Court, Chief Justice Rehnquist also noted that "the Government may [not] parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo."[142] The Chief Justice explained that similar act evidence is only relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor.[143] Thus, such evidence, in the language of Federal Rule of Evidence 104(b), "depends upon the fulfillment of a condition of fact."[144]

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136 *Id.*

137 Jennifer Y. Schuster, *Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence*, 42 U. MIAMI. L. REV. 947, 961 (1988).

138 485 U.S. 681 (1988).

139 *Id.* at 682.

140 *Id.* at 683.

141 *Id.* at 689.

142 *Id.*

143 *Id.*

144 FED. R. EVID. 104(b), in its entirety, provides: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

In *Huddleston*, Chief Justice Rehnquist laid out the standard for determining whether the government has introduced sufficient evidence to meet Rule 104(b): "The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence."[145] Thus, in *Huddleston*, the threshold question was whether the jury could reasonably find, by a preponderance of the evidence, that the televisions and appliances sold by the defendant were stolen.[146] According to the Chief Justice's logic, the question the Court should have asked in *Estelle v. McGuire* was whether a jury could reasonably find that the defendant committed the acts which caused Tori's rib and rectal injuries.

Applying the Court's holding in *Huddleston* to the prior rib and rectal injuries in *Estelle v. McGuire* reveals that the Court's analysis of those injuries is flawed. On one hand, Chief Justice Rehnquist writes that the prosecution was required to show that the baby's death was the result of McGuire's intentional act.[147] On the other, he argues that this goal was furthered by showing that the injuries were inflicted by the intentional act of someone, even though this someone might not have been McGuire.[148] The logic here is troubling.[149] The Court ultimately held that the prior injury evidence was relevant to prove intent, regardless of whether it was linked to McGuire.[150] In doing so, it apparently ignored the Chief Justice's own statement in *Huddleston* that, "similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor."[151]

Yet in Part II of the majority opinion, the Court considers the *Huddleston* prior act standard and concludes that sufficient evidence existed to sustain a jury finding by a preponderance of the evidence

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145 *Huddleston*, 485 U.S. at 690. The Chief Justice went on to explain how the Court envisioned the operation of its prior act standard: "Often the trial court may decide to allow the proponent to introduce evidence concerning a similar act, and at a later point in the trial assess whether sufficient evidence has been offered to permit the jury to make the requisite finding. If the proponent has failed to meet this minimal standard of proof, the trial court must instruct the jury to disregard the evidence."

146 *Id.*

147 Estelle v. McGuire, 112 S. Ct. 475, 480 (1991).

148 *Id.*

149 Utah v. Tanner, 675 P.2d 542, 553 (Utah 1983) (Stewart, J., dissenting) (superceded on other grounds by rule in State v. Walker, 743 P.2d 191 (Utah 1987)) ("[T]he majority asserts that the battered child syndrome evidence is not accusatory and only describes the cause of death . . . and on the other hand admits that such evidence incriminates the parents").

150 *Estelle*, 112 S. Ct. at 480.

151 Huddleston v. United States, 485 U.S. 681, 689 (1988); *see also* United States v. Beechum, 582 F.2d 898, 912-13 (5th Cir. 1978) (en banc).

that McGuire caused the rib and rectal injuries.[152] Not only does this analysis seem unnecessary, given the Court's holding, but it is counter-intuitive, given the facts of the case. The Court bases its conclusion on three pieces of circumstantial evidence: the battered child syndrome diagnosis, a neighbor's testimony about McGuire's "rough treatment" of Tori, and Daisy McGuire's vague explanation for bruises found on Tori's body.[153] In evaluating this evidence, one must remember that this case basically came down to a jury determination as to which parent inflicted the injuries that killed the baby. It is also important to note that only one of these parents, Daisy McGuire, ever admitted to striking Tori on the day that she died. This fact is important for two reasons. First, it tends to prove that Daisy McGuire abused her daughter, increasing the likelihood that she was the person who caused the rib and rectal injuries which played a role in her husband's conviction. Second, since Daisy was granted immunity for her testimony, the jury was left with two options: convict McGuire or allow the crime to go unpunished.[154] Considering the effect of all the circumstantial evidence in this case, the first option was presumably far more appealing to the jury. Realistically, however, a reasonable jury would have no way of knowing who caused Tori to suffer the rib and rectal injuries.

The court of appeals recognized this and thus, it ruled that the circumstantial evidence did not connect McGuire to the prior injury evidence in a meaningful way.[155] According to the Ninth Circuit, "[e]vidence of McGuire's petty meanness does not establish that he committed, or is even capable of, the extensive physical abuse inflicted on the child. It is precisely because anyone, including Daisy McGuire, could have inflicted those injuries that makes the prior injury evidence irrelevant."[156] This reasoning is not only logical, but it is compatible with the Court's holding in *Huddleston*.

Support for the Ninth Circuit's decision can be found in two pre-*Huddleston* child abuse cases from the Fifth Circuit. In *United States v. Colvin*,[157] the defendant sought review of her conviction for the second-degree murder of her fourteen-month-old daughter.[158] The child was hospitalized with massive head injuries on October 4,

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152 *Estelle*, 112 S. Ct. at 483.

153 *Id.*

154 Justice O'Connor wrote about the dilemma that Daisy McGuire's surprise testimony posed for the jury. *Id.* at 486 (O'Connor, J., concurring in part and dissenting in part).

155 McGuire v. Estelle, 902 F.2d 749, 753 (9th Cir. 1990).

156 *Id.* at 753-54.

157 614 F.2d 44 (5th Cir. 1980).

158 *Id.*

1977, and she died one week later.[159] On May 3, 1978, the defendant admitted to Federal Bureau of Investigation agents and Army social workers that she had repeatedly struck her daughter's head against a tile floor approximately ten days prior to the child's death.[160] At trial, the government introduced evidence of rib, clavicle, and leg fractures which caused the child to be hospitalized on August 14, 1977.[161]

The defense challenged the admission of evidence surrounding the August 14 hospitalization.[162] The court upheld its admission as proof of intent because it felt sufficient evidence existed for the jury to reasonably conclude that the defendant was responsible for the prior injuries.[163] There were two reasons for this. First, the defendant admitted that she had exclusive control of the child at the time the prior injuries occurred.[164] Second, the defendant's explanation of the injuries—that the child's leg was accidentally lodged between a bed mattress and a footboard—was inconsistent with the injuries according to the expert medical testimony.[165] Neither of these reasons for linking the defendant to the prior injuries applied in *Estelle v. McGuire*. McGuire and his wife both "cared" for Tori equally, and McGuire never attempted to explain the rib and rectal injuries.

In *Colvin*, the court distinguished another child abuse case it had handed down just three months earlier, *United States v. Brown*.[166] In *Brown*, the defendant appealed her conviction for assault under the Assimilative Crimes Act.[167] On November 16, 1978, she carried her husband's two-year-old son to a neighbor's home.[168] The child had a bruised forehead and was unconscious and breathing irregularly, so the neighbor called an ambulance and began mouth-to-mouth resuscitation.[169] The child was rushed to the hospital where emergency surgery saved his life.[170] The surgeon found a large subdural hemotoma covering the left side of the child's brain and opined that the injury was caused by a blunt, flat instrument.[171]

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159 *Id.*
160 *Id.* at 44-45.
161 *Id.* at 45.
162 *Id.*
163 *Id.* Like the Supreme Court in *Estelle v. McGuire*, the Fifth Circuit cited United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), in its analysis.
164 *Colvin*, 614 F.2d at 45.
165 *Id.*
166 *Id.*; 608 F.2d 551 (5th Cir. 1979).
167 18 U.S.C. § 13 (1948).
168 *Brown*, 608 F.2d at 552-53.
169 *Id.* at 553.
170 *Id.*
171 *Id.*

Prior to surgery, the defendant had told her neighbor that while she was dressing the child, he fell and hit his head on the corner of a chalkboard.[172] After being shown this chalkboard, the surgeon stated that this explanation was improbable, and the examining physician testified at trial that the defendant's explanation was inconsistent with the child's massive bleeding.[173] Over defense objections, the prosecution also introduced evidence of prior injuries to the child.[174] Several witnesses testified to his condition on November 2, 1978, when he was brought to the hospital suffering from severe multiple bruises about his face and body.[175] Further, photographs taken of the child at that time were shown to the jury.[176] However, the prosecution failed to demonstrate that the injuries of November 2 resulted from the commission of any offense, much less from an offense committed by the defendant.[177]

Brown provides an excellent example of a case where prior injury evidence was properly excluded because it could not be linked to the defendant. Here, the prosecution failed to establish that "an offense was in fact committed and the defendant in fact committed it."[178] Since there was no evidence regarding the November 2 injuries, the court refused to allow the jury the opportunity to infer that they were caused by the defendant. The Supreme Court should have adopted a similar stance in *Estelle v. McGuire*. Since there was no real evidence linking McGuire to the rib and rectal injuries, the temptation to find that McGuire caused these injuries should have been removed from the jury.[179]

C. PROBATIVE VALUE VERSUS PREJUDICIAL EFFECT

"Uncharged misconduct evidence often has dual logical relevance; even when the evidence is relevant on a noncharacter theory, it also incidentally shows the accused's bad character."[180] Because of this, courts should not be too receptive to prosecutors' use of prior acts and uncharged misconduct evidence to prove *mens rea*. They should always weigh the probative value of that evidence

172 *Id.*
173 *Id.*
174 *Id.* at 554.
175 *Id.*
176 *Id.*
177 *Id.* at 555.
178 *Id.* (quoting United States v. Beechum, 582 F.2d 898, 912 (5th Cir. 1978)).
179 McGuire v. Estelle, 902 F.2d 749, 753 (9th Cir. 1990).
180 Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 593 (1990).

against its prejudicial effect and the likelihood of abuse by the jury. This function is typically left to the trial judge and is not performed on appeal.[181] Thus, in *Estelle v. McGuire*, Chief Justice Rehnquist did not take this step. He ended his examination of the evidence once he determined it to be relevant. Further examination, however, shows that the prior injury evidence was of tenuous probative value and was likely to be misused by the jury.

Every state has some provision for excluding relevant evidence when, in the opinion of the trial court, it does more harm than good.[182] Under the Federal Rules of Evidence, this provision is embodied in Rule 403, which provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[183] Probative value is determined by a consideration of several factors: first, the degree of certainty to which the proponent of the prior act evidence has proved that the misconduct occurred and that the defendant was the perpetrator; second, the degree to which the material fact is in dispute; and third, the availability of other, less prejudicial, evidence to establish the same fact.[184] Applying these factors to the facts in *Estelle v. McGuire* indicates that the prior injury evidence was of little probative value. As previously discussed, the rib and rectal injuries were connected to McGuire by only the barest threads of circumstantial evidence. Further, the need for the prior injury evidence to negate a claim of accident was obviated by the defense's theory of the case and the massive injuries to the child. And while intent is a crucial element of second-degree murder, it is also an element of almost every crime;[185] as such, courts should be wary of espousing a "magic password approach," by which evidence of prior misconduct is mechanically admitted whenever it is offered to prove intent.[186]

Given the negligible probative value of the rib and rectal injuries, the trial court was obligated to consider whether the value of those injuries was outweighed by their prejudicial effect.[187] "Unfair

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181 *See, e.g.*, United States v. Derring, 592 F.2d 1003, 1007 (8th Cir. 1979) ("We do not reweigh the value of the material against its potential for harm to the defendant, but determine only whether the district judge abused his discretion in admitting it.").

182 *See, e.g.*, CAL. EVID. CODE § 352 (West 1965).

183 FED. R. EVID. 403.

184 Schuster, *supra* note 137, at 960.

185 Lansverk, *supra* note 134, at 1221.

186 *Id.* at 1214.

187 In Huddleston v. United States, 485 U.S. 681, 691 (1988), the Court found that the protection against unfair prejudice to the defendant came from four sources: first,

prejudice" within the context of Rule 403 means "an undue tendency to suggest decision on [an] improper basis, commonly, though not necessarily, an emotional one."[188] There are two inherent dangers in the admission of prior act evidence that may unfairly prejudice the defendant by "suggesting decision on an improper basis." First, the jury may be tempted to punish the accused for the prior act. This danger may be particularly acute where the prior act evidence was not the subject of a conviction.[189] In *Estelle v. McGuire*, evidence of the rib and rectal injuries may have left the jury with the impression that, as of the trial, McGuire had escaped punishment for his abuse of Tori. The jurors may have been tempted to rectify that injustice by punishing McGuire for the prior injuries—even though they may have had reasonable doubts about the identity of Tori's murderer.[190]

The second danger in admitting prior act evidence is that the jury may overestimate its probative value. Jurors are likely to attach great weight to evidence of prior misconduct in determining whether the defendant acted "in character" on the occasion of the charged offense.[191] The natural tendency of the human mind is to judge others on the basis of fragmentary data about their character, even though character is a relatively poor predictor of a person's conduct on a given occasion.[192] Thus, the circumstantial evidence introduced at McGuire's trial may have prompted the jury, first, to conclude that McGuire had a propensity to abuse his daughter and, second, to ascribe undue significance to that conclusion in deciding whether he committed the charged crime.

When considering the likelihood of prejudice in this case, one must consider how the jury must have reacted to hearing evidence of such brutal violence inflicted upon an innocent child. Given the horrifying nature of the rib and rectal injuries, the jury was likely to have misused the prior injury evidence by basing its decision, at

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the prior act evidence must be probative of a material issue other than character; second, the evidence must be relevant (i.e., the jury must be able to "reasonably conclude that the act occurred and that the defendant was the actor"); third, the probative value of the evidence should be weighed against its unfair prejudice; and fourth, the court, upon request, should instruct the jury that evidence of prior acts may be considered only for the proper purpose for which it is admitted.

188 United States v. Zabaneh, 837 F.2d 1249, 1265 n.23 (5th Cir. 1988); *see also* United States v. Johnson, 820 F.2d 1065 (9th Cir. 1987) (Unfair prejudice is measured by a jury's negative response to the evidence, and is unrelated to its tendency to make a fact in issue more or less probable.).

189 *Zabaneh*, 837 F.2d at 1265.

190 Imwinkelreid, *supra* note 180, at 581.

191 *Id.*

192 *Id.* at 581-82.

least in part, on the illegitimate inferences discussed above; it may have decided that McGuire should be punished for his prior abusive acts or that, since he had abused Tori in the past, he probably inflicted the injuries which caused her death. The trial court erred by failing to recognize that the probative value of the prior injury evidence was outweighed by its prejudicial effect.

D. THE JURY INSTRUCTIONS

Justice O'Connor, in her dissent to Part II of the majority opinion, correctly asserted that the trial court's jury instruction on the prior injury evidence deprived McGuire of his Fourteenth Amendment due process rights. Her opinion identified several problems with the instruction. First, the instruction limited the use of evidence of McGuire's prior bad acts, rather than limiting the use of the prior injury evidence. Second, the instruction failed to specify which prior acts it controlled, grouping acts for which McGuire was positively identified with the acts which caused the rib and rectal injuries. These factors combined to create a "reasonable likelihood that the jury would believe that McGuire had been identified—at least in the eyes of the trial judge—as the prior abuser."[193] Then, after encouraging jurors to assume that McGuire had inflicted the prior injuries, the instruction directed them to conclude that the prior abuser was the murderer. Section 3 of the challenged instruction told the jury that if it found a "clear connection" between the prior offenses and the charged offense, "it may be logically concluded that if [McGuire] committed other offenses, he also committed the crime charged in this case." This instruction violated McGuire's due process rights because it created a mandatory presumption that relieved the State of its burden of proving every element of its case beyond a reasonable doubt.[194]

When analyzing an ambiguous jury instruction, the Court must determine whether it creates a mandatory presumption or merely a permissive inference.[195] "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts."[196] In contrast, a permissive inference suggests a possible conclusion to the jury, but does not require the jury to

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193 Estelle v. McGuire, 112 S. Ct. 475, 485 (1991) (O'Connor, J., concurring in part and dissenting in part).

194 *See, e.g.*, Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979).

195 *Francis*, 471 U.S. at 313-14.

196 *Id.* at 314.

draw that conclusion.[197] Here, the challenged instruction was a mandatory presumption because it allowed the jury to assume that whoever committed the prior offenses must have committed the charged crime. Due to the wording of the instruction, the jury may have been compelled to find that McGuire killed Tori, once it determined that there was a "clear connection" between the rib and rectal injuries and the injuries caused by Tori's fatal beating.[198]

Chief Justice Rehnquist disagreed with this interpretation. He argued that the jury was likely to have understood Section 3 of the instruction to require a two-step analysis: if the jury found a "clear connection" between the prior injuries and the present injuries, and if the jury determined that McGuire inflicted the prior injuries, "it could use that fact in determining that McGuire committed the crime charged."[199] There is a reasonable likelihood, however, that the jury did not understand this instruction to establish a two-step process. Further, the majority fails to explain how the jury was to "use" its determination of the prior abuser's identity in determining whether McGuire committed second-degree murder. If, as the majority argues, the prior injury evidence was used to establish McGuire's intent, the jury instruction did not make this clear. Under the plain language of the instruction, the trial court did not direct the jury to "use" the prior injury evidence at all. Instead, it directed the jury to "conclude" that McGuire was guilty if it found that he had committed prior bad acts. This dramatically reduced the State's burden of proving that McGuire committed the brutal acts that killed his daughter.

As such, the jury instruction was inconsistent with the guarantees of the Due Process Clause of the Fourteenth Amendment. That clause requires the prosecution to prove every element of the offense beyond a reasonable doubt.[200] Since the instruction may have relieved the State of its burden of proving *actus reus*, Justice O'Connor properly argued that the case should have been remanded for a determination of whether the erroneous instruction was harmless.[201]

VII. CONCLUSION

In *Estelle v. McGuire*, the Supreme Court upheld the admission

197 *Id.*

198 Estelle v. McGuire, 112 S. Ct. 475, 485-86 (1991) (O'Connor, J., concurring in part and dissenting in part).

199 *Id.* at 483.

200 *In re* Winship, 397 U.S. 358, 364 (1970).

201 *Estelle*, 112 S. Ct. at 486 (O'Connor, J., concurring in part and dissenting in part).

of prior injury evidence to a battered child, even though the injuries were not linked to the defendant and the trial court's limiting instruction encouraged the jury to misuse that evidence in violation of the defendant's due process rights. In its eagerness to endorse the battered child syndrome, the Court created a dangerous precedent for the use of inflammatory character evidence to establish intent. This decision provides trial judges with tremendous discretion in admitting highly prejudicial prior act evidence.

The driving force behind the Court's holding is its deference to state evidentiary law and the *Huddleston*-inspired lowering of the standard of proof for preliminary questions of fact. To establish guilt under federal due process law, the prosecution must prove each element of its case beyond a reasonable doubt. To get prior act evidence admitted, however, a prosecutor need only convince the trial judge that, after all the evidence is in, some reasonable jury could find it more likely than not that the accused committed the prior act. Reasonable juries, like reasonable minds, may disagree. As such, only the slightest showing of circumstantial evidence is needed to reach a threshold at which a reasonable jury could find, by a preponderance of the evidence, that the defendant was the prior actor. Given the prejudicial nature of prior misconduct evidence, the Court should rethink its "preponderance of the evidence" standard. Otherwise, "the terms 'intent' and 'absence of . . . accident' may continue to be used solely as labels to justify predetermined admission decisions."[202]

DAVID J. DOYLE

202 Lansverk, *supra* note 134, at 1219.