No. _____

IN THE
Supreme Court of the United States

_____

LASHAWN LEWIS,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

_____

On Petition for a Writ of Certiorari
to the New York Court of Appeals

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

Petitioner's conviction was predicated on the testimony of a so-called blood spatter expert. Defense counsel objected to the admission of this testimony, noting that it was unreliable science that could not be replicated. Despite defense counsel's request for a *Frye* hearing to challenge the admissibility of the testimony and despite a federal study decrying blood spatter testimony as "more subjective than scientific," the court summarily denied the request for a hearing.

This case presents two critical issues:

1) Was Petitioner deprived of Due Process where the court denied her any meaningful opportunity to contest the use of junk science at her trial?
2) Is New York's reliance on the antiquated *Frye* standard anachronistic to the demands of due process and inconsistent with this Court's holding in *Daubert*, especially where thirty-three states afford defendants greater protections?

PARTIES TO THE PROCEEDING

The Petitioner is Lashawn Lewis, who was defendant-appellant before the New York Court of Appeals.

The Respondent is the State of New York, who was appellant before New York Court of Appeals.

There are no co-defendants.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the Supreme Court of Erie County, New York, the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, and the New York Court of Appeals:

> *The People of the State of New York v. Lewis*, No. 2005-01978 (N.Y. County S. Ct., Erie County, Nov. 8, 2018).
>
> *The People of the State of New York v. Lewis*, KA 19-00669, No. 797 (N.Y. App. Div., 4th Dep't., Nov. 19, 2021).
>
> *The People of the State of New York v. Lewis* (N.Y. Ct. App., May 11, 2022).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Individuals in the throes of the criminal justice system are entitled to be prosecuted on competent, reliable evidence. Without this guarantee, individuals are deprived of due process of law. The *Daubert* standard served to further the ends of due process and an individual's right to a fair trial in criminal cases with exacting, yet liberal, standards for the admission of evidence. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993).

However, New York's *Frye* standard — a standard shared by only nine states in the nation — creates a *per se* rule of admissibility for unreliable scientific evidence. *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Originally intended to exclude expert evidence that was not accepted by the relevant scientific community, *Frye* evolved into a rubber-stamp for prosecutors to admit junk science. Courts in New York state rely on antiquity and stare decisis to determine the reliability of expert evidence. They do so without regard to later scientific evidence that questions the expert testimony at issue. To those courts, if scientific evidence was admitted in the past, even if its reliability has since been questioned, it is categorically admissible.

Due process demands a sound rejection of *Frye*.

OPINION AND ORDER BELOW

The Order of the New York Court of Appeals is reported at 189 N.E.3d 326 (2022). It is reproduced at App. 4a. The opinion of the New York Supreme Court, Appellate Division, Fourth Judicial Department is reported at 154 N.Y.S.3d 603

(2021). It is reproduced at App. 1a. The Erie County Court's oral order denying the request for a *Frye* hearing is unpublished but is reproduced at App. 5a.

JURISDICTION

The Order of the New York Court of Appeals was entered on May 11, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution reads:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

When Petitioner said goodbye to her mother before running errands in 2005, she did not know it would be the last time she saw her alive.

When Petitioner returned to her mother's house mere hours later, she found her mother dead upstairs, covered in blood. The room was covered in blood on the ceilings, walls, and carpet.

Petitioner was hysterical when she found her mother. She tried to wake her mother up in any way possible. She hugged her. She touched her. She shook her. But her mother was already gone. She screamed in despair, flinging her arms in the air.

She ran outside to find help. A postal employee was just outside the home. Petitioner, still hysterical and crying, led him to her mother. She flung her arms in the air as she grieved. She continued trying to touch her mother and wake her.

A neighbor appeared and entered the home. When the emergency medical team arrived, the neighbor had to pull the distraught Petitioner off her mother.

Naturally, after all the hugging and touching, Petitioner's clothing was covered with blood. After she was interrogated, pictures were taken of her clothing and her clothing was seized as evidence. She was not arrested.

Within several days of the incident, the Erie County District Attorney's Office consulted a "blood spatter expert" from Canada. He requested more photos of the scene. He ultimately issued his "conclusion" that the blood spatter indicated that Petitioner was the assailant. He came to this conclusion because Petitioner allegedly had a miniscule spot of blood on her back.

Although there was an immense struggle between the assailant and decedent, Petitioner's DNA was nowhere in the room. Her DNA was not under the decedent's fingernails. It was nowhere in the house save for a trash bag in the basement. An unknown DNA profile was also located in the house, which was never resolved at trial.

With this "evidence," Petitioner was not indicted until twelve years later. The prosecutor's excuse for the delay in prosecution was a misplaced "witness" statement in the police file that somehow evaded review for twelve years.

Following a deadlocked jury at her first trial, Petitioner was retried. Before the prosecutor introduced the blood spatter testimony, defense counsel requested a mistrial should the court allow the testimony. He requested a *Frye* hearing to fully flesh out the issues with blood spatter "evidence," and moved for a mistrial if the Court denied the request for a hearing.

In support of this request, defense counsel tendered a federal report from the National Academy of Sciences that called blood spatter evidence into question. The report noted "enormous" problems with blood spatter testimony, citing the "uncertainties associated with bloodstain pattern analysis."

The court summarily denied the request for a *Frye* hearing and counsel's request for a mistrial. In doing so, it held that defense counsel was not entitled to a hearing because blood spatter testimony was admitted in other courts in the past.

The "expert" was allowed to testify. However, he made several key admissions about his "field" that reaffirmed counsel's earlier qualms with the testimony. The "expert" admitted that there was no way to accurately reproduce blood spatter. He had "no clue" about the rate of error for his "studies." He never obtained specific measurements from the scene to support any "conclusions." In other words, the testimony was unreliable and speculative.

With the lack of DNA evidence or any admissions from Petitioner,[1] this testimony was the keystone of the prosecutor's case. The jury convicted Petitioner, who is now serving a life sentence.

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[1] Over the course of twelve years, Ms. Lewis gave consistent descriptions of how she found her mother. She maintained, and continues to maintain, her innocence.

On direct appeal to the Appellate Division, Fourth Department, Petitioner continued to challenge the admissibility of the blood spatter testimony. She argued that due process minimally demanded a *Frye* hearing where counsel offered evidence that blood spatter testimony was not accepted in the relevant scientific community.

The Appellate Division declined the address the *Frye* issue in significant detail, merely holding that "the court did not abuse its discretion" in denying the request for a hearing. App. 2a.

Petitioner sought leave to appeal to the New York Court of Appeals. She advanced the same arguments as she did before the trial court and the Appellate Division. The Court of Appeals thereafter denied her permission to appeal. *Id.* at 4a.

REASONS FOR GRANTING THE PETITION

The admission of reliable and competent evidence is critical to ensuring that the due process is satisfied. Defendants retain the right to challenge the admissibility of evidence that is questionable or speculative.

However, the use of a "longstanding" approach with *Frye* in New York has resulted in questionable junk science being used at trial merely because it was deemed admissible decades or centuries ago. If science was admitted in the past, defendants in New York are precluded from challenging the evidence with a Frye hearing.

This is in stark contrast with the majority of states that moved away from Frye and accord greater protection and due process to their citizens when scientific

evidence is questionable. The variation between the states and New York's willful disregard of due process concerns necessitates review.

Frye implicates Due Process concerns where unreliable expert conclusions are categorically admitted without any meaningful opportunity for defendants to contest them.

Frye's holding is simple, yet outdated: if scientific testimony has general acceptance in the relevant scientific field, it is admissible. *Frye*, 293 F. at 1014. However, *Frye* has morphed into an entirely different beast: if scientific evidence has ever been admissible in the past, even if it is now questionable, it is *per se* admissible. So long as scientific evidence was once admissible—even if it is now considered junk science—defendants in New York state are systematically prohibited from challenging the admissibility of the evidence with a *Frye* hearing.

This implicates key due process concerns. Citizens facing criminal charges must be able to meaningfully participate in, and challenge evidence, when their liberty interests are at stake. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 76 (1985). They are denied due process where they have no way to challenge evidentiary rulings that are arbitrary and disproportionate to the purposes they are designed to serve. *See Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). All evidentiary rules, regardless of whether they are issued by the states or federal courts, are designed to ensure that the factfinder only considers credible and reliable evidence. *See United States v. Scheffer*, 523 U.S. 303, 309 (1998).

Frye was adopted in New York to avoid unreliable and speculative sciences ("junk science") from being utilized at trial. *See Parker v. Mobil Oil Corp.*, 857 N.E.2d

1114, 1120 (N.Y. 2006). New York courts even recognize that admission of junk science is so fundamentally flawed that it violates due process. *See New York v. Shannon S.*, 980 N.E.2d 510, 513-14 (N.Y. 2012), *certiorari denied* 568 U.S. 1216 (2013). If there is any controversy associated with a particular junk science, a *Frye* hearing must be conducted. *See Miguel II v. New York*, 87 N.Y.S.3d 376, 377-78 (N.Y. App. Div., 3d Dep't 2018]).

New York ignores these due process concerns. Instead, New York courts routinely interpret *Frye* to mean that because scientific evidence was admissible in the past, it is categorically admissible in every case going forward because of the evidence's longstanding use. *New York v Barnes*, 701 N.Y.S.2d 201, 202 (N.Y. App. Div., 4th Dep't 1999).

Under this revised standard, due process is an afterthought. Reliance is placed on precedent rather than scientific principles. One judge noted that reliance on stare decisis over science is catastrophic: "Precedent is like a child's game of telephone . . . . You start off saying something. You whisper it down the line and you continue to whisper it even though it no longer makes sense." Leora Smith, *How a Dubious Forensic Science Spread Like a Virus*, ProPublica (Dec. 13, 2018), available at https://features.propublica.org/blood-spatter-analysis/herbert-macdonell-forensic-evidence-judges-and-courts/ (last accessed Aug. 1, 2022). This is particularly dangerous in fields that were once acceptable but now lack any scientific acceptance. *See* Michael J. Saks et al., *Forensic Bitemark Identification: Weak Foundations, Exaggerated Claims*, 3 J. Life & Biosciences 538, 565-66 (2016) (bitemark evidence).

Without any means to raise a *Frye* hearing, defendants in New York lack any meaningful recourse to challenge junk science. The result is a host of wrongful convictions. *See* Edward J. Imwinkelried, *The Best Insurance Against Miscarriages of Justice Caused by Junk Science: An Admissibility Test That is Scientifically and Legally Sound*, 81 Albany L. Rev. 851 (2018).

New York's interpretation of *Frye* also ignores the key component of the scientific method: "the value of a hypothesis resides in its ability to stimulate additional thinking and further research, rather than in its initial correctness." Francis L. Macrina, Scientific Integrity: An Introductory Text With Cases 4 (2d ed. 2000). In other words, science is nothing unless previous hypotheses cannot be questioned.

In the case of blood spatter evidence, New York systematically denies *Frye* hearings. *See e.g., New York v. Pike*, 880 N.Y.S.2d 832, 834 (N.Y. App. Div, 4th Dep't 2009); *New York v. Eckhardt*, 761 N.Y.S.2d 338, 343 (N.Y. App. Div., 3d Dep't 2003); *New York v. Whitaker*, 734 N.Y.S.2d 149, 149-50 (N.Y. App. Div, 1st Dep't 2001).

But blood spatter evidence is dubious at best. In 2009, the National Academy of Sciences undertook a significant assessment of the use of scientific evidence in courts. *See* National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward 177 (2009), available at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf). This was the same report defense counsel discussed with the court in requesting a *Frye* hearing for Petitioner.

Interpreting blood spatter can be "impossible." *Id.* at 178. The report noted "enormous" problems with blood spatter testimony:

> This emphasis on experience over scientific foundations seems misguided, given the importance of rigorous and objective hypothesis testimony and the complex nature of fluid dynamics. In general, the opinions of bloodstain pattern analysts are more subjective than scientific. . . . For such situations, many experiments must be conducted to determine what characteristics of a bloodstain pattern are caused by particular actions during a crime and to inform the interpretation of those causal links and their variabilities. For these same reasons, extra care must be given to the way in which the analyses are presented in court. The uncertainties associated with bloodstain pattern analysis are enormous.

Id. at 178-79.

Federal courts already questioned the use of blood spatter evidence long before Petitioner's trial. The Seventh Circuit recognized that blood spatter interpretation is "a subjective field" that is "only partly scientific." *See Camm v. Faith*, 937 F.3d 1096, 1101 (7th Cir. 2019). The Ninth Circuit found, based on this report, that one blood spatter "expert" was "thoroughly discredited." *See Palermo v. Olivarez*, 232 F.3d 896, 896 (9th Cir. 2000). Other courts recognize that the failure to address such problematic junk science at trial or on appeal constitutes ineffective assistance of counsel. *See Showers v. Beard*, 635 F.3d 625, 634 (3d Cir. 2011); *see also Richter v. Hickman*, 578 F.3d 944, 952-53 (9th Cir. 2009).

Even under *Frye*'s standard, the evidence in Petitioner's trial demonstrably lacked acceptance in the scientific community. Instead of recognizing that, the trial court, Appellate Division, and Court of Appeals ignored science at the expense of stare

decisis. The blood spatter testimony by the "expert's" own admission was speculative. There was no known rate of error. There was no way to replicate his findings. Speculative evidence had no place in Petitioner's trial, especially where it was the significant contributing factor to her conviction. This due process violation should be reviewed by this Court.

Inconsistent application of the Due Process protections in *Daubert* necessitates review from this Court.

Equal Protection and Due Process mandate that each citizen be accorded the same rights. But in the context of *Daubert* and *Frye*, defendants have heightened rights in most states and lack meaningful recourse to challenge the admission of junk science in others.

Daubert was issued under the auspices of clarifying F.R.E. Rule 702. At its core, however, was the finding that scientific evidence must be reliable as a condition precedent to its admission. *See Daubert*, 509 U.S. at 590. Put another way, it satisfies the demands of due process by only admitting reliable evidence at trial. *Scheffer*, 523 U.S. at 309; *see also Holmes*, 547 U.S. at 324-25).

There is no logical reason to uphold *Frye*'s rigid and antiquated holdings. *See Tome v. United States*, 513 U.S. 150, 174 (1995) (Breyer, J., dissenting). While states are free to accord greater rights to their citizens than those issued in the constitution, they cannot grant them fewer protections.

Daubert provided clear guideposts on scientific integrity. Most states, recognizing the importance of these guideposts, incorporated *Daubert*.[2] Others adopted *Daubert* in part or implicitly adopted it.[3]

But a small minority of states elected to stay in the dark ages, including New York.[4] These states avoid the use of scientific methodology, deferring to centuries-old judicial precedent instead.

This divergence between states means that the rules set forth in *Daubert* are not clearly established and should be reviewed. *See McWilliams v. Dunn*, 137 S. Ct.

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[2] Thirty-three states and the District of Columbia adopted the *Daubert* standard. *See Ex Parte George*, No. 1190490, 2021 WL 68997 (Ala. 2021); *State v. Sharpe*, 435 P.3d 887 (Alaska 2019); *Coca-Cola Bottling Co. of Memphis, Tenn., v. Gill*, 100 S.W.3d 715 (Ark. 2003); *State v. Cooper*, 496 P.3d 430 (Colo. 2021); *State v. Edwards*, 156 A.3d 506 (Conn. 2017); *Rodriguez v. State*, 30 A.3d 764 (Del. 2010); *Lewis v. United States*, 263 A.3d 1049 (D.C. 2021); *Kemp v. State*, 280 So. 3d 81 (Fla. 2019); *HNTB Georgia, Inc. v. Hamilton-King*, 697 S.E.2d 770 (Ga. 2010); *Smith v. Yang*, 829 N.E.2d 624 (Ind. 2005); *Matter of Cone*, 435 P.3d 45 (Kan. 2019); *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995); *State v. Brown*, 2022 WL 2066603 (La. 2022); *Rochkind v. Stevenson*, 236 A.3d 630 (Md. 2020); *Commonwealth v. Davis*, 168 N.E.3d 294 (Mass. 2021); *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391 (Mich. 2004); *Corrothers v. State*, 148 So. 3d 278 (Miss. 2014); *State ex rel. Gardner v. Wright*, 362 S.W.3d 311 (Mo. 2018); *Schafersman v. Agland Coop.*, 631 N.W.2d 862 (Neb. 2001); *Baker Valley Lumber v. Ingersoll-Rand Co.*, 813 A.2d 409 (N.H. 2002); *State v. Fry*, 126 P.3d 516 (N.M. 2005); *State v. McGrady*, 787 S.E.2d 1 (N.C. 2016); *Watkins v. Affinia Grp.*, 54 N.E.3d 174 (Ohio 2016); *Taylor v. State*, 889 P.2d 319 (Okla. Crim. App. 1995); *State v. Brown*, 687 P.2d 751 (Or. 1984); *Morabit v. Hoag*, 80 A.3d 1 (R.I. 2013); *State v. Huber*, 2010 S.D. 63 (S.D. 2010); *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268 (Tenn. 2005); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995); *USGen New England, Inc. v. Town of Rockingham*, 862 A.2d 269 (Vt. 2004); *San Francisco v. Wendy's Int'l., Inc.*, 656 S.E.2d 485 (W. Va. 2007); *Seifert v. Balink*, 888 N.W.2d 816 (Wis. 2017); *Hoy v. DRM*, Inc., 114 P.3d 1268 (Wyo. 2005).

[3] Nine states adopted *Daubert* in part or implicitly adopted it. *State v. Montalbo*, 828 P.2d 1274 (Haw. 1992); *Weeks v. E. Idaho Health Servs.*, 153 P.3d 1180 (Idaho 2007); *Ranes v. Adams Laboratories*, 778 N.W.2d 677 (Iowa 2010); *State v. Bickart*, 963 A.2d 183 (Me. 2009); *McClue v. Safeco. Ins. Co.*, 394 P.3d 604 (Mont. 2015); *Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008); *State v. Jones*, 681 S.E.2d 580 (S.C. 2009); *State v. Quintana*, 2004 Utah App. 418 (Utah Ct. App. 2004); *Hyundai Motor Co. v. Duncan*, 289 Va. 147 (Va. 2015).

[4] Nine states declined to extend *Daubert*. *State v. Lucero*, 85 P.3d 1059 (Ariz. 2004); *People v. Eubanks*, 266 P.3d 301 (Cal. 2011); *In re Simons*, 821 N.E.2d 1184 (Ill. 2004); *State v. Garland*, 942 N.W.2d 732 (Minn. 2020); *In re Accutane Litig.*, 191 A.3d 560 (N.J. 2018); *People v. Wesley*, 633 N.E.2d 451 (N.Y. 1994); *Grady v. Frito-Lay*, 546 A.2d 1039 (Pa. 2003); *State v. Copeland*, 922 P.2d 1304 (Wash. 1996); *City of Fargo v. McLaughlin*, 512 N.W.2d 700 (N.D. 1994).

1790, 1804 (2017) (Alito, J., dissenting). Petitioner should not lose her Due Process right to challenge junk science solely by virtue of her New York residency.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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