ORIGINAL

No. 19-8497

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER DALE LYMAN,

Petitioner,

v.

STATE OF KANSAS

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Kansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a court can deny a criminal defendant his medical expert, who's expert testimony is critical to a material fact in dispute, and base this denial of a expert on false and erroneous findings, using in part, religious factors that have no bearing on the material fact in dispute. Does this disqualification violate the First Amendment's prohibiting of free exercise of religion, the Sixth Amendment's confrontation clause, compulsory process clause and violates a defendants Fourteenth Amendment right to due process?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher Dale Lyman (herein after Lymen) respectfully prays that a *Writ of Certiorari* be issued to review the judgement of the Supreme Court of the State of Kansas

OPINION BELOW

The opinion of the Supreme Court of Kansas is published at State v. Lyman, 455 P.3d 393 (2020) A copy of the opinion is attached as Appendix A.

JURISDICTION

The Kansas Supreme Courts decision was entered on January 10th, 2020. This petition is timely filed under Order, 2020 U.S. dated March 19th, 2020 authorizing 150 days from day of final judgement to file a Writ of Certiorari due to COVID-19. This Courts certiorari jurisdiction is invoked under 28 USC § 1257 (a)

CONSTITUTIONAL PROVISIONS INVOLVED

This Court has recognized that the First Amendment protects one religious freedom and provides in relevant part "prohibiting the free exercise thereof"

The Sixth Amendment provides in relevant part: "in all criminal prosecutions the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor."

The Sixth Amendment provides in relevant part: "in all criminal prosecutions, the accused shall enjoy the right.... to be confronted with witnesses against him."

The Fourteenth Amendment Section I, provides in part:....."nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protections of the laws."

STATEMENT OF THE CASE

In Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). This Court suggested that a trial court assessing the reliability of proposed scientific testimony might consider, among others, the following factors:

> (1) wheather the theory or technique underpinning the expert's opinion "can be (or has been) tested"; (2) wheather the theory or technique "has been subjected to peer review and publication"; (3) whether, with respect to particular theory or technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and (4) whether the theory or technique enjoys "general acceptance" within the "relevant scientific community." Id at 593-5

In 2014, the Kansas Legislater changed K.S.A. 2014 Supp. 60-456(b) substantively identical to the Federal Rules of Evidence (FRE) 702, it reads:

> "if scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if: (1) The testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case."

FACTS RELEVANT TO LYMANS ARREST AND CONVICTION

On September 15th, 2013 Lyman rushed his nephew, Jonathan Swan (JS) age nine (9) months to Geary County Community Hospital (GCH), Junction City, Kansas. Mr. Lyman was a Staff Sergeant in the United States Army, serving at Ft. Riley, Kansas. He was arrested on September 15th, 2013. In May 2015 at trial, Dr. Tera Frazier of Childrens Mercy Hospital, (CMH) the hospital JS was transfered to after GCH, testified she diagnosied JS with physical abuse and abusive head trama. Dr. Erik K. Mitchell who performed the autopsy testified the pressence of the "classic triad" associated with a shaking death: retinal hemorrhages, hemorrhages about the optic nerve sheaths, and

subdural hematoma. He concluded JS death was not caused by a blood disorder, RSV, or accident but by injuries. Lyman was convicted of murder, child abuse, via shaking and aggravated battery. Lyman was aquitted of aggravated sodomy.

FACTS RELEVANT TO THE DAUBERT HEARING

The defense timely notified the State that he would call an expert pathologist, Dr. Thomas Young, MD. The State filed a Motion in Limine objecting to the defense expert. According to Dr Youngs report, he reviewed the JS Death Report (Autopsy), Letter from Mitchell to Opat and Biggs, the report of Dr. Tera Frazier, Social Work Progress Notes, hospital and autopsy photographs, curricilum vitae of Dr. Frazer, and medical records from GCH and CMH. Dr. Young concluded to a reasonable degree of medical certainity (App D Pg1) JS died as a result of apnea/hypoxia, from his ongoing medical issues. (App D Pg 3-4) Dr. Young concluded Dr. Frazier and Mitchell did not "compare witness accounts of the past" to "physical evidence in the present" but looking at the physical evidence (the body) in the present and "surmising" what past events led to the physical evidence in the present. (App D Pg1) To sum it up, Dr. Young is stating that Dr. Frazier and Mitchell were "guessing" (App D Pg 4) at what caused JS death.

In Dr. Youngs report, he stated:

> "Jonathan Swan had a history of respiratory syncytial virus (RSV) and influenza infections, RSV has been associated clinically with apnea spells (spells where the child stops breathing) in infants.
>
> "Witnesses observed difficulties with breathing in the child while caring for the child. The child's uncle, according to **Dr. Fraziers report,** "thought Jonathans breathing problems was likely related to his past problems with RSV and breathing difficulties" (Emphasis added)
>
> "The same uncle, according to the **Event Log, Childrens Mercy Critical Care Transport**, mentions the child had "several episodes where he was found in bed "stiff and holding his breath" After the spell, the child "relaxed,

opened his eyes and appeared fine" (App D Pg 2) (Emphasis added)

During the Daubert hearing, when asked what Dr. Young used to come to his medical conclusions, Dr. Young testified that he:

> "I determined that Dr. Frazier cannot surmise child abuse from physical evidence. That's -- thoes are complex past events. She cant do that reliability. She certainly can't claim to be certain of it. Furthermore, I also looked at the witness accounts and statements from a variety of sources, and looked at the physical evidence findings as described through the photographs and autopsy, and I said they are all consistent. And what is described here is nothing involving trama, but simply involving a child's inability to breath properly on several occasions." (App C Pg 311)

The other issue us the different set of bruises or discolorations on JS through three hospitals, (GCH, CMH, and Autopsy) Dr. Young in his report and testimony goes into detail why various hospitals document different bruises on the skin and why, not hours later, they disappeared and new ones formed. JS was suffering from a "temporary coagulopathy" from a lack of oxygen that leads to temporary bruising and explains why a coagulopathy was not disclosed by laboratory testing. (App D Pg 2-4)

The State of Kansas, not once did they refute the medical records, how could they, it was collected by them and turned over on discovery. Instead of attacking the facts, they attacked Dr. Young's "inferential test" which according to Dr. Youngs report:

> "One can be reasonably certain if witness accounts of the past are consistent or not consistent with physical evidence in the present, but one cannot reliably surmise past events from physical evidence unless there is only one plausible explanation" (App D Pg 1)

This is, as Dr. Young states in his report a summary of how to infer and not infer from evidence. (App D Pg 1) The Word "inference" according to Blacks Law Dictionary, Eighth Edition is "a conclusion reached by considering other facts and deducing a logical consequence from them". The word "inferential" is "the process by which such a conclusion

is reached; the process of thought by which one moves from evidence to proof"

The purpose of the States case was to attack Dr. Young, personally, professionally, his methodology and the "inferential test". However, Dr. Young in this case reviewed the States own evidence and used the "inferential test" to test his medical conclusions, testyfing he used this test prior to entering private pratice. (App C Pg 243) This means Dr. Young was using his test when he was serving for the Missouri (App C Pg 244-245) and Georgia justice systems.

During this Daubert hearing the State asked various questions about Dr. Youngs "inferential test" as Dr. Young explained to the District Court:

> "One of them is, you characterize past events as an event. Okay? What happens in the past is not a single event. It's one item following another item following another item. It's complex. Past events are basically items that follow in succession and time. Okay? So to characterize that an an event it not-- is not accurate. These are events. Furthermore, the items that are called physical evidence, they can basically be numerous, but they're finite, They're present, and you have an opportunity to look at them all as a group. And what then involves-- what then needs to happen *is that you basically compare the two for consistency or inconsistency.* This is essentially what the inferential test is saying. (App C Pg 223-224) (Emphasis added)

The essence of Dr. Youngs expert testimony is there can be multiple events that lead up to one event, in this case its JS death. Dr. Youngs concern is you cant say its "abuse", unless there is a tramatic and obvious injury, and or eyewitness that can easily explain the injury. Dr. Young would go on to say that its "safe to say" many pathologists and child abuse pediatricians pratice methods that go against the "inferential test" and are error prone. (App C Pg 237) As he stated in his report, Dr. Frazier and Mitchell are guessing when forming there medical conclusions.

The State also brought up the issue of Dr. Young being retained by defense teams as an expert in his field. (App C Pg 239-241)

The State brought up the issue with the Harber case State v. Harber, 192 P.3d 1130, 2008 Kan App Unpub (Kan. App 2008) In this case Dr. Young was asked why he reviewed a infant death case that was in Kansas, when he was a Jackson County, Missouri Medical Examiner. (App C Pg 244-246) Dr. Young in this case testified that the injuries could have happened at anytime and it was a "tramatic" injury. (App C 245-246)

The State then questions Dr. Youngs service to the State of Missouri. Infering there was some improper conduct by Young that led him to resign, of which there was none. Dr. Young testified that he was unaware of any issues with the local prosecutors due to his resignation. (App C Pg 254) It was a issue with the Jackson County prosecutors and another doctor that worked for Young, who did not want to remove an employee, Dr. Gill. (App C Pg 254-256) Dr. Young then attempted to open a dialog with the Jackson County District Attorney, Mr. Sanders, who ran for County Executive, however, after attempts of communication failed, Dr. Young then resigned. (App C Pg 256) None of this had any bering on Dr. Young methodology and medical conclusions.

The State then brought up an article on Dr. Youngs website. An article called "Diatoms, Retinal Hemorrhages and Other Forensic Tests: A logical assessment by using Probable Theory. (App C Pg 258-259) Dr. Young testified this was not an application of his theories it was an application of deductive theorem. Again, nothing of this had anything to do with Dr. Youngs methods under Daubert.

The State then ventures into religion, infering it was a part of Dr. Youngs religious faith, Dr, Young counters its a "historical treatise" (App C Pg 276) The State then asked the following about a reference to "Mosaic Law" Dr. Youngs response is as follows:

> The saying that, in ancient times, under Mosiac Law, which according to witnesses, was basically given by God to the nation of Israel, they required the testimony of two or three witnesses before claiming that anybody

> committed a murder. In other words, it pointed out the importance of witnesse accounts. We don't know what happened in the past unless there was somebody to see it happen. And this basically affirms the importance of witnesses. (App C Pg 283-284)

From page 276 to 287, the State ventures into biblical references and breaches into religion. Again, this had noting to do with the Daubert analysis.

Dr, Young in his testimony states that we dont know what happens in the past unless someone was there to witness it. Science does not take the "place of absent witness accounts" (App C Pg 284) Dr. Young denies he has stated forensic pathologists use "junk science" (App C Pg 285) Dr. Young finished the line of questions by the State as follows:

> "That I can be reasonably certain that they're consistent. Now, wheather they are in fact the truth is not something a scientist does. A scientist ***only compates witness accounts with physical evidence for consistency or inconsistency.*** Wheather or not something is the ***truth*** is an ***inductive inference*** that would need to be considered by a ***jury*** after hearing ***all available evidence.***" (Emphasis added)(App C Pg 286-287))

The defense questioned Dr. Young and he again stated that the "inferential test" says you cannot reliability surmise (guess) past events from physical evidence. You cant look at a bruise and guess at what cused it. (App C Pg 297) All that can be done is:

> "we can take a witness account of something that occured in the past, compare it to the physical evidence that is seen in the pesent, and test it for consistency or inconsistency wheather it could have happened the way the witness said it happened, or it can't happen the way that the witness said it happened. We can do that with reasonable certainity" (App C Pg 298)

The District Court denied Dr. Young from testifying, in its opinion the Court said:

> "Dr. Young was undoubtfully qualified to testify by virtue of education and experience. He is a MD with years of pratice in the field of anatomy and pathology. He is board certified in the field and has many published and peer reviewed articles to his credit in his area of expertise. He has been an associate professor of medicine at UMKC medical school and has been either deputy examiner or medical in several large metropolitian areas including Atlanta and Kansas City..... So Dr. Young presents to the court as a well

qualified expert." (App B Pg 5-6)

The District Court would go on to state that Dr. Young used a methodology outside of his field (App B Pg 6) The District Court then attacks a article published by Dr. Young that states "One should assign manner of death of only one manner remains as plausible after a through investigation: otherwise, the manner should be undertermined" (App B Pg6) The Court also questions Dr. Young on how careful he was in this case, compared to his regular profession. The Court believed Dr. Young deviated from every acceptable premise there is. The Court would then go and bring up religion in a inflammatory and absurd way. (App B Pg 3-7)

The District Court summed up his views on Dr. Young:

> "Dr. Young was a noted medical examiner and forensic pathologist. He lost his job as a medical examiner for some reason that is obscure. He opened his own business and now has a business that caters to defendants charged in child death cases. He has developed a theory that is not accepted by any other in his field. Clearly, the theory is based on biblical themes and Mosiac Law.... Dr. Young was somehow excluded from the team of which he was a part, so he invented a new game and made the rules. This Court surmises that he did this for monetary gain for business and income he has been cut out for some reason. Dr. Young is a team of one. He has no teammates. No expert in his field agrees with him.... (App B Pg 7)

The United States Supreme Court should read in detail the Courts opinion to get a full understanding of the absurd position the District Court took. (App B Pg 1-8)

FACTS RELEVANT TO THE APPEAL

The Kansas Supreme Court ruled in there opinion thre District Court correctly rejected Dr. Young's proposed testimony finding "Dr. Youngs principles and methodology are flawd." State v. Lyman 455 P.3d 393, 413 (2000) (App A Pg 35) During oral arguments defense counsel asked the Court to "slice" (App A Pg 34) Dr. Youngs inferential test out of

the equation The Court would answer this question by deciding that Dr. Young testified he applied his court rejected inferential test about the cause and manner of JS death. Saying that eventhough Dr. Young testified to medical certainity dosent mean he actually did so. Then the focus was on the methodology not generally the conclusions they generate. The test is the methodology not the coclusions they generate. (App A Pg 33-34)

REASON FOR GRANTING CERTIORARI

The Establishment Clause allows for the seperation of church and state as this Court has held "No person can be punished for entertaining or professing religious beliefs of disbeliefs." Everson v. Bd. of Education 330 U.S. 1, 24-25, 67 S. Ct. 504 91 L.Ed. 711 (1947)

The Due Process and Confrontation Clause allows a criminal defendant to present witness and allows him to "present his own witnesses to establish a defense. This right is a fundamental element of due process of law". Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L.Ed. 2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973) ("few rights are more fundamental than that of an accused to present witnesses in his own defense")

The Sixth Amendments Confrontation Clause is made applicable to the states via the Fourteenth Amendment. In Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965) provides that "in all criminal prosecutions, the accused shall enjoy the right... to be confronted with witnesses against him."

This Court has held in Hinton v. Alabama, 571 U.S. 263, 134 S. Ct. 1081 188 L.Ed. 2d 1 (2014):

"Indeed, we have recognized the threat to fair criminal trials posed by the

> potential for incompetant or fraudulent prosecution forensics experts, noting that "serious deficiencies have been found in the forensic evidence used in criminal trials... One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases" This threat is minimized when the defense retains a competant expert to counter the testimony of the prosecutions expert witnesses." Id at 276 (internal quotations and citations omitted)

The District Court and Kansas Supreme Court conclusions that Dr. Youngs "inferential test" is "flawd" is of supreme error. Considering this "test" was nothing more than a means to double check his medical findings. If you read the entire Daubert transcripts, it was actually seperate of the methods to draw the medical conclusions. Without an expert, Lyman was not able to give a meaningful opportunity to test the "honesty, proficiency, and methodology" Meleendez-Diaz v. Massachusetts, 557 U.S. 305, 321, 129 S.Ct. 2527 174 L.Ed. 2d 314 (2009) of Dr. Frazier, Mitchell and the States case in chief as a whole.

The fact the District Court also relied on religious factors, that had nothing to do with Dr. Youngs methodology, as he stated in testimony, or his medical conclusions, is beyond absurd and would constitute an abuse of discretion. This Court should decide one and for all if religious factors can be a part of the Daubert analysis.

There is not a firm Daubert standard set by this Court for forensic pathologists that testify in criminal defense trials. Giving the widespread use of forensic pathologists in criminal trials and varying degress of admissability of evidence, the resolution of this issue is of critical importance to the interest of justice. For these reasons, this court should grant certiorari.

I. The Kansas Supreme Courts conclusions that Dr. Thomas Youngs methodology is flawd and unreliable is incorrect and undermines this Courts decision in Daubert, Kumho, General Electric and all other factual rulings of the Courts

constitutes an abuse of discretion.

This Court has held that a abuse of discretion standard applies to reviewing the denial of expert testimony. General Electric Co. v. Joiner, 522 U.S. 136, 139, 118 S. Ct. 512, 139 L. Ed 2d 508 (1997) This Court has also held that a abuse of discretion review includes a review of any legal conclusions de novo and any factual findings for clear error. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990).

The Tenth Circuit has held an abuse of discretion exists when the district courts findings are "arbitrary, capricious, whimsical, or manifestly unreasonable" or if the Circuit Court is convinced that the district court "made a clear error in judgement or exceeded the bounds of permissible choice in the circumstances." Atlantic Richfield Co. v. Farm Credit Bank of Wichita, 226 F.3d 1138, 1163-64 (10th Cir 2000)

The 11th Circuit has held that although District Courts have wide lattitude to decide the evidence used in a case "such discretion does not, however, extend to the exclusion of crucial relevant evidence necessary to establish a valid defense." United States v. Kelly, 888 F.2d 732, 743 (11th Cir 1980) and held thats is an abuse of discretion to exclude the otherwise admissible opinion of a party's expert on a "critical" issue, while "allowing the opinion of his adversary's expert on the same issue." United States v. Gaskell, 985 F. 2d 1056, 1063 (11th Cir 1993) (per curiam); accord United States v. Garber, 607 F.2d 92, 95-97 (5th Cir 1979) (en banc).

In Gaskell the 11th Circuit found it was an abuse of discretion for the District Court to allow the Government to present expert testimony on the determinative issue in that case, while not similarly sllowing the defense to present its expert testimony. Id at 1062-64

Gaskell involved a father charged with murdering his infant daughter by shaking her to death. Id at 1062. The Government was allowed to proffer the testimony of its expert who stated that, "We are all taught to support the baby's head. Its fragile. You dont want to shake a baby's head" Id at 1062 (citation omitted) The defense was forbidden, however, from proffering the testimony of its expert, who would have testified to the general lack of "public awareness" to the dangers of shaking an infant. Id. at 1062.

The 11th Circuit held that the exclusion of the defense experts was an abuse of discretion and that this error was "compounded" by allowing the Government to present its experts. Id at 1063-64.

The Kansas Supreme Court and the District Court misapplied Daubert and Kumho Tire v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L.Ed. 2d 238 (1999) the Kansas Supreme Court also missed the District Courts ruling about the religious aspect of its factual findings. In Everson v. Bd of Education 330 U.S. 1, 24-25 (1947) this Court has held:

> "The "Establishment of Religion" Clause of the First Amendment **means at least this**: Neither a state nor the Federal Government can set up a church. Nether can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. **No person can be punished** for **entertaining** or professing religious beliefs or disbeliefs, for church attendance or non-attendance..... (Emphasis added)

This Court has stated that there is to be given "broad interpretation" to the "establishment of religion clause" Id at 24 Its very concerning that religion even factored into the District Courts opinion. Religion has no place in the court room, during the Daubet hearing, the State went into religion as they stated they believed it was "relevant" to the hearing. (App C Pg 276) Dr. Young was quick to respond it was not a expression of faith

(App C Pg 276) just a "historical treatise" from the Bible as it is a "collection" of historical treatises. (App C pg 275-276) All Dr. Young was trying to do is give a contextual understanding about logic and inference that had its roots in a historical document, ie, a simple history lesson. Inference and Inferential is, as stated earlier, quoted in Blacks Law.

The District Courts ruling on religion that Dr. Young's "inferential test" is rooted in "Mosical Law" and, in its opinion, cites verses, on the doctors website, that appear in the Old Testament (App B Pg 6-7) is a "clear error" Cooter & Gell 496 U.S. at 405 of fact and is an "arbitrary" and "unreasonable" Atlantic Richfield Co 226 F.3d at 1163-64 factual finding.

This Court has held in Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355 79 L.Ed. 2d 604 (1983) that every Establishment Clause case this Court must reconcile the "inescapable" tension between unnecessary intrusion, of the church or state. Id at 672

This Court held in Lemon v. Kurtzman, 403 U.S. 602, 614 91 S. Ct. 2105 29 L.Ed. 2d 745 (1971) that a "blurred, indistinct and variable" existed and depending on all the "circumstances" of a particulat relationship. Its true that religion cannot be "total" in terms of seperation between church and state. Id

However, its clear from this Courts rulings in Daubert and Kumho that this Court never intended for religion to be part of the methodoloy analysis. Eventhough the Daubert analysis is a "flexable" one Kumho 526 U.S. at 141 this Court cannot allow any religion into the analysis. Considering the District Courts ruling was completely out of bounds, both on facts,First Amendment issues, and is absurd, these factual finding is in itself a reversable abuse of discretition.

The District Court then assaults Dr. Youngs current employment as a praticing

physician for private and defense teams and his prior employment as the Jackson County, Missouri Medical Examiner. (App B Pg) Ruling that Dr. Young was no longer a praticing coroner and lost his job for some reason that is obscure and has been "cut out". (App B pg 7) This factual finding is pure **fiction** and a "clear error." Cooter & Gell 496 U.S. at 405. Dr. Young testified that he resigned after he could not open a dialog with the Jackson County District Attorney. (App C Pg 256) Over his objections of a Dr. Gill, who was recovering from substance abuse. Dr. Young **did not** lose his job, in fact, Dr. Young stated he "didnt" want to work for "him" (Mr. Sanders) (App C Pg 256)

The Kansas Courts completely ignore the fact that Dr. Young was working for the criminal justice system for many years in Missouri and Georgia. Using this "inferential test" to obtain convictions for the Missouri justice system. (App C Pg 242-245) During the Daubert hearing, the State was not interested in Dr. Young using this "test" to obtain convictions for the State, only for defense uses. (App C Pg 243) The Kansas Courts overlook and simply ignore this. Dr. Young cases in Missouri, just to name a few are State v. Bass, 81 S.W. 3d 595 (2002) (child abuse and death case), State v. Dunson, 979 S.W. 2d 237 (1998) (child abuse/murder) State v. Yeager, 63 S.W. 3d 307 (2001) (infant death case) State v. Yoksh, 989 S.W. 2d 227 (1999) (infant death) (infant death, **Shaken Baby Syndrome)**

The District Court would go on to rule that Dr. Young "caters" to defendants charged in child abuse cases. (App B Pg 3,7) Dr. Young is no longer an employee of the State. He therefore works for defense teams. Keeping in mind this Courts ruling in Hinton where criminal defense attorneys should retain there own experts. This finding is again

absurd and a "clear error of judgement" 226 F.3d 1163-64

To use a private citizens choice of employment as a reason in part to deny the defendant his medical examiner, goes beyond the "flexable" Kumho 526 U.S. 141 Daubert analysis yet again. These inflamatory, absurd, false and misleading statements the District Court made is reversable error under Cooter & Gell.

The next issue the District Court rules on is Dr. Youngs methodology. During the hearing the State never asked what type of "etiology" he used and they never went through the evidence in detail and question why Dr. Young can provide explanations for Dr. Fraziers and Mitchells findings. Never once questioning the scientific methods just aksing if Dr. Young used the "inferential test" to arrive at his methods, which he did. However, the inferential test is not the sum total of the scientific principles and methods used.

Dr. Young relied on scientific articles, publications (App D Pg 2-3) and the medical literature. (App C Pg 304-305) in detail Dr. Young explains his findings about apnea:

> "In a young infant, respiratory syncytial virus infections have been associated with spells of apnea. Okay? They have noticed that association. That dosen't mean that they know what causes the apnea. Okay? They just notice that there's an association. Okay? the association dosen't even have necessarily to do with how bad the lung disease is. It's something that is independant of wheather the air tubes are blocked or not. It's just an independant association. How long the apnea spells can go on, and to what degree, this is not addressed in the **literature** that I could find. (App C Pg 304) (emphasis added)

When asked if RSV can lead to bronchial pneumonia Dr. Young answered yes. (App C Pg 305) At autopsy, one of many records Dr. Young reviewed, it was noted to be present. (App E Pg 12) When asked why JS has a history of "easy" bruises, Dr. Young provided a clear medical picture of lack of oxygen on the effects on the body:

If there is a situation in which that system is impaired-- and there are many

> ways you can impair that system. One of them is to have a lack of oxygen through a lack of breathing, that is one way to impair that system....Even small handling of the child in a very, very minor fashion can lead to bruises... during the time that he's not recieving the oxygen, the cells that are required for clotting are not able to function well because they need oxygen to work... Once the oxygen is restored (App C Pg 295-296)

In Dr. Fraziers own report, she catalogs one cheek bruise at GCH,(first hospital) (App F Pg2) Then at CMH she records all these various bruises, a day later. (App F Pg 9) Then at autopsy a complete different set of bruises are on JS. All the bruises are 1/16th inch (The width of a tip of a pen) to 3/8 inch. (The width of a pinky nail)(App E Pg 6-7) Reviewing the medical records, historical facts, and witness accounts. (Appc Pg 297-300) Its clear by these facts, the ones the State provided on discovery, the State had no intention on questioning the medical facts or Dr. Youngs methods of reviewing medical records and literature. Dr. Young ruled out all the potential and obvious cause (abuse) due to no eyewitness accounts. (App C Pg 305)

Dr. Young relied on what is known in the Federal Circuit Courts as a differential diagnosis/etitology. Although not directly stated by Dr. Young, this methodology is exactly what was used. Differential etitology is used by expert witnesses to describe the investigation and **reasoning** that leads to the determination of external causeation. McClain v. Metabolife Int'l Inc., 401 F.3d 1233 1252 (11th Cir 2005)(Emphasis Added)

Differential diagnosis is defined as:

> Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the **cause** of a medical problem by eliminating the likely causes until the **most probable one is isolated**. See Baker v. Dalkon Shield Claimants Trust, 156 F.3d 248, 252-53 (1st Cir. 1998). A reliable differential diagnosis typically, though not invariably, is performed after "**physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests,**" and generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of these potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is

the most likely. Westberry v. Gislaved Gummi AB, 178 F.3d 257, 262 (4th Cir. 1999). (Emphasis Added)

Glaser v. Thompson Med. Co., 32 F.3d 969, 977 n.15 (6th Cir. 1994) ("In differential diagnosis the doctor considers all information specific to the case to rule out possible causes and determine the most probable cause(s) of the injury."); In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 758 (3d Cir. 1994) ("Differential diagnosis generally is a technique that has widespread acceptance in the medical community, has been subject to peer review, and does not frequently lead to incorrect results it is a method that involves **assessing causation** with respect to a particular individual. As a result, the steps a doctor has to take to make that (differential) diagnosis reliable are likely to **vary from case to case** . . . ."); Hines v. Consol. Rail Corp., 926 F.2d 262 (3d Cir. 1991) (defining "differential diagnosis" as the "process whereby medical doctors experienced in diagnostic techniques provide testimony countering other possible causes of the injuries at issue") (citation omitted). (Emphasis Added)

The Federal Circuits have also held, refering to eyewitness testimony that medical professionals "reasonably may" be expected to rely on self-reported patient histories. Walker v. Soo Line R.R. Co., 208 F.3d 581, 586 (7th Cir 2000) (citing Cooper v. Carl A. Nielson & Co., 211 F.3d 1008, 1019-21 (7th Cir 2000)) This was one of Dr. Youngs components of his methodology. Other Circuit Courts have held that eyewitness accounts can be used Smith v. BMW N. Am., Inc., 308 F.3d 913, 919 (8th Cir. 2002) concluding that a physician's testimony as to the cause of the plaintiff's injuries is admissible where the doctor applied medical knowledge and his experience to the "**physical evidence** and came to a conclusion as to the cause of Smith's neck injury".(Emphasis Added) see also McGuire v. Davis, 437 F.2d 570, 572 (5th Cir. 1971)recognizing the "well-settled proposition" that a doctor who has examined the patient may describe what he has seen and give his **expert inferences** therefrom. (Emphasis added)

Dr. Youngs "inferential test" although submitted for peer review, should be allowed in Court, the Third Circuit had concluded that physician is not required "to rely on

definitive published studies" before exposure was the most likely cause of plaintiff's illness. Heller v. Shaw Indus., Inc 167 F.3d 146, 154 (3rd Cir 1999) During oral arguments, defense counsel argued that Dr. Young relied on the medical evidence, studies, such as thoes from the United Kingdom, United States, (App D Pg 2-4) and medical literature to come to his conclusions. The "inferential test" was noting more than a means to test the medical findings. This Court has also held in Daubert:

> "The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised."Daubert 509 U.S. at 594
>
> Using Websters Collegiate Disctionary, Eleventh Edition "logic" is defined as
>
> "a science that deals with the principles and criteria of validity of inference and demonstration: the science of formal principles of reasoning". (Emphasis added)
>
> To further this K.S.A. 60-456 (d) provides:
>
> "testimony in the form of opinions or **inferences** otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of fact." (Emphasis added)

The reasoning by the Third Circuit in Heller, and this Court in Daubert should extend to the inferential test.

This Court has held under Hinton that defense attorneys are supposed to consult with defense attorneys to combat fradulent States experts. While on the issue of fradulent or discredited experts, since the District Court in its opinion brought in the Harber case about Dr. Youngs credability, we must look at the Dr. Erik K. Mitchell MD, the medical examiner who performed the autopsy on JS.. Dr. Mitchell was a ME in New York State in the 80's to the mid 90's. In the Hector Rivas case, see Rivas v. Fischer, 780 F.3d 529 (2015)

Rivas was convicted of a murder that occured in the late 80's while Dr. Mitchell was the ME, Id at 543 in the late 90's Rivas filed for state post conviction proceedings Id at 543and alleged as follows:

> "Rivas presented essentially unchallenged expert testimony persuasively showing that Hill in fact died sometime after 3:30 p.m. on Saturday, March 28, 1987, casting grave doubt on the prosecution's theory that Hill was murdered on Friday night. In his § 440.10 filing, Rivas also presented compelling evidence further discrediting **Dr. Mitchell**. Rivas's filing alleged that Dr. Mitchell had **perjuriously purported** to base his time-of-death opinion in part on "brain slides" that, Rivas later learned, were nonexistent. Rivas also introduced evidence that, at the time of Rivas's trial, Dr. Mitchell was under investigation by state and local agencies (including possibly the office of the prosecutor who charged Rivas) for various forms of misconduct. At trial, Rivas's counsel failed to challenge Dr. Mitchell's reliance on the non-existent "brain slides," or to cross-examine him regarding the investigations into his alleged misconduct that were pending at the very time of the prosecution of Rivas." Id at 532 (Emphasis Added)

Originally Dr. Mitchell testified that the time of death was Sunday or Saturday afternoon. Id at 535 When Rivas had an alabi. Id at 534-35

> "On November 22, 1992, nearly six years after the murder of Valerie Hill, a grand jury indicted Rivas on charges of murder in the second degree and aggravated sexual abuse. It is not clear what, if any, new evidence might have come to light that would lead authorities to pursue, and the grand jury to indict, Rivas nearly six years after the murder." Id at 536

> "Rivas contends that, sometime after becoming District Attorney, Fitzpatrick approached Mitchell, the medical examiner, and requested that he review Hill's autopsy report with an eye toward expanding the time of death to include Friday, March 27, 1987, when Rivas's alibi was not as strong. According to Rivas, at the time this alleged request was made, Mitchell "was under criminal investigation by DA Fitzpatrick's office, as well as by the Department of Health and the Department of Environmental Conservation" for varieties of misconduct, including improper disposal of waste and stealing and mishandling of body parts." Id at 536

> "The State concedes that Mitchell was accused of various forms of misconduct as early as 1989, see Appellee's Br. at 24, and does not dispute that he was under investigation by the State Department of Health at the time he testified against Rivas. It is also undisputed that Mitchell resigned in November 1993, in part to avoid prosecution by the District Attorney's

Office. See Remand Hearing Tr.[, dated Sept. 21 & 22, 2009,] at 205.It is not clear from the record, however, at what point the District Attorney's Office opened its criminal investigation into Mitchell's conduct." Id at 536

Mr. Rivas hired Dr. Cyril H. Wecht a renowned forensic pathologist who testified that Dr.Mitchell's reliance on the non existant brains slides, to determine time of death to be "misguided" and in his expert opinion, testified to "reasonable degree of medical certainity" time of death was around 36-48 hours. Id at 543-44

The Second Circuit summed up its opinion as follows:

"Ultimately . . . it does not matter how much indirect, circumstantial evidence the State amassed to suggest that Rivas killed Hill on Friday night, if she in fact died [at another time] . . . . Therefore, the question turns almost entirely on the **relative credibility** of the prosecution's expert, **Mitchell**, and Rivas's expert, Wecht. In this regard, we stress once more that the State, despite having the opportunity to challenge Wecht's [affirmation before the state collateral review court], or to [submit] its own expert to support Mitchell's conclusions, **failed to raise any serious question about Wecht's qualifications or conclusions.** We therefore are left to weigh the unchallenged [affirmation] of a renowned forensic pathologist—who concluded "to a reasonable degree of medical certainty" that Hill could not have died on Friday—against the testimony of a **disgraced and allegedly beholden medical examiner,** who initially told police that Hill died on Saturday evening, later told the grand jury that it was on the "outside edge of possibility" that she died on Friday evening, and finally testified, **without reference to any degree of medical certainty**, that it was "more likely" that she died on Friday night. . . ." Id at 551 (Emphasis aded)

"Finally, though we do not suggest that Mitchell intentionally lied on the stand or that District Attorney Fitzpatrick suborned perjury, we think a **reasonable juror would discredit Mitchell's testimony** upon learning that he had been subject to numerous investigations for misconduct and official malfeasance and was under investigation for potentially criminal misconduct at the very moment that he was providing testimony in the criminal trial. In short, based on the record before us, any reasonable juror would almost certainly credit Wecht over Mitchell and would therefore, more likely than not, harbor a reasonable doubt about Rivas's guilt." Id at 551 (Emphasis Added)

In the end the 2nd Circuit found a rare "unreasonable application" of Strickland by

the state courts. Hector Rivas was granted a rare 28 USC § 2254 (d) relief Id at 522 Also as of note, Dr. Mitchell was accused by subordinates of the following:

> The investigation was triggered when two subordinates publicly accused Mitchell of misconduct. These self-styled "whistleblowers" submitted statements that were included in the record of Rivas's initial appeal to this Court. One subordinate claimed to have witnessed Mitchell **"slant the interpretation of evidence and/or exclude evidence to serve his predetermined objectives,"** and averred that **"Dr. Mitchell's opinions and interpretations of evidence cannot be trusted as impartial or accurate."** Aff. of William R. Sawyer at 5—7 (quoted in Joint App'x at 337 n.7). Another—who was himself fired at the same time Mitchell resigned, and later had his medical license revoked for persistent drug and alcohol abuse —claimed that Mitchell had instructed him to fashion his **autopsy reports** in a way that would allow **for manipulation** of the case findings and had remarked that **"the medical examiners worked for Onondaga County and were there to serve the needs of the District Attorney's Office."** Letter of David A. Rigle at 16 (quoted in Joint App'x at 337 n.7).
> Rivas v. Fischer, 780 F.3d 529 **Footnote 8** (2015)

If there ever was a case that demanded a defense expert to counter a States expert it would be Lyman's case. As Dr. Young testified, Dr. Mitchell was "guessing" (App D Pg To corroborate this "guessing" the Certificate of Death, for JS, just lists "head trama" and does not give injury location or time of injury. (App E Pg 1) Anything in Dr. Mitchells autopsy report can be "slanted" to support the States theory. The denial of Dr. Young by the Kansas Court was a clear abuse of discretion.

While on the subject of allegedly fradulent and incompetant experts, Dr. Tera Frazier of CMH, as the other physician that Dr. Young accused of "guessing". To touch one piece of her "fradulent testimony" she testified at trial that JS had "peri anal laserations" and JS was the victim of blunt force penetrating trama. (App A Pg 9) Again Lyman was aquitted of sodomy. (App A Pg16)

However, in her own report, this anal trama is non existant at GCH, (first hospital) per her own report. (App F Pg 2) Yet it majically appears hours later at CMH (second

hospital) In the District Courts own opinion, he takes issue that Dr. Youngs report makes clear that autopsy reveals there was no injury to the anus and for some reason takes exception to that finding. (App B Pg 3)

Dr. Frazier ignored an avalanch of exculpatory eyewitness information in her own report, most notably, JS easily bruises, and various eyewitness reports of JS medical condition in the days prior to his hospitilization. (App F Pg 3-8) Again, this is the States evidence, not Lymans.

What the District Court did in this case by abusing his discretion, is what Chief Justice Rehnquist warned in his dissenting opinion in the Daubert Court:

> "But I do not think it imposes on them either the obligation or the authority to **become amateur scientists** in order to perform that role. I think the Court would be far better advised in this case to decide only the questions presented, and to leave the further development of this important area of the law to future cases." Daubert 509 U.S. at 601 (Emphasis added)

Under *K.S.A. 60-456 (b)* and FRE 702 Dr. Young has met all the qualifications:

> (1) the testimony is based upon sufficient facts or data, **(Dr. Young relied on Medical records provided by the state, medical literature, and case studies provided by himself)**. (2) the testimony is the product of reliable principles and methods. **(Reviewing Dr. Frazier and Mitchell's reports, photographs, and then checking, with inferences, (Inferential Test)** to see if the findings are consistent.) and (3) the witness has applied the principles and methods reliably to the facts of the case.**(Proposing an alternate causeation of death, with facts, medical literature and eyewitness testimony)** (Emphasis and additions to original added)

This Court has stated "vigorous cross-examination" is still the means to attack shaky medical evidence. Daubert 509 U.S. at 596. Rather than trust the jury with the facts, the District Court did a end run around the First, Sixth and Fourteenth Amendments and denied Lyman his ability to call witnesses and present evidence of Dr. Frazier and Mitchells fradulent testimony. Never before has a Court assaulted inferences

when its used to convict. However, when its used to form a defense, it falls on deaf ears.

If the State of Kansas was so confident that Dr. Young was some kind of "quack" then discrediting him should have been no problem at trial. However, instead of leaving the evidence to the jury and trusting them as the trier of fact, which is what they always argue when they are fighting a conviction. The Kansas Courts slanted the playing field in the States favor, and allowed a ME, like Dr. Mitchell, to go unchallenged, knowing of his questionable history and the Second Circuits ruling of "disgraced and allegedly beholden" ME and a juror would "discredit" Dr. Mitchell testimony Rivas 780 F.3d at 551

II There is a conflict among state and federal courts on this issue.

Since this Courts ruling in Daubert, Kumho, and General Electric there has been a differential diagnosis/etitology adoption within the federal circuits as stated earlier. However, when it comes to the state courts, the rulings of Daubert, for expert testimony in criminal defense cases, concerning infant death, have become somewhat less clear.

In Alabama, a differential diagnosis has not been adopted under Daubert, most notably in a infant death case. see Payne v. State, 239 So. 3d 1173 (2017) Foot note 2.

In another infant death case, in Deleware, the Superior Court ruled that a "differential diagnosis" is admissible under Daubert. see State v. McMullen, 900 A.2d 103, 116 (2006) Ohio follows the same, see Valentine v. Conrad, 110 Ohio St.3d 42, 2006 Ohio 3561, 850 N.E.2d 683,¶22.

The same is for Texas see Wolfe v. State, 509 S.W.3d 325 (2017) where Daubert is followed Id at 336 "deductive-reasoning" Id at 340 (ie Dr. Youngs Inferential Test) is a

process of evaluation. Wolf provides very informative information to corrolate Dr. Youngs inferential test with the differential diagnosis that is accepted throughout federal and most state courts:

> See also Dr. Sandeep Narang, A Daubert Analysis of Abusive Head Trauma/Shaken Baby Syndrome—Part II: An Examination of the Differential Diagnosis, 13 Hous. J. Health L. & Pol'y 203, 303-04 (2013) ("In the differential diagnosis methodology, the physician **gathers historical information on a patient's symptoms and signs and generates hypotheses** (a.k.a., the differential diagnosis). Through the attainment of additional clinical information (via various diagnostic tests), the physician goes through **an inferential and deductive process** of hypothesis refinement until a consistent 'working diagnosis' is achieved. Hypothesis refinement utilizes a variety of **reasoning strategies**—probabilistic, causal, and deterministic—to discriminate among the existing diagnoses of the differential diagnosis. . . . **In the simplest sense, the methodology relies on process-of-elimination reasoning.** As one eminent evidentiary scholar stated, '[I]n differential diagnosis, if there are four possible diagnoses and you eliminate three, **logic** points to the last illness as the correct diagnosis.'") (citations and quotations omitted). **(Emphasis Added)** Id at Foot Note 25

In Maryland, the courts have recognized the importance of a differential diagnosis in Sissoko v. State, 236 Md. App. 676, 729 182 A. 3d 874 (2018)

> In abusive head trauma/shaken baby syndrome cases, the differential diagnosis depends on the findings presented. Soft tissue injuries (such as bruises) have a differential diagnosis. Fractures (either long bone or skull) have a differential diagnosis. And intracranial findings (such as [subdural hematomas] or cerebral edema) and ophthalmologic findings (such as [retinal hemorrhages]) also have a differential diagnosis. It is the physician's task to parse through the **historical information**, the physical examination, and the laboratory and radiologic results to arrive at a unifying diagnosis that satisfies the criteria of "adequacy," "parsimony," and "coherency . . . [I]n many cases, but obviously not all, the unifying diagnosis will be trauma. From there, the physician will again utilize the **historical information**, the physical examination, the laboratory/radiology results, the **medical literature, and his/her experience to distinguish between accidental and non-accidental trauma.** (Emphasis added)

However, in Maryland they apply the differential diagnosis to the Frye Standard, see Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), Id at 704-08.

In Florida the State Supreme Court only adopted Daubert in 2019, see In re Amendments to the Fla. Evidence Code, 278 So. 3d 551 (2019) However, to date Florida has not applied the Daubert in child death cases.

In Alaska the differential diagnosis is applied however, Daubert by name is not invoked, except under Alaska Rules of Evidence 703 (Identical to FRE 703) see Allison v. State, 448 P.3d 266, 271 (Foot Note 10) Alaska (2019)

The West Virginia Supreme Court has also adopted the differential diagnosis as admissible under Daubert:

> medical opinion based upon a properly performed differential diagnosis is sufficiently valid to satisfy the reliability prong of the Rule 702 inquiry under Daubert/Wilt. A differential diagnosis is a tested methodology, has been subjected to peer review / publication, does not frequently lead to incorrect results, and is generally accepted in the medical community. Opinions based on differential diagnosis must be analyzed on a case-by-case basis, ensuring that the medical expert's application of the technique is reliable and proper in each case. see San Francisco v. Wendy's Int'Inc., 221 W. Va. 734 747-48 656 S.E.2d 485 (2007)

This Court has also questioned (Dissenting Justices Ginsburg, Breyer and Sotomayor) the validity of Abusive Head Trama (Shaken Baby) in Cavazos v. Smith, 565 U.S. 1,132 S. Ct. 2, 181 L. Ed. 2d 311 (2011) Justice Ginsburg, in her dissenting opinion wrote:

> Reason to suspect the Carpenter-Erlich thesis has grown in the years following Smith's 1997 trial. Doubt has increased in the medical community "over whether infants can be fatally injured through shaking alone." State v. Edmunds, 2008 WI App. 33, P15, 308 Wis. 2d 374, 385, 746 N.W.2d 590, 596. See, e.g., Donohoe, Evidence Based Medicine and Shaken Baby Syndrome, Part I: Literature Review, 1966-1998, 24 Am. J. Forensic Med. & Pathology 239, 241 (2003) (By the end of 1998, it had become apparent that "there was inadequate scientific evidence to come to a firm conclusion on most aspects of causation, diagnosis, treatment, or any other matters pertaining to SBS," and that "the commonly held opinion that the finding of [subdural hemorrhage] and [retinal hemorrhage] in an infant was strong evidence of SBS was unsustainable."); Bandak, Shaken Baby Syndrome: A Biomechanics

> Analysis of Injury Mechanisms, 151 Forensic Sci. Int'l 71, 78 (2005) ("Head acceleration and velocity levels commonly reported for SBS generate forces that are far too great for the infant neck to withstand without injury. . . . [A] n SBS diagnosis in an infant . . . without cervical spine or brain stem injury is questionable and other causes of the intracerebral injury must be considered."); Minns, Shaken Baby Syndrome: Theoretical and Evidential Controversies, 35 J. Royal College of Physicians of Edinburgh 5, 10 (2005) ("[D]iagnosing 'shaking' as a mechanism of injury . . . is not possible, because these **are unwitnessed injuries that may be incurred by a whole variety of mechanisms solely or in combination.");** Uscinski, Shaken Baby Syndrome: An Odyssey, 46 Neurol. Med. Chir. (Tokyo) 57, 59 (2006) ("[T]he hypothetical mechanism of manually shaking infants in such a way as to cause intracranial injury is based on a misinterpretation of an experiment done for a different purpose, and contrary to the laws of injury biomechanics as they apply specifically to the infant anatomy."); Leestma, Case Analysis of Brain-Injured Admittedly Shaken Infants, 54 Cases, 1969-2001, 26 Am. J. Forensic Med. & Pathology 199, 211 (2005) ("[M]ost of the pathologies in allegedly shaken babies are due to impact injuries to the head and body."); Squier, Shaken Baby Syndrome: The Quest for Evidence, 50 Developmental Med. & Child Neurology 10, 13 (2008) ("[H]ead impacts onto carpeted floors and steps from heights in the 1 to 3 feet range result in far greater . . . forces and accelerations than shaking and slamming onto either a sofa or a bed."). (Emphasis added) Id at 13-15

Even this Courts dissenting justices have acknowledged Dr. Youngs methods, in part, **(above in bold)** when they quote the above literature that questions Abusive Head Trama/Shaken Baby. Dr. Young and many courts, to include experts, for the State, have acknowledged there is a general process to diagnosing patients suspected as being victims of abuse. Because, its the same process as diagnosing any other patient that any decent physician has followed for at least, the last 100 years.

None the less, you have multiple courts in the United States that applys all of Dr. Youngs methods, under Frye and Daubert, in everything but name. The names should not matter, its the substance of the methods that should matter.

Giving that the dissenting justices in Cavazos have acknowledge that Abusive Head Trama (Shaken Baby) is becoming a more suspect diagnosis, year by year, this Court

should take this time to fix the conflict within the state and federal courts. Rule the differential/etitology diagnosis and inferential test on one in the same and make it a Daubert standard for all state and federal courts to admit or deny expert testimony in infant death/shaken baby head trama cases. As former Chief Justice Rehnquist stated in his dissenting opinion, in the Daubert Court, that further "development" Daubert 509 U.S. at 601 of the Daubert question should be left to future cases. The issues in this petition would fall under the "further development" of Daubert

III This issue implicates the proper administration of criminal justice

A. Effect of Daubert Error on Lymans Defense

While abuse of discretion is undoubtedly the standard used to evaluate the evidentiary decisions of trial courts, one must never forget that, in criminal cases, the life and freedom of a real individual are at stake as this Court has held:

> "There are certain immutable principles of justice, which inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice, and an opportunity of being heard in his defense."

Holden v. Hardy, 169 U.S. 366, 389-90, 18 S. Ct. 383, 387, 42 L. Ed. 780 (1898). "By "the law of the land" is intended "a law which hears before it condemns." Powell v. Alabama, 287 U.S. 45, 68, 53 S. Ct. 55, 64, 77 L. Ed. 158 (1932) (citation omitted).

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right **to his day in court** -- are basic in our system of jurisprudence; and these rights include, as a minimum, a right to **examine the witnesses against him, to offer testimony**, and to be represented by counsel." (Emphasis added)

In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 507-08, 92 L. Ed. 682 (1948). "Judgment without such citation and opportunity . . . can never be upheld where justice is justly

administered." Hovey v. Elliott, 167 U.S. 409, 418, 17 S. Ct. 841, 845, 42 L. Ed. 215 (1897) (citation and internal quotation marks omitted). "A defendant who has been denied an opportunity to be heard in his defense has [indeed] lost something indispensable." Snyder v. Massachusetts, 291 U.S. 97, 116, 54 S. Ct. 330, 336, 78 L. Ed. 674 (1934).

> "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a **meaningful opportunity to present a complete defense**." (Emphasis added)

California v. Trombetta, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532, 81 L. Ed. 2d 413 (1984);accord United States v. Beard, 436 F.2d 1084, 1086 (5th Cir. 1971).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the **defendant's version of the facts** as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses . . ., he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973). True enough, a defendant has no right to put on inadmissible evidence or unreliable expert testimony. See Johnson v. Wainwright, 806 F.2d 1479, 1485 (11th Cir. 1986); Phillips v. Wainwright, 624 F.2d 585, 588 (5th Cir. 1980). However, when the evidence is supplied by the State, not by Lyman its hard to imagine a court denying the obvious.

Several cases in the 11th Circuit, for example, support the proposition that a criminal defendant must be allowed to present a complete defense. In particular, the 11th

Circuit has reversed lower court rulings that have excluded defense testimony.

> The trial court is vested with broad discretion in ruling upon the relevancy and admissibility of evidence. Its ruling will not be disturbed on appeal in the absence of clear abuse of that discretion. Such discretion does not, however, **extend to the exclusion of crucial relevant evidence necessary to establish a valid defense**. (Emphasis added)

United States v. Kelly, 888 F.2d 732, 743 (11th Cir. 1989) (citation and internal quotation marks omitted) "'When proffered defense evidence is of substantial probative value, and will not tend to prejudice or confuse, all doubt should be resolved in favor of admissibility.'" United States v. Terebecki, 692 F.2d 1345, 1351 (11th Cir. 1987) (Hill, J., dissenting) (quoting United States v. Wasman, 641 F.2d 326, 329 (5th Cir. Unit B Apr. 2, 1981)). There is no doubt that Dr. Young's proposed testimony, and report, basing his findings off the States own evidence, and coming to conclusion that JS death was a natural, and not homicide is of supreme importance.

Dr. Youngs "inferential test" is nothing more than a means to test evidence and findings using proper inferences.

Furthermore, the fact that Dr. Frazier and Mitchell were guessing, also adds to the impeachment of not only the experts, but the States case in chief as a whole.

Therefore, its undisputed that that Lyman's proffered expert testimony here was fundamental to his case. Informing the jury in simple, declarative terms that the medical evidence did not exist to substantiate the claim of child abuse, murder, sodomy and that the evidence pointed to guesswork, a rush to judgement and a natural death, the District Courts decision disallowed the jury "to hear the whole story." United States v. Word, 129 F.3d 1209, 1213 (11th Cir. 1997).

B. Dr. Youngs Opinion on the Causeation of JS Death

The District Court would not allow Dr. Youngs proposed testimony to draw any inferences that the lack of eyewitness statements did not substantiate the States claim of child abuse and murder. Not because the evidence was pointed to a natural death, but due to the District Courts assault on inferences, medical literature, scientific studies, religion, employment etc.

However, according to the D.C. Circuit:

> "it is part of the normal role of the expert not merely to describe patterns of conduct in the abstract, but to connect actions in a specific case to those patterns -- sometimes even to the point of testifying that the defendant was **or was not** involved in criminal conduct." (Emphasis added)

United States v. Boney, 298 U.S. App. D.C. 149, 977 F.2d 624, 629 (D.C. Cir. 1992). Dr. Young drew a straight line in his testimony to explain how JS died. The State had ample opportunity to present new medical evidence to counter Dr. Youngs testimony, it did not. Daubert requires the expert to:

> "assist the trier of fact to understand the evidence or to determine"..... Fed. R. Evid. 702. Daubert and Rule 702 require only that the expert testimony be derived **from inferences** based on a scientific method and that those inferences be derived from the **facts of the case** at hand". (Emphasis added)

Jahn v. Equine Servs., PSC, 233 F.3d 382, 390 (6th Cir 2000) quoting Daubert, 509 U.S. at 590-92. Dr. Youngs "scientific method" is the differential diagnosis/etitology in everything but name.

As Dr. Young stated in his proffered testimony, he was not making decisions on Lymans guilt or innocence, just interpreting the facts of the case and then testing the facts, through inferences, to see if its logical. He was going to "merely assists the jury in interpreting the significance of the evidence," United States v. Brown, 7 F.3d 648, 654 (7th Cir. 1993), drawing on "common sense," United States v. Glover, 265 F.3d 337, 345 (6th

Cir. 2001), or, while helpful, is nonetheless "obvious," United States v. Sellers, 566 F.2d 884, 886 (4th Cir. 1977). The obvious would be the black and white documented evidence, in the States files, photgraphs, etc. Indeed:

> "whether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert's testimony often will rest 'upon an experience confessedly foreign in kind to **the jury's own**." (Emphasis added)

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 149, 119 S. Ct. 1167, 1174, 143 L. Ed. 2d 238 (1999) (citation omitted) All Dr. Young was doing is making sense of the evidence in terms that are easily understandable.

In Brown, for instance, the defendant had been convicted of possession with intent to distribute cocaine base. 7 F.3d at 649. On appeal, "the issue was whether he possessed the twenty-five rocks of crack cocaine for distribution or for personal use." Id. at 652. The government's expert identified certain traits that are commonly associated with drug dealers.

> "He also described the typical paraphernalia associated with street-level crack distributors and compared that with the paraphernalia and behavior patterns usually associated with those possessing crack only for personal use." Id. at 650.

From this information, the expert concluded that the crack cocaine seized from the defendant was not intended for personal consumption, but for distribution. Id. The defendant objected, arguing that the jury could draw its own inferences from the habits and practices testimony of the expert. Id. at 652. The Seventh Circuit affirmed the district court's refusal to exclude the testimony on the ultimate issue, reasoning that "the average juror might be unable to determine whether the **absence** of certain drug paraphernalia typically associated with crack cocaine is significant." Id. (emphasis added)

In the same way, Dr. Young's conclusion in this case -- that the absence of any eyewitness evidence of abuse, did not substantiate the claim of child abuse and murder -- would have helped the jury to understand the significance of Dr. Young's proffered testimony. The proffered testimony did not state a legal conclusion as to Lyman's guilt or innocence, and it did not "tell the jury what result to reach." Montgomery v. Aetna Cas. & Sur. Co., 898 F.2d 1537, 1541 (11th Cir.1990). His analysis was clear and was supported by undisputed factual findings as to the evidence retrieved from the States discovery, he was no mere "oath-helper," Hanson v. Waller, 888 F.2d 806, 811 n.2 (11th Cir. 1989), Dr. Young's testimony would have assisted the average juror, unqualified "to determine intelligently and to the best possible degree," United States v. Lankford, 955 F.2d 1545,1558 (11th Cir. 1992) (Hoffman, J., dissenting), what to make of the fact that not a single shred of medical evidence was presented to link Lyman to the death of JS. Quite the opposite in fact, as stated by JS own mother MS, the victim had numerious health issues that went to a key fact in Lyman's proffered defense. Dr. Young's testimony would have assured against any tendency to over-or underestimate the value of this finding; indeed, the lack of eyewitness evidence of abuse could neither exonerate nor condemn Lyman of murder, but only failed to substantiate it. To exclude such helpful testimony on the inappropriate,absurd,bias, and false ground relied on by the District Court was manifestly reversible "clear" error. Cooter & Gell 496 U.S. at 405.

C. Effect on Lymans Constitutional Rights

This Court has recognized that because forensic evidence is not immune from distortion and manipulation, it is critical for a defendant to be given the opportunity to test the analysts's "honesty, proficiency, and methodology" through confrontation. Melendez-

Diaz, 129 S. Ct. at 2536-38. In Melendez-Diaz, this Court noted that:

> "because forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency. A forensic analyst responding to a request from a law enforcement official may feel pressure--or have an **incentive**--to **alter the evidence in a manner favorable to the prosecution**." Id. at 2536 (internal quotes and edits omitted)(Emphasis Added)

This Court further explained that "confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well," noting that "an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." Id. at 2537.

Dr. Erik K. Mitchell was accused of the same thing in Rivas that this Court in Melendez-Diaz and Hinton had warned courts and defense attorneys to keep a watchful eye for. Lyman's own expert Dr. Young was going to expose Dr. Mitchell's ability to testify to generalities, with no reference to specific times, dates, or mechanism of injury. Nothing in his testimony, narrowing JS demise on Lyman was ever testified to medical certainity. Why would Dr. Mitchell alter evidence in favor of the prosecution? For convictions of course, just like he was accused in Rivas.

Likewise for Dr. Frazier, she is a child abuse "expert" her most obvious reason to give evidence to convict, was derived by the States thirst for convictions at the expense of the truth and damage to her reputation if it was ever proven she gave false testimony. The jury never heard of the evidence that Lyman gave JS CPR and heard 'bubbles" (App F Pg 1,2) and JS was found "limp" and had "vomited" after being patted on the back. (App F Pg 2) he was "gurguling" on the ride to GCH (App F Pg 5) JS had his mouth "suctioned" at GCH (App F Pg 5) This "expert" (Frazier) testified JS had been a victim of sexual abuse.

(Pg 22 of this Petition) However, it was never noted by the first hospital. All of which Dr. Young was going to **expose.**

This goes to show that fradulent and inept experts are all over the place and should be exposed with expert testimony, as this Court dictated in Hinton.

Allowing the prosecution to present the findings of experts, with a questionable and discredited history like Dr. Mitchell, allows the prosecution to perform an end run around the Sixth Amendment by depriving the defendant of the opportunity to test the reliability of the findings of the experts through cross-examination with an expert of his own. Likewise, Lymans ability to present witnesses in his favor acted like a double edge sword. This concern is not merely hypothetical.

Using religion in part to deny Lyman a expert defies logic, common sense, and violates the First Amandment.

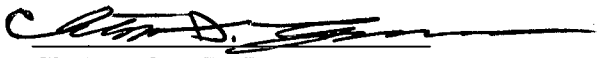
The practice condoned by the Kansas Supreme Court in this case, denying Lyman a proper expert, defense and exposing fradulent experts undermining this Court's holdings in *Melendez-Diaz, Daubert, Kumho*

In sum, the Kansas Supreme Court's decision that Dr. Young's methodology is "flawd" is of error. It gives other states the ability to exclude defense experts when they are affraid of there own experts incompetance, and of theirs, of being exposed. The District Courts rulings go beyond absurd. Federal and some state courts are divided over the question of what is allowed methodology under Daubert. Because this issue is of critical importance for the administration of criminal justice, this Court should use this case to resolve the conflict among the courts, reverse Lymans conviction on constitutional grounds and for abuse of discretion.

CONCLUSION

For the foregoing reasons, petitioner, Christopher D. Lyman, respectfully prays that a writ of certiorari be issued to review the judgement of the Kansas Supreme Court.

Respectfully submitted,



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