

NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

BARBARA LANG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

- I. Whether the Sixth Circuit erred by affirming the Trial Court's ruling that Government witness, Dr. Kloth, could testify as an expert without holding a *Daubert* hearing, when his opinion was based on incomplete medical records thereby violating Ms. Lang's Fourteenth Amendment due process rights to a fundamentally fair trial.
- II. Whether the Sixth Circuit erred by affirming the Trial Court's ruling that excluded fourteen (14) defense witnesses by finding treating physicians/nurse practitioners to be expert witnesses *per se* rather than lay witnesses thereby violating Ms. Lang's Fourteenth Amendment due process rights to fundamentally fair trial.
- III. Whether the Sixth Circuit erred by affirming the Trial Court's ruling that Ms. Lang's 280-year sentence was not unreasonable and whether such sentence constitutes cruel and unusual punishment under the Eighth Amendment.

PARTIES TO THE PROCEEDING

The parties to this proceeding are the Petitioner Barbara Lang, who was the Defendant in the District Court and the Appellant in the Sixth Circuit Court of Appeals. The only other party is the United States who was the Plaintiff in the District Court and the Respondent in the Sixth Circuit Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Barbara Lang, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered on October 31, 2017.

OPINIONS BELOW

The opinion from the Sixth Circuit Court of Appeals, *United States v. Lang* No. 15-5997, 2017 WL 4924680, at *1 (6th Cir. Oct. 31, 2017) is attached as Appendix A. The District Court's original judgment is attached as Appendix B.

JURISDICTIONAL STATEMENT

On October 31, 2017, the United States Court of Appeals for the Sixth Circuit entered its judgment and opinion affirming the District Court's Final Judgment. *United States v. Lang* No. 15-5997, 2017 WL 4924680, at *1 (6th Cir. Oct. 31, 2017). No petition for rehearing was filed. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

Rule 13(1) of the Supreme Court states that unless otherwise provided by law, a Petition for Writ of Certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States Court of Appeals is timely when it is filed with the Clerk of the United States Supreme Court within ninety (90) days after entry of the Judgment. Accordingly, this Petition is timely filed.

Pursuant to Rule 29, 4(a), appropriate service is made the Solicitor General of the United States and the Assistant United States Attorney, Gregg L. Sullivan, who appeared in the United States Court of Appeals for the Sixth Circuit on behalf of the

United States Attorney's Office, a federal office which is authorized by law to appear before this Court on its own behalf.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

18 U.S.C. § 3553(a).

Rule 701 of the *Federal Rules of Evidence*

Rule 702 of the Federal Rules of Evidence

Eighth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

STATEMENT OF THE CASE AND FACTS

The United States brought a criminal action against Ms. Lang relating to three pain management clinics: Superior One Medical Clinic (“Superior One”), Primary Care and Pain Clinic (“Primary Care”) and Elite Pain Clinic (“Elite”).

The Government alleged that Ms. Lang conspired to distribute/dispense controlled substance at Superior One and Primary Care (Counts 1, 8); maintained a drug involved premises at Superior One’s four locations and Primary Care’s two locations (Counts 2-5, 9-10); structured financial transactions to evade reporting requirements (Counts 67-88); obstructed and impeded the Internal Revenue Service (Count 91) and concealed a person from arrest (Count 93).

Ms. Lang filed nineteen (19) pretrial motions, among them was a motion to strike the testimony of Dr. Kloth and two *Daubert* motions. Ms. Lang’s second *Daubert* motion dealt, in part, with the relevancy and reliability of Dr. Kloth’s testimony. *See* Appendix C.

After a jury trial, Ms. Lang was convicted of two counts of conspiracy to distribute/dispense controlled substances (Superior One and Primary Care); five counts of maintaining a drug involved premises (three Superior One locations and two Primary Care locations); and fourteen counts of structuring financial transactions. Ms. Lang was acquitted of the twelve remaining counts including Count 93, concealing a person from arrest. Count 91 was dismissed upon Motion for Judgment of Acquittal.

On August 27, 2015, the District Court sentenced Ms. Lang to the maximum 280 years (3,3360 months); 20 years on Counts 1, 3, 4, 5, 8, 9, and 10; 10 years on Counts 71-78 and 81-86. Each sentence on each count was run consecutively.

On October, 31, 2017, the United States Court of Appeals for the Sixth Circuit affirmed the trial court's judgment.

REASONS FOR GRANTING THE WRIT/ARGUMENT

- I. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED BY AFFIRMING THE DISTRICT COURT'S RULING THAT THE GOVERNMENT ONLY EXPERT WITNESS, DR. KLOTH, COULD TESTIFY AS AN EXPERT WITHOUT HOLDING A *DAUBERT* HEARING, WHEN HIS OPINION WAS BASED ON INCOMPLETE MEDICAL RECORDS AND WHEN HE CONCEDED IN HIS TESTIMONY THAT IF HE DID NOT HAVE ALL OF THE RECORDS, THAT HIS OPINION WOULD BE UNRELIABLE THUS VIOLATING MS. LANG'S RIGHT TO A FAIR TRIAL PURSUANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court held that Rule 702 of the Federal Rules of Evidence imposes a "gatekeeping" duty on the trial court to ensure expert testimony "is not only relevant, but reliable." 509 U.S. 579, 589 (1993). This gatekeeping obligation applies not only to scientific testimony but also to testimony regarding a technical or other specialized skill. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). The party seeking to admit expert testimony must establish its admissibility by a preponderance of the evidence. *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001) (citing *Daubert*, 509 U.S. at 592 n.10); see *United States v. Thomas*, 223 F. App'x 447, 457 (6th Cir. 2007) (noting that even when an expert opinion is unopposed, it is error not to conduct a *Daubert* analysis). The trial court's gatekeeping role and the offering party's burden in this regard is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 153.

On July 31, 2014, counsel for Ms. Lang filed a Motion for a *Daubert* Hearing as to the Government's expert witness Dr. Kloth and a Motion in Limine to Exclude Certain Portions of Dr. Kloth's Reports, on grounds that his testimony was unreliable. Counsel raised pre-trial the issue that Dr. Kloth did not have all of the medical records for the patients that he reviewed.¹ See Appendix C, p. 2 & 12.

On November 3, 2014, the first day of trial, the District Court denied Ms. Lang's motion for a *Daubert* hearing and reserved ruling on her Motion in Limine. On November 19, 2014, Dr. Kloth testified. On January 16, 2015, during the trial, defense counsel filed a Motion to Strike the Testimony of Dr. Kloth, which the trial court denied. See Appendix D. Over the course of the trial, it became clear that there existed certain "electronic medical records" or "EMR's" which the Government knew about from grand jury testimony, but had not obtained copies of nor provided such records to Dr. Kloth. During the trial, Defense counsel obtained copies of these records which contained a considerable amount of information that Dr. Kloth had criticized was lacking from his review of the limited paper medical records which had been provided to him. In fact, he testified that if he did not have all of the medical records then his opinions would not be reliable. Counsel clearly moved the Court to

¹ ¶ 6 of the Defendant's Daubert Motion alleges that it is "unclear whether the twenty-four patient files were obtained by the Government from their search of the storage unit....their search of Primary...the files obtained from Geoffrey Dean Peterson....the files obtained from Ralph Carroll, or the files obtained by Investigator Charles Whitson." See Appendix C, p. 2.

Further, the Defendant states in his Motion, "Additionally, regarding the patient files provided to Dr. Kloth, there is nothing to suggest that the patient files at the time law enforcement first obtained them, were the same patient files used by Superior, Elite or Primary at the time when they were prescribing prescriptions to their patients." *Id.* at 12.

correct this obvious error both before trial in the form of a Daubert motion and during trial in the form of a Motion to Strike.

In light of the *Daubert*, the Court of Appeals for the Sixth Circuit erred by affirming the trial court's decision to conduct an incomplete *Daubert* analysis and by affirming the trial court's decision not to exclude or otherwise limit Dr. Kloth's testimony.

- a. The Court of Appeals erred when holding that Ms. Lang did not raise the issue of an incomplete record.

A district court abdicates its gatekeeping role where it bases its *Daubert* ruling on an "incomplete record" or engages in a "perfunctory review" of the issues before it. See *Kentucky Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 915-16 (6th Cir. 2009) (citing *Jahn*, 233 F.3d at 393; *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1087-88 (10th Cir. 2000)).

The Court of Appeals for the Sixth Circuit found that because Ms. Lang did not mention the magic words of electronic medical records "EMRs", that she therefore forfeited the issue. Frankly, this is too high of a burden to place on Mrs. Lang or Counsel for Mrs. Lang. There is no evidence whatsoever that Mrs. Lang ever used the EMR's. She was not a medical provider, but merely a lay person. She was not in the examining rooms and played no role putting any information into any electronic medical record.

Ms. Lang did raise the issue in her second *Daubert* motion and in her motion to strike. See Appendix C & D. The Court of Appeals relied on the following part of

the second *Daubert* motion when finding that Ms. Lang forfeited any argument she had pertaining to the EMRs:

“[T]here is nothing to suggest that the patient files at the time law enforcement first obtained them, were the same patient files sued by [the clinics] at the time when they were prescribing prescriptions to their patients. These files appear to have been stored, moved, and kept by a variety of different individuals over several months. The files appear to have traveled over state lines and appear to have several custodians at certain times and no custodians at other times. The chain of custody of these files is certainly at issue and calls into question the credibility of the files themselves.

The Court of Appeals for the Sixth Circuit maintained that the above quoted language only asserted that law enforcement might not have obtained the *correct* files and that the content of the files might be *inaccurate* because of their dubious chains of custody.

The objection made by Ms. Lang was sufficient enough that Court of Appeals should have found that the District Court abdicated its gate keeping role and should have reviewed the trial court’s decision *de novo*.

Moreover, it is undisputed that (1) EMR records actually existed; (2) that the Government knew about the EMR records and chose not to locate them and not to provide them to their Expert, Kloth, or advise Defense counsel as to their existence; and (3) that the those records contained many of the same information which Kloth criticized was lacking in the paper records. The Trial Court and the Sixth Court have allowed the United States to utilize an expert (the only expert called to criticize the treating physicians’ opinions and decisions to prescribe medications) which impacted

the jury's decision when that expert conceded from the stand that his opinions would not be reliable if based they were based on incomplete medical records.

- b. The Court of Appeals for the Sixth Circuit erred when it affirmed the district court's ruling denying Ms. Lang's Motion to Strike Dr. Kloth's testimony.**

The inquiry under *Daubert* must be "solely in principles and methodology, not on the conclusions that they generate." *Nelson*, 243 F.3d at 254 (citing *Daubert*, 509 U.S. at 595). However, "conclusions and methodology are not entirely distinct from one another." *Id.* (citing *Gen. Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)). As such, "[a] district court is not required to admit expert testimony "that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.* (citing *Joiner*, 522 U.S. at 146).

In certain circumstances, the factual basis of an expert's opinion may go to the credibility of the testimony and not to its admissibility. *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 530-32 (6th Cir. 2008). However, this is not the case where, as here, there is "simply too great an analytical gap" between the faulty or incomplete data relied upon by the expert and the opinion proffered. *Nelson*, 243 F.3d at 254 (citing *Joiner*, 522 U.S. at 146).

In this case, although EMRs existed, Dr. Kloth formed his opinion solely on CSMD information and the limited paper medical records provided to him by the Government. In so doing, Dr. Kloth opined at trial that the records he reviewed did not support or warrant the medications provided. He also criticized the lack of diagnosis, lack of physical examination, and the lack of note taking by medical

providers at Primary Care. However, unlike the paper files, the EMRs contained the very information that Dr. Kloth opined was lacking: patient histories, reported pain levels, notes about the patient's current problems, diagnosis, physical examinations performed by the health providers, personal notes of the providers, notes about whether the CSMD was checked before writing a prescription, and other observations by nurse practitioners. In light of this information, Dr. Kloth admitted at trial that his testimony would be unreliable if there were additional medical records (electronic or otherwise) that he did not review. For example, Dr. Kloth noted that patient Tony Rasso's file contained "inadequate medical documentation" to justify certain prescriptions, with his paper file largely being comprised of triage forms, patient questionnaires, and records from another facility. However, Rasso's EMR contains information Dr. Kloth complained was lacking—details about Rasso's physical examination and rationale for the medicines prescribed. As another example, Dr. Kloth found that there was "an inadequate history and physical and documentation" of patient Ezra Easterly's medical condition, with Easterly's paper file largely being comprised of a patient questionnaire and medical records from another facility. However, Easterly's EMR clearly contains records of physical examinations performed at Primary Care—examinations of which Dr. Kloth was not aware. The basis for Dr. Kloth's testimony is not only unreliable, but troubling given that the Government had actual knowledge about the EMRs, but failed to obtain them and provide them to Dr. Kloth. In this regard, courts have consistently excluded expert testimony based on data that is cherry-picked or knowingly omitted by its provider.

See e.g. *E.E.O.C. v. Freeman*, 778 F.3d 463, 470 (4th Cir. 2015) (J. Agee, concurring) (collecting cases); see also *Spangler*, 313 F.3d at 362 (ERISA) (holding vocational expert's report incomplete and inaccurate where employer knowingly sent the expert an incomplete file to review). Given that his testimony was unreliable under law and by admission, the trial court abused its discretion by allowing Dr. Kloth to testify and subsequently refusing to strike his testimony and the Court of Appeals for the Sixth Circuit erred in affirming the trial court's decision. These errors allowed an expert whose opinions were based on incomplete data thereby violated this Defendant's right to a fundamentally fair trial.

The United States Supreme Court should grant this petition because the Sixth Circuit's finding that the trial court did not abdicate its gatekeeping role is in contravention of precedent from the Sixth Circuit and other Circuits. Accordingly, experts have been excluded as unreliable under 702(b) and 702(c) where their conclusions were based on faulty or incomplete data. *See Ask Chem., LP v. Computer Packages, Inc.*, 593 F. App'x 506, 510 (6th Cir. 2014) (testimony of economic expert properly excluded as unreliable where his ultimate projections were based on "faulty and incomplete" financial data and he was unable to explain how he could extrapolate reliably when using such data); *Jack Henry & Assoc., Inc. v. BSC, Inc.*, 487 F. App'x 246, 257 (6th Cir. 2012) (design expert's testimony about an interface properly excluded, in part, where he failed to review data related to the interface); *Coffey v. Dowley Mfg., Inc.*, 89 F. App'x 927, 931-32 (6th Cir. 2003) (testimony of engineer

properly excluded where projections were “based on data which may not reflect conditions in the real world”).

In the specific context of medical records/experts, in *Kolesar v. United Agri Products, Inc.*, the Sixth Circuit held that a medical expert had been properly excluded as unreliable where her conclusion “was not the result of a careful study of [the plaintiff’s] prior medical records.” 246 F. App’x 977, 981 (6th Cir. 2007). It should also be noted that, in the administrative context, expert opinions are consistently deemed unreliable when based on incomplete medical records. See *Spangler v. Lockheed Martin Energy Sys., Inc.*, 313 F.3d 356, 362 (6th Cir. 2002) (ERISA) (vocational expert’s report “inherently flawed” where not provided with all relevant medical records); *Hung v. Guardian Life Ins. Co. of Am.*, 229 F.3d 1142, 2000 WL 1099401, *5 (4th Cir. Aug. 7, 2000) (Table) (ERISA) (medical expert’s opinion “necessarily called into doubt and unreliable” where not based on all relevant medical records).

Further, the Supreme Court of the United States should grant the writ because its supervisory role requires it and the decision below is incorrect. The decision of the District court and Sixth Circuit improperly heightened the standard for granting a *Daubert* hearing. If the Sixth Circuit’s affirmance of the trial court’s ruling regarding a *Daubert* hearing is allowed to stand it will have a significant adverse impact on a defendant’s right to question a government expert’s credibility and as it did in this case, it shifted the burden to the Defendant to obtain records when the Government knew that they existed and were material to the issues raised.

Finally, the denial of a request by Ms. Lang for a *Daubert* hearing violated her right to fundamentally fair trial guaranteed to her by the Due Process Clause of the Fourteenth Amendment. The Due Process Clause protect against government deprivation of “life, liberty, or property without due process of law.” U.S. Const. amend. XIV, §1 ([Nor shall any State deprive any person of life, liberty or property, without due process of law.”) By failing to provide Ms. Lang a *Daubert* hearing, the District Court and the Sixth Circuit, by their affirmance of the District Court’s ruling, denied Ms. Lang her constitutional right to a fair trial under the 14th Amendment’s Due Process Clause.

II. THE SIXTH CIRCUIT ERRED BY AFFIRMING THE DISTRICT COURT’S RULING THAT EXCLUDED FOURTEEN DEFENSE WITNESSESS *PER SE* RATHER THAN LAY WITNESSES THUS VIOLATING MS. LANG’S FUNDAMENTAL RIGH TO A FAIR TRIAL GUARANTEED BY THE DUE PROCESS CLAUSE OF THE 14th AMENDMENT.

During its case in chief, the Government introduced CSMD (“controlled substance monitoring database”) reports for 107 patients of Superior One, Primary Care, and Elite Care. Contained within those 107 CSMD reports, were the names of other treating doctors and nurse practitioners who had written those patients similar prescriptions during the time period of the alleged conspiracy. Defense counsel subpoenaed fourteen treating physicians and nurse practitioners who were referenced in the CSMDs that the Government introduced as exhibits during trial. They included Dr. Maria Stubbs; Alicia Horst, APN; Tiffany Steelman, APN; Dr. Timothy Gowder; Dr. Gary Moore; Dr. Phillip Bannor; Dr. Douglas Carpenter; Dr. Clary Foote; Rebecca Norfleet, APN; Dr. Timothy Bell; Linda Cole, APN; Dr. Troy

Gibson; Dr. Neal Frauwirth; and Dr. Frances Barnett. These physicians and nurse practitioners treated and prescribed pain medication for patients at or around the same time of the alleged conspiracies that the patients were being treated by Primary Care or Superior One.

These physicians and nurse practitioners treated the nine (9) patients whose partial medical files were reviewed by Dr. Kloth and who testified that the decision to give these patients pain medication was not medically necessary. They included Damaris Abston, Kathleen Parsons, Kevin Woody, John Goss, Tony Rasso, Angelique Gilmore, Tim Wright, Shakeema Branch, and Misty Garcia.

In response to Dr. Kloth's testimony, the defense sought to call fourteen (14) treating physicians and nurse practitioners as lay witnesses to discuss their treatment of and prescriptions written for the common patients which were specifically referenced in the Government's own exhibits. On January 6, 2015, the Government filed a Motion in Limine to exclude these defense witnesses. The parties were heard on this issue on January 9, 2015, at which time the trial court requested briefs. After submitting briefs, the trial court excluded the testimony on January 12, 2015. On January 13, 2015, counsel for Ms. Lang filed a motion to present an offer of proof in this regard and submitted that offer of proof on January 20, 2015. *See* Appendix E.

- a. The defense witnesses, treating physicians/nurse practitioners, were properly called as lay witnesses rather than experts.

In 2000, Rule 701 of the *Federal Rules of Evidence* was amended to foreclose lay witness testimony that is more properly given by a qualified expert under Rule

702. *Fed. R. Evid.* 701, advisory committee notes (2000). As the Sixth Circuit has noted, the line between expert testimony under 702 and lay testimony under Rule 701 is not always easy to draw. *United States v. White*, 492 F.3d 380, 401 (6th Cir. 2007). However, lay testimony typically involves personal knowledge of facts, such as eyewitness observations, while expert testimony involves more general hypothesizing, interpretation, or guidance. *Id.* at 401-03.

To the best of defense counsel's knowledge, neither the Sixth Circuit nor the United States Supreme Court has not specifically addressed the bounds of permissible testimony for a treating physician as a lay witness under Rule 701, since the 2000 amendment. The Eleventh Circuit, however, applying the amended rule has held that treating physicians may offer lay testimony about firsthand observations and treatment, but may not hypothesize. See *United States v. Henderson*, 409 F.3d 1293, 1300 (11th Cir. 2005) (noting a treating physician's testimony about the victim's injury was permissible lay testimony, but her statement about the cause of the injury was a hypothesis and was outside the realm of lay testimony under Rule 701).

In the civil context, other circuits applying the amended Rule 701 have come to the same conclusion—treating physicians may offer lay testimony about firsthand observations and treatment, but may not hypothesize. See e.g., *Williams v. Mast Biosurgery USA, Inc.*, 644 F.3d 1312, 1317-18 (11th Cir. 2011); *Brooks v. Union Pac. R. Co.*, 620 F.3d 896, 900 (8th Cir. 2010); *Hoffman v. Lee*, 474 F. App'x 503, 505 (9th Cir. 2012).

Similarly, in a case that predates the amended Rule 701, the Sixth Circuit held that treating physicians may offer lay testimony about firsthand observations and treatment. *United States v. Wells*, 211 F.3d 988, 997-99 (6th Cir. 2000). In *Wells*, a case that involved a prescription pill conspiracy, several of the charges were related to prescriptions written in the name of a patient's father-in-law, Arlie Boyd. *Id.* at 997. The government called two treating physicians who were allowed to testify about their treatment of Boyd. *Id.* More specifically, the doctors testified that they had not prescribed Boyd medication during the years that the defendant physician had. *Id.* at 998. Over the defendant's objections, the trial court held that both doctors testified as fact witnesses, and not as experts. *Id.* The Sixth Circuit affirmed, holding that because the doctors testified only about their first hand observations and treatment of Boyd, they testified as fact rather than expert witnesses, and the government was not required to comply with Fed. Crim. P. 16(a)(1)(E) as to the doctors' testimony. *Id.*; see also *United States v. Russell*, 142 F.3d 438, 1998 WL 136574, *4 (6th Cir. 1998) (Table) (trial court properly admitted the testimony of four pharmacists under Rule 701, where the pharmacists testified that they refused to honor the defendant-physician's prescriptions).

In this case, Defense Counsel attempted to do exactly what the government did in *Wells* and *Russell*. The Defendant attempted to call fourteen (14) physicians and nurse practitioners that also treated the patients that were allegedly given illegal prescriptions at Superior and Primary. Defense counsel did not provide notice under Rule 16 of the *Federal Rules of Criminal Procedure* because it was not required to—

it did not intend to treat these physicians as experts and only wanted to inquire about firsthand observations and treatment—i.e. the prescriptions written by the treating physicians for the patients at issue. In any event, the Government had actual knowledge of each and every one of the treating medical professionals, their names, their addresses, and their specific prescriptions well before the trial ever began because their very information was contained in the 107 exhibits that they introduced at trial.

Finally, it should be noted that the amended Rule 701 “does not distinguish between expert and lay witnesses, but rather between expert and lay testimony.” *White*, 492 F.3d at 403. In other words, “it is possible for the same witness to provide both lay and expert testimony in a single case.” *Id.* Accordingly, if defense counsel had asked any question that elicited “expert” testimony, the Government could have objected, and the trial court could have limited the testimony. Instead, the court erred by issuing a blanket exclusion over all fourteen of the defense witnesses and the Court of Appeals for the Sixth Circuit erred in affirming the trial court.

The United States Supreme Court should grant Petitioner’s Writ on this issue to provide clarity to the District Courts with regard to the bounds of permissible testimony for a treating physician as a lay witness under Rule 701, since the 2000 amendment and the denial of a request by Ms. Lang for a Daubert hearing violated her right to fundamental fair trial under the Due Process Clause of the Fourteenth Amendment.

The Sixth Circuit in affirming the trial court's judgment, has split from other Circuits including the Eleventh, Eighth and Ninth. The Eleventh Circuit in *United States v. Henderson*, 409 f.3d 1293 1300 (11th Cir. 2005) found that a treating physician's testimony about the victim's injury was permissible lay testimony, but her statement about the cause of the injury was a hypothesis and was outside the realm of lay testimony under Rule 701. The Eighth Circuit in *Brooks v. Union Pac. R. Co.* 620 F.3d 896, 900 (8th Cir. 2010) found that treating physicians may offer lay testimony about firsthand observations and treatment, but may not hypothesize. The Ninth Circuit in *Hoffman v. Lee*, 474 F. App'x 503, 505 (9th Cir. 2012) also found that treating physicians may offer lay testimony about first hand observations and treatment, but may not hypothesize.

This case presents an excellent vehicle to resolve the question presented. The issue is squarely presented and outcome-determinative. The Petitioner sought to have fourteen defense witnesses testify to rebut Dr. Kloth's testimony, testimony that for reasons stated above was faulty. By not allowing the fourteen defense witnesses to rebut Dr. Kloth's faulty testimony Ms. Lang's right to a fair trial was compromised.

III. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED BY AFFIRMING THE DISTRICT COURT'S RULING THAT MS. LANG'S 280 YEAR SENTENCE WAS NOT UNREASONABLE THEREBY VIOLATING MS. LANG'S EIGHTH AMENDMENT RIGHTS.

Ms. Lang filed objections to her PSR and motions for variance of sentence and downward departure. The grounds for many of these motions/objections relate to the fact that Ms. Lang (a layperson) is sixty-two years old, has serious medical issues,

and zero criminal history. Further, the objections are based upon many enhancement factors that were not found by the jury which included drug quantity.

On August 27, 2015, Ms. Lang was sentenced to 280 years, the maximum sentence. The District Court could have not have given her one day longer. In essence, the District Court found multiple enhancing factors on his own to give her the maximum.

In stark contrast, the physician, Sherard, who was also indicted received a sentence of 60 months and the nurse practitioner, Larmore, who was also indicted received a sentence of approximately fourteen (14) years.

As set forth below, Ms. Lang's 280-year (3,360 month) sentence is procedurally and substantially unreasonable because (A) the methodology used by the Government and adopted by the trial court for calculating the attributable drug quantity was not supported by a preponderance of the evidence; and (B) the trial court failed to properly consider the nature of the offense and the history and characteristics of the defendant and created an unwarranted sentencing disparity between Ms. Lang, her co-defendants and other similarly situated defendants.

The Sixth Circuit was "not persuaded" that the trial court's factual findings on drug quantity were not supported by the preponderance of the evidence.

The District Court held Ms. Lang accountable for the distribution of 50 kilograms of oxycodone. This calculation is based on CSMD records reflecting 100% of the oxycodone prescribed by Defendants Larmore and Sherard while Superior One

and/or Primary Care were open. The Probation Office attributed 100% of all of those prescriptions to Ms. Lang. Such methodology is unreliable

In a drug conspiracy case, the Government bears the burden of proving the quantity of drugs for which an individual co-conspirator is responsible by a preponderance of the evidence. *United States v. Jinadu*, 98 F.3d 239, 249 (6th Cir. 1996), cert. denied, 117 S. Ct. 1455 (1997). The amount of drugs attributable to an individual co-conspirator involves a specific factual finding to be made by the sentencing judge. *Id.* at 247-49; see also, *United States v. Tucker*, 90 F.3d 1135, 1144-45 (6th Cir. 1996) (sentencing court committed clear error by attributing the total amount of drugs involved in the conspiracy to the defendant without determining defendant's individual participation). Such finding is reviewed for clear error. *United States v. Walton*, 908 F.2d 1289, 1300-1301 (6th Cir. 1990).

In conducting an individualized assessment of drug quantity, if the exact amount of drugs is unknown, an "estimate will suffice, but ... a preponderance of the evidence must support the estimate." *Id.* at 1302. Mere extrapolation is insufficient and, ultimately, sentencing courts are instructed to "err on the side of caution." *Id.* As such, any estimate must be based on a reasonable method and factually supported grounds. Compare *Walton*, 908 F.2d at 1302 (methodology unreasonable where volume of drugs handled during five-month period could not be merely extrapolated over two-year period) with *United States v. Rodriguez Iznaga*, 575 F. App'x 583, 588 (6th Cir. 2014) (methodology reasonable where court considered total oxycodones prescribed and found only those prescribed to individuals from out of state who filled

the prescriptions in-house to be illegitimate); *United States v. Tran*, 609 F. App'x 295, 300-01 (6th Cir. 2015) (methodology reasonable where quantity was based on only those prescriptions issued by the defendant in a specific "red flag" pattern as proven by the Government during trial).

In this case, the sentencing court did not make any individualized factual findings regarding the scope of the conspiracy and the duration and nature of Ms. Lang's participation in the conspiracy as required per *Tucker*. Instead, a blanket attribution of 100% was made (and adopted).

Further, there is no proof in the record that every prescription for narcotics written by Larmore and Sherard while Superior One and Primary Care were open was illegitimate. Instead, the sentencing court merely heard testimony in this regard from five patients and from Dr. Kloth who only reviewed partial files of approximately 20-22 patients out of the approximate 2000 patients estimated to have gone thru the clinics during the time in question.

As such, the evidence upon which the calculation was based consists of approximately .01% of the total patients seen at both Primary and Superior (estimating 2000 patients divided by the 20 reviewed). Accordingly, the record does not support a finding, and the Government has not proved by a preponderance of the evidence, that every prescription issued to every patient on every visit to Larmore and Sherard during the time Primary Care and Superior were open was issued outside the usual course of professional practice and without a legitimate medical purpose. To hold Ms. Lang personally accountable for an estimate representing every

oxycodone prescribed constitutes extreme overreaching. Accordingly, Ms. Lang's sentence, which was based on such an exaggerated quantity, was unreasonable and should be vacated and remanded.

The Supreme Court, in *United States v. Booker*, made clear that, after considering the guideline range a sentencing court must then impose a reasonable sentence pursuant to 18 U.S.C. § 3553(a). *Booker*, 543 U.S. 220, 245 (2005). In so doing, a court may not presume the guideline range is reasonable, but must make an individual assessment based on the facts presented. Section 3553(a) obligates the district court to fashion a sentence that is "sufficient, but not greater than necessary, to comply with the purposes of sentencing" and, among other things, instructs courts to consider "the nature and circumstance of the offense and the history and characteristics of the defendant" and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(1),(6).

In this case, Ms. Lang (a layperson) is sixty-two, has serious medical issues, and zero criminal history. She was involved with two pain management clinics, but her role in medical decisions was extremely limited—she did not examine patients or prescribe medications to patients. And, yet, Ms. Lang was given a sentence of 280 years (3,360 months). Counsel for defendant is unaware of any cases where a similarly situated defendant was given a sentence even close to this.

The United States Supreme Court should grant a writ on this issue because the Sixth Circuit committed a fundamental error when it affirmed the trial court's

judgment and it is appropriate for the court to exercise its supervisory role. The Eighth Amendment prohibits the inflictions of cruel and unusual punishment. The Sixth Circuit's opinion is in contravention of precedent from the Sixth Circuit and other circuits. In *United States v. Guzman*, 571 F. App'x 356, 359 (6th Cir. 2014) a owner/operator of pain management clinic in the Eastern District of Tennessee at Knoxville convicted on 57 counts, including conspiracy and structuring—sentenced to 258 months. In *United States v. Kincaid*, 631 F. App'x 276, 279 (6th Cir. 2015) the court sentenced an owner operator of a pain management clinic, who had been convicted on multiple counts—including conspiracy to 470 and 830 respectively. The Eleventh Circuit in *United States v. Krisciunas*, 422 F. App'x 520, 522 (11th Cir. 2011) sentenced the owner/operator of a pain clinic in the Southern District of Florida, convicted on multiple counts, including conspiracy, to 78 months. The Fourth Circuit in *United States v. Boccone*, 556 F. App'x 215, 224 (4th Cir. 2012) cert. denied 135 S. Ct. 169 (2014) sentenced the owner operator of a pain clinic in the Eastern District of Virginia, convicted on multiple counts, including conspiracy, to 60 months. Although their sentences were substantially lower, many of these defendants, all laypersons, engaged in more egregious conduct than Ms. Lang—directly participating in the illegal distribution of prescript medication in additional

Although their sentences were substantially lower, many of these defendants, all laypersons, engaged in more egregious conduct than Ms. Lang—directly participating in the illegal distribution of prescription medication in addition to operating the clinics administratively. *Guzman*, 571 F. App'x at 357-58 (defendant

not only regularly saw patients and issued prescriptions on pre-signed forms, but opened a pharmacy on site and fraudulently ordered prescription medication using a doctor's DEA license number); *Kincaid*, 631 F. App'x at 282-83 (defendant Sandra Kincaid regularly met with patients and forged prescriptions; defendant Randy Kincaid exchanged pills for sexual favors in the clinic); *Boccone*, 556 F. App'x at 221 (defendant Boccone often sat in exam room, interfered with medical decisions, issued prescriptions, and wore a lab coat referring to himself as Dr. Boccone).

Further, there are many similar pain-clinic-conspiracy cases where the owners of such clinics were licensed medical professionals and received substantially lower sentences. *Singleton*, 626 F. App'x at 594 (nurse/owner of two pain clinics in the Eastern District of Kentucky convicted on multiple counts, including conspiracy—sentenced to 240 months);² *United States v. Joseph*, 700 F.3d 1082, 1092-93, 1105 (11th Cir. 2013) (doctor/owner of pain clinic in the Middle District of Georgia convicted on 46 counts, including conspiracy and dispensing outside the scope of professional practice that resulted in the death or serious bodily injury of a patient—sentenced to 360 months); *United States v. Dubrule*, 822 F.3d 866, 870 (6th Cir. 2016) (doctor/owner of pain clinic in the Western District of Tennessee convicted of 45 counts, including conspiracy—sentenced to 150 months); *see also Rodriguez-Iznaga*, 575 F. App'x at 586 (doctor/owner of pain clinic in the Eastern District of Kentucky convicted of two counts of conspiracy—sentenced to 240 months); *Krisciunas*, 442 F. App'x at 522 (physician/owner of pain clinic in the Southern District of Florida

convicted on two counts of conspiracy—sentenced to 97 months). The aforementioned pain-clinic-conspiracy cases involve similar charges, large quantities of drugs, and often more egregious behavior. And yet they resulted in sentences ranging from 60 to 830 months.

The text of the “Cruel and Unusual Punishments” Clause of the Eighth Amendment prohibits all forms of disproportionate punishment, including terms of imprisonment and the enactment history of the Clause—which comes directly from the English Bill of Rights—strongly supports the view that its ban on cruel and unusual punishment was meant to outlaw punishments that, while permissible in some circumstances, are disproportionate for the offense at hand.

The United States Supreme Court first held that the Eighth Amendment prohibits disproportionate noncapital sentences nearly a hundred years ago in *Weems v. United States*, 217 U.S. 349 (1910). The Court strongly reaffirmed this principle in the majority opinion of *Solem v. Helm* when it held that “[t]he common-law principle [of proportionality] incorporated into the Eighth Amendment clearly applied to prison terms.” 463 U.S. 277, 289 (1983). Since then, the United States Supreme Court has consistently recognized the Eighth Amendment prohibition on disproportionate sentences. *See Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).

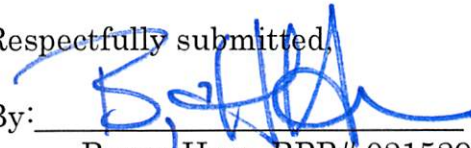
When the above national cases are considered and when considerations about Ms. Lang’s Eighth Amendment rights are taken into account, it becomes clear that the 280-year (3,360 month) sentence imposed on Ms. Lang, a 62-year-old female in

poor health with no criminal history, is unreasonable, violates our Constitution, results in an unwarranted sentencing disparity, and constitutes an abuse of discretion. Accordingly, Ms. Lang's sentence should be vacated and remanded.

CONCLUSION

For the reasons contained herein, the Petitioner respectfully requests that this Court grant her Petition for a Writ of Certiorari.

Respectfully submitted,

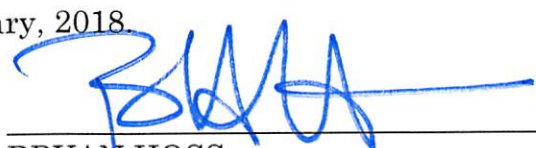
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing has been served upon the Solicitor General, Department of Justice, 10th Street and Constitution Avenue, Washington, D.C., 20530, and to Gregg L. Sullivan, 1110 Market Street, Suite, Suite 515, Chattanooga, Tennessee 37402, by placing a true and exact copy of same in the United States Mail, with sufficient postage thereon to carry the same to its destination.

This 25 day of January, 2018.


BRYAN HOSS